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

PETITIONERS' SUPPLEMENTAL BRIEF

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Pursuant to Rule 15.8, petitioners file this supplemental brief to bring to the Court's attention the Fifth Circuit's recent decision in this case, which petitioners have attached alongside this filing. *See El Paso Cty. v. Trump*, No. 19-51144, Doc. 00515662230 (Dec. 4, 2020). In a 2-1 decision, a Fifth Circuit panel held that petitioners lack Article III standing to challenge respondents' border-wall expenditures and construction. Op. 7-24. Judge Dennis dissented from the panel decision. He would have held that petitioners have standing and satisfy the zone-of-interests test, and that respondents' border-wall expenditures and construction violate the Consolidated Appropriations Act (CAA). Op. 25-72 (Dennis, J., dissenting).

The Fifth Circuit's ruling underscores why this Court should grant certiorari in this case.

First, in light of that decision, petitioners no longer seek certiorari *before* judgment, and the higher standard applicable to petitions for certiorari before judgment does not govern. The Court should convert petitioners' earlier petition into a traditional petition for a writ of certiorari *after* final judgment and apply the customary certiorari factors. *See* S. Ct. R. 10.

Second, the same reasons for granting certiorari to consider this case alongside *Sierra Club* and *California* exist now as existed before the Fifth Circuit's decision—namely, the need to consider petitioners' unique zone-of-interests and CAA arguments and definitively resolve the legality of respondents' border-wall expenditures and construction. *See* Pet. 15-23. Judge Dennis's dissent cogently explains why both of petitioners' arguments are correct. As to the zone-of-

interests test, Judge Dennis reasoned that the CAA evinces Congress's concern for the border wall's "economic effects" on "local municipalities" like El Paso, and its intent to protect entities that would have "direct[ly] benefit[ed]" from "appropriated funds … but for [an] allegedly unlawful transfer." Op. 55-56 (Dennis, J., dissenting). As to the merits, Judge Dennis reasoned that the CAA's "specific limit on where and to what extent funds may be spent on border wall construction … controls over DoD's more general authorit[ies]" under 10 U.S.C. §§ 284 and 2808, and that CAA § 739 "explicitly prohibits" respondents' expenditures in any event. *Id.* at 60-61.[1]

Third, the Fifth Circuit majority's standing analysis undercuts the Solicitor General's principal vehicle argument in this case. The Solicitor General has argued that this case would be an inappropriate vehicle for resolving the issues presented because petitioners here supposedly have a weaker argument for Article III standing than the plaintiffs in *Sierra Club* and *California*. BIO 20-22. But the Fifth Circuit majority's decision makes clear that El Paso's standing arguments are *identical* to the principal standing argu-

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[1] Judge Dennis also would have held that "the plain text of § 2808" prohibits respondents' $3.6 billion border-wall expenditure made pursuant to that provision. *Id.* at 67.

ments raised in *Sierra Club* and *California* and accepted by the Ninth Circuit.[2] As the majority explained, its "decision conflicts with the Ninth Circuit's recent holding in *Sierra Club v. Trump*," involving a "parallel challenge" to respondents' border-wall expenditures and construction. Op. 11 (citing 977 F.3d 853 (9th Cir. 2020)); *id.* at 14 ("we reiterate that we decline to follow the Ninth Circuit's approach to standing in *Sierra Club*"); *id.* at 20. Because this Court will already have to decide these Article III standing issues in *Sierra Club* and *California*—and will benefit from consideration of the arguments in this case—there is no basis for denying certiorari here. The Solicitor General's contrary suggestion is untenable.

CONCLUSION

The petition for a writ of certiorari should be granted.

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[2] The Fifth Circuit majority's standing analysis—which creates a novel "specific tax revenue" loss requirement for municipal standing, Op. 12—is incorrect for the reasons given in petitioners' reply brief. *See* Reply Br. 9-12.

Respectfully submitted,

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December 7, 2020

APPENDIX

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
December 4, 2020
Lyle W. Cayce
Clerk

No. 19-51144

El Paso County, Texas; Border Network for Human Rights,

Plaintiffs—Appellees Cross-Appellants,

versus

Donald J. Trump, President of the United States, In his official capacity; Mark Esper, Secretary, Department of Defense, In his official capacity; Chad F. Wolf, Acting Secretary, U.S. Department of Homeland Security, In his official capacity; David Bernhardt, Secretary, U.S. Department of the Interior, In his official capacity; Steven T. Mnuchin, Secretary, U.S. Department of Treasury, In his official capacity; Todd T. Semonite, In his official capacity as Commanding General United States Army Corps of Engineers,

Defendants—Appellants Cross-Appellees.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 3:19-CV-66

Before Owen, *Chief Judge*, and Dennis and Haynes, *Circuit Judges*.

Priscilla R. Owen, *Chief Judge*:

El Paso County, Texas and the Border Network for Human Rights (BNHR), a community organization headquartered in El Paso, sued the government defendants, challenging their use of funds allocated for 10 U.S.C. § 284 and § 2808 purposes to construct a wall on the southern border. The district court enjoined the defendants from using § 2808 funds to build the border wall but declined to enjoin the defendants from using § 284 funds. The defendants appeal the § 2808 injunction, and the plaintiffs appeal the district court's denial of the § 284 injunction. Because El Paso County and BNHR do not have standing to challenge either the § 2808 or § 284 expenditures, we affirm in part, reverse in part, and remand.

I

In early 2019, President Trump requested that Congress appropriate $5.7 billion in fiscal year 2019 for the construction of approximately 234 miles of border wall. A month later, Congress passed the Consolidated Appropriations Act, 2019 (CAA).[1] The CAA appropriated only $1.375 billion for the construction of "primary pedestrian fencing."[2] Section 739 of the CAA states:

> 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.[3]

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[1] Consolidated Appropriations Act, 2019, Pub. L. No. 116-6, 133 Stat. 13.

[2] *Id.* § 230(a)(1), 133 Stat. at 28.

[3] *Id.* § 739, 133 Stat. at 197.

President Trump promptly signed the CAA into law.[4] The same day, President Trump published a factsheet announcing a plan to divert funds that Congress had appropriated for other purposes to build the border wall.[5] The announcement stated that funds, including $2.5 billion of Department of Defense (DoD) funds originally appropriated for support for counterdrug activities under 10 U.S.C. § 284, would be "reprogrammed."[6] The announcement also asserted that $3.6 billion of DoD funds originally appropriated for military construction projects could be reallocated under the President's declaration of a national emergency pursuant to 10 U.S.C. § 2808.[7]

Also on the same day, President Trump issued a proclamation declaring a national emergency on the southern border.[8] The proclamation stated that "[t]he southern border is a major entry point for criminals, gang members, and illicit narcotics."[9] Then, citing the "long-standing" "problem of large-scale unlawful migration through the southern border" and the "sharp increases in the number of family units entering and seeking entry to the United States[,] and an inability to provide detention space for many of these aliens while their removal proceedings are pending," the proclamation invoked the National Emergencies Act to "declare that a

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[4] *See id.* 133 Stat. at 13.

[5] Donald J. Trump, *President Donald J. Trump's Border Security Victory*, THE WHITE HOUSE (Feb. 15, 2019), https://www.whitehouse.gov/briefings-statements/president-donald-j-trumps-border-security-victory/.

[6] *Id.*

[7] *Id.*

[8] Declaring a National Emergency Concerning the Southern Border of the United States, Proclamation No. 9844, 84 Fed. Reg. 4949 (Feb. 15, 2019).

[9] *Id.*

national emergency exists at the southern border of the United States."[10] The stated purpose for declaring a national emergency was "[t]o provide additional authority to the Department of Defense to support the Federal Government's response" and to make "the construction authority provided in section 2808" "available . . . to the Secretary of Defense."[11]

Later that month, the Department of Homeland Security formally requested that DoD assist with constructing or replacing over 200 miles of border infrastructure pursuant to DoD's § 284 authority to "provide support for the counterdrug activities" of other agencies.[12] One of the approved § 284 construction projects is located fifteen miles from downtown El Paso. Because Congress had only appropriated $517.2 million to DoD for counter-narcotics support, DoD transferred $2.5 billion from other appropriation accounts to fund the requested projects, citing § 8005 of the DoD Appropriation Act, 2019, as authority for the transfer.[13] The DoD's transfer of funds was challenged in federal court, and the district court issued a nationwide injunction preventing DoD and other officials from using the redirected § 284 funds to construct a border wall.[14] The Supreme Court granted a stay of the injunction pending appeal.[15]

DoD later announced plans to spend $3.6 billion on eleven military construction projects pursuant to § 2808 to support the use of the armed

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[10] *Id.*

[11] *Id.*

[12] 10 U.S.C. § 284(a).

[13] Department of Defense and Labor, Health and Human Services, and Education Appropriations Act, 2019 and Continuing Appropriations Act, 2019, Pub. L. No. 115-245, § 8005, 132 Stat. 2981, 2999 (2018).

[14] *Sierra Club v. Trump*, 379 F. Supp. 3d 883, 928 (N.D. Cal. 2019).

[15] *Trump v. Sierra Club*, 140 S. Ct. 1, 1 (2019).

forces in connection with the national emergency. Section 2808(a) requires that money spent under its emergency authority be taken from "the total amount of funds that have been appropriated for military construction . . . that have not been obligated."[16] Accordingly, DoD redirected funds from 127 planned military construction projects to fund the emergency construction, including a $20 million defense access roads construction project at Fort Bliss, which is located within El Paso County. The closest § 2808 construction project to El Paso County is located roughly 100 miles away, in two counties in New Mexico.

El Paso County and BNHR filed a suit challenging both the President's proclamation and the Government's § 284 and § 2808 border wall expenditures. The district court granted summary judgment to the plaintiffs on the § 2808 claims, holding that the plaintiffs had standing and that the § 2808 expenditures violated the CAA. As to § 284, the court concluded that the plaintiffs' claims were "unviable" in light of the Supreme Court's order granting a stay in *Sierra Club*. The court then granted the plaintiffs a declaratory judgment that the President's proclamation was unlawful to the extent it authorized the agency-head defendants to use § 2808 funds for border wall construction, and granted a permanent injunction preventing the agency-head defendants from such use. The district court denied the Government's motion to stay the injunction pending appeal. The Government then filed a motion in this court to stay the injunction. A motions panel of this court stayed the injunction pending appeal, explaining that, "among other reasons," a stay was warranted due to "the substantial likelihood that [El Paso County and BNHR] lack Article III standing."

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[16] 10 U.S.C. § 2808(a).

II

We review questions of standing de novo.[17] To have Article III standing, "a plaintiff must show (1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision."[18] "Since they are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported . . . with the manner and degree of evidence required at the successive stages of litigation."[19] "In a case that has proceeded to final judgment, the factual allegations supporting standing (if controverted) must be supported adequately by the evidence adduced at trial."[20] As the party seeking to invoke federal jurisdiction, the plaintiffs bear the burden of establishing standing for each claim they assert,[21] and because there is a final summary judgment and a permanent injunction in this case, the plaintiffs must have adduced evidence to support controverted factual allegations.

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[17] *OCA-Greater Hous. v. Texas*, 867 F.3d 604, 610 (5th Cir. 2017).

[18] *Friends of the Earth, Inc. v. Laidlaw Env't. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)).

[19] *Lujan*, 504 U.S. at 561.

[20] *Walker v. City of Mesquite*, 169 F.3d 973, 978 (5th Cir. 1999) (first citing *United States v. Hays*, 515 U.S. 737, 743 (1995); then citing *Lujan*, 504 U.S. at 561; and then citing *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 115 n.31 (1979)).

[21] *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016); *see also DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006).

A

We conclude that neither El Paso County nor BNHR has standing to challenge the Government's § 2808 expenditures.

1

El Paso County asserts two distinct grounds for standing to challenge the Government's § 2808 expenditures: (1) an economic injury caused by the cancellation of the $20 million project at Fort Bliss, and (2) a reputational injury and corresponding economic injury caused by the President's proclamation.

a

We first consider El Paso County's argument that it has suffered an economic injury due to the cancellation of the Fort Bliss project. "[E]conomic injury is a quintessential injury upon which to base standing."[22] Unquestionably, Fort Bliss has a substantial impact on the economy of El Paso County. The military base "create[s] nearly 62,000 jobs with more than $4 billion in compensation to area households" and "affects the real estate market and every other aspect of the economy." Due to the importance of the military base, El Paso County argues that diverting funds away from Fort Bliss will inflict harm to the county's economy. Yet, as a political subdivision of the state, El Paso County may not assert the economic injuries of its citizens on their behalf as *parens patriae*.[23] Rather, to establish Article III

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[22] *Tex. Democratic Party v. Benkiser*, 459 F.3d 582, 586 (5th Cir. 2006).

[23] *See City of Safety Harbor v. Birchfield*, 529 F.2d 1251, 1256 n.7 (5th Cir. 1976); *accord City of Sausalito v. O'Neill*, 386 F.3d 1186, 1197 (9th Cir. 2004).

standing, El Paso County must show that the county itself has suffered an injury.

El Paso County is not directly harmed by the cancellation of the Fort Bliss project—no part of the $20 million would be paid to the county itself. Instead, El Paso County asserts that the cancellation of the project will reduce the county's tax revenues, because a $20 million construction project within the county would necessarily generate taxes through workers staying at hotels, buying supplies, and spending money at local establishments. In addition, El Paso County argues that cancellation of the Fort Bliss project denies the county the opportunity for an economic benefit. However, aside from the potential for increased tax revenues, El Paso County does not allege that the project would directly provide an economic benefit to the county itself. El Paso County's theory of economic injury boils down to a single alleged harm: the loss of general tax revenues.

We conclude that a county's loss of general tax revenues as an indirect result of federal policy is not a cognizable injury in fact. El Paso County's proposed theory of standing is inconsistent with the Supreme Court's reasoning in *Wyoming v. Oklahoma*.[24] In that case, Wyoming challenged an Oklahoma state law that required Oklahoma utility companies to burn at least 10% Oklahoma-mined coal.[25] Prior to the law's enactment, the Oklahoma utilities purchased virtually all of their coal from Wyoming sources.[26] Wyoming collected severance tax on all coal extracted from the state.[27] The act's passage caused Wyoming to lose hundreds of thousands of dollars of

[24] 502 U.S. 437 (1992).

[25] *Id.* at 440.

[26] *Id.* at 445.

[27] *Id.* at 442.

severance tax revenue.[28] The Supreme Court held that Wyoming had standing to sue because the Oklahoma law caused Wyoming "a direct injury in the form of a loss of specific tax revenues."[29] The Court distinguished Wyoming's loss of the specific severance tax with two Court of Appeals decisions that denied standing when "actions taken by United States Government agencies had injured a State's economy and thereby caused a decline in general tax revenues."[30]

Both cases that the Court distinguished in *Wyoming* involved claims by states that the federal government granted their citizens insufficient disaster relief funds.[31] In one of the cases, *Pennsylvania v. Kleppe*, Pennsylvania argued that the insufficient disaster relief funds would lead to a reduction of the state's tax revenues.[32] The court acknowledged that a loss of tax revenues "embodies a comprehensible harm to the economic interests of the state government."[33] Nevertheless, the court held that Pennsylvania did not have standing.[34] The court compared the state's indirect loss of general tax revenues with the "cases imposing very strict limits on taxpayer standing."[35] The reality of federal expenditure is that "virtually all federal policies" will have "unavoidable economic repercussions."[36] Consequently,

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[28] *Id.* at 445.

[29] *Id.* at 448.

[30] *Id.*

[31] *See Pennsylvania v. Kleppe*, 533 F.2d 668, 670 (D.C. Cir. 1976); *Iowa ex rel. Miller v. Block*, 771 F.2d 347, 348-49 (8th Cir. 1985).

[32] *Kleppe*, 533 F.2d at 671.

[33] *Id.* at 672.

[34] *Id.* at 672-73.

[35] *Id.* at 672.

[36] *Id.*

the court held that to have standing, a state must show a "fairly direct link between the state's status as a collector and recipient of revenues and the . . . action being challenged."[37] Otherwise, a state, county, or municipality could have standing even if "diminution of tax receipts is largely an incidental result of the challenged action."[38] The Eighth and Tenth Circuits have expressly followed the reasoning in *Kleppe* and denied standing when a state failed to show a direct link between the collection of tax revenues and the challenged federal action.[39]

El Paso County does not allege that it will lose specific tax revenues due to the cancellation of the Fort Bliss project. Instead, El Paso County asserts that the economy of the county at large will be harmed, resulting in a reduction in general tax revenues for the county. To distinguish *Wyoming*, El Paso County argues that it is easier for a county, rather than a state, to establish that a federal policy has caused it economic harm because counties have smaller economies. That argument fails. The distinction identified in *Wyoming* and applied in other cases does not turn on the size of the economy at issue. Rather, the cases acknowledge that federal policies will inevitably have an economic impact on local governments but require more than an incidental economic impact to establish a cognizable injury.[40] A direct link, such as the loss of a specific tax revenue, is necessary to demonstrate

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[37] *Id.*

[38] *Id.*

[39] *See Iowa ex rel. Miller v. Block*, 771 F.2d 347, 353-54 (8th Cir. 1985); *Wyoming v. U.S. Dep't of Interior*, 674 F.3d 1220, 1234 (10th Cir. 2012).

[40] *See Kleppe*, 533 F.2d at 672; *Block*, 771 F.2d at 354; *U.S. Dep't of Interior*, 674 F.3d at 1234.

standing.[41] "[H]olding otherwise might spark a waive [sic] of unwarranted litigation against the federal government."[42]

We are aware that our decision conflicts with the Ninth Circuit's recent holding in *Sierra Club v. Trump*.[43] That case involved a parallel challenge to the Government's use of § 2808 funds to build the border wall.[44] Nine states "alleged that the Section 2808 diversion of funds will result in economic losses, including lost tax revenues."[45] Addressing *Wyoming*, the Ninth Circuit acknowledged that "[i]t may be appropriate to deny standing where a state claims only that 'actions taken by United States Government agencies . . . injured a State's economy and thereby caused a decline in general tax revenues.'"[46] Nevertheless, the court concluded that the states' alleged tax-loss injuries were "analogous to those in *Wyoming v. Oklahoma*."[47] The court held that the "injuries in the form of lost tax revenues resulting from the cancellation of specific military construction projects" were "direct" and therefore sufficient to support standing.[48]

We do not agree with the holding in *Sierra Club* with regard to economic injury and decline to follow it. The states in *Sierra Club* did not contend that they would lose specific tax revenues due to the redirection of

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[41] *See Wyoming v. Oklahoma*, 502 U.S. 437, 448 (1992); *Kleppe*, 533 F.2d at 672.

[42] *U.S. Dep't of Interior*, 674 F.3d at 1234.

[43] 977 F.3d 853 (9th Cir. 2020).

[44] *Id.* at 861.

[45] *Id.* at 871.

[46] *Id.* at 870 (quoting *Wyoming*, 502 U.S. at 448).

[47] *Id.* at 871.

[48] *Id.*

federal funds. Instead, the states alleged that the cancellation of military construction projects would reduce economic activity in their respective states and therefore cause the loss of general tax revenues.[49] This is the exact injury that the Supreme Court reasoned was inadequate for standing in *Wyoming*.[50]

It is inevitable that any reduction in expenditure at a military base will have an economic impact on the local and state economy where the base is located and cause a reduction in general tax revenues. Yet, incidental and attenuated harm is insufficient to grant a state or county standing. The Article III standing requirement "serves to prevent the judicial process from being used to usurp the powers of the political branches"[51] and "confines the federal courts to a properly judicial role."[52] If every local government could sue to challenge any federal expenditure at a military base, the courts "would cease to function as courts of law and would be cast in the role of general complaint bureaus."[53] Accordingly, a county must establish a "direct link between the state's status as a collector and recipient of revenues and the . . . action being challenged,"[54] such as the loss of a specific tax revenue,[55] to have standing. El Paso County only alleges a loss of general tax revenue, and thus has not established a cognizable injury in fact.

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[49] *See id.* at 871-72.

[50] *See Wyoming*, 502 U.S. at 448.

[51] *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013).

[52] *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016).

[53] *Cf. Hein v. Freedom from Religion Found., Inc.*, 551 U.S. 587, 593 (2007) (explaining the need for strict limits on taxpayer standing).

[54] *Pennsylvania v. Kleppe*, 533 F.2d 668, 672 (D.C. Cir. 1976).

[55] *See Wyoming*, 502 U.S. at 448.

Even if El Paso County's alleged economic injury were cognizable, the county fails to demonstrate that the injury is redressable by a favorable decision in this case. To establish redressability, a plaintiff must show "a 'substantial likelihood' that the requested relief will remedy the alleged injury in fact."[56] For El Paso County to receive the tax revenues it allegedly lost, the Government would have to proceed with the $20 million Fort Bliss project. Yet, enjoining the Government from spending the diverted funds on border wall construction does not necessarily result in the Government's use of those funds on the Fort Bliss project. Congress did not directly appropriate $20 million for the Fort Bliss project. Instead, funds for a defense access roads project are sourced from a lump-sum appropriation for the construction of defense access roads generally.[57] "The allocation of funds from a lump-sum appropriation is . . . traditionally regarded as committed to agency discretion."[58] Standing is not inherently precluded when it is based on the discretionary choice of a third-party, but "it becomes the burden of the plaintiff to adduce facts showing that those choices have been or will be made in such manner as to produce causation and permit redressability of injury."[59] El Paso County has not alleged any facts demonstrating that it is likely that the DoD would exercise its discretion to go forward with the Fort Bliss project if the Government were enjoined from spending the diverted funds on border wall construction. Standing must exist at all stages of the litigation. The DoD transferred § 2808 funds in

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[56] *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 771 (2000) (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 45 (1976)).

[57] *See* 23 U.S.C § 210(a)(1).

[58] *Lincoln v. Vigil*, 508 U.S. 182, 192 (1993).

[59] *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 562 (1992).

September 2019, during the 2019 budget cycle. At the time the district court granted summary judgment in favor of the plaintiffs and issued a permanent injunction, in November and December 2019, respectively, the federal government had entered a new budget cycle. Without additional facts, it is speculative as to whether the Fort Bliss project would proceed if the courts were to conclude that the transfer of § 2808 funds was impermissible.

In so holding, we reiterate that we decline to follow the Ninth Circuit's approach to standing in *Sierra Club*. In that case, the Ninth Circuit concluded that the states' alleged tax-loss injury was redressable, because "[a] favorable judicial decision barring Section 2808 construction would prevent the military construction funds at issue from being transferred from projects within the States to border wall construction projects, thereby preventing the alleged injuries."[60] The Ninth Circuit did not address whether the states met their burden of establishing that, were the transfer of funds prevented, the Government would proceed with the cancelled military construction projects.

b

Alternatively, El Paso County contends that it has standing to challenge the § 2808 expenditures because the county suffered an injury to its reputation and an accompanying economic injury as a result of the President's proclamation. Specifically, El Paso County alleges that the proclamation harmed the county's reputation as a safe and diverse community by branding the county as crime-ridden and dangerous. Relying on statements from County officials, the County asserts that the "[p]roclamation thus poses 'a serious threat to both tourism and economic development because of the false and negative impression of El Paso that it

[60] *Sierra Club v. Trump*, 977 F.3d 853, 872 (9th Cir. 2020).

creates'—which in turn will cause 'drop-off' in the County's '$4 million in tax revenue based on tourism,'" and that "the County is 'harmed by [its] unwanted association' with crime, construction, and militarization." We will assume, without deciding, that these conclusory assertions, if supported by an adequate evidentiary foundation, would suffice to state an injury to El Paso County's reputation.

The plaintiffs must demonstrate standing for each claim and each form of relief they seek.[61] Accordingly, to have standing to challenge the § 2808 expenditures, El Paso County's alleged reputational injuries must be traceable to, and redressed by, a ruling regarding the § 2808 expenditures. Yet, El Paso County admits that the alleged "reputational injury stems from the Proclamation itself . . . not from any specific construction" project.

The President's proclamation and DoD's redirection of funds under § 2808 are certainly related. The declaration of a national emergency is a prerequisite for military construction projects under § 2808.[62] But the DoD's discretionary determination to spend § 2808 funds on border wall construction, made nearly seven months after the President's proclamation, is separate and distinct from the proclamation itself. Consequently, any injury resulting from the allegedly harmful rhetoric employed in the proclamation is traceable only to the proclamation, not to the subsequent § 2808 expenditures on a construction project that is located approximately 100 miles from El Paso County in two counties in New Mexico.

The dissenting opinion asserts that "the fear of investors and tourists to do business with a county that they expect will suffer the negative effects of massive nearby construction and that they perceive to be associated with a

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[61] *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 734 (2008).

[62] *See* 10 U.S.C. § 2808(a).

project reflecting intolerant values may be causally linked to the § 2808 construction."[63] But here again, any reputational injury to El Paso County stems from the President's proclamation. With respect to "negative effects of massive nearby construction," the construction project to which the dissenting opinion refers is a portion of the border wall to be constructed 100 miles from El Paso County. There is no evidentiary support for such an assertion, and in any event, the connection to El Paso County is far too attenuated.

El Paso County fails to demonstrate redressability. An order granting relief against the § 2808 expenditures would not rescind the proclamation and accordingly would not redress any harm caused by the proclamation.[64] The alleged reputational injuries do not provide El Paso County standing to challenge the § 2808 expenditures.

2

Next, we consider whether BNHR has standing to challenge the Government's § 2808 expenditures. "An organization has standing to sue on its own behalf if it meets the same standing test that applies to

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[63] *Post* at 22.

[64] *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 105-106 (1998) ("None of the specific items of relief sought, and none that we can envision as 'appropriate' under the general request, would serve to reimburse respondent for losses caused by the late reporting, or to eliminate any effects of that late reporting upon respondent."); *id.* at 106 ("The first item, the request for a declaratory judgment that petitioner violated EPCRA, can be disposed of summarily. There being no controversy over whether petitioner failed to file reports, or over whether such a failure constitutes a violation, the declaratory judgment is not only worthless to respondent, it is seemingly worthless to all the world.").

individuals."[65] BNHR contends that it has standing because the organization was forced to divert time and resources to help its members deal with the harmful effects of border wall construction. An organization suffers an injury in fact if a defendant's actions "perceptibly impair[]" the organization's activities and consequently drain the organization's resources.[66] However, an organization does not automatically suffer a cognizable injury in fact by diverting resources in response to a defendant's conduct. For example, "[t]he mere fact that an organization redirects some of its resources to litigation and legal counseling in response to actions or inactions of another party is insufficient to impart standing upon the organization."[67] Further, the organization's reaction to the allegedly unlawful conduct must differ from its routine activities.[68]

BNHR's evidence is insufficient to establish that the border wall construction "perceptibly impaired" the organization's mission by forcing it to divert resources. The organization's mission is to "to organize border communities through human rights education" and "mobilize [its] members to advocate for positive change in policies . . . that affect . . the immigrant

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[65] *Ass'n of Cmty. Orgs. for Reform Now v. Fowler*, 178 F.3d 350, 356 (5th Cir. 1999) (citing *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378-79 (1982)).

[66] *Havens Realty Corp.*, 455 U.S. at 379; *see also Tenth St. Residential Ass'n v. City of Dallas*, 968 F.3d 492, 500 (5th Cir. 2020) ("[W]hen an organization's ability to pursue its mission is 'perceptibly impaired' because it has 'diverted significant resources to counteract the defendant's conduct,' it has suffered an injury under Article III." (quoting *NAACP v. City of Kyle*, 626 F.3d 233, 238 (5th Cir. 2010))).

[67] *Ass'n for Retarded Citizens of Dall. v. Dall. Cnty. Mental Health & Mental Retardation Ctr. Bd. of Trs.*, 19 F.3d 241, 244 (5th Cir. 1994).

[68] *See City of Kyle*, 626 F.3d at 238-39 (holding that an organization did not have standing when its alleged diversion of resources did not differ from its normal operations).

community." BNHR argues that the President's proclamation and the subsequent transfer of funds for border wall construction under § 2808 harmed its mission by forcing the organization to divert its resources away from advocacy work and toward counseling and helping the immigrant community.

As an initial matter, we reiterate that any alleged injury caused by the President's language in the proclamation is not traceable to the subsequent § 2808 construction projects and therefore does not establish standing to challenge those expenditures. BNHR alleges harm caused by the § 2808 expenditures, providing a declaration made by the organization's executive director as its sole source of evidence. BNHR asserts that border wall construction threatens the local immigrant community's "basic quality of life by forcing [it] to deal with the noise," "[t]raffic slowdowns," and "blight." According to the declaration, BNHR had to redirect "approximately 70 to 80% of the organization's time and resources [to] opposing the illegal construction and . . . helping [its] members deal with the harmful impacts they experience from it." Yet, the only concrete diversion of resources identified by BNHR is that the organization is giving significantly more "Know Your Rights" presentations to the local community. This diversion is not caused by the § 2808 expenditures. The declaration admits that BNHR gave more presentations due to fear caused by the President's proclamation, not due to any concern over the impacts of construction.

BNHR's single vague, conclusory assertion that the organization had to divert resources is insufficient to establish that the § 2808 construction has "perceptibly impaired" the organization's ability to carry out its mission. BNHR does not provide any details on how the organization is helping its members respond to the harmful impacts of construction. In addition, it is unclear whether any of the resources BNHR diverted are being used for litigation and legal counseling, or whether its efforts fall within the general

ambit of its normal operations—activities that would not satisfy the requirements of standing. Further, BNHR's declaration fails to link the concern over increased noise and traffic with any specific § 2808 construction. Finally, BNHR does not identify any particular projects that suffered because of the diversion of resources.[69] BNHR has merely "conjectured that the resources [the organization] devoted . . . could have been spent on other unspecified . . . activities."[70] Thus, there is no injury in fact, and BNHR does not have standing to challenge the § 2808 construction.

B

Last, we consider whether El Paso County or BNHR has standing to challenge the Government's § 284 expenditures. We conclude that they do not.

To demonstrate that it has standing to challenge the Government's § 284 expenditures, El Paso County again relies on a tax-loss theory of economic injury. In particular, El Paso County contends that border wall construction in Doña Ana County, New Mexico, fifteen miles from El Paso, will disrupt the county's "ability to compete for business investment and tourism," and consequently the county will lose tax revenues. In support of this contention, the county points to evidence that "local business leaders" have indicated that border wall construction is causing "uncertainty" and "fears" among potential business investors that the city "will be mired in . . . the blight of construction, and impediments to crossing back and forth across the border."

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[69] *See OCA-Greater Hous. v. Texas*, 867 F.3d 604, 611-12 (5th Cir. 2017) (reasoning that an organization could provide evidence of standing by identifying a specific project that the organization had to put on hold).

[70] *City of Kyle*, 626 F.3d at 239.

For the same reasons identified above, we reject El Paso County's general tax-loss theory of economic standing. A county may not base an injury in fact on the loss of general tax revenues as an indirect result of federal expenditure. Moreover, the evidence is conclusory and speculative.

El Paso County cites decisions from other circuits in which cities were found to have standing based on alleged environmental injuries.[71] In *City of Sausalito*, a city sought to enjoin the National Parks Service from implementing plans to develop Fort Baker, a nearby former military base, alleging violations of environmental and conservation statutes.[72] We disagree with the Ninth Circuit's analysis in *City of Sausalito* regarding tax revenue, but in any event, El Paso County has not alleged the types of environmental injuries that the city asserted in that case. In *City of Olmsted Falls*, a city located two miles from the Cleveland, Ohio airport objected to the Federal Aviation Administration's approval of certain changes to the airport's runways and operations.[73] The D.C. Circuit held that to establish standing to bring a claim under an environmental statute, the city "must allege an injury related to an environmental interest—geographic proximity

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[71] *See City of Sausalito v. O'Neill*, 386 F.3d 1186, 1197-99 (9th Cir. 2004); *City of Olmsted Falls v. Fed. Aviation Admin.*, 292 F.3d 261, 266-68 (D.C. Cir. 2002).

[72] 386 F.3d at 1193 (reflecting that the plaintiffs alleged violations of the National Environmental Policy Act, 42 U.S.C. §§ 4321–4347; the Endangered Species Act, 16 U.S.C. §§ 1531–1544; the Coastal Zone Management Act, 16 U.S.C. §§ 1452–1465; the Migratory Bird Treaty Act, 16 U.S.C. §§ 703–712; the Marine Mammal Protection Act, 16 U.S.C. §§ 1371–1421h; the National Park Service Concessions Management Improvement Act, 16 U.S.C. § 5951, et seq.; the Omnibus Parks and Public Lands Management Act of 1996, 16 U.S.C. § 17o; the National Park Service Organic Act, 16 U.S.C. §§ 1–18f–3; and the Act creating the Golden Gate National Recreation Area, 16 U.S.C. § 460bb).

[73] 292 F.3d at 265, 267.

might be necessary to show such an injury, but it is not sufficient."[74] The court concluded that "[a]lthough it is a close question," the city had "alleged harm to its own economic interests based on the environmental impacts of the approved project."[75] In the present case, El Paso County is not relying on an environmental statute and has not presented evidence of an environmental impact to the city "*qua* city."[76]

The dissenting opinion relies on *Walker v. City of Mesquite*,[77] in addition to *City of Sausalito* and *City of Olmsted Falls*, in arguing that El Paso County has standing to challenge the § 284 expenditures.[78] In *Walker*, two homeowners and their homeowners' associations alleged equal protection violations when a court ordered that public housing units be located adjacent to the plaintiffs' neighborhoods because the residents of the neighborhoods were predominantly white.[79] This court concluded that the plaintiffs had standing on at least two grounds, one of which was that the record reflected injury to the plaintiffs because of "the potential for neighborhood disruption traceable to improperly managed public housing projects" and evidence that "quality of life and property values would be diminished by a next-door public housing . . . project."[80] There is no comparable evidence of injury to the city in the present case.

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[74] *Id.* at 267.

[75] *Id.* at 268.

[76] *Id.* ("Olmsted Falls may bring this petition if it alleges harm to itself as city *qua* city.").

[77] 169 F.3d 973 (5th Cir. 1999).

[78] *Post* at 17-18.

[79] 169 F.3d at 975-76.

[80] *Id.* at 980.

The dissenting opinion asserts that damage to El Paso County's reputation provides the requisite standing.[81] We have discussed reputational standing above in conjunction with the § 2808 expenditures and will not repeat it here. We note that El Paso County does not argue that damage to its reputation supports standing with regard to the § 284 expenditures. In any event, the decision cited by the dissenting opinion regarding injury to reputation, *National Collegiate Athletic Ass'n v. Governor of New Jersey*,[82] is inapposite. In that case, the state of New Jersey sought to legalize and "license gambling on certain professional and amateur sporting events."[83] A "conglomerate of sports leagues" sued.[84] The Third Circuit looked to the record evidence in concluding that the leagues had adduced considerable evidence of injury to their respective reputations that supported standing.[85] The court's discussion of that evidence is quoted in the margin.[86] Suffice it

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[81] *Post* at 18 & n.2.

[82] 730 F.3d 208 (3d Cir. 2013), abrogated on other grounds by *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461 (2018).

[83] *Id.* at 214.

[84] *Id.*

[85] *See id.* at 121.

[86] *See id.*:

> For one, the conclusion that there is a link between legalizing sports gambling and harm to the integrity of the Leagues' games has been reached by several Congresses that have passed laws addressing gambling and sports, *see, e.g.,* H.R.Rep. No. 88–1053 (1963), 1964 U.S.C.C.A.N. 2250, 2251 (noting that when gambling interests are involved, the "temptation to fix games has become very great," which in turn harms the honesty of the games); Senate Report at 3555 (noting that PASPA was necessary to "maintain the integrity of our national pastime"). It is, indeed, the specific conclusion reached by the Congress that enacted PASPA, as reflected by the statutory cause of action conferred to the Leagues to enforce the law when their individual games are the target of state-licensed sports wagering. *See* 28 U.S.C. § 3703. And, presumably, it

to say that the plaintiffs in the present case have not established the causal link of any reputational injury or produced evidence of reputational injury to El Paso County.

BNHR argues that it has standing to challenge the Government's § 284 expenditures "[f]or the same reasons BNHR has standing to challenge the Defendants' § 2808 expenditures." BNHR does not offer any additional

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has also been at least part of the conclusions of the various state legislatures that have blocked the practice throughout our history.

* * *

The record is replete with evidence showing that being associated with gambling is stigmatizing, regardless of whether the gambling is legal or illegal. Before the District Court were studies showing that: (1) some fans from each League viewed gambling as a problem area for the Leagues, and some fans expressed their belief that game fixing most threatened the Leagues' integrity [App. 1605–06]; (2) some fans did not want a professional sports franchise to open in Las Vegas, and some fans would be less likely to spend money on the Leagues if that occurred; and (3) a large number of fans oppose the expansion of legalized sports betting. [2293–98.] This more than suffices to meet the Leagues' evidentiary burden under *Keene* and *Doe*—being associated with gambling is undesirable and harmful to one's reputation.

Although the Leagues could end their injury in fact proffer there, they also set forth evidence establishing a clear link between the Sports Wagering Law and increased incentives for game-rigging. First, the State's own expert noted that state-licensing of sports gambling will result in an increase in the total amount of (legal plus illegal) gambling on sports. [App. 325]. Second, a report by the National Gambling Impact Study Commission, prepared at the behest of Congress in 1999, explains that athletes are "often tempted to bet on contests in which they participate, undermining the integrity of sporting contests." App. 743. Third, there has been at least one instance of match-fixing for NCAA games as a result of wagers placed through legitimate channels, and several as a result of wagers placed in illegal markets for most of the Leagues, and NCAA players have affected or have been asked to affect the outcome of games "because of gambling debt." App. 2245. Thus, more legal gambling leads to more total gambling, which in turn leads to an increased incentive to fix or attempt to fix the Leagues' matches.

evidence to establish that the § 284 construction has "perceptibly impaired" the organization's ability to carry out its mission. Instead, BNHR contends only that the organization's standing is "even clearer" because § 284 border wall construction is occurring closer to El Paso than the § 2808 construction, and therefore the § 284 construction affects more of its members. Since BNHR relies on the same evidence for both claims, we conclude that BNHR does not have standing to challenge the § 284 expenditures for the same reason it does not have standing to challenge the § 2808 expenditures—the evidence is insufficient to demonstrate that border wall construction has "perceptibly impaired" the organization's activities.

* * *

Because El Paso County and BNHR do not have standing to challenge the Government's § 2808 or § 284 expenditures, we AFFIRM the district court's denial of an injunction that would enjoin the § 284 expenditures, REVERSE the district court's grant of summary judgment for the plaintiffs, VACATE the district court's injunction enjoining the § 2808 expenditures, and REMAND for dismissal of all claims for lack of jurisdiction.

James L. Dennis, *Circuit Judge*, dissenting:

In the final days of 2018, an impasse over the White House's insistence that Congress grant the Department of Homeland Security $5.7 billion to construct a wall at the nation's southern border led to the longest government shutdown in American history. The shutdown concluded when the President signed the 2019 Consolidated Appropriations Act, which afforded only $1.375 billion to build pedestrian fencing along a specific small portion of the border and required the Department of Homeland Security to submit a detailed construction plan to Congress for consideration prior to any further funding being appropriated to the project. On the same day that he signed the Act, the President issued an executive order declaring that a national emergency existed at the southern border. Explicitly linking the proclamation to Congress's refusal to appropriate the funds he had requested, the President directed the Department of Defense to respond to the emergency by redirecting funding that had been dedicated to other uses to build the border wall.

The Acting Secretary of Defense ultimately approved two series of border-wall construction projects that relied on funds that had not been originally appropriated for that purpose. The first includes El Paso Project #1, a forty-six-mile stretch of wall beginning about fifteen miles from downtown El Paso. According to affidavits from El Paso County officials, tourists and investors have already declined to spend money in the county due to its unwanted association with the construction, citing both their distaste for the politically controversial undertaking and fears over the practical consequences of doing business in close proximity to a massive construction project. The officials aver that the loss of this outside money will cause a decline in the county's tax revenue. The second set of projects repurposed funds that had been committed to a $20-million defense access road project that, but for the redirection, would have been constructed at

Fort Bliss within El Paso County. The El Paso County officials state that the cancellation of the access road project will likewise result in a significant decline in the county's tax revenue.

The majority today holds that the injuries El Paso County suffered and continues to endure as a result of the border wall construction projects are insufficient to support Article III standing. But the precedents of this and other courts firmly establish that, when a plaintiff suffers identifiable, material injuries as a result of a specific government construction project undertaken in the plaintiff's immediate vicinity—injuries that are qualitatively different from the generalized harm that anyone might suffer simply as a result of the project's attenuated economic ripple effects—those injuries are concrete and particularized enough to satisfy standing. Further, the cancellation of a specific government project and the economic benefits that would flow from it is wholly distinguishable from the generalized loss of tax revenue discussed in the cases upon which the majority relies. Far from being the type of nebulous injury that any municipality might assert as a result of changes in government policy, the cancellation of the Fort Bliss access roads project injured El Paso in a discrete, tangible way that is distinct from any injury suffered by other localities. Indeed, one is hard pressed to imagine *any* plaintiff that would be capable of challenging the border-wall construction and the funding transfers that facilitated it under the majority's unduly onerous standard, which is unfortunate given that multiple courts have concluded they are unlawful on several different grounds.

I, likewise, would conclude that the 2019 Consolidated Appropriation Act clearly prohibited the redirection of funds that underpins the border-wall construction and that the cited statutory authority for the transfers did not authorize them in any event. I therefore cannot join the majority's decision and must respectfully dissent.

I. Background and Procedural History

A. Border Wall Negotiations Between the President and Congress

During the run-up to the 2016 presidential election, then-candidate Donald Trump made building a wall along the nation's southern border with Mexico a key part of his campaign platform. Upon entering office the following year, President Trump sought to make good on that promise, promptly issuing an order directing the executive branch to "take all appropriate steps to immediately plan, design, and construct a physical wall along the southern border." 82 Fed. Reg. 8793, 8794 (Jan. 25, 2017). He then proceeded to unsuccessfully request funding for border wall construction in each of his first three budget proposals to Congress.

For fiscal year 2017, the President requested that Congress appropriate $999 million for construction of the first installment of the border wall, but Congress granted him only $341.2 million to replacing preexisting border fencing. *See* Consolidated Appropriations Act, 2017, Pub. L. No. 115-31, 131 Stat. 135, 434. For fiscal year 2018, the President requested $2.6 billion for border wall construction, but Congress appropriated only $1.571 billion for border security technology and fencing, much of which was earmarked for building barriers only in specific locations or for replacing preexisting fencing. Consolidated Appropriations Act, 2018, Pub. L. No. 115-141, 132 Stat. 348, 616. The 2018 appropriations act also established a consultation process under which the Secretary of Homeland Security was tasked with presenting a plan to Congress for improving border security that would include the details of how any proposed border barriers would be built, the estimated yearly cost of construction through fiscal year 2027, and a process for consulting state and local authorities regarding the construction process and the use of eminent domain to acquire the land on which the wall

was to be built. *Id.* at § 231(a), 132 Stat. at 617. The record does not disclose if any such report was ever submitted.

In his proposed budget for fiscal year 2019, the President initially requested $1.6 billion to construct approximately sixty-five miles of border wall. However, during a meeting with Congressional Democratic leadership in the Oval Office shortly after the 2018 mid-term election, the President instead demanded that Congress appropriate $5 billion to the project. Congress refused, and the impasse in budget negotiations resulted in a government shutdown. Shortly after the shutdown began, the President sent a letter to Congress, this time calling for $5.7 billion for the construction of approximately 234 miles of border wall. As the shutdown wore on, eventually breaking the record for the longest in U.S. history, the President publicly stated that he was considering declaring a national emergency in order to "build

Negotiations eventually led to the enactment of a stop-gap funding bill, and then, on February 14, 2019, Congress passed the Consolidated Appropriations Act, 2019, Pub. L. No. 116-6, 133 Stat. 13 (the "CAA"). The CAA appropriated only $1.375 billion to the Department of Homeland Security ("DHS") for the construction of pedestrian fencing solely within the "Rio Grande Valley Sector," *Id.* at § 230(a)(1), 133 Stat. at 28, and it again set forth a requirement that the Secretary of Homeland Security submit to Congress a detailed plan containing all the information about border-wall construction called for in the in the previous year's appropriation act, *id.* at § 230(c), 133 Stat at 28. Section 739 of the bill, which appeared within Title VII, "GENERAL PROVISIONS—GOVERNMENT WIDE," contained a prohibition on altering the budget of any project that appeared in a President's budget request, save for through a transfer provision in an appropriations act:

> 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.

Id. at § 739, 133 Stat. at 197.

The following day, the President signed the CAA into law, permanently ending the government shutdown.

B. The National Emergency Proclamation

The same day that the President signed the CAA, the White House published a factsheet entitled "President Donald J. Trump's Border Security Victory." The document announced a plan to "reprogram" specific funds "to build the border wall once a national emergency is declared." As relevant here, the factsheet stated that "[u]p to $2.5 billion" would be available "under the Department of Defense funds transferred for Support for Counterdrug Activities (Title 10 United States Code, section 284)." It also asserted that "[u]p to $3.6 billion" could be "reallocated from Department of Defense military construction projects under the President's declaration of a national emergency (Title 10 United States Code, section 2808)."

On the same day, the President also issued a proclamation entitled "Declaring a National Emergency Concerning the Southern Border of the United States." 84 Fed. Reg. 4949 (Feb. 15, 2019) (the "Emergency Proclamation"). The Emergency Proclamation stated that the southern border was "a major entry point for criminals, gang members, and illicit narcotics." *Id.* Then, citing the "long-standing" "problem of large-scale unlawful migration through the southern border" and the "sharp increases

in the number of family units entering and seeking entry to the United States," the Emergency Proclamation invoked the National Emergency Act ("NEA") to declare "that a national emergency exists at the southern border of the United States." *Id.* It stated that the purpose of declaring the emergency was "[t]o provide additional authority to the Department of Defense to support the Federal Government's response" and to make "the construction authority provided in section 2808 of title 10, United States Code" available to the Secretary of Defense. *Id.*

During a press conference announcing the Emergency Proclamation, President Trump indicated that the measure was intended to circumvent the limited appropriations Congress had made for construction of a border wall, stating

> Look, I went through Congress. I made a deal. I got almost $1.4 billion when I wasn't supposed to get one dollar—not one dollar. 'He's not going to get one dollar.' Well, I got $1.4 billion. But I'm not happy with it. . . . . [O]n the wall, they skimped. So I did—I was successful, in that sense, but I want to do it faster. I could do the wall over a longer period of time. I didn't need to do this. But I'd rather do it much faster.

Five days later, on February 20, 2019, El Paso County, Texas and the Border Network for Human Rights ("BNHR") (collectively, "the Plaintiffs") filed a complaint in the U.S. District Court for the Western District of Texas, asserting both a claim under the Administrative Procedures Act ("APA") and a series of equitable claims to enjoin the construction on various grounds and initiating the case that gives rise to this appeal.

C. The Redirection of the § 284 Funds and the *Sierra Club* Case

Shortly after the complaint was filed, on February 25, 2019, DHS formally requested that the Department of Defense ("DoD") utilize its 10 U.S.C. § 284(b)(7) authority to assist with the construction or replacement

of over 200 miles of border barriers in several specified "Project Areas." The Project Areas included the "El Paso Sector," in which DHS proposed building "El Paso Project 1." El Paso Project 1 consists of the 46 miles of border barriers in Luna and Doña Ana Counties, New Mexico, the latter of which immediately borders El Paso County. On March 25, 2019, the Acting Secretary of Defense approved three of the proposed projects, including El Paso Project 1.

Because Congress had appropriated only $517.2 million to DoD for counter-narcotics support, which was well short of the $2.5 billion called for in the President's factsheet, DoD transferred an eventual total of $2.5 billion from other appropriation accounts to its § 284 counter-narcotics support account. As its authority for the transfer, DoD cited Section 8005 of the 2019 DoD Appropriations Act, Pub. L. No. 115-245 § 8005, 132 Stat. 2981, 2999 (2018), which permits DoD to move money between its appropriations accounts for "unforeseen military requirements" that have not previously been "denied by Congress."

Two environmental groups then filed suit against many of the same Government officials that are defendants in the present case in the U.S. District Court for the Northern District of California. Asserting that they had environmental interests that would be damaged by unlawful construction, they argued that DoD's redirection of funds to its § 284 account was not authorized under Section 8005 because any need for border barrier construction was not unforeseen and the project had been denied by Congress. *See Sierra Club v. Trump* ("*Sierra Club I*"), 929 F.3d 670, 675-676 (9th Cir. 2019). The district court agreed that border barrier construction was not an unforeseen military requirement and that funding for it had been denied by Congress, and the district court thus issued a nation-wide injunction permanently enjoining the defendants from using the redirected § 284 funds to construct a border barrier. *Id.* at 676.

The defendants appealed to the Ninth Circuit and moved for an emergency stay of the district court's injunction pending appeal. See *Id.* A panel of the Ninth Circuit denied the motion for a stay in a 2-1 decision. *Id.* The panel majority determined, *inter alia*, that the environmental groups had either a cause of action under the Administrative Procedures Act ("APA") or an implied equitable cause of action to challenge the Government's violation of the Appropriations Clause of the Constitution. *Id.* at 694-700. The majority expressed doubt that the "zone of interest" requirement—that is, the requirement that a plaintiff's asserted interest must be the interest that a law is intended to protect in order for the plaintiff to have a cause of action to enforce that law—applied to the environmental groups' claims. *Id.* at 700. But if the requirement did apply, the majority reasoned, the appropriate focus would not be Section 8005, which was simply an affirmative grant of statutory authority that allegedly did not apply to the § 284 transfer, but rather the Appropriations Clause, which was the source of the ultimate restriction DoD allegedly violated. *Id.* at 703. Because the Appropriations Clause was intended to maintain the separation of powers in order to protect individual rights and liberties, the majority concluded that the plaintiffs satisfied the zone of interest test. *Id.* at 703-04.

Judge N. R. Smith dissented, arguing that the environmental groups claim was properly evaluated under the APA, for which the zone of interest requirement unquestionably applied. *Id.* at 713 (Smith, J., dissenting). Judge Smith faulted the majority for recharacterizing the environmental groups' claim that DoD acted in excess of the statutory authority provided by Section 8005 as a constitutional claim; under applicable Supreme Court precedent, he argued, the plaintiffs were alleging a statutory violation. *Id.* at 708-10. He concluded that the restrictions on transferring funds in Section 8005 were intended to "arguably protect[] economic interests," as well as the interests of "Congress and those who would have been entitled to the funds as

originally appropriated." *Id.* at 715. Because the environmental groups' asserted environmental interests fell outside of this sphere, Judge Smith stated that they lacked a cause of action to enforce Section 8005's restrictions. *Id.*

The defendants then applied to the Supreme Court for an emergency stay pending appeal. In a brief unsigned order, a majority of the Court appeared to agree with Judge Smith's dissent, stating 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." *Trump v. Sierra Club* ("*Sierra Club II*"), 140 S. Ct. 1(2019). The Court therefore stayed the district court's injunction pending the Ninth Circuit's final disposition and any certiorari proceedings that followed. *Id.*

D. The Redirection of the § 2808 Funds

On September 3, 2019, the Acting Secretary of Defense issued a memorandum to the various secretaries of the military departments entitled "Guidance for Undertaking Military Construction Projects Pursuant to Section 2808 of Title 10, U.S. Code." The memorandum noted the President's February 15 Emergency Proclamation and stated that the Acting Secretary had determined that 11 military construction projects with an estimated cost of $3.6 billion were necessary to support the use of the armed forces in connection with the national emergency.

Because 10 U.S.C. § 2808(a) requires that the money spent under its emergency authority be taken from "the total amount of funds that have been appropriated for military construction . . . that have not been obligated," DoD redirected funds from 127 planned military construction projects to fund the emergency construction, including approximately $20 million from a defense access road construction project that was scheduled to begin in January 2020 at Fort Bliss within El Paso County. And, because 10 U.S.C.

§ 2801(a) limits the "military construction" that 10 U.S.C. § 2808 authorizes in relevant part to "construction, development, conversion, or extension of any kind carried out with respect to a military installation," DoD began acquiring the land on which the border barrier would be constructed and administratively designating the new land to be an extension of Fort Bliss.

E. District Court Proceedings

On April 25, 2019, the Plaintiffs here amended their complaint to include allegations related to the Acting Secretary of Defense's approval of the use of § 284 funds for El Paso Project 1. The same day, the Plaintiffs filed a motion for summary judgment or, in the alternative, a preliminary injunction. The Government filed a cross-motion to dismiss or for summary judgment, and, after taking supplemental briefing on DoD's September 3 decision to authorize the various § 2808 projects, the district court held a hearing on both motions.

On November 11, 2019, the district court issued a memorandum opinion granting in part the Plaintiffs' motion for summary judgment and denying the Government's. The court first pretermitted all consideration of the Plaintiffs' claims regarding the § 284 funds, simply stating that they were "unviable" in light of the Supreme Court's *Sierra Club II* order without further elaboration.

The court then determined that the Plaintiffs had standing with respect to the § 2808 funds and found that, by specifically appropriating $1.375 billion for border-wall construction, the CAA implicitly limited the executive branch to using only those funds for that purpose. The court further concluded that Section 739 of the CAA explicitly prohibited using any appropriated funds to alter the amount appropriated to any project proposed in the President's budget request unless authorized by a transfer provision within an appropriations bill. Because the border wall was a project proposed

in the President's budget request, the court continued, the Government was not permitted to use funds appropriated to DoD to alter the budget appropriated to the project except pursuant to an appropriation bill transfer provision. And because neither § 284 nor § 2808 were enacted through an appropriation bill, the district court reasoned that they did not fall into the exception to the prohibition, and it thus concluded that the Government had violated Section 739 by redirecting the funds.

On December 10, 2019, the district court issued a second memorandum opinion granting the Plaintiffs a declaratory judgment stating that the Emergency Proclamation was unlawful to the extent it authorized the agency-head Government defendants to use § 2808 funds for border wall construction and permanently enjoining those defendants from such use on a nation-wide basis. The government timely appealed, and while the appeal was pending, a divided motions panel of this court issued an order staying the district court's injunction and denying the Plaintiffs' motion to expedite the appeal.

II. Standard of Review

This court reviews legal questions, including those of constitutional and statutory interpretation, *de novo*. *Willy v. Admin. Review Bd.*, 423 F.3d 483, 490 (5th Cir. 2005); *U.S. v. Lauderdale Cnty.*, 914 F.3d 960, 964 (5th Cir. 2019). Thus, we examine *de novo* whether a plaintiff possesses standing and a valid cause of action. *N.A.A.C.P. v. City of Kyle*, 626 F.3d 233, 236 (5th Cir. 2010). Similarly, whether an agency has acted in excess of statutory authority is reviewable *de novo*, subject to the familiar *Chevron* framework where appropriate. *See City of Arlington v. F.C.C.*, 569 U.S. 290, 296 (2013) (citing *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984)). And when reviewing these questions, the court "may affirm summary judgment on any ground supported by the record, even if it is

different from that relied on by the district court." *Bluebonnet Hotel Ventures, LLC v. Wells Fargo Bank, N.A.*, 754 F.3d 272, 275-76 (5th Cir. 2014). By contrast, a district court's decisions regarding equitable remedies, including whether and to what extent to grant an injunction, are reviewable only for abuse of discretion. *See Moses v. Wash. Parish Sch. Bd.*, 379 F.3d 319, 327 (5th Cir. 2004).

III. Discussion

A. The Plaintiffs' Right to Sue

This case implicates two distinct but often confused threshold issues: standing and the existence of a cause of action. *See Davis v. Passman*, 442 U.S. 228, 239 n. 18 (1979) (contrasting the concepts). As "[t]he Supreme Court has stated succinctly[,] . . . the cause-of-action question is not a question of standing." Wright & Miller, 13A Fed. Prac. & Proc. Juris. § 3531 (3d ed.) (collecting cases). Because these inquiries are often wrongly conflated, it is useful to define and differentiate them at the outset of the analysis.

First, standing. The Constitution limits "[t]he judicial Power" to "cases" and "controversies," U.S. CONST. Art. III, § 1, and "the core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III," *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). "The irreducible constitutional minimum of standing contains three elements." *Id.* First, a plaintiff must allege an "injury in fact—an invasion of a legally protected interest" that is both "(a) concrete and particularized" and "(b) actual or imminent, not conjectural or hypothetical." *Id.* (cleaned up). Second, the injury must be "fairly traceable" to the action by the defendant that the plaintiff challenges. *Id.* (cleaned up). Lastly, it must be "likely, as opposed to merely speculative,"

that the injury will be redressed by a favorable order the court is empowered to issue. *Id.* (internal quotations omitted).

In other words, standing is the question of whether the defendant's alleged conduct injured the plaintiff in a way that the court could theoretically remedy, regardless of whether the defendant's alleged conduct was actually unlawful and actually entitles the plaintiff to relief. When a plaintiff has not alleged the requisite injury, federal courts lack the power to hear the case because "[s]tanding is jurisdictional." *LeTourneau Lifelike Orthotics & Prosthetics, Inc. v. Wal-Mart Stores, Inc.*, 298 F.3d 348, 351 (5th Cir. 2002).

But not every injury that satisfies standing entitles a plaintiff to relief from the courts. "[T]he question of standing is whether the litigant is entitled to have the court decide the merits of the dispute" and it "in no way depends on the merits of the plaintiff's contention that particular conduct was illegal" or entitles the plaintiff to a remedy. *Warth v. Seldin*, 422 U.S. 490, 498 (1975). This separate question—whether a plaintiff's alleged injury would actually entitle the plaintiff to a judicial remedy if proven—is the question of whether a cause of action exists.

Put another way, a cause of action is a legal right to relief from the courts. *See Passman*, 442 U.S. at 239 n. 18. In many instances, whether a plaintiff has a cause of action will depend on whether the legislature has created such a right to relief, although a cause of action can also arise from the common law (such as torts or a breach of contract claim) or in equity (such as an inferred right to seek an equitable injunction to prevent injury from unlawful conduct). *See Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 327 (2015). A plaintiff can have standing but lack a cause of action when, for example, the plaintiff is injured by a defendant's conduct that is totally lawful, such as when a defendant company benefits from a strategic decision by taking business from its competition. *See Cooper v. Texas Alcoholic*

Beverage Comm'n, 820 F.3d 730, 738 (5th Cir. 2016) ("[N]umerous courts have upheld the standing of competitors to challenge official actions that change the amount of competition in an economic actor's market.").

However, a plaintiff may also lack a cause of action even when actually injured by a defendant's unlawful conduct. This is because one aspect of the cause of action inquiry is "whether the class of litigants of which [the plaintiff] is a member may use the courts to enforce the right at issue." *Passman*, 442 U.S. at 239 n. 18. For example, courts generally do not allow non-parties to a contract to enforce contract rights absent special circumstances, regardless of whether a contracting party's unlawful breach has harmed the third party in a way that would satisfy standing. *See, e.g.*, *Riegel Fiber Corp. v. Anderson Gin Co.*, 512 F.2d 784, 787–88 (5th Cir. 1975). Similarly, plaintiffs generally cannot recover tort damages based on purely economic losses resulting from a defendant's negligence unaccompanied by physical injury, although the economic injury alone would satisfy standing. *Louisiana. Ex rel. Guste v. M/V TESTBANK*, 752 F.2d 1019, 1021 (5th Cir. 1985).

The Supreme Court has held that, in the context of claims based on federal statutes, determining whether a plaintiff has a cause of action generally requires looking to whether the interest that the plaintiff asserts the defendant's unlawful conduct harmed is among the "zone of interests" the federal statute was intended to protect. *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 125-26 (2014). This requirement is based on the inference that, when Congress creates a cause of actions (such as in the APA), it does not intend to allow individuals to use it to vindicate "interests [that] are so marginally related to or inconsistent with the purposes implicit in the statute" that was allegedly violated. *Id.* at 130 (quoting *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 225 (2012)). Although many courts have muddied the waters by referring to this

inquiry as "prudential standing" or "statutory standing," it is a separate and distinct question from whether a defendant's alleged conduct caused the plaintiff redressable injury—the focus of the standing inquiry. *Id.* at 127 n. 3. The distinction is particularly important because, unlike standing, the existence of a cause of action is not a jurisdictional requirement and it instead goes to the merits of a claim. *Id.*

With these distinctions in mind, I turn to the current case.

1. Standing

"[T]he presence of one party with standing is sufficient to satisfy Article III's case-or-controversy requirement." *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 52 n.2 (2006). Thus, where there are multiple plaintiffs in a suit, an appeals court need determine only that at least one of the plaintiffs has standing with respect to each claim in order to proceed to the merits of that claim. *See id.* As discussed below, I would hold that El Paso has standing to challenge both the § 284 and the § 2808 transfers and the construction they facilitated. I therefore would not reach whether BNHR's asserted injuries likewise satisfy the standing inquiry.

a. The Redirection of Funds for § 284 Construction

As detailed above, the Acting Secretary of Defense has authorized the use of § 284 funds to construct El Paso Project 1, including forty-six miles of border barrier beginning in Doña Ana County, New Mexico, which immediately borders El Paso County. The construction will take place approximately fifteen miles from downtown El Paso. The Plaintiffs argue that El Paso County has standing to challenge the pending construction because the project has already damaged the county's reputation and disrupted its regional economy by compromising its ability to compete for business investment and tourism. In support of this argument, the Plaintiffs introduced declarations from several county officials who state that potential

investors and tourists have expressed reluctance to do business with the county due to the threat of chaos and congestion from massive construction taking place in the near vicinity and uncertainty regarding whether easy cross-border commerce will continue. The officials also claim that being associated with the nearby construction will damage the county's image as a community that celebrates diversity and its connection with Mexico, further undermining the county's ability to attract tourists and investors. The officials assert that they have had to expend significant resources and effort combatting these perceptions, yet still the county has suffered decreased tax revenues attributable to the project.

Several other circuits have held that municipalities often have standing to assert injuries that result from adjacent government construction. In *City of Olmsted Falls v. Federal Aviation Administration*, for instance, the D.C. Circuit held that a city had standing based on alleged economic harm it would suffer as a result of environmental damage caused by the Federal Aviation Administration's construction at an airport two miles from the city. 292 F.3d 261, 266-67 (D.C. Cir. 2002). Similarly, in *City of Sausalito v. O'Neill*, the Ninth Circuit held that a city had standing to challenge military construction at a nearby fort based on a declaration from a city official asserting that the construction was likely to result in, *inter alia*, "congested streets," "lost property and sales tax revenue due to impaired vehicular movement and commerce rendering [the city] less attractive to business," and damage to the city's "tourism industry because added traffic congestion and crowded streets will destroy the City's quiet, beauty, serenity and quaint and historic village character and attributes." 386 F.3d 1198 (9th Cir. 2004). The Ninth Circuit determined that the city had valid, cognizable interests in preventing physical damage to its streets and harm to its municipal management and public safety functions, as well as in its aesthetics, tax base, and natural resources. *Id.* at 1198-99. All of these would potentially be

harmed by the nearby construction, the Ninth Circuit held, and the city therefore satisfied the constitutional requirements of standing.

Although this court has not addressed the exact issue of municipal standing as a result of nearby government construction, it has found that standing was satisfied when considering the issue with respect to individual plaintiffs. In *Walker v. City of Mesquite*, 169 F.3d 973, 980 (5th Cir. 1999), homeowners brought an action seeking to enjoin the government from constructing two new public housing projects adjacent to their predominantly white neighborhood because the site selection had been racially motivated as a result of a previous remedial court order. Although this court found that the disparate treatment on the basis of race was sufficient injury in itself to support standing, it held in the alternative that standing was satisfied because the homeowners had alleged "that constructing two new 40-unit public housing projects adjacent to their neighborhoods will cause a decline in their property values and other problems involving crime, traffic and diminished aesthetic values."[1] *Id.*

Together, these cases stand for the basic proposition that a party in close proximity to government construction will have standing when "the concrete and particularized injury which has occurred or is imminent [is] due to geographic proximity to the action challenged." *City of Olmsted Falls*, 292 F.3d at 267 (emphasis omitted). Under this standard, the injuries El Paso County has demonstrated as a result of the pending § 284 construction—including damage to its reputation and a diminishment of tax revenue due to being located adjacent to the border wall construction—qualify as an injury-

[1] Alternate holdings are considered binding precedent in this circuit. *See United States v. Potts*, 644 F.3d 233, 237 n.3 (5th Cir. 2011).

in-fact.[2] *See id.*, *Nat'l Collegiate Athletic Ass'n v. Governor of New Jersey*, 730 F.3d 208, 220 (3d Cir. 2013) (holding that athletic league's reputational injuries due to unwanted association with sports gambling satisfied injury-in-fact to challenge law permitting sports gambling).

One might question the veracity of the submitted declarations and whether the nearby pending construction has actually resulted in a diminishment of investment and tourism and damaged the county's reputation for diversity and inclusivity. However, standing "must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation." *Lujan*, 504 U.S. at 561. The court is generally not permitted to weigh credibility at the summary judgment stage, and this means that assertions in declarations in support of standing should be treated as true when they are uncontroverted. *See id.*; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). Because the Plaintiffs submitted sufficient evidence that they were injured, the burden shifted to the Government to introduce evidence creating a genuine issue of material fact on the matter. *See Int'l Shortstop, Inc. v. Rally's, Inc.*, 939 F.2d 1257, 1265 (5th Cir. 1991). And the Government offered no evidence that El Paso County's economy and tax base have not and will not been harmed by the § 284 construction in the manner that the Plaintiffs' declarations describe.

The Government argued that El Paso County's contentions are speculative and based on the independent actions of third parties. First,

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[2] In addition to being located immediately adjacent to the construction, the naming of the construction project after the county—El Paso Project 1—likely strengthened perceptions that the county was associated with the project, further supporting the county's reputational and resulting economic injuries.

Plaintiffs' declarations make clear that they have already endured harm, and thus their injury is not speculative. Second, "standing is not [inherently] precluded" when it is based on the choices of third-parties; rather, the plaintiff must simply "adduce facts showing that those choices have been or will be made in such manner as to produce causation and permit redressability of injury." *Lujan*, 504 U.S. at 562. Where an injury results as a "predictable effect of Government action on the decisions of third parties," standing is satisfied. *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2566 (2019) (holding state had standing to challenge inclusion of citizenship question on census that would predictably discourage third-party noncitizens from responding, resulting in loss of state funding, despite nonresponse being unlawful and fears being irrational in light of confidentiality law). Here, the county officials declared that they encountered tourists and investors who expressly linked their disinclination to spend money in El Paso County to the pending construction—an aversion that was easily predictable given the politically charged nature of the project.

Furthermore, "the injury in fact requirement under Article III is qualitative, not quantitative, in nature," and it "need not measure more than an identifiable trifle." *Ass'n of Cmty. Orgs. for Reform Now v. Fowler*, 178 F.3d 350, 357-58 (5th Cir. 1999). Thus, even if only one individual has chosen not to do business with El Paso County as a direct result of the construction, it is sufficient to show an actual or imminent injury in fact with a causal linkage to the construction. Here, the Plaintiffs' declarations—which, again, are uncontroverted—aver that the county has indeed suffered a loss in business attributable to the construction, satisfying standing's injury-in-fact component.

The Government and the majority rely heavily on dictum in *Wyoming v. Oklahoma*, 502 U.S. 437, 448 (1992), to conclude that El Paso's asserted injury is too nebulous to satisfy standing. In *Wyoming*, the state of Wyoming

sued Oklahoma to challenge Oklahoma legislation that required local powerplants to burn at least 10% Oklahoma-mined coal. *Id.* The Court held that standing was satisfied because the law resulted in a decrease in the sale of Wyoming-mined coal, which in turn deprived Wyoming of severance tax revenues. *Id.* at 447-49. In so holding, the court noted that some Courts of Appeals had denied standing when states claimed that actions taken by the federal government injured the state's economy and caused a decline in general tax revenues, but it held that those cases were not analogous because Wyoming had alleged "a direct injury in the form of a loss of specific tax revenues." 502 U.S. at 448.

In addition to the Court's statement about a decline in general tax revenues being dictum—indeed, dictum that does not even clearly endorse the principle the Government and the majority cite it for—it is inapposite here. The two cases the Court noted in *Wyoming* were *Pennsylvania v. Kleppe*, 533 F.2d 668, 671 (D.C. Cir. 1976) and *Iowa v. Block*, 771 F.2d 347, 348 (8th Cir. 1985). Both cases involved claims by states that their citizens were entitled to greater disaster relief than the federal government had afforded to them. *See Kleppe*, 533 F.2d at 671 (challenging "class B" designation by Small Business Administration following hurricane as providing inadequate recovery loans); *Block*, 771 F.2d at 353 (challenging Agriculture Secretary's failure to provide subsidy relief to farmers affected by drought) The courts found that the states were essentially bringing actions on behalf of their citizens, and any allegation of harm to the states themselves was "sketchy and uncertain" and might have included some general loss in tax revenue as a result of the state's citizens not receiving a greater benefit. *Kleppe*, 533 F.2d at 671 n.14; *Block*, 771 F.2d at 353. There is no indication the states even alleged that the citizens would spend the additional relief fund within the states. Notably, the states' asserted injuries were the same injuries that any

state might suffer when the federal government implements federal policy, for virtually all federal laws have some incidental effect on the economy.

Even assuming the holdings of *Kleppe* and *Block* were endorsed by the Supreme Court in *Wyoming*, El Paso County does not make vague allegations that the construction will alter economic patterns in some unspecified way and that its general tax revenues will fall as a result. Rather, El Paso County demonstrated that tourists and investors have and will continue to decline to do business in the county because of its extremely close proximity to a specific massive, controversial construction project that will have many material adverse effects unique to the surrounding areas. Its evidence shows that the county will lose specifically the sales and income tax revenue related to those particular actors' aborted transactions. No locality other than those in proximity to the project could claim a similar injury—it is particularized to El Paso. Thus, the county's "direct injury in the form of a loss of specific tax revenues," *Wyoming*, 502 U.S. at 448, is far more analogous to the economic harm the Supreme Court found sufficient to support standing in *Wyoming* and the Courts of Appeals upheld in *Olmsted Falls*, *Sausalito*, and *Mesquite* than to the undefined injuries asserted in *Kleppe* and *Block*. El Paso County therefore has standing to challenge the redirection of the § 284 funds, and the majority errs by holding otherwise.

b. The Redirection of Funds for § 2808 Construction

For many of the same reasons that El Paso has standing to challenge the construction undertaken with the § 284 funds, the county arguably has standing to challenge the § 2808 construction. Although the § 2808 construction is occurring further from El Paso County than the § 284 construction, El Paso remains the nearest major city to the construction. Thus, the fear of investors and tourists to do business with a county that they expect will suffer the negative effects of massive nearby construction and that

they perceive to be associated with a project reflecting intolerant values may be causally linked to the § 2808 construction.

However, El Paso County has standing to challenge the redirection of funds for § 2808 construction for a second reason: The redirection of funds has resulted in the cancellation or "deferment" of a planned $20 million defense access road construction project that would have taken place at Fort Bliss in El Paso County.

Fort Bliss is the nation's second-largest Army base, and it houses about 70,000 soldiers and family members. U.S. Army, Fort Bliss, https://home.army.mil/bliss/index.php/my-fort. According to studies cited in the declaration filed by a top El Paso County official, Fort Bliss contributes $23.13 billion to the Texas economy and $5.9 billion specifically to El Paso County. Its presence in El Paso County creates 62,000 additional jobs, resulting in $4 billion in compensation to area households. Thus, county officials consider Fort Bliss to be "the lifeblood of the El Paso economy," with the financial health of the base affecting the "real estate market and every other aspect of the economy in El Paso."

Courts have long recognized that government action that results in the cancellation of a government benefit that a state or municipality expects to receive gives rise to an injury in fact sufficient to satisfy standing. In *Clinton v. City of New York*, 524 U.S. 417, 429 (1998), for instance, the Supreme Court found that New York City had standing to challenge the President's use of the line-item veto to veto a provision that would have nullified a debt New York State owed to the federal government. Because New York State was likely to assess New York City for a portion of the debt owed, the court found that the cancellation of the economic benefit constituted an injury-in-fact to the city. *Id.* at 430; *see also New York*, 139 S. Ct. at 2566 (holding state would have standing to challenge census citizenship question that would

discourage response and lead to loss of federal benefits); *Texas v. United States*, 945 F.3d 355, 376 (5th Cir. 2019) (holding that states that would lose federal funding as a result of district court's order striking down the Affordable Care Act have standing to appeal), *cert. granted* 140 S. Ct. 1262 (Mar. 2., 2020) (mem.).

The Government and majority argue that El Paso County was not directly entitled to the funds that would be spent on the Fort Bliss access road project, and any allegation that the loss of the project will result in decreased tax funds is a generalized grievance that cannot support standing under *Wyoming*, 502 U.S. at 448.[3] But, as discussed above, the Court's note in *Wyoming* that some Courts of Appeals had found generalized losses of tax revenue insufficient to support standing was dictum that did not expressly endorse the decisions it described. *See supra*, § III.A.1.a. And, even assuming that those decisions were correct, they are inapposite here because generalized harm to the economy is not analogous to the loss of a specific identified project and the benefits that would flow from it. It is axiomatic that a $20 million construction project will require a range of local spending, including the procurement of local materials and labor. *See Carpenters Indus.*

[3] The Government also refers to the Fort Bliss access road construction as a "proposed project" and asserts that Congress would have still been required to approve the project before construction could have begun. However, the Government cites only 10 U.S.C. § 2802(a) for this requirement, which simply states that "[t]he Secretary of Defense and the Secretaries of the military departments may carry out such . . . defense access road projects (as described under section 210 of title 23) as are authorized by law." 23 U.S.C. § 210(a)(1) in turn authorizes the construction of access roads when the Secretary of Defense certifies them as "important to national defense." It thus does not appear that any further Congressional approval was necessary for the planned project. *See Brock v. City of Anniston*, 14 So. 2d 519, 523 (Ala. 1943) (concluding that certification under former version of statute gave "full authority" for the construction and maintenance of access roads).

Council v. Zinke, 854 F.3d 1, 6 (D.C. Cir. 2017) (Kavanaugh, J., concurring) (noting that "[c]ommon sense and basic economics" can be useful tools when "performing that inherently imprecise task of predicting or speculating about causal effects" for purposes of evaluating standing). The county would have been entitled to collect income and sales tax on these expenditures, and it is the "direct injury in the form of a loss of [these] specific tax revenue[s]" that the county challenges. *Wyoming*, 502 U.S. at 448. Thus, even if the loss of the plethora of beneficial secondary economic effects from the project—including increases in property values and the creation of jobs—is too generalized or speculative to constitute an injury in fact, the loss of the specific tax revenue from the planned construction is sufficient. And, should the county deem the access road necessary for its own purposes, it will now be forced to finance the project itself.

Indeed, the Ninth Circuit recently held as much when considering this exact issue in a decision the majority acknowledges conflicts with its own. In the latest chapter in the *Sierra Club* case, the court determined that, in a separate challenge brought by a number of states that was consolidated with the appeal, "the States ha[d] alleged analogous" injuries to those the Supreme Court found sufficient in *Wyoming* because they were "direct injuries in the form of lost tax revenues resulting from the cancellation of specific military construction projects." *Sierra Club v. Trump* ("*Sierra Club IV*"), 977 F.3d 853, 871 (9th Cir. 2020). The court expressly rejected the comparison to *Kleppe* on which the majority today relies, *see id.* at 870-71, and not even the dissent in that case adopted this unsupported reasoning, *see id.* at 896 & n.5 (Collins, J., dissenting) (declining to reach the issue).

The Government also challenges the fact that the declaration filed by the Plaintiffs was made before the Acting Secretary of Defense had conclusively decided to defund the Fort Bliss access road project. But the Fort Bliss access road project had already been identified for likely

cancellation in order to free up funds for the § 2808 construction, which the declaration explicitly references. That the project was indeed canceled simply confirms that the harm to El Paso County was imminent and not too speculative to support standing at the time the complaint was filed.

The majority also argues that El Paso has not shown redressability for this injury because DoD would maintain discretion not to build the Fort Bliss access road even if the § 2808 construction were enjoined. Majority at 13-14. Notably, the government made this argument below but has wholly abandoned it on appeal, perhaps recognizing that it is untenable. The Supreme Court has expressly stated that, where a plaintiff's injury is its lost opportunity to "obtain a benefit," the plaintiff need not show "that he [will actually] obtain the benefit" if the court rules in his favor in order to satisfy redressability. *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666 (1993). "Article III does not demand a demonstration that victory in court will without doubt cure the identified injury." *Teton Historic Aviation Found. v. DOD*, 785 F.3d 719, 727 (D.C. Cir. 2015). The plaintiff must only show that the injury is "likely to be redressed by a favorable decision." *Vill. of Arlington Heights*, 429 U.S. at 262.

Here, the Fort Bliss access road project was already considered to be a needed addition that would greatly benefit the base, and it was only canceled because of the desire to free up funds for border barrier construction. Indeed, the Government does not even describe the decision as a cancellation, but rather a "deferment," indicating that it still plans to undertake the project someday once funds are available. It is thus substantially likely that the access road would be built if the § 2808 construction were enjoined, freeing up the funds, and redressability is

therefore satisfied.[4] *Cf. Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 261-62 (1977) (holding that, where the plaintiff's injury stemmed from a "barrier to constructing [certain] housing," the plaintiff had standing to challenge the obstacle even though "[a]n injunction would not, of course, guarantee that [the plaintiff's project would] be built").

Accordingly, El Paso has demonstrated a sufficient injury to establish standing to challenge the § 2808 construction, and the majority errs be determining that it has not.

2. Cause of Action – The Zones of Interests

As discussed *supra*, § III.A.1, in order for a plaintiff to bring an action challenging an agency decision under the APA, the plaintiff's asserted injury must arguably be to an interest that falls among the "zone of interests" the allegedly violated law was intended to protect. *Lexmark*, 572 U.S. at 129 (citing *Assoc. of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150 (1970)). The test "is not meant to be especially demanding," *Clarke v. Sec. Inds. Assn.*, 479 U.S. 388, 399 (1987), and it should be applied in light of "Congress's 'evident intent' when enacting the APA 'to make agency action presumptively reviewable.'" *Match-E-Be-Nash-She-Wish*, 567 U.S. at 225

[4] Further, to the extent the statutory limitations on DoD's transferring funds can be construed as procedural restraints, the Plaintiffs need not even demonstrate causation and redressability in the first place. *See Lujan*, 504 U.S. at 572 n.7 ("There is this much truth to the assertion that 'procedural rights' are special: The person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy. Thus, under our case law, one living adjacent to the site for proposed construction of a federally licensed dam has standing to challenge the licensing agency's failure to prepare an environmental impact statement, even though he cannot establish with any certainty that the statement will cause the license to be withheld or altered, and even though the dam will not be completed for many years.").

(quoting *Clarke*, 479 U.S. at 399). Thus, the Supreme Court has "always conspicuously included the word 'arguably' in the test to indicate that the benefit of any doubt goes to the plaintiff." *Id.*

As an initial matter, the Plaintiffs dispute whether the "zone of interest" test should apply to all of their claims. They contend that *Lexmark International, Inc. v. Static Control Components*, 572 U.S. 118, 127 (2014), made clear that the requirement is applicable to only "legislatively conferred cause[s] of action." Because they also assert an implied equitable cause of action to enjoin violations of law by federal officials, they contend that the zone-of-interest inquiry is irrelevant to some of their claims.

It is true that the Supreme Court has long recognized that federal courts "may in some circumstances grant injunctive relief against [federal official] who are violating, or planning to violate, federal law." *Armstrong*, 575 U.S. at 327; *see also Chamber of Commerce v. Reich*, 74 F.3d 1322, 1328 (D.C. Cir. 1996) (holding that the APA "does not repeal the review of ultra vires actions recognized long before"). But "[t]he power of federal courts of equity to enjoin unlawful executive action is subject to express and implied statutory limitations." *Armstrong*, 575 U.S. at 327. When Congress has excluded or restricted private enforcement of a statute, plaintiffs "cannot, by invoking our equitable powers, circumvent Congress's" restrictions. *Id.* at 328. This rule applies here because Congress placed various limitations--including the zone-of-interests requirement--on the judicial review provided for in the APA, which a plaintiff cannot avoid simply by bringing an equitable action to challenge a final agency decision alongside or instead of an APA claim.. *See* 5 U.S.C. § 706 (setting forth the scope of review); *Hernandez v. Mesa*, 140 S. Ct. 735, 747 (2020) ("It would be 'anomalous to impute . . . a judicially implied cause of action beyond the bounds [Congress has] delineated for [a] comparable express caus[e] of action'" (quoting *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 736 (1975))); *W. Radio Servs. Co.*

v. U.S. Forest Serv., 578 F.3d 1116, 1123 (9th Cir. 2009) ("The fact that APA's procedures are available where no other adequate alternative remedy exists further indicates Congress's intent that courts should not devise additional, judicially crafted default remedies.")

This is confirmed by the Supreme Court's order in *Sierra Club II*. There, the plaintiffs had also asserted an equitable right of action to which they argued the zone-of-interests test did not apply. 929 F.3d at 700-01. A majority of the Ninth Circuit appeared to tentatively agree, stating that they were "skeptical that there could be a zone of interests requirement for a claim alleging that official action was taken in the absence of all authority." *Id.* at 700. But by granting a stay on the ground that "the plaintiffs have no cause of action to obtain review of the Acting Secretary's compliance with Section 8005" in *Sierra Club II*, 140 S. Ct. at 1, the Supreme Court seems to have necessarily adopted one of two views: either courts may not entertain equitable claims challenging agency actions that could be reviewed under the APA, or any equitable claim that exists must also be subject to the zone of interests test, which was not met there. Under either formulation, the zone-of-interests requirement would apply to all of the claims brought by the Plaintiffs in the present case.

a. El Paso County at Minimum Has a Cause of Action to Challenge the Transfer of the § 284 Funds as Violative of the CAA.

Generally, when a plaintiff brings an APA claim for a violation of another source of law, the focus of the zone-of-interest inquiry is not the APA itself, but rather "the zone of interests to be protected or regulated by the statute that [the plaintiff] says was violated." *Match-E-Be-Nash-She-Wish*, 567 U.S. at 224 (internal quotations and citations omitted); *accord Bennett v. Spear*, 520 U.S. 154, 175 (1997) (stating the focus should be on the "substantive provisions . . . [that] serve as the gravamen of the complaint.").

With regard to the § 284 funds, the Plaintiffs argue that the Government violated the CAA generally, Section 739 of the CAA in particular, and Section 8005 of the 2019 DoD Appropriations Act.

The Plaintiffs argue that these provisions—like all "structural principles secured by the separation of powers"—are intended to "protect the individual." *Bond v. U.S.*, 564 U.S. 211, 222 (2011). And because El Paso County and BNHR are composed of individuals who have been injured by the Government's alleged violation of statutes that were intended to preserve the separation of powers, the Plaintiffs argue, they are within the zone of interests the statutes were intended to protect. They rely significantly on *Bond v. U.S.*, in which the Supreme Court held that an individual citizen fell within the zone of interests protected by the division of power between the states and federal government, and thus could raise as a defense in a federal prosecution the argument that the allegedly violated law was unconstitutional because it was enacted pursuant to a power that is rightly reserved to the states. *Id.* at 222-23.

At first blush, the Plaintiff's argument has significant appeal. Indeed, in *Bond* itself, the Court noted that the same purpose of individual protection that is served by federalism is served by the separation of powers between the branches of the federal government, and it cited numerous cases in which "the claims of individuals—not of Government departments—have been the principal source of judicial decisions concerning separation of powers and checks and balances." *Id.* (citing, *inter alia*, *INS v. Chadha*, 462 U.S. 919 (1983); and *Clinton v. City of New York*, 524 U.S. 417, 433–436 (1998)). And this court, sitting *en banc*, recently interpreted these statements broadly to allow all claims implicating separation of powers violations to go forward when the requirements of standing are met: "A plaintiff with Article III standing can maintain a direct claim against government action that violates the separation of powers. . . . If the constitutional structure of our

Government that protects individual liberty is compromised, individuals who suffer otherwise justiciable injury may object." *Collins v. Mnuchin*, 938 F.3d 553, 587 (5th Cir. 2019) (en banc) (quoting *Bond*, 564 at 223) *cert. granted*, No. 19-422, 2020 WL 3865248 (U.S. July 9, 2020), and No. 19-563, 2020 WL 3865249 (U.S. July 9, 2020). However, this is the precise reasoning the majority in *Sierra Club I* adopted and that the Supreme Court necessarily rejected by staying the injunction in *Sierra Club II*. *See* 929 F.3d at 703-04 (citing *Bond*, 564 U.S. at 223).

However, at least with respect to the alleged violations of the CAA, El Paso asserts an injury to a more specific interest. As related above, the CAA established a detailed consultation process in which DHS was required to submit a plan for border wall construction to Congress that would include "[a] plan to consult State and local elected officials on the eminent domain and construction process relating to physical barriers." Pub. L. No. 116-6 at § 229(c), 133 Stat. at 28 (citing Consolidated Appropriations Act, 2018, Pub. L. No. 115-141 § 231(a), 132 Stat. 348, 617). The clear import of the requirement that DHS submit such a plan, viewed in conjunction with the CAA's appropriation of funds for border wall construction only in one specific area and Section 739's restriction on altering the budget appropriated to a requested project, is that Congress was not prepared to authorize construction of a border wall in other areas without consultation with state and local officials. *See Indian River Cnty. v. U.S. DOT*, 945 F.3d 515, 530 (D.C. Cir. 2019) (holding that, when applying the zone-of-interests test, courts should not look to the allegedly violated provisions in isolation but also to other provisions bearing an "integral relationship" to the restrictions the plaintiff wishes to enforce); *Ctr. for Biological Diversity v. Trump*, No. 1:19-CV-00408 (TNM), 2020 WL 1643657, at *20 (D.D.C. Apr. 2, 2020) (explaining that Section 739 bears an integral relationship to all of the funding in the CAA because it "would be meaningless if not paired with other

provisions of the CAA," which "put flesh on § 739's bare mandate"). And when viewed in this light, there is a strong argument that Congress intended that the CAA protect the interest of local municipalities in being free from the harmful political and economic effects of nearby border-wall construction—the precise interests El Paso County claims are injured by the Government's commencement of § 284 construction only 15 miles from the downtown of the county's largest city. This arguable connection is sufficient to satisfy the zone-of-interests test with respect to the CAA. *See Match-E-Be-Nash-She-Wish*, 567 U.S. at 225 (noting that the conspicuous use of the term "arguably" in the test "indicate[s] that the benefit of any doubt goes to the plaintiff"). Thus, I would hold that the Plaintiffs at minimum satisfy the zone-of-interest requirement to challenge the § 284 transfers' compliance with the CAA.

b. El Paso County Also Has a Cause of Action to Challenge the § 2808 Redirection of Funds Because Its Interest in the Canceled Fort Bliss Access Road Project Is Protected by the Statutes it Invokes.

The Plaintiffs argue that the § 2808 transfer was unlawful because it violates the same portions of the CAA as the § 284 transfer, as well as § 2808 itself. The above analysis as to why the Plaintiffs satisfy the zone-of-interests requirement to challenge the § 284 transfer's compliance with the CAA is also applicable to the § 2808 funds. *See supra*, § III.A.2.a. However, El Paso County also demonstrated one injury as a result of the § 2808 transfer that is qualitatively different from those it sustained as a result of the § 284 construction: the cancellation of the $20 million defense access road construction project at Fort Bliss within El Paso County.

As discussed above, the dissent in *Sierra Club I*, which the Supreme Court appeared to endorse with its *Sierra Club II* order, postulated that the restrictions on redistributing appropriated funds contained in Section 8005

were intended to "protect[] Congress and those who would have been entitled to the funds as originally appropriated." *Sierra Club I*, 929 F.3d at 715 (Smith, J., dissenting). The dissent in the Ninth Circuit's later decision on the merits in *Sierra Club III* likewise accepted that a party asserting that it would have been entitled to the funds as originally appropriated would have a cause of action. *Sierra Club III*, 963 F.3d at 909 (Collins, J., dissenting) ("The assumption that no one will ever be able to sue for any violation of § 8005 seems doubtful[.]" (quoting *Sierra Club I*, 929 F.3d at 715 (Smith, J., dissenting)); *see also California v. Trump*, 963 F.3d 926, 961 (9th Cir. 2020) (Collins, J., dissenting) (arguing in companion case to *Sierra Club III* that states had not established that they were within the Section 8005 zone of interests because they had "made no showing whatsoever that, in the absence of these transfers to the 'Drug Interdiction and Counter-Drug Activities, Defense' appropriation, the funds in question would otherwise have been transferred for the direct benefit of" the states). Thus, even the dissent in the various *Sierra Club* decisions agreed that, at minimum, a party asserting a loss of a benefit that it would have received but for the allegedly unlawful transfer would fall within the zone of interests protected by Section 8005.

The CAA generally, Section 739 of the CAA in particular, and the restrictions contained in § 2808 all protect the same interests as Section 8005 because they all prohibit the Executive's use of funds for projects that have been denied by Congress and ensure those funds are spent as originally appropriated. Thus, a party asserting that appropriated funds would have been used to its direct benefit but for the allegedly unlawful transfer should likewise fall within the zones of interests protected by the CAA.

Although El Paso County would not be the direct recipient of the entirety of the $20 million scheduled for use on the Fort Bliss access road, the county would certainly receive some portion of that spending in tax revenues. And, as stated, Congress has made agency action "presumptively

reviewable" under the APA such that an injury to any interest that is even "arguably" within the zone of interests protected by a statute will entitle the plaintiff to bring suit. *Match-E-Be-Nash-She-Wish*, 567 U.S. at 225 ("[T]he benefit of any doubt goes to the plaintiff."). El Paso County's loss of the Fort Bliss access road construction project and the revenues it would generate represents an injury to an interest that the CAA and the restrictions within § 2808 were at least arguably intended to protect, and I would therefore hold that the Plaintiffs possess a cause of action to challenge the transfer of the § 2808 funds.

B. Statutory Violations

1. The Redirection of the § 284 Funds Violated the CAA.

a. Under the CAA, Congress's Appropriation of $1.375 Billion for the Construction of Border Barriers Precludes the Use of Other Funds for Border Barrier Construction.

As related above, the CAA appropriated $1.375 billion to DHS for the construction of pedestrian fencing specifically in the Rio Grande Valley Sector. Pub. L. No. 116-6 at § 230(a)(1), 133 Stat. at 28. The Plaintiffs argue—and the district court determined—that the appropriation of these specific funds for border barrier construction in a specified locale precluded the use of other general funds to construct border barriers.

"[F]rom time immemorial," courts and the agencies responsible for administering the federal budget have followed the rule 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) (quoting Office of the General Counsel, United States Government Accountability Office ("GAO"), PRINCIPLES OF FEDERAL APPROPRIATIONS

LAW 2–21 (3d ed. 2004) ("RED BOOK"[5]); 4 Comp. Gen. 476, 476 (1924)). In other words, "[i]f a specific appropriation exists for a particular item, then that appropriation must be used and it is improper to charge the more general appropriation (or any other appropriation) or to use it as a 'back-up.'" RED BOOK 3-408. "Otherwise, an agency could evade or exceed congressionally established spending limits." *Id.* at 3-408. "The cases illustrating this rule are legion." *Id.* at 3-409. For example, as early as 1894, the Comptroller General of the United States informed the Attorney General that "[a] State Department appropriation for 'publication of consular and commercial reports' could not be used to purchase books in view of a specific appropriation for 'books and maps.'" *Id.* (quoting 1 Comp. Dec. 126 (1894)).

In finding that, under this rule, Congress's appropriation of $1.375 billion to DHS for border wall construction precluded DoD's use of its funds to undertake the project, the district court relied on the D.C. Circuit's decision in *Nevada v. Department of Energy*, 400 F.3d at 16. In *Nevada*, the D.C. Circuit applied the rule to hold that a specific appropriation of $1 million for "Nevada . . . to conduct scientific oversight responsibilities and participate in licensing activities" precluded the use of any of the funds in the more general "nuclear waste disposal activities" appropriation for this purpose. *Id.* (quoting Energy and Water Development Appropriations Act,

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[5] The RED BOOK is the GAO's authoritative treatise on federal fiscal law that courts frequently rely upon when considering appropriations challenges. *See, e.g.*, *Lincoln v. Vigil*, 508 U.S. 182, 192 (1993) (citing the RED BOOK in addressing suit challenging reallocation of funds). Since *Nevada* was decided, the GAO has published the Fourth Edition of Chapters One through Three of the RED BOOK, and the materials contained at page 2-21 are now at page 3-408. Unless otherwise specified, RED BOOK citations in this opinion refer to the latest edition of each chapter, which can be found at https://www.gao.gov/legal/appropriations-law-decisions/red-book.

2004, Pub. L. No. 108–137, 117 Stat. 1827, 1865 (2003)). The court explained that the holding was an outgrowth of the well-known "general principle of statutory construction reiterated repeatedly by the Supreme Court, that a more specific statute will be given precedence over a more general one." *Id.* (internal citations and quotations omitted) (quoting *Busic v. United States*, 446 U.S. 398, 406 (1980)).

The Government argues that *Nevada* is inapposite for three related reasons. First, it contends that the rule that a specific appropriation precludes the use of a general appropriation for that purpose applies only when the two appropriations are made to the same agency. But *Nevada* neither stated nor implied any such limitation and in fact stated that the specific-controls-general rule applies "even when the two appropriations come from different accounts." *Id.* And the GAO's RED BOOK confirms that the Government is mistaken. It discusses a 1959 case in which the Navy sought to use its appropriation for "Shipbuilding and Conversion" to dredge rivers to allow for the safe passage of two nuclear submarines away from the shipyard where they had been built. See RED BOOK 3-408. The proposal failed, the RED BOOK states, because "dredging rivers was a function for which funds were appropriated to the Army Corps of Engineers, not the Navy." *Id.* at 3-409. It was immaterial that the appropriation was made to a different agency; that Congress had made a specific appropriation for dredging rivers to *any* agency was sufficient to preclude the use of other moneys for that same purpose.

Next, the Government argues that the specific-controls-general rule applies only when there is a conflict between the two statutes. There is no conflict, it contends, between Congress's appropriation to DHS for border-barrier construction and DoD's use of its own funds to assist other agencies by constructing barriers to block drug smuggling corridors. But this misses the point of the rule—there is almost never an explicit conflict between a

specific appropriation and a general appropriation that embrace the same subject matter. The rule assumes that the specific appropriation implicitly establishes the upper limit on the amount of funds that can be used for that specific purpose, and it is with respect to this implicit limit that the use of a more general appropriation conflicts.

Indeed, that the $1.375 billion in the CAA was intended to establish the limit of funding for border wall construction is further illustrated by the fact that the CAA specifies where the construction could take place and establishes a consulting process to determine if and how further border barriers could be built. Pub. L. No. 116-6 at § 230(a)(1), (c), 133 Stat. at 28. The clear implication is that Congress wanted more information on the project before it agreed to appropriate funds for border barrier construction in areas other than the Rio Grande Valley Sector. And, where the CAA contains an implied specific limit on where and to what extent funds may be spent on border wall construction at the southern border, that limit controls over DoD's more general authority to assist other agencies by building roads and fences to block drug smuggling corridors at international borders. *See Nevada*, 400 F.3d at 16.

Lastly, the Government points out that the CAA does not include any express prohibition on DoD spending funds to construct border barriers. As will be discussed, this is inaccurate. *See infra* § III.B.1.b. But it is also irrelevant. Congress enacts laws with knowledge that "[t]he established 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." *United States v. MacCollom*, 426 U.S. 317, 321 (1976). It was thus unnecessary for Congress to enact an express prohibition; so long as it did not enact explicit permission, the spending was prohibited. Nonetheless, Congress actually did expressly prohibit DoD from spending additional funds on the border wall when it included Section 739 in the CAA.

b. Section 739 of the CAA Explicitly Prohibits Altering the Budget Appropriated for Border Wall Construction Because it was Included in a Presidential Budget Request.

In Section 739 of the CAA, Congress enacted a prohibition on using any funds to alter the appropriated budget of "any 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." Pub. L. No. 116-6 at § 739, 133 Stat. 13, 197. The only exception to the ban applies when the alteration is done pursuant to "the reprogramming or transfer provisions of this or any other appropriations Act." *Id.* It is undisputed that President Trump's budget requests for fiscal years 2017, 2018, and 2019 each included a request for funding to DHS to construct a border barrier. And the President's budget request for fiscal year 2020, which was issued before the Acting Secretary of Defense approved any of the § 284 or § 2808 construction projects, included $8.6 billion for border wall construction, $3.6 billion of which was requested specifically for DoD. The Government makes no argument that either Section 8005 nor § 2808 were enacted through an appropriations act as the term is statutorily defined, *see* 1 U.S.C. § 105 (noting that the title of an appropriation act must begin with "An Act making appropriations"); 2 U.S.C. § 662 (cross-referencing 1 U.S.C. § 105 to define "Appropriation Act"), and thus any argument that Section 739's exception would apply to the transfers is forfeited.[6] *See*

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[6] Even if the Government had argued that the Section 8005 transfer fell into Section 739's exception because it is a transfer provision within an appropriations act, it would be necessary to determine whether Section 8005 in fact authorized the transfer in order to determine whether Section 739 was violated. As majorities of two separate panels of the Ninth Circuit have concluded on multiple occasions, Section 8005 clearly did not authorize the transfer because the border wall is not an unforeseen military requirement and it is an item that was denied by Congress. *See Sierra Club I*, 929 F.3d at 690-92; *Sierra Club III*, 963 F.3d at 886, *California*, 963 F.3d

Celanese Corp. v. Martin K. Eby Constr. Co., 620 F.3d 529, 531 (5th Cir. 2010). Section 739 therefore prohibits DoD's transfer of the § 284 funds for border wall construction.

The Government responds that the phrase "program, project, or activity," is a term of art that the GAO defines as "[a]n element within a budget account." GAO, A GLOSSARY OF TERMS USED IN THE FEDERAL BUDGET PROCESS 80 (2005), https://www.gao.gov/assets/80/76911.pdf. It is this specific meaning that was intended when the CAA used the phrase in Section 739, the Government contends, and because DoD's redirection of funds does not alter the amount of funds in DHS's budget account for border wall construction, Section 739 is inapplicable.

As an initial matter, even if the Government Defendant's reading of Section 739 were correct, it would still prohibit the transfers at issue in this case. The plain text of Section 739 prohibits altering the budget of any program, project, or activity contained in "the President's budget request for a fiscal year," which would include *any* fiscal year and not just fiscal year 2019. The President's 2020 budget request included funding for DoD to construct a border wall. Thus, even under the Government's interpretation, Section 739 would prohibit altering DoD's budget for border wall construction from the time the 2020 budget request was submitted to Congress "until such proposed change is subsequently enacted in an appropriation Act." Because the Acting Secretary of Defense's approval of the transfer of the § 284 and § 2808 funds postdated the submission the President's 2020 budget request, the transfers would still violate Section 739 even were this court to adopt the Government's argued position.

944-46. Accordingly, the exception to Section 739's prohibition does not apply.

Moreover, it is doubtful Congress intended the phrase "program, project, or activity" in Section 739 to carry a specialized meaning. When a statute uses a term of art, Congress is presumed to intend the specialized meaning only "[i]n the absence of contrary indication." *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 342 (1991). Section 739 appears in Title VII of the CAA, which contains provisions applicable "Government-wide." Pub. L. No. 116-6, 133 Stat. at 187. And the provision makes no reference to a single "agency," which would be the sole subject of the restriction under the Government's interpretation. Additionally, if the Government were correct, the President could easily circumvent the limitations of Section 739 simply by phrasing his budget requests in broad terms and not referencing specific appropriations accounts. There is thus ample reason to believe Congress intended the phrase "program, project, or activity" to be given its *ordinary* meaning, which the district court determined includes "a specific plan or design." MERRIAM WEBSTER'S DICTIONARY 932 (11th ed. 2003). Under this ordinary meaning, the border wall remains the same project regardless of the account from which it is funded. Indeed, as the district court pointed out, the Executive Branch itself has continuously referred to the wall as single project, repeatedly stressing its "contiguous" nature. 82 Fed. Reg. 8793-94.

Because Section 739 prohibits the transfers at issue here under either interpretation, we ultimately need not decide which is correct. The Border Wall is a project that was proposed in a President's budget request for a fiscal year, and, accordingly, I would hold that the Acting Secretary of Defense violated Section 739 when he used appropriated funds to alter the budget appropriated to border wall construction.

2. The Redirection of the § 2808 Funds Was Not Authorized by § 2808.

The reasoning set forth above regarding why the redirection of the § 284 funds violates the CAA and specifically Section 739 thereof applies with equal force to the redirection of the § 2808 funds.[7] *See supra*, § III.B.1. However, the § 2808 transfer was also unlawful for a second reason—it was not authorized by § 2808 in the first place.

Title 10 U.S.C. § 2808 provides that, in the event of a national emergency "that requires use of the armed forces," DoD "may undertake military construction projects . . . not otherwise authorized by law that are necessary to support such use of the armed forces." Title 50 U.S.C. § 1621(a) in turn authorizes the President to declare a national emergency. The provision was enacted in 1976 as part of the NEA, Pub. L. No. 94-412, 90 Stat. 1255 (1976) (codified at 50 U.S.C. §§ 1601-1651). The NEA does not provide a definition of national emergency, nor even specify when one should be declared. Title 50 U.S.C. § 1621(a) simply states that "[w]ith respect to Acts of Congress authorizing the exercise, during the period of a national emergency, of any special or extraordinary power, the President is authorized to declare such national emergency." Nevertheless, the legislative history of the NEA indicates that it was not intended to give the executive branch boundless authority to exercise emergency powers like those contemplated by § 2808.

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[7] Although § 2808(a) states that its authorization applies "without regard to any other provision of law," the Government has made no argument at any stage of the proceedings that this clause overrides any prohibition contained in the CAA, and the contention therefore is forfeited. *See Celanese Corp.*, 620 F.3d at 531.

Prior to the passage of the NEA, over 400 separate "emergency statutes" permitted the President to declare national emergencies with virtually unfettered discretion. S. Rep. No. 93-1170, at 2 (1974). At the time Congress took up the NEA, hundreds of ongoing emergency declarations were active, several of which had lasted continuously for 40 years. *Id.* at 1. Noting how many sweeping emergency powers had been abused by the Executive, Congress enacted the NEA so that "emergency authority, intended for use in crisis situations[], would no longer be available in non-crisis situations." *Id.* at 2. As one of the committee reports on the NEA stated, the law was intended to ensure the Executive's "extraordinary powers . . . delegated by Congress. . . [could] be utilized only when emergencies actually exist, and then, only under the safeguard of congressional review." S. Rep. No. 93-1170, at 2 (1974).

An early draft of the legislation authorized an emergency declaration only when "the President finds that a proclamation of a national emergency is essential to the preservation, protection and defense of the Constitution or the common defense, safety, or well-being of the territory or people of the United States." S. 977, 94th Cong. § 201(a) (1975). However, this language was removed by the Senate Committee on Government Operations because the committee believed it was too broad:

> Following consultations with several constitutional law experts, the committee concluded that section 201(a) is overly broad, and might be construed to delegate additional authority to the President with respect to declarations of national emergency. In the judgment of the committee, the language of this provision was unclear and ambiguous and might have been construed to confer upon the President statutory authority to declare national emergencies, other than that which he now has through various statutory delegations. The Committee amendment clarifies and narrows this language. *The Committee decided that the definition of when a President is authorized to*

> *declare a national emergency should be left to the various statutes which give him extraordinary powers.* The National Emergencies Act is not intended to enlarge or add to Executive power. Rather, the statute is an effort by the Congress to establish clear procedures and safeguards for the exercise by the President of emergency powers conferred upon him by other statutes.

S. Rep. No. 94-1168 (emphasis added). Thus, the NEA requires that, when a national emergency is declared, the President must specifically identify the statutory powers he or she intends to invoke, with any updates issued as subsequent executive orders as necessary. 50 U.S.C. § 1631. The committee report indicates Congress intended to reign in the President's emergency powers by ensuring that the specific limitations contained in each emergency power identified by the President be strictly enforced.[8]

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[8] Indeed, such limitations are arguably necessary for the NEA to pass constitutional muster. Article I of the Constitution vests "[a]ll legislative Powers . . . in a Congress of the United States." The Supreme Court has long held that "[t]his text permits no delegation of those powers." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001). Therefore, when Congress confers decision making authority on the Executive, it must "lay down . . . an intelligible principle to which" the Executive "is directed to conform." *J.W. Hampton, Jr., & Co. v. U.S.*, 276 U.S. 394, 409 (1928). The lack of any intelligible principle to guide the President in determining when an emergency exists is particularly troublesome because, "the degree of [executive] discretion that is acceptable varies according to the scope of the power congressionally conferred." *Whitman*, 531 U.S. at 475. In passing the NEA, Congress itself recognized that the executive powers triggered by a national emergency declaration are "extraordinary." S. Rep. No. 93-1170, at 2. At the time of the Act's passage, they included the power "to seize property and commodities, organize and control the means of production, assign military forces abroad and restrict travel." *Id.* Today, they include the power to permit testing of chemical weapons on human subjects, 50 U.S.C. § 1515; to prohibit the export of any agricultural commodity, 7 U.S.C. § 5712(c); and to suspend minimum-wage requirements for public contracts, 40 U.S.C. § 3147. Given the sweeping nature of this authority, adopting the Government's argued interpretation—under which the President has

Accordingly, even assuming that the President's Emergency Proclamation is valid, the border wall construction would need to comply with the plain text of § 2808. For several reasons, it does not.

First, § 2808 authorizes a transfer only when a national emergency "requires" the use of armed forces. That the border wall is a responsibility statutorily assigned to the civilian agency DHS, *see* Pub. L. No. 104-208, div. C, tit. I, § 102(a), 110 Stat. 3009 (1996) (codified at 8 U.S.C. § 1103 note), weighs heavily against any argument that the situation at the border inherently "requires use of the armed forces." Under the common meaning of the term, "require" indicates some level of necessity. *See* "Require," MERRIAM WEBSTER'S DICTIONARY (2020), https://www.merriam-webster.com/dictionary/require ("to demand as necessary or essential : have a compelling need for"); *Thompson v. Goetzmann*, 337 F.3d 489, 497 (5th Cir. 2003) ("Unless indicated otherwise in a statute, its words are to be given their ordinary meaning."). Indeed, as of 2017, DHS had installed approximately 650 miles of barriers along the southern border without any aid from the military. *See* Senate Appropriations Hearing on the DHS FY 2018 Budget, 2017 WL 2311065 (May 25, 2017) (testimony of Secretary John Kelly).

More importantly, however, even assuming this threshold requirement is met, § 2808 would also not authorize construction of the

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unbridled discretion to exercise his emergency powers subject only to Congress's power to terminate the emergency by enacting legislation—would likely result in a non-delegation violation. *Cf. Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935) (striking down a statute on nondelegation grounds that allowed the President to prohibit the transport of petroleum product beyond state quotas because it "establish[ed] no criterion to govern the President's" decision and "left the matter to the President without standard or rule, to be dealt with as he pleased.").

border wall because the border wall is not "military construction." That term is statutorily defined in 10 U.S.C. § 2801(a) as "any construction, development, conversion, or extension of any kind carried out *with respect to a military installation*." (Emphasis added.) 10 U.S.C. § 2801(c)(4) in turn defines "military installation" as "a base, camp, post, station, yard, center, or other activity under the jurisdiction of the Secretary of a military department." The Government argues that, because DoD will acquire the land on which the barriers will be built, all of the construction will take place on land "under the jurisdiction of the Secretary of a military department." But it is not sufficient that the land be under DoD jurisdiction. Under the plain language of the statute, the construction must be carried out with respect to some sort of military facility.

The border wall clearly cannot reasonably be construed as a military as "a base, camp, post, station, yard, center." Nor does the wall fall into the residual clause for construction with respect to "other activit[ies]" under military jurisdiction. "[U]nder the established interpretative canons of *noscitur a sociis* and *ejusdem generis*, where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." *Washington State Dep't of Soc. & Health Servs. v. Guardianship Estate of Keffeler*, 537 U.S. 371, 384, (2003) (internal quotations and alterations omitted). Because the series of terms "base, camp, post, station, yard, [and] center" all refer to installations for the housing, training, and staging of troops, the phrase "any other activity" must be limited to these types of facilities. A wall constructed for a civilian agency that will not be manned or otherwise used by the military simply does not qualify.

Apparently recognizing this infirmity in its legal theory, DoD has administratively assigned the land on which the border barriers are to be built to Fort Bliss. The Government appears to alternatively argue that this

administrative assignment makes the border wall "construction with respect to a military installation." Yet the border wall bares no objective, logical relationship to Fort Bliss. Considering a project "construction with respect to" a base merely because it is administratively assigned to Fort Bliss would write virtually all limitations out of the statutory definition of military construction, allowing it to be circumvented at will. *See Sierra Club IV*, 977 F.3d at 884-87 (concluding that the border wall is not "military construction" as the term is statutorily defined, as the Government's argued interpretation would give the executive branch "unfettered discretion to divert funds to any land it deems under military jurisdiction").

Yet, even if the border wall were "military construction," § 2808 does not authorize it for yet another, third reason. The plain text of the statute requires that the military construction be "necessary to support" the use of "armed forces" in response to a national emergency. The border wall construction would invert the required relationship—rather than the construction being undertaken in support of the use of armed forces, the use of the armed forces is entirely in support of the construction. Put another way, the construction is the entire objective of the military operation. Instead of being built in service to the military's response to an emergency, the border wall *is* the response to the purported emergency. Because there is no use of armed forces connected to the emergency except for the construction, the construction cannot be said to be "necessary to support" the use of armed forces in response to a national emergency.

Accordingly, I would hold that, by its own terms, § 2808 does not authorize the transfer of funds for border wall construction.

C. The Remedy

The Government argues that, even if the district court was correct that the redirection the § 284 funds was unlawful, it abused its discretion by

granting a permanent injunction. The Government relies heavily on *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 32 (2008), in which the Supreme Court stated, "An injunction is a matter of equitable discretion; it does not follow from success on the merits as a matter of course." The Court noted that, "[i]n each case, courts must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." *Id.* at 24.

The Court in *Winter* considered a preliminary injunction prohibiting the Navy from using a particular type of sonar until it had performed the required environmental impact review. *Id.* at 17. The use of the sonar itself was not unlawful; rather, the Court concluded only that the Navy had not performed the required procedural step of considering the effects the sonar would have on the environment prior to electing to use the technology. *Id.* The Court accordingly held that a permanent injunction enjoining the activity was inappropriate where the plaintiffs' ultimate claim merely sought to make the Navy perform an environmental impact review, not to stop the Navy from using the sonar technology, which the Navy had done for forty years without any evidence of harm. *Id.* at 32-33.

Winter is inapposite here. The Government argues that the district court erred in weighing the relative harm because El Paso County's economic and reputational injuries are outweighed by the damage the injunction would allegedly do to the nation's "compelling interests in safety and in the integrity of our borders." *Nat'l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 672 (1989). But the Government cites no case in which a court has found that the Government's challenged action violates the law and has declined to issue a requested injunction prohibiting that action. Some courts, in fact, have held that government can never "suffer harm from an injunction that merely ends an unlawful practice." *Rodriguez v. Robbins*, 715 F.3d 1127, 1145 (9th Cir. 2013). Moreover, the sum effect of an injunction would be to

preserve the status quo as it existed before the unlawful transfer and construction were undertaken. *See Barber v. Bryant*, 833 F.3d 510, 511 (5th Cir. 2016) ("[T]he maintenance of the status quo is an important consideration in granting a stay." (quoting *Dayton Bd. of Educ. v. Brinkman*, 439 U.S. 1358, 1359 (1978) (Rehnquist, C.J., in chambers)). There is thus no "irreparable" harm to the Government's interests, as it remains free to seek funding for a border barrier through lawful means.

In the alternative, the Government argues that the district court should have limited its injunction to the expenditure of the $20 million in funds that would have gone to the Fort Bliss project, citing the rule that "injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979). But *Califano* itself rejected such an argument, stating that "the scope of injunctive relief is dictated by the extent of the violation established, not by the geographical extent of the plaintiff class." *Id.*

The Government also relies on a concurrence by Justice Gorsuch questioning the propriety of nationwide injunctions as a general matter. *See DHS v. New York*, 140 S. Ct. 599, 599-601 (2020) (Gorsuch, J., concurring in grant of stay). But the concurrence was not the holding of the Court, and it therefore cannot overrule our circuit precedents holding that, "it is not beyond the power of a court, in appropriate circumstances, to issue a nationwide injunction." *Texas v. United States, 809 F.3d 134*, 188 (5th Cir. 2015). Where the district court determined that all of the Government's § 2808 expenditures were unlawful, it was not an abuse of discretion for it to enjoin those expenditures. And because the § 284 transfer was likewise unlawful, those expenditures should have also been enjoined.

* * *

The Supreme Court has repeatedly reaffirmed that, under our Constitution, Congress's "power of the purse" is an important check on the Executive branch. *United States v. Richardson*, 418 U.S. 166, 178 n.11 (1974). The founders vested in the legislature the power to control appropriations in order that it would serve as a "continuing monitor[] of the wisdom and soundness of Executive action." *Laird v. Tatum*, 408 U.S. 1, 15 (1972). The President's misuse of emergency powers and creative accounting techniques to openly defy the spending limits set by Congress flies in the face of that vision, and the majority's decision today goes a long way toward sanctioning this blatant subversion of the constitutional design. Indeed, between the artificially high bar the majority erects for standing and the Supreme Court's apparent strict application of the zone-of-interests requirement in this context, it is difficult to imagine a plaintiff that could challenge transfers like the ones at issue here, no matter how unlawful. Because both these dynamics—the flouting by the Executive of limitations imposed by the legislature and the insulation of unauthorized Executive action from judicial review–are at odds with the separation of powers that is the foundation of our constitutional system, I dissent.