No. 22-805

# In the Supreme Court of the United States

BG GULF COAST LNG, L.L.C., ET AL.,
*Petitioners*,

*v.*

SABINE-NECHES NAVIGATION DISTRICT
OF JEFFERSON COUNTY, TEXAS,
*Respondent*.

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

## BRIEF IN OPPOSITION


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## QUESTION PRESENTED

The Water Resources Development Act of 1986 allows local authorities to "finance" their share of project costs by "levy[ing] port or harbor dues * * * in conjunction with a harbor navigation project whose construction is complete (including a usable increment of the project)." 33 U.S.C. §§ 2236(a)(1), (a)(1)(A)(i).

The question presented is whether the Act allows local authorities to levy harbor dues to finance the costs of construction of a harbor navigation project once a usable increment of that project is complete.

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## BRIEF IN OPPOSITION

The Sabine-Neches Waterway Improvement Project was designed to deepen and otherwise improve a key Texas waterway that has not been upgraded since the Kennedy Administration. The Project will facilitate interstate and foreign commerce by allowing larger ships to access the waterway, reducing congestion, and speeding transits for all vessels—thus making use of the waterway cheaper and more efficient for all users.

This case involves a narrow statutory challenge to a harbor-dues ordinance promulgated by the Sabine-Neches Navigation District (the "District") to finance the District's minority "non-Federal share" of the Project's cost. The expenses financed by the harbor dues include the costs for a portion of the Project that has already been constructed and is currently benefitting all waterway users, including Petitioners. The harbor dues will also finance the District's portion of the remaining Project increments, including work already underway to deepen a key portion of the waterway from the Gulf of Mexico up to the first liquefied natural gas ("LNG") terminal.

For the more than two decades that this Project has been under development, Congress and the Executive Branch have consistently supported it. The U.S. Army Corps of Engineers ("Corps") entered into a cooperative cost-sharing agreement with the District to divide the $1.2 billion in Project-related expenditures roughly 60/40 between the federal government and the District. At the Executive Branch's urging, Congress has repeatedly appropriated funds for this Project—most recently after the Corps had published the challenged harbor-dues ordinance ("Ordinance") in the Federal Register and after the District Court and Fifth

Circuit had issued decisions upholding the legality of that Ordinance.

The Petition does not even attempt to satisfy this Court's most important criterion for certiorari; to the contrary, Petitioners effectively concede that there is no split of authority and that their narrow statutory question is one of first impression. See Pet. 3-4. Their argument that the case is nonetheless important enough to justify this Court's error-correction review is based on a mischaracterization of the Ordinance and its practical effects. In truth, nothing about this case justifies further review.

On the merits, Petitioners purport to don the mantle of textualism, but their reading would require rewriting the plain language of the Water Resources Development Act of 1986 ("WRDA"). Their arguments misapply elementary principles of grammar and syntax, confusing verbs with nouns and trending downhill from there. Lacking any plausible text-based theory, Petitioners rely heavily on cherry-picked fragments of the least reliable forms of legislative history. And to make matters worse, Petitioners' interpretation makes no sense in the context of how Congress used language in the statute overall. Petitioners' strained reading of the statute would frustrate WRDA's purposes of expediting waterway-improvement projects and facilitating cost-sharing by non-Federal parties such as the District, thus undermining Congress's goal of *reducing* the burden on federal taxpayers.

A unanimous Fifth Circuit panel saw this lawsuit for what it is: a self-interested effort by two Fortune 30 companies (both of whom purport to "strongly support the Project," C.A. R.O.A. 9) to avoid paying their fair

share for improvements that were designed to benefit the energy industry generally and hydrocarbon shippers in particular. The fees at issue are modest on a per-cargo basis—approximately $16,000 on each LNG cargo worth tens of millions of dollars. Yet Petitioners' lawsuit aims to shift those costs onto local and federal taxpayers.

About 120 different entities have been subject to these harbor dues to date, and all but the two Petitioners here are paying without protest—some voicing strong public support for the Project. See, *e.g.*, C.A. R.O.A. 225 (letter from ExxonMobil supporting the "user fee * * * financing structure"). Petitioners, by contrast, seek through this lawsuit to frustrate completion of a Project that would facilitate competition by allowing more ships to come into the waterway and enabling other shippers to use larger and thus more cost-effective ships.

Given the repeated and bipartisan support this Project has received from Congress, the Army Corps of Engineers, and the past three presidential administrations, there is no need or basis to delay resolution of the case by calling for the views of the Solicitor General. Contra Pet. 4. It is long past time for this ill-considered litigation to come to an end, thereby removing the cloud over the District's use of harbor dues to finance its minority share of this important waterway-modernization Project.

This Court should deny the Petition.

## STATEMENT

1. By the mid-1980s, America's "water resources development program ha[d] been in serious decline"

for years, S. Rep. 99-126, at 3 (1985), and the Nation's ports were "in critical need of repair, rehabilitation and improvement," H.R. Rep. 99-251(I), at 4 (1985). See Pet. App. 2a-3a. To address these concerns, Congress enacted WRDA in 1986. See Pub. L. No. 99-662, 100 Stat. 4082 (Nov. 17, 1986). The centerpieces of WRDA are its Sections 101 and 208, codified as amended in 33 U.S.C. §§ 2211 and 2236.

Section 2211 embodies a system of cooperative federalism whereby the costs of port- and harbor-improvement projects are shared between the federal government and so-called "non-Federal interests" such as navigation districts and port authorities. Non-Federal interests must assume a minimum "non-Federal share" of 25% of total costs for projects between 20 and 50 feet in depth—but in practice (as here) the Corps can and does negotiate for the non-Federal interest to pay a larger share. 33 U.S.C. § 2211(a)(1)(B).

Recognizing the substantial financial burden that § 2211 would impose on non-Federal entities, Congress provided in § 2236 a new mechanism to finance the non-Federal share of project costs: levying port or harbor dues. Section 2236 provides that "a non-Federal interest may levy port or harbor dues * * * in conjunction with a harbor navigation project whose construction is complete (including a usable increment of the project)," so long as the amount of harbor dues is not greater than the amount necessary to "finance the non-Federal share of construction and operation and maintenance costs of a navigation project for a harbor." 33 U.S.C. § 2236(a). The statute's drafters intended harbor dues to improve "the ability of and the *rate* at which nonfederal entities will be able to

undertake harbor improvement projects" by creating a new source of revenue for non-Federal interests to finance significant projects. H.R. Rep. 99-251(I), at 526 (emphasis added).

Under WRDA, non-Federal interests are limited to collecting dues for their local share of the costs of a Project. The statute gives district courts jurisdiction to "order the refund of any port or harbor dues not lawfully collected." 33 U.S.C. § 2236(b)(3)(B).

2. The Sabine-Neches Waterway provides access to several large ports and terminals in Texas and Louisiana. As one of the nation's largest waterways for hydrocarbon shipments (and by total tonnage), the waterway is critically important to the Texas and Louisiana economies, the American military, and the global oil-and-gas industry. See Pet. App. 2a, 19a. But the waterway has not been improved since 1962, and it cannot be efficiently utilized by many of the larger vessels currently operating in the global hydrocarbon-shipping industry.

To remedy that problem, the District has been actively partnering with Congress and the Corps for nearly two decades to develop the Project. Among other improvements, the Project will deepen the waterway's main channel from 40 to 48 feet. Pet. App. 5a n.3.

The approval process for the Project began in 2011, when the Corps prepared a "feasibility study" for the Project. Pet. App. 3a-4a. That study recommended that the Project be approved because it would reduce congestion and delays on the waterway. Pet. App. 21a. Congress then authorized the Project (by name) in the

Water Resources Reform and Development Act of 2014. Pub. L. 113-121, § 7002, 128 Stat. 1193, 1364 (June 10, 2014). Since then, the Corps has allocated significant funding to the Project in its annual "work plans," and Congress in turn has enacted annual appropriations bills that approve and fund those work plans, including Project expenses.[1]

In 2018, Congress appropriated $18 million in "new start" funding for the Project. Pet. App. 4a-5a, 22a; Energy and Water, Legislative Branch, and Military Construction and Veterans Affairs Appropriations Act, 2019, Pub. L. No. 115-244, div. A, 132 Stat. 2897, 2898-99 (Sept. 21, 2018); Army Civil Works Program, *FY 2019 Work Plan – Construction*, https://bit.ly/3ZSxp1r. In 2020 and 2021, the Corps again allocated tens of millions of dollars to the Project in its work plans, which Congress approved and funded in its annual appropriations bills.[2]

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[1] See Army Civil Works Program, *FY 2015 Work Plan – Investigations*, https://bit.ly/3Un84vD; Consolidated and Further Continuing Appropriations Act of 2015, Pub. L. No. 113-235, div. D, 128 Stat. 2130, 2303 (Dec. 16, 2014); Army Civil Works Program, *FY 2016 Work Plan – Investigations*, https://bit.ly/3nSpVOI; Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, div. D, 129 Stat. 2242, 2397-98 (Dec. 18, 2015); Army Civil Works Program, *FY 2017 Work Plan – Investigations*, https://bit.ly/3KqSVVw; Consolidated Appropriations Act, 2017, Pub. L. No. 115-31, div. D, 131 Stat. 135, 301-02 (May 5, 2017); Army Civil Works Program, *FY 2018 Work Plan – Investigations*, https://bit.ly/3ZRUhOR; Consolidated Appropriations Act, 2018, Pub. L. No. 115-141, div. D, 131 Stat. 348, 510 (Mar. 23, 2018).

[2] See Army Civil Works Program, *FY 2020 Work Plan – Construction*, https://bit.ly/41SzE6n; Further Consolidated Appropriations Act, 2020, Pub. L. No. 116-94, div. C, 133 Stat. 2534,

Most recently, after the District adopted the Ordinance and after the District Court and Fifth Circuit upheld its validity, the Corps allocated some $167 million for the Project in its 2023 work plan. Congress, in turn, approved and funded that work plan in its annual appropriations bill. See Army Civil Works Program, *FY 2023 Work Plan – Construction*, https://bit.ly/3miEvyP; Consolidated Appropriations Act, 2023, Pub. L. No. 117-328, div. D, 136 Stat. 4459, 4623-24 (Dec. 29, 2022).

The Corps entered into a formal Partnership Agreement with the District in July 2019. See Pet. App 4a-5a; 33 U.S.C. § 2211(e)(3). That Agreement estimated the full cost of the Project to be $1.2 billion with approximately $488 million (40%) to be covered by the District, the Project's non-Federal sponsor. The remaining 60% of costs will be covered by the federal government. C.A. R.O.A. 13, 126-27.

3. The District is a political subdivision of the State of Texas. It is differently situated than many other ports and navigation districts nationwide because it has a limited tax base, limited authority to issue bonds, and does not receive significant revenue from leases or other services. See C.A. R.O.A. 440:22-441:2, 488:6-12, 522:16-23. The District therefore opted to finance its share of the Project's costs through harbor dues under WRDA.

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2660 (Dec. 20, 2019); Army Civil Works Program, *FY 2021 Work Plan – Construction*, https://bit.ly/3H7Hxgc; Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, div. D, 134 Stat. 1182, 1353 (Dec. 27, 2020).

The Corps published the District's initial harbor-dues ordinance in the Federal Register for public comment. *Sabine Neches Navigation District User Fee Notice*, 85 Fed. Reg. 37,634 (June 23, 2020). Following a public hearing, the District revised the proposed ordinance in response to comments from shippers and the Corps. Pet. App. 7a & n.5. The Corps published the revised Ordinance in January 2021. *Sabine Neches Navigation District User Fee Notice*, 86 Fed. Reg. 7369 (Jan. 28, 2021). That version of the Ordinance provides (as relevant here) that the District will collect harbor dues from ships that use the waterway and have design drafts greater than 20 feet. The Ordinance charges $0.02 per short ton of non-hydrocarbon cargo and $0.20 per short ton of hydrocarbon cargo that is loaded onto or unloaded from ships transiting the waterway. *Id.* at 7371-72; see Pet. App. 6a.

The Ordinance will help the District finance its costs for the "non-Federal share" of the Project, which (according to the 2019 Partnership Agreement) is approximately $488 million. Pet. App. 6a, 22a; see C.A. R.O.A. 114. The District will also be required to spend large sums of money on certain Project-related expenses (e.g., relocation of underwater pipelines) that are not financed through harbor dues. 33 U.S.C. §§ 2211(a)(3), 2236(a)(1)(A); see *infra* note 10.

Construction has already begun, and the Project's first usable increment is complete. That increment—known as Anchorage Basin No. 1—is a turning basin and anchorage for ships that has now been deepened from 20 to 40 feet. Pet. App. 5a-6a, 23a. Anchorage Basin No. 1 is already benefitting *all* ships transiting

the waterway. Contra Pet. 23. Large vessels can now travel up the channel, pull into the basin, and anchor, allowing other vessels to pass in the waterway rather than having to wait offshore, which reduces congestion and travel times. See C.A. R.O.A. 146-47.

4. In accordance with the Ordinance and WRDA, the District began collecting harbor dues in May 2021, after completion of the first usable increment (Anchorage Basin No. 1). Pet. App. 7a. The harbor dues are limited to financing the non-Federal share of Project costs, and in no sense are being used to raise "general revenue." See Pet. App. 13a. As a practical matter, collection of harbor dues will always lag behind the District's expenditures and other financial obligations, given the construction schedule and the magnitude of funds the District must commit to the Project overall, including for engineering and development expenses far exceeding the costs of Anchorage Basin No. 1.

Petitioners are the only two waterway shippers who have challenged the harbor dues. In September 2021, they sued in Texas federal district court claiming that the Ordinance violates WRDA. At the time, Petitioner Phillips 66 Company did not allege that it had paid any harbor dues. See Pet. App. 7a, 24a. Petitioner BG Gulf Coast LNG, LLC did allege that it has paid fees, Pet. App. 24a, consistent with the fact that it has a long-term contract to ship LNG from Cheniere's LNG export facility, which is located on the waterway.

The District Court dismissed the suit, reasoning that Petitioners' theories "rest[ed] on a fundamental misunderstanding" of the statute and drew support

from exactly "nothing in the statute's text or legislative history." Pet. App. 27a, 47a.

A unanimous Fifth Circuit panel affirmed. After a careful analysis of the statute's text, Judge Elrod's opinion for the court concluded that Petitioners' "theory of [the statute] fails at every turn" and was "far too cramped." Pet. App. 12a, 10a. In pertinent part, the Fifth Circuit concluded that the most "sens[ible]" reading of § 2336(a) was that, "once a usable increment of the project is complete, a fee may be levied, not that a fee may only be levied to finance a usable increment of the project." Pet. App. 11a.[3]

The Fifth Circuit denied petitions for rehearing and rehearing en banc without recorded dissent. Pet. App. 56a.

## REASONS TO DENY THE PETITION

The Petition makes no attempt to satisfy this Court's most important criterion for granting certiorari; to the contrary, the question presented here is "novel" (Pet. 24) and splitless. Petitioners do not—and cannot—contend that any court other than the Fifth Circuit has ever ruled on this issue, much less ruled in a way that creates a circuit split. Petitioners thus focus their efforts on a request for bare error correction, supplemented by a handful of policy arguments

[3] Other portions of WRDA impose additional restrictions on the use of harbor dues. For example, § 2236(a)(3) limits which vessels may be charged dues, and § 2236(a)(4) lists certain criteria that non-Federal sponsors "shall consider" when developing harbor dues. Petitioners originally contended that the District had violated certain of those restrictions. The District Court and Fifth Circuit disagreed, see Pet. App. 13a-17a, 31a-54a, and the Petitioners have now abandoned those arguments.

attempting to show that the issue is important enough to justify plenary review. Those arguments fail at every turn.

## I. The Fifth Circuit's unanimous decision is correct and faithful to the statutory text.

### A. The statutory text authorizes user fees to "finance" the non-Federal share of construction costs upon completion of a first usable increment.

WRDA provides that "[p]ort or harbor dues may be levied only in conjunction with a harbor navigation project whose construction is complete (including a usable increment of the project)." 33 U.S.C. § 2236(a)(1). Harbor dues may be imposed for specified purposes, including "to finance the non-Federal share of construction * * * costs." *Id.* § 2236(a)(1)(A). The court of appeals found that these two provisions, read together, are naturally understood to mean that "once a usable increment of the project is done, [the District] may then finance its share of construction" costs by using harbor dues to "raise[] funds to pay for the next increment of the project." Pet. App. 9a-10a. The Fifth Circuit's holding that the statute allows the District "to finance its share of the project once a usable increment of the project is completed" (Pet. App. 12a) followed from two observations about the plain text of WRDA.

First, the verb "finance" means "to raise money or capital" or "to supply with money or capital." See *Random House Dictionary of the English Language* 719 (1987). When Congress provided that "harbor dues may be levied * * * to finance" construction costs, 33

U.S.C. § 2236(a)(1), it meant that harbor dues could be used as an income stream to secure bonds, obtain credit, or otherwise raise funds that would be used to fund future construction. See *Random House Dictionary of the English Language* 532 (1967) ("finance" means "obtain * * * credit for"); *Ballentine's Legal Dictionary and Thesaurus* 251 (1995) ("underwrite, invest"); *Webster's Third New International Dictionary* 851 (1993) ("to raise or provide funds or capital for"). As the court of appeals correctly observed, because the statute allows the District to "'finance' its share" of costs, there was no requirement that the District "build first and pay later." Pet. App. 9a.

In a related portion of its analysis, the Fifth Circuit explained that the use of "finance" meant that "the focus should be on what [the District] had to do to secure financing." Pet. App. 15a. Here, the harbor dues will provide a current income stream that the District will use to secure bonds, which in turn will be used to fund the non-Federal share of ongoing Project construction. See C.A. R.O.A. 32, 529:5-25. That is consistent with the ordinary meaning of "finance." See *Black's Law Dictionary* 630 (6th ed. 1990) ("finance" means "to supply with funds through the payment of cash or issuance of * * * bonds" or "to provide with capital * * * as needed to carry on business"). As the Fifth Circuit explained, the financing "process" the District is using is exactly how Congress intended "the Act to work." Pet. App. 9a; accord H.R. Rep. 99-251(IV), at 20-21 (1985) ("Since a secure revenue stream is necessary as a condition of marketability of locally-issued revenue bonds," the "authority" to assess harbor dues "is a

necessary prerequisite to the successful implementation of [WRDA].").

Second, the statute allows harbor dues to be imposed in connection with a navigation project "whose construction is complete," and then, immediately after, specifically defines the statutory term "complete" to "includ[e]" a situation in which "a usable increment of the project" is complete. See Pet. App. 10a (noting that completion of "'a usable increment of the project' defines what it means for a project to be 'complete'"); Pet. App. 28a ("Section 2236(a) treats the completion of a usable increment in the same manner as the completion of the entire project."); see also *Advocate Health Care Network* v. *Stapleton*, 581 U.S. 468, 476 (2017) (the word "include" signifies that something "should receive the same treatment"). Because the statute allows the District to begin collecting harbor dues "once a usable increment of the project is completed," and because "Anchorage Basin No. 1 has been completed," the court of appeals saw no problem with an Ordinance allowing the District to collect harbor dues to finance the full non-Federal portion of Project costs. Pet. App. 12a.

The Fifth Circuit grounded its holding in the last-antecedent rule and the nearest-reasonable-referent canon. Pet. App. 11a; see *Barnhart* v. *Thomas*, 540 U.S. 20, 26 (2003) (explaining that "a limiting clause or phrase * * * should ordinarily be read as modifying only the noun or phrase that it immediately follows"); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 152-153 (2012) (similar). Here, the parenthetical "including a usable increment of the project" directly follows the word "complete,"

indicating that the parenthetical is intended to modify and explain the antecedent term. That reading makes sense not only because of textual proximity, but also because the term "usable increment" (i.e., an increment on which construction has ended and which can be used by ships) naturally connotes the concept of "complet[ion]" of the "harbor navigation project." 33 U.S.C. § 2236(a)(1). In other words, the semantic content and proximity of the parenthetical reinforces its syntax.

By contrast, Petitioners' position would require either (1) reading the parenthetical "out of the statute" completely, Pet. App 10a; or (2) pretending that the parenthetical is located in a different place, Pet. App. 11a. Petitioners contend that the "usable increment" parenthetical in § 2236(a)(1) only "refer[s] back to the referenced 'harbor navigation project'" instead of "modif[ying] the word 'complete.'" Pet. 14. But if that were true, then Congress would have placed the parenthetical directly after the phrase "harbor navigation project" instead of after "complete." See Pet. App. 28a.[4] As the court of appeals correctly determined, it "makes far more sense" (Pet. App. 11a) to give meaning to the syntax that Congress chose, rather than credit an interpretation that re-orders the statutory text and discards ordinary canons of statutory

[4] Even assuming arguendo that the parenthetical should be read to "offer a gloss on everything in § 2236(a)(1) that precedes the brackets," Pet. 15, the concept of a "usable increment" indicates that *completeness* is the relevant quality of the "harbor navigation project" in the preceding phrase. And Petitioners' own reading ultimately depends on the parenthetical modifying only "project," and not "complete."

interpretation in favor of what the Petition vaguely calls "other indicia of meaning." Pet. 15.

As the Fifth Circuit correctly concluded, § 2236 is best read to authorize a non-Federal interest to charge harbor dues to finance prospectively the non-Federal share of the project's overall construction costs, once construction of a "usable increment" is complete. That holding was based on a careful textual analysis of a question that the District Court correctly described as one "of first impression" (Pet. App. 19a), and nothing about the Fifth Circuit's conclusion warrants further review from this Court.

### B. The Fifth Circuit's reading aligns with the statutory context, history, and purpose.

The Fifth Circuit's interpretation also draws support from the broader linguistic context and structure of WRDA. Section 2236(a)(1)(A)(i) authorizes the imposition of harbor dues to "finance" the non-Federal share of a "navigation project." Congress did not say that harbor dues can be used only to finance a completed "usable increment"—a phrase that appears in § 2236(a)(1) (defining completion) but not in § 2236(a)(1)(A)(i) (defining what costs can be financed).

The Fifth Circuit's opinion also respects Congress's choice of language elsewhere in WRDA. For instance, where a locality has undertaken certain other kinds of construction activities itself rather than relying on the Corps to do that work, § 2232(d)(5)(B) makes that locality eligible for "credit or reimbursement" for the federal share of work—i.e., work beyond the locality's existing share of costs. But Congress specified in § 2232(d)(5)(B) that for those other kinds of costs, no

"reimbursement" is allowed "until the Secretary [of the Army] determines that * * * the construction of the discrete segment for which credit or reimbursement is requested is complete."

Congress clearly knew how to draft a statute that operates the way Petitioners suggest. The problem for Petitioners is that Congress did so in § 2232 but not § 2236. In § 2236(a)(1), Congress contemplated the imposition of harbor dues to "finance" a non-Federal entity's share of construction costs (as distinct from "reimbursement" for costs covered by § 2232). And while § 2232 expressly conditions reimbursement on the Secretary's first determining that "construction of the discrete segment for which credit or reimbursement is requested is complete," § 2236 contains no similar language. This Court should respect Congress's choice of different language in neighboring statutory provisions. See *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 711 n.9 (2004) ("[W]hen the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended." (internal quotation marks omitted)); but contra Pet. 13 (inviting this Court to ignore Congress's word choice and incorrectly suggesting these textual differences are "slight[]").

The Fifth Circuit's reading also aligns with Congress's chief purpose in enacting WRDA, which was to expedite and facilitate waterway-improvement projects and to increase the non-Federal share of project costs. See H.R. Rep. 99-251(IV), at 18 (goal of WRDA was to allow the "levy of local user fees to finance the local contribution to project cost as a means of *expediting* project construction" (emphasis added)); accord

H.R. Rep. 99-251(I), at 526 (harbor-dues provisions intended to improve "the ability of and the *rate* at which nonfederal entities will be able to undertake harbor improvement projects" (emphasis added)).

Congress understood that non-Federal sponsors would face real and practical difficulties in advancing the costs of expensive harbor improvements if they could not begin to charge harbor dues once users have the opportunity to benefit from at least one completed project increment. The statute accounted for that reality by striking a balance: Non-federal sponsors can charge harbor dues to "finance" the costs of a project, but only after tangible progress has been made by completing the project's first "usable increment." 33 U.S.C. § 2236(a)(1).

Congress also sought to reduce burdens on the federal fisc by encouraging non-Federal interests to cover a greater share of harbor improvement costs, which in turn would "reduce federal outlays." H.R. Rep. 99-251(IV), at 36; see Pet. App. 3a, 20a. Before WRDA, the nation's ports were in critical need of improvement, but "growing budgetary pressures" on Congress and the Corps had resulted in a dramatic "reduc[tion in] Federal spending for new project construction." H.R. Rep. 99-251(IV), at 16. WRDA's harbor-dues provision solved both problems by empowering non-Federal sponsors to assess harbor dues in order to "finance" much-needed port improvements. 33 U.S.C. § 2236(a)(1). Adopting Petitioners' reading of the statute would roll back the clock and revive the exact practical problems that WRDA was purpose-built to solve. See Pet. App. 3a.

Given the statutory purposes and context in which WRDA was enacted, Congress would have spoken more clearly (as it did in § 2232) if it had intended to require navigation districts to advance their share of costs without reliance on harbor dues under § 2236. Although Petitioners would clearly prefer a regime that imposed such a practical constraint on harbor dues, Congress made a different choice. The Fifth Circuit's reading of the statute honors—rather than undermines—Congress's expressed purpose in enacting WRDA.

### C. Petitioners' contrary arguments fail.

#### 1. The constitutional-avoidance canon is irrelevant here.

The Tonnage Clause provides that "[n]o State shall, without the Consent of Congress, lay any Duty of Tonnage." U.S. Const. art. I, § 10, cl. 3. Petitioners concede that Congress explicitly authorized imposing harbor dues in § 2236(a) of WRDA, thus providing the authorization that the Tonnage Clause contemplates. Pet. 2, 5; see 33 U.S.C. § 2236(a). So the narrow question pressed and passed upon in the Fifth Circuit was whether the harbor dues at issue here fell within the statutory authorization provided by WRDA—i.e., whether the "conditions" specified in § 2236(a) have been met. That is a pure question of statutory interpretation that should be resolved by applying the ordinary suite of statutory-interpretation tools.

Despite their repeated references to the Tonnage Clause and suggestion that the dues here would be unconstitutional absent WRDA (a question neither the District Court nor Fifth Circuit reached), Petitioners

do not argue that constitutional-avoidance principles apply or that there is any reason to construe WRDA narrowly. Nor could they. The question whether a federal statute evinces the "Consent of Congress" contemplated in the Tonnage Clause is a classic question of statutory interpretation that must be resolved by applying normal interpretive principles. When interpreting statutes where Congress provided its consent to "enter into any Agreement or Compact with another State," this Court and others have employed standard statutory-interpretation tools. See *Petty* v. *Tenn.-Mo. Bridge Comm'n*, 359 U.S. 275, 281-282 (1959); *Detroit Int'l Bridge Co.* v. *Canada*, 883 F.3d 895, 899 (D.C. Cir. 2018). There is no thumb on the scale favoring Petitioners in this analysis.

In passing, Petitioners suggest that WRDA intended to authorize only fees that constitute payment for services rendered. See Pet. 16-18. But that argument has no grounding in the text of WRDA. And it ignores that such fees are allowed even absent statutory authorization because the Tonnage Clause does not prohibit them. See *Clyde Mallory Lines* v. *Alabama ex rel. State Docks Comm'n*, 296 U.S. 261, 266 (1935) (Tonnage Clause does not prohibit States from charging "for services rendered to and enjoyed by the vessel"). Petitioners' reading would improperly render WRDA a practical nullity.

**2. Petitioners mistake their grammar and misstep in their textual interpretation.**

Purporting to be textualists, Petitioners engage in a flawed grammatical analysis of § 2236(a)(3)(B). They claim that a reference to "project features *constructed* under this subchapter" in § 2236(a)(3)(B)

(emphasis added) involves use of the "past tense," from which they infer that "Congress expected 'project features' would already be 'constructed'—that is, complete—at the time that localities charged 'port or harbor dues.'" Pet. 10. But the grammatical construction at issue does not use the past tense. It's simply what grammarians call a "whiz deletion," that is, "[t]he reduction of a relative clause by omitting a relative pronoun plus a *be*-verb."[5] In other words, the statutory phrase "features constructed under this subchapter" is normal shorthand for "features [that are] constructed under this subchapter," which would ordinarily denote things that are to happen in the future. The suggestion that this phrase involves a past-tense construction is incorrect.

Petitioners next confuse a gerund (i.e., the present-participial noun "providing") with a verb supposedly in the "present progressive tense." Pet. 11. In particular, Petitioners focus (Pet. 10-11) on § 2236(a)(4)(A), in which Congress directed localities setting user fees to consider "the direct and indirect cost of *construction*, *operations*, and *maintenance*, and *providing* the facilities and services under paragraph (1) of this subsection." 33 U.S.C. § 2236(a)(4)(A) (emphases added). Petitioners contend the word "providing" is the "present progressive tense." But in this construction, each of the italicized words is functioning as a *noun*, not a verb. That is no different from someone's saying, "I focus on construction, maintenance, logistics, and running the business." In that example—as

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[5] Bryan A. Garner, *Garner's Modern English Usage* 1247 (5th ed. 2022).

with the use of "providing" in § 2236(a)(4)(A)—"running" is a gerund, i.e., a present participle functioning as a noun. Because the word "providing" in § 2236 is not functioning as a verb, it has no verb tense.[6] Petitioners' argument based on verb tense is thus again wholly misplaced: In grammar, "tense" is a word denoting "the correspondence between a verb form and the concept of time."[7] It has nothing to do with nouns.

Petitioners are also wrong to suggest that the Fifth Circuit's reading fails to give effect to all the words Congress selected. According to Petitioners, the Fifth Circuit's opinion "renders the phrase 'harbor navigation project whose construction is complete' surplusage." Pet. 11. Not so. The Fifth Circuit's interpretation makes clear that harbor dues can be charged either (1) after completion of an entire project or (2) after completion of a usable increment. That clarification matters because not every project will include an initial usable increment. Some smaller projects, for example, might include just one increment, such as a deepening of a river or a removal of one obstruction. Other projects might involve interrelated improvements that are only "usable" upon completion of all aspects of the project.

Oddly, Petitioners insist that the "only way to give effect to every word that Congress wrote is to acknowledge that a locality can impose a user fee that

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[6] See *id.* at 1212 (defining gerund as "[a] present-participial form that functions as a noun," and adding: "A gerund is distinguishable from a participial verb, which is used only after a be-verb and functions as a main verb.").

[7] *Id.* at 1243.

is tied to the *entire cost* of a project only once the *entire project* is complete." Pet. 12 (emphasis in original). But the statute does not use the words "entire cost" or "entire project." Petitioners cannot fault the Fifth Circuit for failing to give meaning to words that are not in the statute.

Petitioners next argue that, because WRDA only allows harbor dues to "be levied * * * *in conjunction with* a harbor navigation project," 33 U.S.C. § 2236(a)(1) (emphasis added), such dues cannot be "assessed before the project is complete," Pet. 10. That too is wrong. The term "conjunction" has a broad meaning, referring merely to "the state of being conjoined" or "associat[ed]." *Random House Dictionary of the English Language* 431 (1987); accord *Webster's Third New International Dictionary* 480 (1993) ("conjunction" and "association" as synonyms). Harbor dues levied to finance project construction are naturally understood to be "associated" with such construction. Petitioners' "interpretation of 'in conjunction with' is far too cramped" when considered in the full context of § 2236(a). Pet. App. 10a. That is so because the phrase "in conjunction with" appears directly before language defining a "complete" project to include one for which a usable increment is complete. *Ibid.*

Finally, Petitioners are mistaken in arguing that the Fifth Circuit's interpretation creates any tension between the phrases "harbor navigation project" and "navigation project for a harbor." See Pet. 13-15. As the District Court explained, Petitioners gloss over the fact that Congress used different words in § 2236(a)(1) and § 2236(a)(1)(A)(i). See Pet. App. 10a, 28a-29a. In

§ 2236(a)(1), Congress authorized fees "in conjunction with" a harbor navigation project. Congress specified that fees could start when construction is "complete," but expressly defined "complete" to include completion of a first usable increment. By contrast, § 2236(a)(1)(A)(i) does not use the phrase "in conjunction with" and does not include the word "complete," much less a definition of that term. That makes sense, because § 2236(a)(1) articulates *when* a non-Federal interest can begin charging harbor dues, whereas § 2236(a)(1)(A)(i) is articulating the kinds of costs that may be financed with harbor dues.

Under the Fifth Circuit's reading, harbor dues may be imposed to "finance" the non-Federal share of project costs, once a usable increment of that project is complete. That satisfies both § 2236(a)(1), because the statute defines a "complete" project to include a project for which a usable increment has been completed, and § 2236(a)(1)(A)(i), because imposing harbor dues in such cases is still for the purpose of "financ[ing] the non-Federal share of construction and operation and maintenance costs of a navigation project for a harbor."

### 3. Petitioners' reliance on isolated bits of legislative history is unpersuasive.

Petitioners' heavy reliance on cherry-picked snippets of legislative history signals the weakness of their textual arguments and lends nothing to their position.

Legislative history can neither "overcome a statute's clear text and structure," *Azar* v. *Allina Health Servs.*, 139 S. Ct. 1804, 1815 (2019), nor displace "the strong presumption that the legislative purpose is

expressed by the ordinary meaning of the words used," *Ardestani* v. *INS*, 502 U.S. 129, 136 (1991) (internal quotation marks omitted). Undeterred, Petitioners marshal snippets of legislative history they interpret as limiting WRDA harbor dues to "recover[ing]" or "recoup[ing]" already expended costs of construction. Pet. 16, 20-21. But the relevant text of WRDA does not use the words "recover" or "recoup." Rather, it authorizes non-Federal sponsors to use harbor dues to "finance" the costs of construction, meaning that they may raise funds prospectively and are not required to "build first and pay later." Pet. App. 9a; see *supra* pp. 11-12.

Petitioners rely heavily on floor statements from individual members of Congress. See, *e.g.*, Pet. 20-21. But "floor statements by individual legislators rank among the least illuminating forms of legislative history." *NLRB* v. *SW Gen., Inc.*, 580 U.S. 288, 307 (2017). From that shaky foundation, Petitioners invite sweeping inferences about what "Congress wanted," "Congress intended," or "Congress ensured." Pet. 20-21. But statements made by individual members or in reports certainly do not evidence what Congress as a whole intended. See Scalia & Garner, *Reading Law* at 376; see also *Unsecured Creditors' Comm. 82-00261c-11A* v. *Walter E. Heller & Co. Se., Inc.*, 768 F.2d 580, 583 (4th Cir. 1985) ("[W]e cannot simply assume that the statements of these individual members of Congress are determinative of the intention of the Congress as a whole."). Instead, the best—and controlling—measure of what Congress intended is the text of the bill that Congress passed.

Predictably, Petitioners ignore the portions of legislative history that undermine their theories. For

example, the Senate Report on which Petitioners here rely stated that non-Federal interests were intended to have significant "flexibility" in developing Projects and crafting the harbor dues that would finance them. S. Rep. 99-126, at 54-56 (1985); see also *id.* at 55-56 ("The precise nature of [the user] fees, the fee structure and schedule, and the frequency with which such fees should be collected is left entirely to the discretion of the appropriate non-Federal sponsors."). Even if this Court were to resort to legislative history, the available evidence supports the Fifth Circuit's reading, not Petitioners'.

**4. Petitioners' remaining arguments misinterpret the Ordinance and WRDA.**

Petitioners' only remaining arguments are that the Ordinance improperly seeks to raise general revenue and that WRDA only allows imposing harbor dues on "direct beneficiaries" of a project. Both arguments are incorrect.

At the outset, Petitioners' repeated, unsupported suggestion that the District is raising general revenue from these harbor dues at most presents a highly fact-bound request for error correction, where no error exists. See Pet. 2, 3, 16, 18, 19, 26. As the Fifth Circuit correctly understood, consistent with the text of WRDA itself, the Ordinance is limited to financing the District's minority local share of Project costs. See Pet. App. 2a; 33 U.S.C. § 2236(a)(1)(A)(i) ("finance the non-Federal share of construction and operation and maintenance costs"); 86 Fed. Reg. at 7370 (explaining that the "Navigation District will be responsible for funding its required cost share of the total Project

* * * , including payment of the Navigation District's 40 percent share of the construction cost").

Petitioners' attempt to liken this Ordinance to the one at issue in *Polar Tankers, Inc.* v. *City of Valdez*, 557 U.S. 1 (2009), is therefore unpersuasive. See Pet. 2, 16-18. In *Polar Tankers*, the ordinance sought to raise general revenue for municipal operations and was promulgated without Congressional authorization. See 557 U.S. at 10. Here, by contrast, the Ordinance is limited to financing the local share of Project-related construction costs, and was promulgated under the express congressional authorization provided in § 2236(a) of WRDA.

Petitioners are also wrong to suggest that WRDA limits the imposition of fees to "direct beneficiaries" or somehow requires proof of a particular relationship between the cost of providing services and benefits conferred on those paying the harbor dues in a manner relevant here. See Pet. 19-20.[8] Subject to certain restrictions no longer at issue here given Petitioners' abandonment of those arguments, § 2236(a) provides that harbor dues may be imposed on any "vessel engaged in trade entering or departing from a harbor and on cargo loaded on or unloaded from that vessel." In

[8] Petitioners read *New Orleans Steamship Ass'n* v. *Plaquemines Port, Harbor & Terminal District*, 874 F.2d 2018 (5th Cir. 1989), to say that fees can be imposed only on "direct beneficiaries" of a complete project. Pet. 4, 6, 20. But the panel correctly distinguished *Plaquemines* as "not apply[ing]" here because it "concerned an entirely different provision of the Act." Pet. App. 10a-12a; accord Pet. App. 31a (*Plaquemines* language as "dicta"). In any event, a claim that one circuit misapplied its own prior dicta is plainly not certworthy. Cf. *Joseph* v. *United States*, 135 S. Ct. 705, 707 (2014) (Kagan, J., respecting denial of certiorari).

any event, Petitioners base their claim of Article III standing on being users of the waterway, and so they are necessarily already benefiting from the completed Project increment. As explained above, Anchorage Basin No. 1 has already reduced waterway congestion and increased the speed and number of trips on the waterway.

## II. The question presented does not warrant further review.

Unable to posit any split of authority on their question presented or show error in the Fifth Circuit's careful textual analysis, Petitioners suggest the Fifth Circuit's opinion will create problems at the average American's "kitchen table" and allow the District to collect fees to raise general revenue, rather than financing the costs of this Project. Neither argument is plausible.

### A. Petitioners' "kitchen table" concerns are not credible.

Petitioners hyperbolically suggest that the "Fifth Circuit's opinion will be felt at Americans' kitchen tables" (Pet. 23) and will "threaten[] the Nation's essential coastal commerce" (Pet. 3). Not even close. The Ordinance imposes a modest per-cargo fee—approximately $16,000 for an average LNG tanker carrying a cargo worth tens of millions of dollars. Cf. Pet. 7. Petitioners do not dispute that the user fee represents a tiny fraction of a penny per MMBTU (a measure of energy content), or thousandths of one percent by value. It is absurd to suggest that this is a "significant economic burden[] on * * * shippers." Pet. 23. Petitioners' parent companies reported $386

billion and $170 billion in revenues last year, respectively.[9] Those figures were up more than 40% year-over-year, at a time when many Americans are struggling with inflation. In this context, Petitioners should not be allowed to avoid paying their fair share for waterway improvements designed to benefit them and other hydrocarbon shippers.

The Petition also glosses over the fact that the entire purpose of the harbor dues is to finance waterway improvements that will make shipping more efficient and cheaper—ultimately *reducing* costs of energy (and other products) for end-users. This is the opposite of a tax that would burden consumers in non-port areas. Contra Pet. 28.

The argument that the District is seeking to "externalize the costs of improvements" (Pet. 26) should not be taken seriously. The Ordinance asks the entities that benefit most from this Project (i.e., vessels using the waterway to transport hydrocarbons) to pay modest per-cargo amounts toward a Project that is designed to benefit them. Indeed, as the District Court correctly explained, the harbor dues were designed to ensure that "the vessels and cargo benefitting the most from the improvements would fund the majority of the costs." Pet. App. 50a. Hence, it is Petitioners who are trying to stick others (e.g., local or federal taxpayers or non-hydrocarbon shippers) with the bill for a Project

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[9] *Shell Revenue 2010-2022*, Macrotrends, https://bit.ly/3Km0aOj (last visited Apr. 23, 2023); *Phillips 66 Revenue 2010-2022*, Macrotrends, https://bit.ly/3UkNcFc (last visited Apr. 23, 2023).

developed and undertaken to benefit hydrocarbon shippers like themselves.

Indeed, the ultimate practical effect of adopting Petitioners' reading of the statute would be to *increase* the cost of financing harbor-improvement projects—by requiring non-Federal interests to pay a higher risk premium to finance their share (if financing can be obtained). That is so because, under Petitioners' reading, harbor dues would not exist as a current revenue stream to support financing while construction was underway. Importantly, even Petitioners concede that the District may properly recover its costs after the Project is complete.

Petitioners' suggestion of increased costs for other goods shipped on the waterway is rich with irony. See Pet. 23. Until they recently abandoned those claims in this Court (see *supra* note 3), one of Petitioners' main complaints in this case was that the Ordinance should charge *non-hydrocarbon* shippers a greater fraction of Project costs—even though this Project is designed to, and will, primarily benefit hydrocarbon shippers. See Pet. App. 27a.

The assertion by Petitioners and their *amicus* that this modest Ordinance could somehow have "devastating" macroeconomic effects is divorced from reality. See Pet. 27; *Amicus* Br. 12. The point of this Project is to upgrade an important waterway, which has not been modernized since 1962, to facilitate commerce by reducing congestion and allowing larger and more efficient ships to transit—ultimately *lowering* costs for shippers and end-users. Petitioners and their *amicus* advance a misreading of WRDA that would make it

more difficult to finance and complete waterway-improvement projects.

For its part, the *amicus* brief is predicated on various incorrect factual and legal premises. For example, *amicus* repeatedly suggests that the District will collect harbor dues for the entire $1.2 billion cost of the Project, including the federal share. *Amicus* Br. 1-2, 12. Incorrect. The District is only financing its own share of the cost, meaning that the harbor dues will never exceed the cost of financing its share of Project costs. See Pet. App. 2a, 42a; 86 Fed. Reg. at 7370 (harbor dues will be used to fund the District's "required cost share of the total Project as set out in the Project Partnership Agreement [with the Corps]"); 33 U.S.C. § 2236(a)(1)(A)(i).

### B. The Ordinance is not raising general revenue.

Petitioners speculate that the District might use harbor dues "to raise more money than is required to fund projects." Pet. 26. But the Ordinance and statute contemplate only collection of fees to finance the non-Federal sponsor's share of the construction costs of a harbor improvement project. See 86 Fed. Reg. at 7370 (harbor dues used to fund the District's "cost share"); 33 U.S.C. § 2236(a)(1)(A) (harbor dues may be used only "to finance the non-Federal share" of a Project). That is all the District is doing here.

Petitioners note in passing that, in May 2022, voters in Jefferson County, Texas approved use of certain "existing tax revenue" to fund the Project, which Petitioners believe shows that the "user fee is not required to cover the entire $488 million local share." Pet. 27.

But this election merely authorized the District to use already-assessed tax dollars to secure a loan to help finance some of the costs of the Project. The referendum created no new tax revenues and is merely a stopgap measure to help finance the Project during the pendency of this appeal. Indeed, much or all of those tax revenues will ultimately be consumed by Project costs not subject to harbor dues and that the federal government does not participate in sharing. Harbor dues therefore remain critical to the District's ability to fund hundreds of millions of dollars in Project costs.

Unlike many other ports and waterways around the country, the District has only limited assets and landholdings. Petitioners' cavalier suggestion that the District should fund the Project by "rely[ing] on traditional funding streams" such as higher taxes (Pet. 27) ignores the fact that the District lacks the sources of revenue that other ports and harbors have used to finance projects (e.g., revenue from providing services or spreading costs across a large tax base). See *supra* p. 7. The District's expenditures and other financial commitments vastly exceed the cost of Anchorage Basin No. 1 and the total amount of harbor dues collected under the Ordinance as of April 2023 (which is approximately $42 million).[10]

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[10] The District has incurred, and will continue to incur, enormous construction and other Project costs which are not covered by harbor dues, such as the cost of relocating dozens of pre-existing pipelines that must be moved before waterway deepening can occur. See 33 U.S.C. § 2211(a)(3) (non-Federal interest "shall provide," among other things, "lands, easements, rights-of-way, and [certain] relocations * * * necessary for the project").

Given the urgent need to undertake the work in question, collections from harbor dues will always lag far behind expenditures and other financial commitments. And if a navigation district were hypothetically to collect amounts in excess of what the statute allows, WRDA authorizes district courts to "order the refund of any port or harbor dues not lawfully collected." 33 U.S.C. § 2236(b)(3)(B).

### C. There is no need to call for the views of the Solicitor General.

The public record shows that the District has worked closely with the Corps and Congress on this Project for decades. From undertaking the initial Feasibility Study to publication of the Ordinance and support for Congressional appropriations, the Corps has consistently supported the Project and found it to be in the public interest. See *supra* pp. 5-7. Indeed, the Project has received high-level and bipartisan Executive Branch support across the Obama, Trump, and Biden Administrations.

For its part, Congress has repeatedly approved the Project, including by approving its Feasibility Study and later appropriating funds with full knowledge of the structure of this harbor-dues Ordinance. See *supra* pp. 5-7 & notes 1-2. Indeed, given the practical need for ongoing Congressional action, Congress could shut down this project (and other waterway-improvement efforts) simply by withholding appropriated funds. Congress and the Executive Branch have done the opposite, with the Executive Branch requesting, and Congress appropriating, $200 million (to date) to cover the federal share of Project costs. In this context, there is no need to prolong the pendency of this

litigation by calling for the views of the Solicitor General.

## III. This case would be an exceedingly poor vehicle to address the hypothetical concerns raised by Petitioners and their *amicus*.

This case is an inappropriate vehicle to address the various hypothetical concerns identified by Petitioners and *amicus*, because it arises in a unique factual context and the circumstances here do not present those concerns.

As explained above, the District is relatively unique among other navigation districts and ports, given its lack of a large asset base or other sources of revenue to fund projects of this magnitude. See *supra* p. 7. This difference may explain why this Ordinance differs from some of the fee structures used by other ports under WRDA and discussed in the Petition, and why harbor dues are particularly important to the District as a current revenue stream for financing the Project.

Petitioners' passing discussion of two other ordinances previously developed under § 2236 serves mainly to undercut their suggestion that the Fifth Circuit's opinion will open the floodgates to copycat financing schemes. Cf. Pet. 24-25. Their examples show that navigation districts tailor fee structures to the particular circumstances of the project in question. Even if the Ordinance here is unique (as Petitioners contend), that would only underscore why this case is an unsuitable vehicle to address Petitioners' hypothetical broader concerns about what other navigation districts might do.

That Congress recently appropriated $1.5 billion for harbor and navigation projects generally (Pet. 25-26) demonstrates the implausibility of Petitioners' suggestion that navigation districts will undertake projects, and charge fees, that somehow depart from Congress's expressed intent or avoid Congressional oversight. The repeated Congressional enactments necessary to undertake projects of this nature and magnitude demonstrate that Congress (like the Executive Branch) is necessarily well aware of these projects and that such projects are unlikely to move forward without affirmative demonstrations of Congress's support. It is implausible to suggest that projects of this sort could proceed "without careful congressional oversight." Pet. 29. These projects take decades to develop and are characterized by close federal involvement. And they can proceed only with ongoing, long-term support from Congress and the Executive Branch (e.g., approval of a Partnership Agreement, appropriation of funding to cover the majority federal share of costs, and supervision of Project-related work by the Corps). See *supra* pp. 5-7.

Nor does this case present the strained hypothetical imagined in the Petition, of a navigation district charging harbor dues after completing a *de minimis* "increment" (e.g., a $2,000 navigation buoy). See Pet. 23. Petitioners cite no example of any port or navigation district ever attempting to charge WRDA harbor dues in such a circumstance. Here, it is uncontested that Anchorage Basin No. 1 has been completed at a cost of $20 million. The District Court and Fifth Circuit had no occasion to address whether harbor dues could be assessed where the only completed "usable

increment" is *de minimis*. This would therefore be a wholly unsuitable vehicle for this Court to address that question. *Brownback* v. *King*, 141 S. Ct. 740, 747 n.4 (2021) ("[W]e are a court of review, not of first view." (citation omitted)). If a navigation district did attempt to collect fees after a *de minimis* improvement, the Executive Branch and Congress could simply decline to provide the support and serial authorizations (and appropriations) needed for the project to move forward. And, of course, shippers could challenge such an ordinance, and courts could consider and address that question.

Petitioners speculate that other ports may adopt similar harbor-dues schemes in the future. See Pet. 25-26. They offer nothing to support those fears except generalized statements by the District's *amici* below about the value of having flexibility to tailor harbor dues to local conditions. The actual ordinances cited in the Petition are (as Petitioners concede) unlike this Ordinance in material respects. See Pet. 24. And because hypothetical future projects, like this one, could proceed only with regular and ongoing approval and support from both the Executive Branch and Congress, projects will not proceed in a manner at odds with Congressional intent. If Petitioners' hypothetical concerns did materialize, this Court could consider whether to grant review in a future case where that issue is presented, with the benefit of further percolation in the lower courts.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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