

In The
Supreme Court of the United States

DONALD J. TRUMP,
PRESIDENT OF THE UNITED STATES, *et al.*,
Petitioners,

v.

SIERRA CLUB, *et al.*,
Respondents.

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Ninth Circuit**

**BRIEF OF DEFENDERS OF WILDLIFE, CENTER
FOR BIOLOGICAL DIVERSITY, ANIMAL LEGAL
DEFENSE FUND, CALIFORNIA WILDERNESS
COALITION, RIO GRANDE INTERNATIONAL
STUDY CENTER, THE CARRIZO/COMECRUDO
NATION OF TEXAS, MR. JOSEPH HEIN, MS. ELSA
HULL, AND DR. RAMIRO RAMIREZ AS *AMICI
CURIAE* IN SUPPORT OF RESPONDENTS**

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INTERESTS OF THE *AMICI CURIAE*¹

Amici's interests are as varied as the terrain and geographic scope that the Trump administration's proposed border wall would traverse. *Amici* include environmental conservation groups that are working to protect the natural and ecological values of the borderlands as well as the Corrido/Comecrudo Nation of Texas, an indigenous association of people who have inhabited the borderlands for generations. Also joining this brief are three individual Americans whose private property along the border is threatened with condemnation. *Amici* will be irrevocably harmed by the Trump administration's heedless rush to construct an illegal border wall in some of North America's most unique and biodiverse landscapes.

Amici's injuries parallel those of Respondents. Some *Amici* are impacted by the exact funding transfer complained of by the Sierra Club and State Respondents. Others are affected by similarly unlawful transfers that are being challenged in other cases still pending in federal courts. But the principle is the same. Environmental, cultural, tribal, and historical interests are being obliterated to construct a massive multibillion-dollar political gesture in direct contravention of Congress' intent to limit construction

¹ No counsel for a party authored this brief in whole or in part, and no person other than *Amici*, their members, or their counsel made a monetary contribution to its preparation or submission. All parties have consented to the filing of this brief.

spending in these areas. Those being harmed deserve to have their claims resolved on the merits.

Defenders of Wildlife (“Defenders”) is a nonprofit conservation organization with a longstanding interest in protecting wildlife, particularly endangered and threatened species, from habitat destruction and degradation. On behalf of 1.4 million members and supporters nationwide and in the vicinity of the U.S.-Mexico border, Defenders seeks to ensure that native species and the ecosystems on which they depend are preserved and maintained for present and future generations. Defenders has been closely involved in policy and litigation matters associated with border wall construction along the U.S.-Mexico border for more than a decade.

The Center for Biological Diversity (“Center”) is a nonprofit organization dedicated to the protection of endangered species and their habitats through science, policy, and environmental law. The Center is incorporated in California and headquartered in Tucson, Arizona, with field offices throughout the United States and Mexico. The Center has more than 1.6 million members and supporters who have interests in conserving endangered and threatened species, and in protecting U.S. federal lands. The Center’s interests in protecting endangered and threatened species and unique natural habitats and landscapes has been, and will continue to be, gravely injured by past and ongoing border wall construction.

Animal Legal Defense Fund represents its members' interests by working to protect the lives of animals, including wildlife, through the legal system. This includes prior litigation challenging unlawful attempts to waive environmental and animal protection laws to facilitate border construction.

California Wilderness Coalition ("CalWild") is a nonprofit organization that works to protect and restore California's wildest natural landscapes and watersheds on federal public lands. Construction of the border wall near the Jacumba Wilderness and near the Otay Mountains near San Diego conflicts with CalWild's mission and threatens the wild landscapes that it fights to protect.

The Rio Grande International Study Center ("RGISC," pronounced "risk") is a public interest nonprofit advocacy organization in Laredo, Texas. RGISC's mission is "to preserve and protect the Rio Grande-Rio Bravo, its watershed and environment, through awareness, advocacy, research, education, stewardship and bi-national collaboration for the benefit of present and future generations." The Rio Grande is particularly important to RGISC and the surrounding communities because it is the area's only source of drinking water. Construction of a 52-mile border wall project known as Laredo Project 7 northwest of Laredo, Texas conflicts with RGISC's mission, frustrates its programs, impacts its daily operations, threatens endangered animals that are key to its programs, and diminishes its members' connection to the Rio Grande.

The Carrizo/Comecrudo Nation of Texas (Esto'k Gna Nation) is a voluntary association comprised of indigenous peoples whose ancestors have inhabited the Rio Grande (Amahatau Mete'l) delta for generations. The Nation seeks to preserve its culture and identity by maintaining the connection with its ancestors and protecting sacred sites in their historical territory. These environmental, cultural, religious, and historical interests are threatened by 110 miles of border barriers in the Rio Grande Valley and by the 52-mile Laredo Project 7 northwest of Laredo, Texas.

Also joining the brief are three individual property owners who are injured as a result of illegal border wall construction funded in part by similarly unlawful transfers of appropriated funds. Dr. Ramiro Ramirez holds the deed to the historic Jackson Ranch Church and Cemetery and has ancestors buried in the adjacent Eli Jackson Cemetery located in Hidalgo County, Texas in the Rio Grande Valley. Mr. Joseph Hein is a rancher along the Rio Grande downriver from Laredo, Texas whose ranch is threatened by Laredo Project 7. Lastly, Ms. Elsa Hull is a homeowner near the banks of the Rio Grande downriver from Laredo, Texas whose land, home, and interests in wildlife are threatened by Laredo Project 7.

Amici call the Court's attention to the extraordinary and irreversible damage being done to environmental, tribal, cultural, and property interests along the southern border of the United States. In derogation of *Amici's* interests, construction of the border wall is destroying ancient landscapes and cultural traditions,

imperiling wildlife and habitat connectivity, and stripping property rights from thousands of Americans. See Editorial Board, *Trump's Border Wall Was a Complete Waste of Time and Money*, Wash. Post, Dec. 25, 2020, <https://wapo.st/35oaTEo>. These interests must be taken into consideration in this challenge to the legality of the Trump administration's unilateral transfer of Department of Defense funds to accelerate building the border wall.



SUMMARY OF THE ARGUMENT

1. It is difficult to overstate the ecological, cultural, historical, and property rights damage being inflicted by the unlawfully funded activities at issue in this litigation. The U.S.-Mexico border is one of the most ecologically diverse regions in North America, comprising six distinct ecoregions and more than 1,500 animal and plant species. Construction of the wall threatens wildlife species by eliminating, degrading, and fragmenting habitats. It is uprooting 200-year-old cacti while draining, deteriorating, or blocking access to scarce water resources that sustain the region's abundant life. For indigenous people, like the Carrizo/Comecrudo Nation of Texas, the border wall is running roughshod over indigenous lands and places of archeological significance, destroying sacred sites and burial grounds, and dividing communities from one another across the border. For other families in the border region, lands that have been worked or enjoyed for generations are being condemned or permanently damaged.

Not just the wall itself, but roads, lighting, and other infrastructure attendant to it are threatening family burial grounds, historic churches, and entire ways of life. Despite express Congressional limitations on appropriations, and despite these interests falling within the range of interests protected by appropriations statutes limiting border barrier construction, the government has unlawfully ignored these and other concerns to complete portions of the border wall before the end of the Trump administration.

2. Respondents' injuries stem directly from the Trump administration's unprecedented and impermissible redirection of Department of Defense funds for an unappropriated purpose: expediting the construction of the border wall while President Trump remained in office. The government does not dispute that Respondents have Article III standing. Rather, the government argues that Respondents' injuries, though grievous, do not fall within the relevant "zone of interests" for statutes governing federal spending. This argument should be rejected. Sierra Club Respondents have argued their claims are constitutional or *ultra vires* and need not meet the "zone of interests" test. But even if the claims are framed, as the State Respondents do, as challenges to federal actions "not in accordance with law" under the Administrative Procedure Act, 5 U.S.C. §§ 701 *et seq.*, the asserted interests must only fall "arguably within the zone of interests to be protected or regulated" by the statutory scheme the plaintiff claims was violated. *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 224 (2012)

(citation omitted). In considering the zone of interests, a court must not focus too narrowly on a particular provision of law, but instead must “adequately place” the provision within the “overall context” of the relevant statute. *Clarke v. Sec. Indus. Ass’n*, 479 U.S. 388, 401 (1987). Congressional appropriations for the border wall include strict limitations on funding and a stated desire to protect critical natural, cultural, and historical interests. 2019 Consolidated Appropriations Act, Pub. L. No. 116-6, § 231, 133 Stat. 13, 28 (2019) (“CAA”). Respondents need show nothing more to satisfy this Court’s zone of interests precedents. The Trump administration’s improper transfer of funds that Congress specifically did *not* appropriate for border construction is the cause of these injuries and this litigation is a proper vehicle to remedy those injuries.

◆

ARGUMENT

I. THE TRUMP ADMINISTRATION’S HEEDLESS RUSH TO CONSTRUCT THE BORDER WALL IS CAUSING IRREPARABLE INJURY TO ENVIRONMENTAL, TRIBAL, CULTURAL, AND PROPERTY INTERESTS

The Trump administration’s rush to construct a bollard wall as high as 30-feet across the southern border is having enormous consequences for wildlife, the environment, and people. While prior administrations balanced border security and environmental considerations in areas of strategic importance through reliance on “vehicle barriers” designed to block vehicles

but not wildlife, the Trump administration is building a wall that is impermeable to wildlife and extending it to pristine areas where no barriers previously existed. Compounding the issue, the administration has also waived all applicable federal and state environmental and historic preservation laws that could help minimize harm to wildlife, natural resources, and areas of cultural and archaeological importance.² The damage, which is occurring in national wildlife refuges, national monuments, and internationally-recognized places of ecological and historical significance, including tribal lands, may be irreparable.

Additionally, construction of an enormous wall across the southern border requires an unprecedented incursion on private property, described by Professor Ilya Somin as “one of the biggest federal-government land grabs in modern history.” Ilya Somin, *How Biden Can Terminate Trump’s Border Wall Project—And Save Money and Protect Property Rights in the Process*,

² Federal statutes waived pursuant to the REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, Title I § 102, Stat. 302 (2005) include the Native American Graves Protection and Repatriation Act, the Endangered Species Act, the National Environmental Policy Act, the Clean Water Act, the Archeological Resources Protection Act, the Antiquities Act, the National Wildlife Refuge System Act and many others. *Laws Waived for Border Construction*, Nat’l Parks Conservation Ass’n (May 30, 2019), <https://bit.ly/2XrMHwm>. The Department of Homeland Security has even waived federal contracting laws. See Eliot Spagat, *Homeland Security Waives Contracting Laws for Border Wall*, AP News, Feb. 18, 2020, <https://bit.ly/39jlp0I>. These waivers ensure no meaningful check on environmental damage, even when such damage is wholly avoidable.

Reason, *The Volokh Conspiracy* (Dec. 28, 2020, 2:35 PM), <https://bit.ly/38sA8av>. Ranches and properties that have been in families for generations are already being taken outright and their access and use is being restricted. To fully construct the border wall, the government would need to seize an additional 5,000 acres of private property beyond what has already been condemned (often without adequate process or compensation). See Camilo Montoya-Galvez, *New Report Details Trump Effort to Seize Thousands of Acres of Private Land for Border Wall*, CBS News, Nov. 24, 2020, <https://cbsn.ws/3saDRRI>. All this for a project that may never be completed and is ineffectual for its purpose. See David J. Bier, *A Wall Is an Impractical, Expensive, and Ineffective Border Plan*, Cato Inst.: Cato at Liberty (Nov. 28, 2016, 2:31 PM), <https://bit.ly/3q5dN8O>.

A. Damage to Environmental Interests

1. Impacts to Wildlife

Ongoing and proposed border wall construction threatens some of the most biodiverse regions in North America. The U.S.-Mexico borderlands contain six different ecoregions, including desert scrub temperate forests and woodlands, semidesert and plains grasslands, subtropical scrublands, freshwater wetlands, and salt marshes. This unusual mix of Nearctic and Neotropical habitats supports an extraordinary amount of the continent's wildlife and plants. Robert Peters et al., *Nature Divided, Scientists United: US-Mexico*

Border Wall Threatens Biodiversity and Binational Conservation, 68 *BioScience* 740, 740 (2018).

A recent analysis endorsed by more than 2,700 scientists showed that the U.S.-Mexico border bisects the habitat of 1,506 native terrestrial animal and plant species, of which 62 are listed as critically endangered, endangered, or vulnerable on the International Union for Conservation of Nature (IUCN) Red List. *Id.* Once the border wall is completed, nearly 350 of these species could be permanently disconnected from more than 50% of their natural range below the border. *Id.* at 741. Division of these populations ends hopes of natural recovery via dispersal from Mexico into the United States and increases the chance of local extirpation and even extinction.

Critically endangered species like the jaguar, Mexican wolf, and ocelot could easily be eliminated from the United States if they cannot connect to broader populations south of the border. *Id.* Jaguar were hunted to near extinction by the 1960s, only to reappear in the 1990s in the Sky Islands, an extraordinarily biodiverse chain of mountain ranges linking southern Arizona and northern Mexico. Much of this area is designated critical habitat under the Endangered Species Act, 16 U.S.C. §§ 1533–1544. But construction of the border wall is both destroying that critical habitat and creating a permanent, impermeable barrier to jaguar recovery. According to the U.S. Fish and Wildlife Service:

Maintaining connectivity between Arizona and Sonora is critical to the continued persistence of jaguars in Arizona and New Mexico. Should all jaguar movement corridors be compromised, it is possible that the jaguar will become extirpated from the US, as it is believed the existence of jaguars in the US relies on interchange with jaguars in Sonora.

U.S. Fish & Wildlife Serv., Conservation Recommendations for the Proposed Border Infrastructure Projects in Pima and Cochise Counties, Arizona, <https://bit.ly/3bnRTJO> 16-17 (2019) [hereinafter “FWS, Cons. Recs.”].

In addition to blocking wildlife movement critical for dispersal and genetic exchange, the wall increases the likelihood of death from thirst, starvation or increased predation. Fluctuations in precipitation require wildlife to move in search of food and water. In 2002, drought nearly caused the extinction of the Sonoran Pronghorn; the species population dropped from 140 to 19. Defenders of Wildlife, *In the Shadow of the Wall: Borderlands Wildlife, Habitat and Collaborative Conservation at Risk* 5-6 (2018), <https://bit.ly/2LCk7FP>. The wall could prevent these and other animals from reaching sustenance. Many border species are also showing northerly shifts in range due to climate change. The wall could block natural adaptation and migration strategies for any species that cannot climb or fly over it. *Id.* at 6.

In Arizona alone, the U.S. Fish and Wildlife Service has predicted significant adverse impacts on many species, including at least 16 species listed as

threatened or endangered under the ESA. FWS, Cons. Recs., *supra*. These risks are not hypothetical. In the San Bernardino National Wildlife Refuge near Guadalupe Canyon, where some of the damage has already occurred, field cameras have reported 90% less movement by mountain lions, bobcats, and javelinas in recent months. Anita Snow, *Damage From Border Wall: Blown-up Mountains, Toppled Cactus*, AP News, Dec. 17, 2020, <https://bit.ly/2LP6S4M>.

Beyond the effects of the wall itself on wildlife movement, the construction and maintenance of the project is forever altering formerly pristine habitat. Permanent Border Patrol outposts, road networks, and significant off-road vehicle traffic—even in wildlife refuges and wilderness areas—is crushing plants and animals and significantly fragmenting habitat. For example, border barriers, access roads, and increased patrol traffic on the ground and in the air in the El Centro sector of California will impact Peninsular bighorn sheep and, if prolonged, could cause bighorn sheep to move away from the stimuli and even abandon their home range.³ In steep inaccessible terrain, mountains

³ Pls.' Sur-reply Addressing Remedy at 6, *Rio Grande Int'l Study Ctr. ("RGISC") v. Trump*, 453 F. Supp. 3d 11 (No. 1:19-cv-00720), ECF No. 100 (addressing impacts from a border barrier known as El Centro 1). In 2019, the Department of Defense unlawfully funded construction of El Centro 1 with transfers from a Drug Interdiction and Counter-Drug Activities account pursuant to 10 U.S.C. § 284 and § 8005 of the 2019 Department of Defense Appropriations Act, Pub. L. No. 115-245, 132 Stat. 2981 (2018). Pls.' Mem. Supp. Mot. Summ. J. at 15-16, *RGISC*, 453 F. Supp. 3d 11 (No. 1:19-cv-00720), ECF No. 84.

are literally being blasted away to carve roads for vehicles to build the wall. In lower lying areas, walls can also cause significant flooding (even in a desert). After heavy rains in 2008 and 2011, flood waters in Arizona's Organ Pipe Cactus National Monument created a channel against the border wall that trapped debris, drowned wildlife, and uprooted a 40-foot section of the wall itself. Defenders of Wildlife 2018, *supra*, at 6.

To appreciate the gravity of the situation, we urge the Court to view these images of formerly pristine jaguar habitat in the Peloncillo Mountains in Arizona that have now been transformed into a moonscape. One video shows a steep and inaccessible canyon being blasted to facilitate wall building. Laiken Jordahl (@LaikenJordahl), Twitter (Nov. 30, 2020, 1:02 PM), <https://bit.ly/3qiTTHG>. Another video shows the aftermath of similar destruction, a mountainside reduced to rubble. Laiken Jordahl (@LaikenJordahl), Twitter (Dec. 16, 2020, 11:03 PM), <https://bit.ly/39ufLJu>. Dramatic images such as these are being captured across the southern border. Indeed, drone footage of seven ecologically important areas demonstrates the significant harm that has already occurred in the Buenos Aries National Wildlife Refuge, along the San Pedro River and San Pedro National Conservation Area, Quitobaquito Springs and Organ Pipe Cactus National Monument, San Bernardino National Wildlife Refuge and Guadalupe Canyon, Cabeza Prieta National Wildlife Refuge, the Tinajas Altas Mountains, and the Coronado National Memorial. Russ McSpadden (@PeccaryNotPig), Twitter (Nov. 12, 2020, 12:12 PM), <https://bit.ly/2XGKIEI>.

The still image below shows the results of blasting in the Tinajas Altas Mountains, which straddle the Cabeza Prieta National Wildlife Refuge and Barry Goldwater Range. The Tinajas Altas are rich in history and artifacts and provide habitat for desert bighorn sheep.



Photo: Laiken Jordahl

Not even wildlife capable of flight is immune from the wall's impacts. The endangered Quino checkerspot butterfly and the imperiled cactus-ferruginous pygmy owl (a candidate for ESA listing) could also be casualties of the wall. The low flying creatures will be unable to avoid it and will face risks from collision and lack of connectivity to cross-border populations. Peters et al., *supra*, at 741; Noah Greenwald et al., Ctr. for Biological Diversity, *A Wall in the Wild, The Disastrous Impacts of Trump's Border Wall on Wildlife* 16 (2017), <https://bit.ly/398eeZ6>. Moreover, these and other species—

including many bats and pollinators—will be drawn to the wall’s “high intensity security lights,” which will be shining from atop the 30-foot structure at regular intervals for miles on end. John Burnett, *Contractors Dynamite Mountains, Bulldoze Desert in Race to Build Trump’s Border Wall*, Nat’l Pub. Radio (Dec. 11, 2020, 5:00 AM), <https://n.pr/3s6wPh5>. Lights can attract and mesmerize birds, bats, and insects causing mass mortality events. See Travis Longcore & Catherine Rich, 2 *Ecological Light Pollution*, *Frontiers in Ecology & the Env’t* 191, 191-98 (May 1, 2004), <https://bit.ly/3oJfFE0>; Eliza Barclay & Sarah Frostenson, *The Ecological Disaster That Is Trump’s Border Wall: A Visual Guide*, *Vox* (Feb. 5, 2019, 11:22 AM), <https://bit.ly/3oyXot7>.

2. Impacts to Waters

Water resources are exceptionally scarce along many parts of the borderlands, but the construction of the border wall is posing a serious threat to ancient aquifers, wells, and the Rio Grande that serves as the sole source of water for some communities. Mixing the raw materials for a 30-foot concrete and iron wall requires as much as 84,000 gallons of water a day, according to U.S. Customs and Border Protection’s own estimates. Lucy Sherriff, *How the Trump Border Wall Sapped a Desert Oasis Dry: Ancient Springs Might Not Survive Unchecked Construction During the Pandemic*, *Popular Sci.*, Jan. 6, 2021, <https://bit.ly/3ou3N8U>. This is an enormous amount to draw out of such an arid landscape. The 450 miles of new and replacement border wall in portions of California, Arizona, New Mexico,

and Texas have required more than 971,000 tons of concrete. *See id.* (“The demand for water, alongside historic droughts in the West, has had a colossal impact on the surrounding ecology of largely public and tribal lands across the Southwest, which scientists and Indigenous communities fear may take years, if not decades, to reverse.”).

Indeed, recent groundwater pumping associated with unlawful border wall construction has already resulted in ongoing significant hydrologic impacts in the San Bernardino National Wildlife Refuge in Arizona. Curt Prendergast, *Border Wall Created ‘Dire Emergency’ at Arizona Wildlife Refuge*, Ariz. Daily Star, Aug. 21, 2020, <https://bit.ly/35nE2zC>. Government scientists estimate that wall construction will cause water levels in wells on the refuge to draw down by as much as 13.7 feet. Rachel Frazin, *Government Scientists Predicted Border Wall Construction Could Harm Wildlife Refuge*, The Hill, Dec. 18, 2020, <https://bit.ly/3biWVY5>. Their report, which notes that the wells “support several endangered [and threatened] species,” including the Yaqui catfish, Yaqui chub, Yaqui topminnow, and beautiful shiner, concludes that “any ongoing withdrawals will have large impacts on the system as a whole.” *Id.* Underscoring the risk to the ecosystem, refuge manager Bill Radke in emails obtained by the press said that the withdrawals are posing a “dire emergency” and represent “the current greatest threat to endangered species in the southwest region.” *Id.*

Near Quitobaquito Springs, located in Organ Pipe Cactus National Monument in Arizona, which is

designated a UNESCO biosphere reserve because of its special value as a world-class intact ecosystem, the U.S. Customs and Border Protection has reportedly diverted water from the same aquifer that feeds the springs. Sherriff, *supra*. The water in these aquifers was laid down thousands of years ago and is not easily replenished, particularly under increasingly arid conditions. The pond at Quitobaquito once measured two feet deep and covered half an acre, but in the summer of 2020 it dropped 15 inches, and the spring's flow reportedly reached a historic low of 5.5 gallons per minute this past July. *Id.* The drawdowns may spell the death knell for the endangered Quitobaquito pupfish and Sonoyta mud turtle. *Id.* These species reside nowhere else in the country.

These disturbing impacts resulted from U.S. Customs and Border Protection flagrantly ignoring the conservation recommendations of the U.S. Fish and Wildlife Service by allowing the pumping of thousands of gallons of irreplaceable groundwater daily in areas directly adjacent to occupied endangered species habitat. See FWS Cons. Recs., *supra*, at 2 (“*Avoid impacts to groundwater* by obtaining treated water from outside the immediate area for construction use.”) (emphasis in original); *id.* at 8 (“To ensure water levels are stable in Quitobaquito Spring, *do not drill any water wells within 5 miles to the west and 10 miles to the east of Quitobaquito Spring.*”) (emphasis in original); *id.* at 24 (“Avoid any impacts of water reduction, contamination, or sedimentation to the ponds on [San Bernardino National Wildlife Refuge] or Black Draw, including

groundwater withdrawal.”). With no meaningful environmental or other laws in place to check or mitigate these impacts—such safeguards have all been waived by the Secretary of Homeland Security—these warnings from expert agencies can simply be ignored.

Unlawful barriers also impact water resources that are vital for border communities. The Rio Grande is the only source of water for the City of Laredo where the Rio Grande International Study Center (“RGISC”) works to protect water security and ecosystems. Construction of the border wall known as Laredo Project 7 impedes RGISC’s ability to fulfill its mission, which includes restoration of a large watershed that is important for water quality.⁴

3. Impacts to Ancient Cacti and Vegetation

Saguaro and organ pipe cacti are the redwoods of the desert. Ancient and slow growing, these cacti can take 100–150 years to reach maturity and can live longer than 200 years. The tree-like saguaro can grow to 60 feet, while the organ pipe forms tall spires that resemble a pipe organ. Pollinated by bats, they produce a sweet cactus fruit.

Removing a saguaro is a felony in Arizona, but to facilitate construction of the wall, these cacti are being

⁴ Pls.’ Mem. Supp. Mot. Summ. J. at 23-26, *RGISC*, 453 F. Supp. 3d 11 (No. 1:19-cv-00720), ECF No. 84. The Secretary of Defense authorized unlawful transfers of money from 10 U.S.C. § 2808 to fund Laredo Project 7. *Id.* at 17, 38.

chopped down, even in refuges and monuments set aside specifically for their conservation. Molly Hennessy-Fiske, *It's Illegal to Destroy Saguaro Cactuses. So Why Are They Being Removed for Trump's Border Wall?*, L.A. Times, Feb. 26, 2020, <https://lat.ms/35nM8Z2>. The saguaro is also sacred to the Tohono O'odham Nation, whose members have long harvested the cactus's fruit. While attempts have been made to transplant some saguaro, many others have been destroyed at Organ Pipe Cactus National Monument and Cabeza Prieta National Wildlife Refuge. See Simon Romero, *Tribal Nation Condemns 'Desecration' to Build Border Wall*, N.Y. Times, Feb. 26, 2020, <https://nyti.ms/32zcqHb>. (See also Appendix).



Felled saguaro cactus at Organ Pipe Cactus National Monument. Photo: Laiken Jordahl

Border wall construction is also threatening the federally endangered Pima pineapple cactus and Otay Mesa mint. Impacts to native vegetation from border construction could also compromise the recovery plan for the Quino checkerspot butterfly. Extensive off-road vehicle traffic in the region “compacts soil, destroys host plants, increases erosion and fire frequency, and creates trails that are conduits for non-native plant invasion.” Defenders of Wildlife, *In the Shadow of the Wall*, *supra*, at 6. Non-native plants and noxious weeds like buffelgrass and Sahara mustard that degrade western landscapes are easily transported by the tires and undercarriages of vehicles. *Id.* Sahara mustard spreads rapidly and has eliminated vast landscapes of wildflowers that give the desert its color. *Id.*

B. Damage to Tribal and Cultural Interests

The areas being degraded for border wall construction are also a rich, living landscape of historical, cultural, and tribal sites that are beloved, visited, and studied by millions of people. A recent National Park Service study found the Sonoran Desert has “an abundance [of] natural and cultural resources unique” to that area, some of which are still being evaluated for inclusion in the National Register of Historic Places. Nat’l Park Serv., *Archaeological Survey of 18.2 Kilometers (11.3 Miles) of the U.S. Mexico International Border 1* (July 2019), <https://bit.ly/3s83PFx>.

According to the National Park Service, construction of the border wall in the Organ Pipe Cactus

National Monument alone could damage or destroy up to 22 archaeological sites. Juliet Eilperin & Nick Miroff, *Border Fence Construction Could Destroy Archaeological Sites, National Park Service Finds*, Wash. Post, Sept. 17, 2019, <https://wapo.st/39eD5dr>. These rare and fragile sites are currently well-preserved, but once disturbed or destroyed could be lost forever.

As discussed in a separate *amicus* brief submitted in this case by the Tohono O’odham Nation, construction of the border wall is having particularly egregious impacts on native people and native cultural sites. Construction in the Sonoran Desert is blasting away ancient burial grounds and draining a critical desert aquifer that has sustained life in the region for 16,000 years. Romero, *supra*. Sacred places like Monument Hill, which includes a tribal burial site, are simply being blown up without so much as consultation with affected sovereign tribal nations. Paulina Firozi, *Sacred Native American Burial Sites Are Being Blown Up for Trump’s Border Wall, Lawmaker Says*, Wash. Post, Feb. 9, 2020, <https://wapo.st/30y6efV>; *see also* Rafael Carranza, *Sacred Native American Site in Arizona Blasted for Border Wall Construction*, USA Today, Feb. 7, 2020, <https://bit.ly/3biuBVV>.

To offer another example, *Amicus Carrizo/Comecrudo* Nation of Texas is a voluntary association of indigenous peoples whose ancestors have inhabited the Rio Grande delta for generations and who have historical villages and sacred burial sites along the Rio Grande from the village of Juliame (near present day

Marfa, Texas) to the mouth of the river at Boca Chica.⁵ Their national mission is to maintain their connection to relatives and ancestors, some of whom are buried at the Eli Jackson Cemetery and Jackson Ranch Cemetery in the Rio Grande Valley of Texas, located on the grounds of one of the Nation's ancestral villages.

Border wall construction along a large swath of the Rio Grande threatens the Carrizo/Comecrudo Nation of Texas's ability to protect its sacred burial sites, maintain ancestral connection, and preserve cultural artifacts essential to their identity and culture. Among other impacts, border walls in the Rio Grande Valley will damage burial and village sites by causing deeper flooding and increased deposition of sediment and debris.⁶ Moreover, because the people of the Carrizo/Comecrudo Nation are indigenous to lands on both sides of the U.S.-Mexico border, the border wall will divide the Nation and impede access to some of these cultural and spiritual sites.

In December 2020, U.S. Customs and Border Protection alerted the Carrizo/Comecrudo Nation of Texas that it had found archaeological sites of cultural significance in preparation for building border barriers in the Rio Grande Valley. No commitments have been made to preserve these sites. Upriver of the Rio

⁵ Pls.' Sur-reply Addressing Remedy at 10-12, *RGISC*, 453 F. Supp. 3d 11 (D.D.C. 2020) (No. 1:19-cv-00720), ECF No. 100. First Am. Compl. at 8-9, *RGISC*, 453 F. Supp. 3d 11 (D.D.C. 2020) (No. 1:19-cv-00720), ECF No. 33.

⁶ Pls.' Sur-reply Addressing Remedy at 10-12, *RGISC*, 453 F. Supp. 3d 11 (D.D.C. 2020) (No. 1:19-cv-00720), ECF No. 100.

Grande Valley, north of Laredo, Texas, the U.S. Army Corps of Engineers is also overseeing construction of a 52-mile border wall along the Rio Grande known as Laredo Project 7 that would cause these same kinds of harms to sites along and near Laredo Project 7's route that are of cultural and spiritual significance to the Carrizo/Comecrudo Nation.⁷ Irreplaceable cultural artifacts and spiritual sites that connect members of the tribe to their ancestors and lifeways are being destroyed by the Trump administration's unchecked race to build the border wall.

C. Damage to Private Property Interests

In addition to irreparably damaging unique public lands, the border wall requires the seizure of hundreds of tracts of property held by private landowners. According to a recent U.S. General Accounting Office report, as of July 2020, the federal government acquired 135 private tracts, or sections, of land and is working to acquire 991 additional tracts. U.S. Gov't Accountability Off., GAO-21-114, *Southwest Border, Information on Federal Agencies' Process for Acquiring Private Land for Barriers Report to Congressional Requesters* (Nov. 2020), <https://bit.ly/3np6KWW>. "The privately owned land the government acquired or is working to acquire totals about 5,275 acres or 8.2 square miles, and most of it—1,090 of 1,126 tracts—is in south Texas." *Id.* The *Texas Tribune* reported that in many

⁷ Pls.' Mem. Supp. Mot. Summ. J. at 17, 38, *RGISC*, 453 F. Supp. 3d 11 (D.D.C. 2020) (No. 1:19-cv-00720), ECF No. 84.

condemnation cases that have already occurred, the Department of Homeland Security violated fair compensation rules and failed to conduct adequate review of properties they were seizing, causing property owners to spend tens of thousands of dollars to contest wrongful or inaccurate condemnations. T. Christian Miller et al., *The Taking: How the Federal Government Abused Its Power to Seize Property for a Border Fence*, Texas Tribune, Dec. 14, 2017, <https://bit.ly/3bmdjXP>.

Three *Amici* have property interests that are threatened by the border wall. Dr. Ramiro Ramirez holds the deed to the historic Jackson Ranch Church and Cemetery located in Hidalgo County, Texas.⁸ Dr. Ramirez's great-grandfather, Martin Jackson, built the chapel on the property in 1874. The Jackson Ranch Church was the first Protestant church in the Rio Grande Valley and was an important stop on the Underground Railroad. Dr. Ramirez has ancestors buried there and in the adjacent Eli Jackson Cemetery. The Church and cemeteries are designated historical markers and continue to hold spiritual significance to Dr. Ramirez, his extended family, and Protestant congregations that are still active in the area.

Within the Rio Grande Valley where these properties are located, Customs and Border Protection is building a total of 110 miles of border wall.⁹ One

⁸ First Am. Compl. at 7, *RGISC*, 453 F. Supp. 3d 11 (D.D.C. 2020) (No. 1:19-cv-00720), ECF No. 33.

⁹ In December 2019, U.S. Customs and Border Protection unlawfully diverted funds from the Treasury Forfeiture Fund ("TFF"), 31 U.S.C. § 9705, to build two sections of wall in the Rio

segment of the wall known as “RGV 04” is being constructed on the levee that runs just north of the Jackson Ranch Church and Cemetery and abuts the Eli Jackson Cemetery. This wall will cut off direct access to the Jackson Ranch Church and Cemetery, stranding them in a no man’s land between the Rio Grande River and the wall, and impeding access to the cemeteries for Dr. Ramirez and his family, as well as the public. The wall will also cause deeper flooding and increase the amount of sediment and debris deposited by the Rio Grande that will irreparably harm the properties.

Amicus Mr. Joseph Hein is a rancher with more than 579 acres of land that extends for three-quarters of a mile along the Rio Grande downriver from Laredo, Texas. The ranch has been passed down through his family for nearly 100 years. Mr. Hein raises spotted Appaloosa horses and operates an aoudad (a non-native wild sheep) hunting business on the ranch. The Rio Grande is the only source of water on the whole property. Laredo Project 7 threatens to erode steep cliffs on his property and degrade water quality, which jeopardizes Mr. Hein’s ranching related businesses and will negatively impact the ecosystems and wildlife on his

Grande Valley that contribute to Dr. Ramirez’s harms, and the agency is also likely to divert TFF funds for the barrier segment known as “RGV 04” next to the Church and cemeteries. Pls.’ Sur-reply Addressing Remedy at 10-12, *Rio Grande Int’l Study Ctr. v. Trump*, 453 F. Supp. 3d 11 (D.D.C. 2020) (No. 1:19-cv-00720), ECF No. 100; Notice Regarding Use of the Treasury Forfeiture Fund, *Rio Grande Int’l Study Ctr. v. Trump*, 453 F. Supp. 3d 11 (D.D.C. 2020) (No. 1:19-cv-00720), ECF No. 68.

ranch. This would impair his, and future generations of his family's, ability to use and enjoy the land.¹⁰

Amicus Ms. Elsa Hull owns land within 200 yards of the banks of the Rio Grande, about 40 miles downriver from Laredo, Texas, where she has lived with her two daughters for 15 years. Ms. Hull and her family use their property and the river area for kayaking, birding, and observing wildlife. Ms. Hull's property is on the edge of the flood zone, placing her property and home at risk from increases in the severity of flooding due to border wall construction. The construction of Laredo Project 7 will increase the risk of property damage from flooding and debris deposition, will negatively impact the wildlife she values observing on her property, and will destroy the habitat and wildlife that she also enjoys seeing along Laredo Project 7's proposed route.¹¹

These landowners are illustrative of the many Americans along the border whose property will be taken and whose lives and livelihoods will be deleteriously affected by the border wall. For them, the border wall is not merely an environmental disaster and a national economic boondoggle¹²—it will destroy their use

¹⁰ Pls.' Mem. Supp. Mot. Summ. J. at 29-30, *RGISC*, 453 F. Supp. 3d 11 (No. 1:19-cv-00720), ECF No. 84. The Secretary of Defense funded Laredo Project 7 with unlawful transfers of money from 10 U.S.C. § 2808. *Id.* at 17, 38.

¹¹ Pls.' Mem. Supp. Mot. Summ. J. at 17, 38, *RGISC*, 453 F. Supp. 3d 11 (No. 1:19-cv-00720), ECF No. 84.

¹² The U.S. Army Corps of Engineers' own estimates found that the U.S. government would save roughly \$2.6 billion should

and enjoyment of property that has been in their families, in some cases, for generations. That these construction projects may occur despite an express lack of congressional authorization further harms their interests, as it prevents them from meaningfully participating in the political process and seeking redress from their representatives.

Congress placed clear limits on both the amount appropriated for border barrier construction and the geographical areas in which these funds could be used. The Trump administration's violation of those limits has seriously injured Respondents and *Amici* alike, and those injuries are properly considered in this litigation.

II. THE GOVERNMENT'S ZONE OF INTERESTS ARGUMENT CONTRAVENES THIS COURT'S PRECEDENTS AND IGNORES CONGRESSIONAL INTENT

The government's invocation of the zone of interests test to evade judicial review disregards not only the demonstrable harms suffered by the Sierra Club and State Respondents, but also the interests of numerous other organizations, tribal nations, and individual landowners, as *Amici* have demonstrated. Moreover, the government's position contravenes this Court's

President-elect Joe Biden halt construction on his first day in office. Josh Dawsey & Nick Miroff, *Biden Order to Halt Border Wall Project Would Save U.S. \$2.6 Billion, Pentagon Estimates Show*, Wash. Post, Dec. 16, 2020, <https://wapo.st/35DpFHk>.

precedents and negates Congress’s clearly expressed intent to limit funding for, and the location of, border wall construction so as to safeguard the kinds of environmental, tribal, historical, cultural, and other interests at stake in this litigation.

Given the extreme environmental havoc being wrought along the border, it is indisputable that those who live, work, and recreate where this damage is being inflicted—as well as the States with trust responsibilities to protect natural resources within their borders—are suffering grievous injuries that may be remedied through judicial relief. Indeed, the government does not dispute that the Sierra Club Respondents and the State Respondents have Article III standing to challenge the legality of border wall construction. Rather, the government maintains that such injuries cannot be redressed because none of the Respondents comes within the zone of interests of Section 8005 of the Department of Defense Appropriations Act, 2019, Pub. L. No. 115-245, Div. A, Tit. VIII, § 8005, 132 Stat. 2999 (2018) (“Section 8005”). The government is wrong.¹³

¹³ The Sierra Club Respondents argue that their constitutional and *ultra vires* claims need not satisfy the zone of interests test, Brief of Sierra Club et al. at 30-34, and that they meet the requirements for a claim under the Administrative Procedure Act (“APA”). *Id.* at 34-40. State Respondents contend that their claims are reviewable under the APA because their interests fall within the zone of interests of the statutes they invoke. Brief of State Respondents at 2. This section addresses whether, for purposes of pursuing an APA claim, interests such as those represented by Respondents collectively come within the zone of interests of the

The Administrative Procedure Act affords judicial review to any person with Article III standing who is “aggrieved by agency action within the meaning of the relevant statute.” 5 U.S.C. § 702. The interests asserted by the plaintiff must only be “arguably within the zone of interests to be protected or regulated” by the statutory scheme the plaintiff claims was violated. *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians*, 567 U.S. at 224 (quoting *Ass’n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 153 (1970)). This test is “not meant to be especially demanding,” *id.* at 225, and “forecloses suit only when a plaintiff’s ‘interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit.’” *Id.* (quoting *Clarke*, 479 U.S. at 399); *see also id.* (explaining that courts “have always conspicuously included the word ‘arguably’ in the test to indicate that the benefit of any doubt goes to the plaintiff”). Further, in determining whether a plaintiff’s interests are arguably encompassed within the relevant statutory scheme, such interests “may reflect aesthetic, conservational, and recreational as well as economic values.” *Ass’n of Data Processing Serv. Orgs.*, 397 U.S. at 153-54 (citations omitted).

In arguing that Respondents’ interests do not satisfy this “lenient approach,” *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 129-30 (2014), the government maintains that the “asserted interests

relevant statutes, which includes the Consolidated Appropriations Act of 2019, discussed *infra*.

are not even arguably within the zone of interests protected” by Section 8005. Brief for the Petitioner (“Pet. Br.”) at 21. According to the government, Section 8005 “primarily protects Congress’s interests in the appropriations process,” *id.* at 26, and hence “Respondents’ asserted interests in public lands indirectly affected by the transfers are entirely outside the contemplation of Section 8005’s proviso.” *Id.* at 21.

The government’s reading of Section 8005 is too limiting. Section 8005 states that “in no case” can the Department of Defense transfer money to fund an “item” that “has been denied by Congress.” § 8005. As discussed in the Brief for the State Respondents at 35-38, this language provides no basis for excising Respondents’ interests from the scope of review. Moreover, Section 8005 must be considered within the context of the overall 2019 appropriations cycle, which includes limitations on border wall construction found in the Consolidated Appropriations Act of 2019, Pub. L. No. 116-6, 133 Stat. 13 (2019) (“CAA”).

In fact, the government’s position directly conflicts with this Court’s precedents, which instruct that, in assessing the range of relevant interests, statutory provisions cannot be considered in isolation but, rather, must be viewed in the “overall context” of the statutory scheme “under which respondents have sued.” *Clarke*, 479 U.S. at 401; *see also Indian River Cty. v. U.S. Dep’t of Transp.*, 945 F.3d 515, 530 (D.C. Cir. 2019) (“[i]n assessing whether a plaintiff’s interests fall within the zone-of-interests protected by a statute, we must consider the ‘context and purpose’ of the relevant

statutory provisions and regulations at issue,” and consider the specific provision claimed to be violated in combination with other provisions to which it bears an “integral relationship”) (quoting *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians*, 567 U.S. at 226; other internal quotations omitted).

In the “overall context” of 2019 appropriations, the interests of Respondents and those similarly situated come squarely within the zone of interests. Although the government fixates almost exclusively on the general transfer authority in Section 8005, its zone of interests analysis glosses over the relationship between that provision and the CAA; *see also Ctr. for Biological Diversity v. Trump*, 453 F. Supp. 3d 11, 42 (D.D.C. 2020) (holding that “the CAA may indeed embrace the conservationist interests that Plaintiffs seek to protect”). In that statute, Congress not only rejected the Trump Administration’s border wall funding request, reducing it to \$1.375 billion “for the construction of primary pedestrian fencing, including levee pedestrian fencing,” CAA Div. A, Tit. II, § 230(a)(1), but also specifically rejected the geographic scope of the request by limiting the appropriated funds to the Rio Grande Valley (“RGV”) Sector. *Id.* § 230(b).

Of particular importance to the zone of interests analysis, Congress in the CAA also expressly prohibited the use of border wall funding in four areas of environmental significance within the RGV Sector—including two units of federal public lands within the National Wildlife Refuge System (Santa Ana National Wildlife Refuge and the Vista del Mar Ranch tract of

the Lower Rio Grande Valley National Wildlife Refuge), a Texas State Park (Bentsen-Rio Grande Valley State Park), and a private nature reserve (the National Butterfly Center), as well as a municipal area of historical and cultural significance (La Lomita Historical Park). *Id.* § 231(1)–(5). Plainly, Congress would not have adopted these express limitations on border wall funding if it was totally disinterested in ensuring the compatibility of ecological, historical, and cultural values with interests in border security. *See Lexmark Int’l*, 572 U.S. at 128, 130 (explaining that courts use “traditional principles of statutory interpretation” to determine if a plaintiff “arguably” falls within the zone of interests of the pertinent statutes).¹⁴

Consequently, when the “overall context,” *Clarke*, 479 U.S. at 401, of Congress’s border wall funding enactments is properly considered, it “requires no guesswork” to conclude that environmental, historical, and cultural interests such as those represented and advanced by Respondents (and mirrored by *Amici*) fit comfortably within the relevant zone of interests for APA purposes. *Lexmark Int’l*, 572 U.S. at 131. Certainly, Respondents’ interests are not “so marginally related to or inconsistent with the purposes implicit” in the statutory scheme that it “cannot reasonably be assumed that Congress” wanted to foreclose Respondents from

¹⁴ Even if the Court accepts Petitioners’ argument that the zone of interests precludes claims under the CAA, which it does not, Respondents need not fall within the zone of interests for their ultra vires claims. *Ctr. for Biological Diversity v. Trump*, 453 F. Supp. 3d at 48.

bringing suit. *Id.* at 129-30 (internal quotations omitted).

The government’s sweeping contention that no plaintiff can seek judicial review of the Department of Defense’s compliance with congressional limits on appropriations—except, perhaps, those “claiming an entitlement to transferred funds” pursuant to statutes such as Section 8005, Pet. Br. at 28 n.3—means that those with concrete injuries from the devastating border wall that fall within the range of interests of the CAA are denied access to judicial review. This includes *Amici*, whose interests and harms are enumerated in this brief so that the Court can fully appreciate the dire implications of the government’s position.



CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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App. 1

APPENDIX



Before construction at Organ Pipe Cactus National Monument.

Photo: Laiken Jordahl

App. 2



After construction at Organ Pipe Cactus National Monument (same location).
Photo: Laiken Jordahl