No. 20-138

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 AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF RESPONDENTS

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Founded in 1973, PACIFIC LEGAL FOUNDATION is a nonprofit, tax-exempt corporation organized under the laws of the state of California for the purpose of engaging in litigation in matters affecting the public interest. PLF provides a voice in the courts for Americans who believe in limited government, private property rights, and individual freedom.

PLF is the most experienced public-interest legal organization defending the constitutional principle of separation of powers in the arena of administrative law. PLF's attorneys have participated as lead counsel in several cases involving judicial review of agency action under the Administrative Procedure Act. *See, e.g.*, *Weyerhaeuser v. U.S. Fish & Wildlife Serv.*, 139 S. Ct. 361 (2018); *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 136 S. Ct. 1807 (2016); *Kent Recycling Servs., LLC v. U.S. Army Corps of Eng'rs*, 136 S. Ct. 2427 (2016); *Sackett v. Environmental Protection Agency*, 566 U.S. 120 (2012). PLF attorneys have also generated substantial scholarship on this issue. *See, e.g.*, Damien M. Schiff, *Judicial Review Endangered: Decisions Not to Exclude Areas From Critical Habitat Should Be Reviewable Under the APA*, 47 Envtl. L. Rep. 10,352 (2017).[1]

[1] All parties have consented to the filing of this brief. PLF affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than PLF or its counsel made a monetary contribution to its preparation or submission.

Introduction and Summary of Argument

The Administrative Procedure Act provides that any person "adversely affected" by agency action "is entitled to judicial review thereof," 5 U.S.C. § 702, unless Congress expressly exempts the agency action from judicial review or the action is the sort traditionally understood as unreviewable, *id.* § 701(a). *See Weyerhaeuser v. U.S. Fish and Wildlife Serv.*, 139 S. Ct. 361 (2018). Under this text, the answer to the first question presented is straightforward.

In 2019, the Acting Secretary of Defense diverted money Congress had appropriated for one purpose to instead fund border-wall construction, an action which Sierra Club and the other plaintiffs (collectively, Sierra Club) assert violates Section 8005 of the Department of Defense Appropriations Act, Pub. L. No. 115-245, Div. A, Tit. VIII, 132 Stat. 2981, 2999 (2019). Pet. App. 17a. The Government does not dispute that Sierra Club is adversely affected by the Acting Secretary of Defense's action. Nor does the Government argue that any statute precludes review or that the challenged action fits any historical category of unreviewable agency action. This is enough to hold that Sierra Club has a cognizable claim under the APA.

Yet the Government argues that the claim is foreclosed by the "zone-of-interests" test, which purports to limit judicial review to those interests Congress intended to protect under the relevant statute. *See Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 153-54 (1970). This Court has rejected zone-of-interests test arguments in all but one of the APA cases in which they were raised. *See infra* Part II. It should reject the

argument again here but also take the further step of acknowledging that the zone-of-interests test has no place in the Court's interpretation of the APA. The test has no foundation in the APA's text and invites courts to speculate about the purposes underlying statutes wholly divorced from the text, speculation which this Court has rightly considered improper in other contexts.

Even if the zone-of-interests test were a proper limit on judicial review under the APA, it should be no obstacle here. The Government's arguments to the contrary rely on a miserly view of the purposes served by the Constitution's separation of powers, a view that this Court has correctly rejected. *See Bond v. United States*, 564 U.S. 211, 222 (2011). The Appropriations Clause, a structural protection for the separation of powers, protects Congress' power of the purse not for its own sake but to limit government power and, thereby, preserve individual rights and liberty. By constraining Executive Branch officials' discretion to depart from Congress' appropriation decisions, Section 8005 secures this structural protection and, therefore, implicates the same broad interests.

Argument

I. The Zone-of-Interests Test Is Unsupported by the APA's Text

Under the APA, any person "adversely affected or aggrieved by agency action within the meaning of a relevant statute[] is entitled to judicial review thereof." 5 U.S.C. § 702. Congress provided only two, narrow exceptions to this broad right of review: (1) when the relevant statute explicitly precludes

judicial review and (2) when the action is "committed to agency discretion by law." *See id.* § 701(a).

Giving effect to the APA's broad text, this Court has recognized a strong presumption that agency actions are judicially reviewable. *See Abbott Labs. v. Gardner*, 387 U.S. 136, 140-41 (1967). To overcome this presumption, an agency bears the "heavy burden," *Mach Mining, LLC v. E.E.O.C.*, 575 U.S. 480, 486 (2015), to establish by "clear and convincing" evidence that Congress intended to foreclose review, *Dunlop v. Bachowski*, 421 U.S. 560, 567 (1975).

The presumption's strength is such that the APA's two explicit exceptions are narrowly applied. Therefore, any statute purporting to limit judicial review under the APA is interpreted narrowly whenever possible. *See Guerrero-Lasprilla v. Barr*, 140 S. Ct. 1062, 1068-69 (2020) (statute limiting judicial review to "questions of law" does not bar review of a "mixed question of law and fact"). *See also Kucana v. Holder*, 558 U.S. 233, 251 (2010). Likewise, the Court has read the exception for actions committed to agency discretion by law "'quite narrowly,' confining it to those rare 'administrative decision[s] traditionally left to agency discretion[.]'" *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1905 (2020) (quoting *Weyerhaeuser Co.*, 139 S. Ct. at 370, and *Lincoln v. Vigil*, 508 U.S. 182, 191 (1993)).

For the same reasons that the APA's explicit exceptions are construed narrowly, courts should not create other exceptions by fiat. *See* Jonathan R. Seigel, *Zone of Interests*, 92 Geo. L.J. 317, 343 (2004) ("Because Congress has the power to specify who may challenge agency action and has exercised it in Section

702 . . . there is no room for a separate, judicially crafted body of law delineating which parties are entitled to seek judicial review of agency action under the APA."). Yet that's precisely how the zone-of-interests test arose. In adopting the test, this Court added "a gloss on the meaning" of § 702. *Clarke v. Securities Industry Ass'n*, 479 U.S. 388, 395-96 (1987). It "supplied this gloss by adding to" § 702's adversely affected or aggrieved requirement "the additional requirement that 'the interest sought to be protected by the complainant [be] arguably within the zone of interests . . . .'" *Id.* (citation omitted).

The zone-of-interests test is unsupported by the text, structure, and intent of § 702. The Court's conclusory suggestion to the contrary—*see Lujan v. National Wildlife Federation*, 497 U.S. 871, 883 (1990) (suggesting § 702's reference to "within the meaning of a relevant statute" as a textual hook for the test)[2]—collapses under scrutiny. Under the last-antecedent rule, "within the meaning of a relevant statute" does not modify "adversely affected" but "agency action." *See Lockhart v. United States*, 136 S. Ct. 958, 962-63 (2016). *See also* Black's Law Dictionary 1532-33 (10th ed. 2014) ("[Q]ualifying words or phrases modify the words or phrases immediately preceding them and not words or phrases more remote, unless the extension is necessary from the context or the spirit of the entire writing."); Antonin Scalia & Bryan A. Garner,

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[2] *See also Nat'l Credit Union Admin. v. First Nat'l Bank & Trust Co.*, 522 U.S. 479, 504 (1998) ("[R]espondents must establish that the injury they assert is 'within the meaning of a relevant statute,' *i.e.* satisfies the zone-of-interests test.").

READING LAW: THE INTERPRETATION OF LEGAL TEXTS 144 (2012).[3]

The structure and intent of § 702 reinforce the natural reading of the test. Determining what constitutes a reviewable agency action requires careful consideration of the context of an agency decision within the broader statutory scheme. In *Sackett v. Environmental Protection Agency*, for instance, this Court considered whether an administrative compliance order issued under the Clean Water Act was subject to pre-enforcement review under § 702. 566 U.S. 120 (2012). To answer that question, the Court looked to the role administrative compliance orders play under the Clean Water Act, the consequences resulting from such orders under the statute, and whether the statute provided reasonable, alternative avenues for judicial review. *See id.* at 125-28. This Court's other APA cases are in accord. *See, e.g.*, *U.S. Army Corps of Eng'rs v. Hawkes Co., Inc.*, 136 S. Ct. 1807, 1813-16 (2016) (analyzing the role and effect of a jurisdictional determination under the Clean Water Act to conclude that its issuance is a reviewable agency action); *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (analyzing the role and effect of a biological opinion

[3] Section 702's opening phrase, referring to any person "suffering legal wrong because of agency action," codifies a pre-APA body of law authorizing judicial review where an agency adjudication or order deprives one of a legal right. *See, e.g.*, *Alabama Power Co. v. Ickes*, 302 U.S. 464, 479 (1938). Because "legal wrong" provides the relevant limits, that phrase does not incorporate some of the restrictions, including "within the meaning of a relevant statute," that apply to review under § 702's "adversely affected or aggrieved" clause. *See Ass'n of Data Processing Serv. Orgs.*, 397 U.S. at 174 & n.8 (Brennan, J., concurring).

under the Endangered Species Act to conclude its issuance is a reviewable agency action). And, as the strong presumption of judicial review recognizes, the intent of the APA's judicial review provisions is "to enlarge the class of people who may protest administrative action." *See Ass'n of Data Processing Serv. Orgs.*, 397 U.S. at 154-55.

National Wildlife Federation does not address the last-antecedent rule, nor suggest why a departure from that rule is necessary from "the context or the spirit of the entire writing." *See Lockhart*, 136 S. Ct. at 962-63 (quoting Black's Law Dictionary 1532-33). Instead, *National Wildlife Federation* simply asserts that the zone-of-interests test lurks in the phrase "within the meaning of a relevant statute" without offering any supporting analysis. *See* 497 U.S. at 883. No subsequent decision from this Court offers a cogent argument in support of *National Wildlife Federation*'s unexplained suggestion. *See, e.g.*, *Thompson v. North American Stainless LP*, 562 U.S. 170, 177-78 (2011); *Fed. Election Comm'n v. Akins*, 524 U.S. 11, 19-20 (1998); *Nat'l Credit Union Admin.*, 522 U.S. at 504; *Director, Office of Workers' Comp. Programs, Dep't of Labor v. Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 126-27 (1995); *Air Courier Conf. of Am. v. American Postal Workers Union AFL-CIO*, 498 U.S. 517, 523-24 (1991).

In fact, the zone-of-interests test is founded on an analogy to tort law, not § 702's text. *See Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 130 n.5 (2014).[4] For that reason, the Court has found

[4] Under the common law of torts, a mere violation of a statute will not be deemed proof of negligence "unless the statute 'is interpreted as designed to protect the class of persons in which

the test more useful for analyzing causes of action between private parties than for interpreting § 702. *See Lexmark*, 572 U.S. at 130 (distinguishing other cases from those under the APA's "generous review provisions"). *See also infra* Part II (explaining that this Court has only once in fifty years denied review in an APA case under the zone-of-interests test). Whatever the merits of the analogy to tort law for analyzing claims between private parties, the analogy has no persuasive force when interpreting the APA's right of review, which raises unique separation of powers and accountability concerns.

Under § 702, the "meaning of the relevant statute" informs the reviewable agency-action inquiry, not whether an adverse effect entitles a party to judicial review. According to the APA's text, that latter inquiry is simple: any adverse effect that satisfies the requirements of Article III standing gives rise to a cognizable APA claim. *See Clarke*, 479 U.S. at 395-96 (equating "adversely affected" with suffering an injury-in-fact).[5] Here, the Government does not dispute that Sierra Club has standing nor that it is adversely affected by the challenged agency action.

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the plaintiff is included, against the risk of the type of harm which has in fact occurred as a result of its violation.'" *Lexmark*, 572 U.S. at 130 n.5 (quoting W. Page Keeton, et al., *Prosser and Keeton on Law of Torts* § 36, pp. 229-30 (5th ed. 1984)).

[5] The APA does not expressly require an adverse effect to constitute an injury-in-fact for standing purposes. *See* 5 U.S.C. § 702. However, that limitation is derived from the Constitution and cannot be set aside by Congress. *See Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547-48 (2016). The zone-of-interests test enjoys no such constitutional foundation.

Therefore, Sierra Club has a claim and the Ninth Circuit's holding on that point should be affirmed.[6]

II. In This Court, the Zone-of-Interests Test Has Been a Solution in Search of a Problem

This Court has considered the zone-of-interests test in the context of an APA claim on twelve occasions. In eleven of those cases, the Court rejected the agency's zone-of-interests defense.[7] The lone exception—*Air Courier Conference of America v. American Postal Workers Union AFL-CIO*, 498 U.S. 517 (1991)—epitomizes the notion that "bad facts make bad law."

In that case, Postal Service unions challenged a Postal Service regulation suspending the agency's monopoly for certain categories of mail. *Id*. at 519. *See* 39 U.S.C. § 601(b) (authorizing the Postal Service to suspend its monopoly if "in the public interest"). The unions challenged this suspension on the theory that

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[6] Although Sierra Club does not argue that the zone-of-interests test should be discarded for purposes of APA claims, that question is fairly included within the first question presented and is a purely legal question that is an integral part to determining whether that test bars the claim presented here. Therefore, it is a proper basis on which to resolve this case. *See Lewis v. Clarke*, 137 S. Ct. 1285, 1292 (2017).

[7] *See Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209 (2012); *North Am. Stainless, LP*, 562 U.S. 170; *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139 (2010); *Akins*, 524 U.S. 11; *Nat'l Credit Union Admin.*, 522 U.S. 479; *Bennett*, 520 U.S. 154; *Nat'l Wildlife Fed'n*, 497 U.S. 871; *Clarke*, 479 U.S. 388; *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 n.4 (1986); *Arnold Tours, Inc. v. Camp*, 400 U.S. 45 (1970) (per curiam); *Barlow v. Collins*, 397 U.S. 159 (1970); *Ass'n of Data Processing Serv. Orgs.*, 397 U.S. 159.

allowing private competition could reduce Postal Service revenues which, in turn, "might have an adverse effect on employment opportunities of postal workers." *Am. Postal Workers Union*, 498 U.S. at 524. The Court found no evidence in the statute's text or legislative history that the Postal Service monopoly was intended to protect postal employment and, therefore, held that the claim failed the zone-of-interests test. *Id.* at 525-30.

Yet *American Postal Workers Union* is notable less for its zone-of-interests holding than the unusual steps taken to get there. First, this Court ignored a serious standing defect.[8] The Court declined to consider whether the union asserted an actual (as opposed to hypothetical) injury-in-fact because the standing issue "was not appealed." *See Am. Postal Workers Union*, 498 U.S. at 523-24. But, as this Court has regularly affirmed since *American Postal Workers Union* was decided, courts have "an independent obligation to assure that standing exists, regardless of whether it is challenged by any of the parties." *See, e.g.*, *Summers v. Earth Island Inst.*, 555 U.S. 488, 499 (2009).[9] Second, the Court reached the zone-of-interests test question even though Congress had expressly exempted the Postal Service from the APA's

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[8] The union's standing relied on two levels of speculation: that suspending the monopoly for one type of mail would appreciably reduce Postal Service revenue and that this "might," in turn, have an adverse effect on postal employment. *Am. Postal Workers Union*, 498 U.S. at 523-24.

[9] This rule was first articulated in a case decided the year before *American Postal Workers Union*. *See FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231 (1990). Yet *American Postal Workers Union* provides no explanation why the Court ignored the rule in that case. *See* 498 U.S. at 523.

rulemaking and judicial-review provisions. *Am. Postal Workers Union*, 498 U.S. at 522-23 (declining to consider this issue because it was raised for the first time on appeal). *See* 39 U.S.C. § 410(a). Thus, the *only* time this Court has had cause to rely on the zone-of-interests test under the APA was a case in which it declined to consider two easier paths to the same result. The Court could, thus, eliminate the test without any significant interference with its past precedents.

III. The Zone-of-Interests Test Invites Courts to Impose Their Subjective View of a Statute's Purpose

This Court has acknowledged that its articulation of the zone-of-interests test provides little guidance to the lower courts. *See Clarke*, 479 U.S. at 396 ("The 'zone of interest' formula . . . has not proved self-explanatory[.]"). *See also* Seigel, *supra*, at 317-18 ("Almost everything . . . about this 'zone of interests' test, however, remains a mystery.").

Indeed, the test is subject to several unresolved contradictions. In *American Postal Workers Union*, this Court's holding that the unions' claim was barred rested on a lack of evidence in a statute's text and legislative history that Congress intended to protect the plaintiffs. 498 U.S. at 525-30. But the Court has subsequently said that the zone-of-interests test "do[es] not require any 'indication of congressional purpose to benefit the would-be plaintiff.'" *See Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians*, 567 U.S. at 225 (quoting *Clarke*, 479 U.S. at 399-400). The Court has said that the zone-of-interests test is not determined by generalities but should instead be applied "by reference to the particular provision of law

upon which the plaintiff relies." *Bennett*, 520 U.S. 175-76. In other cases, the Court has rejected this myopic approach, explaining that the test requires consideration of "the overall context" of the law invoked by the plaintiff, including "any provision that helps us to understand Congress' overall purposes[.]" *Clarke*, 479 U.S. at 401.

Without any objective standard from this Court, lower courts have applied the zone-of-interests test subjectively, favoring some parties over others according to the courts' view of a statute's highest purpose. *See* Seigel, *supra*, at 341 (The zone-of-interests test has "produced a system in which different categories of plaintiffs receive unfairly differing treatment."). The Ninth Circuit, for instance, has held that only those deemed to represent "environmental" interests may bring claims under the National Environment Policy Act (NEPA), a statute which governs how agencies evaluate tradeoffs between environmental and other considerations. *See Nevada Land Action Ass'n v. U.S. Forest Serv.*, 8 F.3d 713, 716 (9th Cir. 1993). So applied, the zone-of-interests test introduces unjustified bias into the law. The Ninth Circuit's NEPA rule, for instance, ensures that anyone who seeks more regulation of private conduct on environmental grounds has a claim, but many who object to such regulation issued on the basis of arbitrary or biased analysis of environmental tradeoffs do not. *See id.*

These subjective applications of the zone-of-interests test deny parties' their right to judicial review not because a statute's text requires that result—that situation is already directly addressed by the APA, *see* 5 U.S.C. § 701(a)(1)—but because courts

divine Congress' unstated intention to preclude review from (the court's understanding of) a statute's purpose. So applied, the test adopts a free-wheeling approach to statutory interpretation that this Court has repeatedly rejected. *See, e.g.*, *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2468 (2020) ("[T]o ascertain and follow the original meaning of the law before us . . . is the only 'step' proper for a court of law."); *Nat'l Ass'n of Mfrs. v. Dep't of Defense*, 138 S. Ct. 617, 632 (2018) (rejecting an interpretation because it was "completely unmoored from the statutory text"). *Cf.* Damien M. Schiff, *Purposivism and the "Reasonable Legislator,"* 33 Wm. Mitchell L. Rev. 1081, 1092 (2007) (such an approach can "cause a statute to morph over time so that it reflects more and more a particular lobby in the enacting Congress, thereby giving effect to that lobby's views to a degree not democratically justifiable").

"[N]o legislation pursues its purposes at all costs." *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987) (per curiam). *See* John F. Manning, *What Divides Textualists From Purposivists?*, 106 Colum. L. Rev. 70, 92, 104 (2006). Instead, enacting legislation is "the art of compromise" between conflicting or competing interests. *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1725 (2017). To limit judicial review to only a subset of those interests "frustrates rather than effectuates" legislative intent. *See Rodriguez*, 480 U.S. at 526.

This concern is especially weighty in the context of the APA's judicial review provision. Congress has delegated vast swaths of its power to Executive Branch agencies. *See Free Enterprise Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 499

(2010) (The administrative state "wields vast power and touches almost every aspect of daily life[.]"); *Alden v. Maine*, 527 U.S. 706, 807 (1999) (Souter, J., dissenting) ("[T]he administrative state with its reams of regulations would leave [the Founders] rubbing their eyes."). Such delegations present a difficult balancing-act: how to give agencies enough power to achieve congressional aims but not so much that they can go well beyond them. That balance has momentous implications for the Constitution's separation of powers. *See City of Arlington, Tex. v. F.C.C.*, 569 U.S. 290, 315 (2013) (Roberts, C.J., dissenting) ("It would be a bit much to describe [the concentration of power within federal agencies] as 'the very definition of tyranny,' but the danger posed by the growing power of the administrative state cannot be dismissed." (quoting The Federalist No. 47, p. 324 (J. Cooke ed. 1961) (J. Madison)).

But the balance is precarious. This Court "know[s]—and know[s] that Congress knows—that legal lapses and violations occur, and especially so when they have no consequence." *Mach Mining, LLC*, 575 U.S. at 488-89. That is why the Court "has so long applied a strong presumption favoring judicial review of administrative action." *Id.* at 489.

Absent such review, an agency's "compliance with the law would rest in the [agency's] hands alone." *Id.* at 488. Congress could not easily police agencies' exercise of delegated power, as any legislative response would be subject to presidential veto. *See I.N.S. v. Chadha*, 462 U.S. 919 (1983). Nor could the President. Elena Kagan, *Presidential Administration*, 114 Harv. L. Rev. 2245, 2250 (2001) ("[N]o President (or his executive office staff) could, and presumably

none would wish to, supervise so broad a swath of regulatory activity."). *See* Richard P. Nathan, THE ADMINISTRATIVE PRESIDENCY 2 (1986) (quoting President Truman as complaining, "I thought I was the president, but when it comes to these bureaucrats, I can't do a damn thing").

Thus, the right of review provided by the APA is the primary mechanism for ensuring that agencies fulfill congressional directives while also not acting contrary to or in excess of their delegated authority. *Cf. City of Arlington*, 569 U.S. at 327 (Roberts, C.J., dissenting) ("Our duty to police the boundary between the Legislature and the Executive is as critical as our duty to respect that between the Judiciary and the Executive."). By imposing atextual limits on judicial review, the zone-of-interests test undermines without justification the important role the APA plays in ensuring agency accountability and preserving the separation of powers. *See Ass'n of Data Processing Serv. Orgs.*, 397 U.S. at 175 n.9 (Brennan, J., concurring) (warning that courts should be especially wary of the zone-of-interests test where withholding review "would, in effect, commit the action wholly to agency discretion"). The zone-of-interest test tips the scales set by Congress, inviting litigation that accords with agency power while turning away litigation that seeks to enforce its limits.[10] *See Haitian Refugee Ctr. v. Gracey*, 809 F.2d 794, 811 n.14 (D.C. Cir. 1987) (noting the zone-of-interests test's troubling

[10] Under the Government's theory, for instance, a would-be contractor would likely have a claim against the Acting Secretary for arbitrarily declining to transfer money to a project for which that contractor would be hired, *see Weyerhaeuser*, 139 S. Ct. at 370-72, but a party adversely affected by an unlawful transfer would not.

implications for claims against *ultra vires* agency action).

IV. Even if the Zone-of-Interests Test Were Proper, Separation of Powers Provisions Like § 8005 Implicate a Wide Range of Individual Interests

Even were the zone-of-interests test a proper limit on the APA's right of review, it should be no obstacle to Sierra Club's claims here. This Court has emphasized that the zone-of-interests test is not "especially demanding" in the APA context. *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians*, 567 U.S. at 225. The test "do[es] not require any 'indication of congressional purpose to benefit the would-be plaintiff.'" *Id*. (quoting *Clarke*, 479 U.S. at 399-400). Instead, it is enough that an interest is "arguably" implicated by a statute. *Bennett*, 520 U.S. at 162.

Contrary to the Government's argument, § 8005 serves to protect not merely Congress' interest in preserving its power. Gov. Br. at 24-27. Instead, § 8005 must be understood "in the overall context" of the appropriations process and the role of the Appropriations Clause in the separation of powers. *See Clarke*, 479 U.S. at 401. The Constitution gives Congress alone the power of the purse. *See* U.S. Const. art. I, § 9, cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law[.]"). Section 8005 preserves this structural guarantee for the separation of powers by constraining Executive Branch discretion to reallocate appropriated money. Relevant here, the clause prevents an agency from simply reversing Congress' appropriations decisions by transferring money to

programs that Congress considered and declined to fund. *See* Pub. L. No. 115-245, Div. A, Tit. VIII. Consequently, the interests implicated by § 8005 are the same as those implicated by the Appropriations Clause.[11]

"Separation-of-powers principles are intended, in part, to protect each branch of government from incursion by the others." *Bond*, 564 U.S. at 222. "Yet the dynamic between and among the branches" is not the only or primary purpose. *Id.* Instead, "the structural principles secured by the separation of powers protect the individual as well." *Id.* Therefore, this Court has held that prudential concerns, including the zone-of-interests test, *id.* at 218, do not bar individuals from asserting their interests through separation-of-powers claims. *Id.* at 222-24.

Suppose, for instance, that Congress delegated significant authority to an officer who was subject to Senate confirmation and, to preserve a measure of democratic accountability and oversight, prohibited that officer from subdelegating the authority to a subordinate. Under the Government's theory, such provision would implicate only the interests of the Senate and the officer. *See* Gov. Br. 24-27. But this would be an unreasonably narrow understanding of the purpose and effect of such a prohibition. A subdelegation prohibition would vindicate Appointments Clause principles and, therefore,

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[11] To avoid any consideration of the Appropriations Clause, the Government offers a non sequitur based on *Dalton v. Specter*, 511 U.S. 462 (1994). *See* Gov. Br. at 32. Whether Sierra Club has a constitutional claim independent of its APA claim is irrelevant to whether this Court can recognize the broad separation of powers interests implicated by § 8005.

implicate the same broad individual interests as that clause. Thus, anyone adversely affected by a subordinate's unlawful exercise of the delegated power would have a cognizable claim under the APA. *See Bond*, 564 U.S. at 223 (observing, by reference to *Free Enterprise Fund*, 561 U.S. 477, that prudential concerns are no obstacle to individuals enforcing separation of powers principles under the Appointments Clause).

So too for § 8005 and the Appropriations Clause. When Congress decides what to fund—and, just as importantly, what not to fund—it considers the consequences of those decisions for individual rights and interests. If, for instance, Congress declined to fund an infrastructure project because of its anticipated environmental impacts only to have an Executive Branch official override Congress' choice, this would implicate not only Congress' interest in preserving its power but also the individual interests affected by the project's environmental impacts.

Consequently, if the zone-of-interests test is to be retained, this Court should adopt a *per se* rule that it is no obstacle to judicial review in cases that implicate structural separation of powers principles. *Cf. Bond*, 564 U.S. at 218.

Conclusion

For the foregoing reasons, this Court should affirm the Ninth Circuit and hold that the zone-of-interests test does not constrain judicial review under the APA or, if it does, that it is no obstacle here due to the broad

range of individual interests implicated by the separation of powers.

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Respectfully submitted,

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