ORAL ARGUMENT NOT YET SCHEDULED

No. 26-5072

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

JOE NEGUSE, IN HIS CAPACITY AS A MEMBER OF THE U.S. HOUSE OF REPRESENTATIVES, *ET AL.*,
Plaintiffs-Appellees,

v.

U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, *ET AL.*,
Defendants-Appellants,

On Appeal from the United States District Court
for the District of Columbia
No. 25-cv-02463
Hon. Jia M. Cobb, U.S. District Judge

BRIEF OF AMICI CURIAE PROFESSORS GILLIAN METZGER, SAMUEL BAGENSTOS, ELOISE PASACHOFF, ZACHARY PRICE, AND MATTHEW LAWRENCE

Gabriel M. Bronshteyn
MUNGER, TOLLES & OLSON LLP
560 Mission Street
Twenty-Seventh Floor
San Francisco, CA 94105
(415) 512-4000
Gabriel.Bronshteyn@mto.com

Donald B. Verrilli, Jr.
Ginger D. Anders
MUNGER, TOLLES & OLSON LLP
601 Massachusetts Ave. NW,
Suite 500E
Washington, DC 20001-5369
(202) 220-1100
Donald.Verrilli@mto.com
Ginger.Anders@mto.com

Counsel for Amici Curiae

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and *amici*

All parties and *amici* appearing before the district court and in this Court are listed in the Brief for Appellants U.S. Immigration and Customs Enforcement, et al.

B. Rulings under review

References to the rulings at issue appear in the Brief for Appellants U.S. Immigration and Customs Enforcement, et al.

C. Related cases

This case has not previously been before this Court, and *amici* are aware of no related cases pending before this or any other court.

Dated: July 31, 2026

/s/ Donald B. Verrilli, Jr.
Donald B. Verrilli, Jr.

STATEMENT REGARDING CONSENT TO FILE AND SEPARATE BRIEFING

Pursuant to Federal Rule of Appellate Procedure 29(a), *amici* submit this brief with the consent of all parties.

Pursuant to D.C. Circuit Rule 29(d), counsel for *amici* certifies that a separate brief is necessary. As professors of constitutional and administrative law with particular expertise in appropriations, *amici* are in a unique position to provide the Court with insight on the constitutional and appropriations issues raised by this case. Further, to the knowledge of counsel, this brief presents arguments that no other *amicus* is presenting.

Dated: July 31, 2026

/s/ Donald B. Verrilli, Jr.
Donald B. Verrilli, Jr.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

* Authorities upon which we chiefly rely are marked with asterisks.

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

OTHER AUTHORITIES

TABLE OF AUTHORITIES
(continued)

STATUTES AND REGULATIONS

All applicable statutes and regulations are contained in the Brief for Appellants U.S. Immigration and Customs Enforcement, et al.

INTEREST OF *AMICI CURIAE*[1]

Amici curiae are professors who have taught and written on administrative and constitutional law, with an emphasis on appropriations law. Professor Gillian Metzger is the Harlan Fiske Stone Professor of Constitutional Law at Columbia Law School. Professor Samuel Bagenstos is the Frank G. Millard Professor of Law at the University of Michigan. Professor Eloise Pasachoff is the Agnes Williams Sesquicentennial Professor of Law at the Georgetown University Law Center. Professor Zachary Price is the Eucalyptus Foundation Endows Chair and Professor of Law at the University of California. Matthew Lawrence is Associate Dean of Faculty and Professor of Law at Emory University School of Law.

The positions taken in this brief are those of the *amici* alone and should not be attributed to any institution with which the *amici* are or have been affiliated.

---

[1] *Amici* certify that no party's counsel authored this brief in whole or in part; no party or party's counsel contributed money intended to fund this brief; and no person other than *amici* and their counsel contributed money intended to fund this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Constitution vests in Congress exclusive and plenary control over appropriations. That power is the "bulwark of the Constitution's separation of powers" and a "particularly important . . . restraint . . . on [the] Executive Branch . . ." *U.S. Dep't of Navy v. FLRA*, 665 F.3d 1339, 1347 (D.C. Cir. 2012). Congress thus has authority to dictate the purposes for which funds may be used—and, just as fundamentally, may not be used. Congress exercises the latter power by enacting appropriations riders—provisions in appropriations laws that restrict the lawful uses of appropriated funds. Appropriations riders are a cardinal feature of Congress's power with respect to the Executive. Because an Executive agency cannot act without using appropriations, Congress's prohibition on using federal funds for a particular activity effectively constrains the Executive from engaging in that activity during the period of the appropriation.

One way that Congress has used this appropriations power is to enforce its oversight authority. As relevant here, since 2020, Congress has exercised its power over appropriations to prohibit the Department of Homeland Security ("DHS") from interfering with the ability of Members of Congress to conduct oversight over DHS detention facilities. Specifically, in an appropriations rider known as Section 527, a version of which has appeared in each subsequent annual appropriations act until this year, Congress has prohibited DHS from using appropriated funds to "prevent"

Members of Congress "from entering, for the purpose of conducting oversight," certain DHS facilities. Plaintiffs here are Members of Congress who allege that DHS violated Section 527 by using restricted funds to promulgate a policy that indeed "prevent[s]" them from accessing various DHS facilities. In response, Appellants (referred to in this brief simply as DHS), contend that the Members lacked standing, that the Antideficiency Act ("ADA") impliedly precludes judicial review of DHS's compliance with Section 527, and that DHS did not use encumbered funds in violation of Section 527 because DHS made retrospective "adjustments" to allocate expenditures to unencumbered funds.

As appropriations law scholars, Amici focus primarily on DHS's contention that the ADA precludes review and DHS's defense of its retrospective "adjustments." Amici also note their agreement with Plaintiffs and the district court that Plaintiffs here have standing to assert their individualized injuries.

First, the ADA does not impliedly preclude suits under the Administrative Procedure Act ("APA") to review DHS's compliance with Section 527. While the ADA generally prohibits government officials from obligating unappropriated funds and provides Executive-administered retrospective remedies punishing employees who violate its prohibitions, Section 527 separately and independently prohibits using appropriated funds for a particular forbidden purpose. Plaintiffs' suit accordingly seeks to enforce Section 527, not the ADA, and it seeks the sort of prospective relief authorized by the APA that is nowhere provided for in the ADA: an order preventing DHS from implementing its policy going forward. Nothing in the ADA permits any inference—much less the strong inference necessary to overcome the APA's presumption of judicial review—that Congress intended the ADA to preclude such suits to enforce entirely *separate* statutory prohibitions on using appropriated funds for particular activities. Such a conclusion would confer on the Executive essentially unreviewable authority to decide whether to comply with Congress's restrictions on appropriated funds, in derogation of Congress's plenary control over appropriations. This Court should construe the ADA so as to avoid those significant constitutional concerns.

Second, Amici agree with Plaintiffs that Plaintiffs have standing to assert their individualized informational injuries from being denied access to particular DHS facilities.

Finally, in considering whether DHS has violated Section 527, the Court should apply established principles of appropriations law, with due regard for the importance of not allowing the Executive to circumvent the appropriations rider by manipulating appropriations principles. DHS's policy should be upheld only if DHS is able to establish its promulgation and enforcement relied on funding that was unencumbered by Section 527.

ARGUMENT

I. The Antideficiency Act Does Not Preclude an APA Suit to Enforce Section 527

Section 527 is a legislative constraint on DHS's authority, violations of which are presumptively subject to judicial review under the APA. DHS cannot meet its "heavy burden" to establish that, in adopting the ADA's fiscal compliance mechanism for appropriations violations, "Congress 'prohibit[ed] all judicial review' of the agency's compliance" with appropriations riders like Section 527. *See Mach Mining, LLC v. EEOC*, 575 U.S. 480, 486 (2015) (citation omitted).

A. The Presumption of Judicial Review Applies to APA Suits Enforcing Section 527

1. Section 527 is an appropriations rider that prohibits DHS from using appropriated funds "to prevent" Members of Congress "from entering, for the purpose of conducting oversight," any DHS facility "used to detain or otherwise house aliens." Further Consolidated Appropriations Act, 2024, Pub. L. No. 118-47, § 527(a), 138 Stat. 460, 619. Congress has imposed the Section 527 rider as part of each of DHS's annual appropriations bills since 2020. JA93. Because the government can act only by spending appropriated funds, appropriations riders like Section 527 have the effect of prohibiting the disfavored activity for the period of the appropriation. In enacting such riders, "Congress decides that, under our constitutional scheme, for the duration of the appropriations denial, the specific activity" to which the rider is directed "is no longer within the realm of authorized

government actions." Kate Stith, *Congress' Power of the Purse*, 97 Yale L.J. 1343, 1361 (1988); Kevin M. Stack & Michael P. Vandenbergh, *Oversight Riders*, 97 Notre Dame L. Rev. 127, 157 (2021) ("Riders allow Congress to target particular activities the agencies may otherwise have authority to do and make those agency actions unlawful by denying funding to support those activities or projects.") Section 527 thus "denies [DHS] all means of engaging in the prohibited activity because employee salaries and other overhead costs are almost invariably paid out of appropriated funds." Stith, *supra*, 97 Yale L.J. at 1361; *see also Env't Def. Ctr. v. Babbitt*, 73 F.3d 867, 872 (9th Cir. 1995); Gillian E. Metzger, *Taking Appropriations Seriously*, 121 Colum. L. Rev. 1075, 1077 (2021). Specifically, Section 527 functions as an "[o]versight rider," whereby Congress "use[s] appropriations powers to enforce its own institutional prerogatives to obtain information from the executive branch and compliance with the law." Stack & Vandenbergh, *supra*, 97 Notre Dame L. Rev. at 178.

2. As with any other congressional mandate, agency actions in violation of appropriations riders like Section 527 are presumptively reviewable under the APA. The APA creates a "presumption favoring judicial review of administrative action." *Sackett v. EPA*, 566 U.S. 120, 128 (2012) (citation omitted). DHS never acknowledges the presumption of judicial review, Br. 53-57, but it applies with full force here. The APA's grant of judicial review does not distinguish between

appropriations laws and other statutes, authorizing review of any administrative actions that are "not in accordance with law" or "in excess of statutory . . . limitations." 5 U.S.C. § 706. Accordingly, this Court has consistently reviewed alleged agency violations of appropriations riders under the APA. *See, e.g., Sherley v. Sebelius*, 689 F.3d 776, 780 (D.C. Cir. 2012); *Kimberlin v. U.S. Dep't of Just.*, 318 F.3d 228, 231 (D.C. Cir. 2003); *Nat'l Treasury Emps. Union v. Devine*, 733 F.2d 114, 121 (D.C. Cir. 1984).

DHS emphasizes (Br. 55) that Section 527 does not amend substantive law, in that it does not create a freestanding prohibition on DHS's preventing Members from accessing DHS detention facilities, independent of the appropriations to which the rider is attached. That is true enough, but irrelevant here. Section 527 of course forbids DHS only from preventing congressional access *using the annual appropriation*, leaving DHS free to prevent access if it can find other funds with which to lawfully do so. But Section 527 is a prohibition nonetheless. *Contra* DHS Br. 58. If DHS uses the annual appropriation to prevent Members of Congress from accessing DHS detention facilities, it violates Section 527, and thus acts contrary to law and "in excess of statutory . . . limitations." 5 U.S.C. § 706. There is therefore no evident reason that violations of Section 527 should not be presumptively reviewable under the APA, and DHS suggests none.

B. DHS Cannot Overcome the Presumption of Judicial Review Here

Because "Congress rarely intends to prevent courts from enforcing its directives to federal agencies," DHS "bears a 'heavy burden' in attempting to show that Congress 'prohibit[ed] all judicial review' of the agency's compliance with [the] legislative mandate" in Section 527. *Mach Mining*, 575 U.S. at 486 (citation omitted). This "'well-settled' and 'strong presumption'" "can be overcome only by 'clear and convincing evidence' of congressional intent to preclude judicial review." *iTech U.S., Inc. v. Renaud*, 5 F.4th 59, 62 (D.C. Cir. 2021) (citation omitted). DHS cannot meet that burden.

1. At the outset, DHS elides a critical framing point: Plaintiffs do not seek to enforce the Antideficiency Act, but instead seek to enforce only Section 527. *Contra* DHS Br. 58. The two are distinct. The ADA is a fiscal accountability law that prohibits individual officials from making expenditures "exceeding an amount available in an appropriation"—regardless of the purpose for which the funds are expended. *See* 31 U.S.C. §§ 1341(a)(1)(A), 1349(a), 1350. The ADA thus "prevents unfunded monetary liabilities beyond the amounts Congress has appropriated." Stith, *supra*, 97 Yale L.J. at 1371. An appropriations rider like Section 527, by contrast, effects a more specific prohibition on using appropriated funds for disfavored purposes. Section 527 thus reflects a focused congressional policy judgment that DHS should not engage in the prohibited activity of preventing

congressional access to DHS facilities using annual appropriations. *See Nat'l Treasury Emps. Union*, 733 F.2d at 117 (appropriations rider reflected Congress's "express opposition to the changes in personnel regulations"). Plaintiffs' suit seeks to enforce that congressional policy judgment—not the ADA's more general prohibition on unfunded expenditures.

Thus, although a violation of an appropriations rider may also be a violation of the ADA, DHS Br. 55; U.S. Gov't Accountability Off., GAO-04-261SP, *Principles of Federal Appropriations Law* ("Redbook") 6-82 (3d ed.), *available at* https://www.gao.gov/legal/appropriations-law/red-book, the gravamen of Plaintiffs' suit is DHS's alleged violation of Section 527, not the ADA. Nothing in Plaintiffs' suit turns on the existence of the ADA: if the ADA did not exist, Plaintiffs would still contend that DHS's use of annual appropriations to promulgate and enforce policies that prevent Members of Congress from accessing DHS facilities violates Section 527's independent prohibition. JA487-88, JA492. Accordingly, Plaintiffs seek only an order enforcing Section 527, i.e., declaratory and injunctive relief that DHS's policy is invalid because its promulgation and enforcement violates Section 527. *Id*.

The preclusion question here is not whether Congress intended the ADA to preclude review of suits enforcing the ADA itself, but instead whether Congress intended in the ADA to preclude judicial review of suits to enforce any *separate* statute that independently prohibits the Executive's use of appropriated funds for congressionally-disfavored activities.

2. The ADA does not clearly and convincingly evidence any such congressional intent. The ADA prohibits expenditures exceeding appropriations, and subjects government employees who make such expenditures to "administrative discipline" and in some cases "criminal penalties" for violations. See 31 U.S.C. §§ 1341(a)(1)(A), 1349(a), 1350. The ADA also requires the "head of the agency" to report violations to the President and Congress. 31 U.S.C § 1351. The ADA's text says nothing about precluding judicial review at all, let alone review of violations of separate provisions in appropriations statutes that prohibit using funds for particular purposes. And nothing in the ADA's "structure" and "objectives" gives rise to any inference of congressional intent to preclude such claims, much less one sufficiently strong to overcome the presumption of review. *See Block v. Community Nutrition Institute*, 467 U.S. 340, 349-50 (1984).

Though no single consideration is dispositive in overcoming the presumption of review, the Supreme Court has "generally reserved" the preclusion-of-review exception to the APA for statutes in which Congress has provided for review of some statutory violations but not others, or for statutory claims by some parties but not others. *Franklin v. Massachusetts*, 505 U.S. 788, 820 n.21 (1992) (Stevens J., concurring in part and concurring in the judgment); *accord Sackett*, 566 U.S. at 129-

30 (describing such statutes). In such situations, the statutory framework provides "clear and convincing evidence of a legislative intent to preclude judicial review." *Franklin*, 505 U.S. at 820 n.21 (quotation marks and citations omitted). For instance, the Court has held that Congress's provision of especially "detailed mechanism[s] for judicial consideration of particular issues at the behest of particular persons," raises an inference that Congress intended to preclude review of claims under the same statute "at the behest of other persons." *Block*, 467 U.S. at 349; *United States v. Fausto*, 484 U.S. 439, 447 (1988) (provision of judicial review for claims by certain "employees" impliedly precluded review of similar claims by non-employees).

Here, the ADA contains no evidence that Congress intended to preclude claims like Plaintiffs'. The statute supplies no "mechanism for judicial consideration" of claims like Plaintiffs' at all, much less a "detailed" one. *Block*, 467 U.S. at 349. Instead, the ADA establishes a purely retrospective scheme of administrative discipline and potential criminal penalties for Executive Branch employees who violate the ADA, as well as notification of Congress of violations. Thus, the ADA focuses on deterring expenditures of unappropriated funds by providing for punishment of involved officials, and on providing Congress an opportunity to respond by either appropriating the necessary funds or conducting oversight. Stith, *supra*, 97 Yale L.J. at 1376-77. The ADA does not address judicial review even of claims premised solely on a violation of the ADA. And because it operates solely on the level of individual employee discipline, the ADA certainly does not address claims that an Executive *policy* is invalid because it violates a condition on the use of appropriations that, separately and independently of the ADA, constrains the Executive's use of appropriated funds for particular purposes. *See* Eloise Pasachoff, *Modernizing the Power of the Purse Statutes*, 92 Geo. Wash. L. Rev. 359, 367 (2024). Nor does the ADA address potential APA vacatur or prospective relief against *ongoing* implementation of an Executive policy; it does not provide any mechanism whatsoever for changing or restraining Executive policies that violate appropriations limitations. *See* DHS Br. 55. Thus, there is no basis on which to infer that in adopting the ADA Congress intended to preclude review of claims under the APA that an agency's policy should be prospectively restrained as contrary to law because it violates an appropriations rider.

The Supreme Court has declined to find preclusion in similar circumstances. In *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 222 (2012), the Court held that the Quiet Title Act ("QTA") did not impliedly preclude judicial review of a claim that the Executive lacked authority under a different statute to take title to particular land. The Court explained that although the QTA addressed similar subject matter as the plaintiff's claim, the QTA did not address the "type of grievance" that the plaintiff sought to assert. *Id*. at 216 (citation omitted). Moreover, the government's argument that the QTA precluded review of "a different claim, seeking different relief, from the kind the QTA addresses" "go[es] much further" than the Court's preclusion precedents. *Id*. at 222-223. So too here: the ADA simply does not address claims for prospective judicial relief based on the contention that an Executive policy violates a separate statutory limitation on the use of appropriations. Although such a claim overlaps with the ADA's subject matter, that "commonality is not itself sufficient," and the Court has "never held … that some general similarity of subject matter can alone trigger a remedial statute's preclusive effect." *Id*. at 223.

Moreover, because the ADA does not address claims like Plaintiffs', and because the ADA's remedies all are contingent on the Executive's own exercise of its enforcement discretion in individual cases, implying preclusion here would foreclose essentially *all* judicial review of Executive compliance with appropriations riders. But this Court must "presume that Congress does not intend to limit jurisdiction if 'a finding of preclusion could foreclose all meaningful judicial review.'" *See Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 489 (2010) (citation omitted); *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 496 (1991). This is not a situation in which finding preclusion of Plaintiffs' district-court APA suit would simply enforce a congressional decision to channel or delay judicial review. *Contra Block*, 467 U.S. at 347 (reasoning that allowing consumers to sue would enable handlers to circumvent statutory exhaustion requirements); *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 207 (1994) (channeling). Rather, finding preclusion would "wholly deprive" all plaintiffs of judicial review of the Executive's violation of an appropriations rider intended to limit Executive conduct—which means that the Court should decline to find preclusion. *Bd. of Governors of Fed. Rsrv. Sys. v. MCorp Fin., Inc.*, 502 U.S. 32, 43 (1991).

It is particularly unlikely that Congress intended the ADA to preclude review of all appropriations conditions given that Congress enacted the ADA to *protect* its appropriations authority against Executive encroachment—not to cede that authority to the Executive. The ADA arose from "Congress's increasing frustration with the failure of Executive Branch agencies to stay within the budgets Congress allocated to them." Randolph D. Moss, *Applicability of the Antideficiency Act to a Violation of a Condition or Internal Cap Within an Appropriation*, 25 Op. O.L.C. 33, 42 (2001); Zachary S. Price, *Effectuating Congress's Power of the Purse*, Florida L. Rev. at 16-34 (forthcoming 2027). At the same time, in structuring the ADA, Congress had "eminently sound reasons other than insulation from judicial review," *Sackett*, 566 U.S. at 128, to establish a fiscal compliance framework focused on retrospective relief administered by the Executive. As a practical and legal matter, Congress cannot police every government expenditure and obligation—the Executive, composed of thousands of civil servants with authority to expend funds, is constantly spending funds, and garden-variety expenditures beyond appropriations often will not give rise to any injured plaintiffs with standing to initiate judicial review. *See* Stith, *supra*, 97 Yale L.J. at 1387. Congress thus sensibly enacted a scheme focused on deterring appropriations violations by providing for Executive punishment of the individuals involved, administered by those closest to the day-to-day spending decisions. But nothing about that choice to protect Congress's appropriations power in one context, using one method, suggests congressional intent to foreclose judicial review of distinct encroachments on Congress's appropriations power, i.e., Executive actions that violate independent appropriations conditions that constrain agency discretion.

Ultimately, given the ADA's silence on judicial enforcement of appropriations riders, DHS's argument for precluding judicial review boils down to the assertion that because the ADA addresses appropriations violations without expressly providing for judicial review, review must be precluded. *See* Br. 54-55. But that flips the presumption of review on its head. If the fact that the ADA "addresses purportedly unauthorized expenditures" without "authoriz[ing] judicial orders barring" them (DHS Br. 54-55), without more, could supply a basis to "overcome the APA's presumption of reviewability for all final agency action, it would not be much of a presumption at all." *Sackett*, 566 U.S. at 129. To establish implicit preclusion, DHS must affirmatively identify elements of the statutory structure that create a strong inference that Congress considered judicial review of the relevant claims and intended to preclude that review. No such inference arises here.

2. Constitutional-avoidance concerns also militate against implied preclusion. Congress enacted Section 527 in the exercise of its core Appropriations Clause power. Congress's plenary and "exclusive power over the federal purse" is the "bulwark of the Constitution's separation of powers" and a "particularly important . . . restraint . . . on [the] Executive Branch." *FLRA*, 665 F.3d at 1346-47; *Harrington v. Bush*, 553 F.2d 190, 195 (D.C. Cir. 1977). And in requiring access to DHS facilities to Members of Congress for the purpose of conducting oversight, Section 527 also implicates Congress's "broad" and "indispensable" constitutional oversight authority. *See Trump v. Mazars USA, LLP*, 591 U.S. 848, 862 (2020).

To construe the ADA as impliedly denying "any judicial forum" to enforce Section 527 would raise "serious constitutional question[s]." *See Webster v. Doe*, 486 U.S. 592, 603 (1988); *DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). Under DHS's view, the ADA renders unreviewable any condition that Congress might place on the use of appropriations, simply because the Executive's violation of the condition may be said also to be a violation of the ADA. That would leave the Executive Branch with the exclusive authority to determine its own compliance with limitations that Congress has imposed on its appropriation of funds. "[T]he control over public funds that the [Appropriations] Clause reposes in Congress in effect [w]ould be transferred to the Executive." *See OPM v. Richmond*, 496 U.S. 414, 428 (1990). That would be, as the Supreme Court put it, a "most dangerous discretion" to confer on Executive Branch officials, upsetting the balance of powers between Congress and the Executive. *Id*. at 425 (citation omitted).

Making matters worse, precluding review would confer on the Executive the sole, unreviewable authority to override the congressional policy judgment that Section 527 effectuates. "Any exercise of a power granted by the Constitution to one of the other branches of Government is limited by a valid reservation of congressional control over funds in the Treasury," *id*., and here Congress has validly used its appropriations authority to limit DHS's authority over immigration enforcement (authority that is, after all, contingent on Congress's appropriation of enforcement resources).[2] But under DHS's view, the Executive can disregard Congress's policy judgment with impunity. The presumption of judicial review exists precisely to prevent the Executive from arrogating such power to police its own compliance with congressional direction, absent clear evidence that Congress

[2] Even decisions recognizing broad Executive enforcement discretion acknowledge the constraints imposed by the funding Congress provides. *See United States v. Texas*, 599 U.S. 670, 680 (2023).

so intended. *See Mach Mining*, 575 U.S. at 488-89 ("Absent such review, the Commission's compliance with the law would rest in the Commission's hands alone. . . . That is why this Court has so long applied a strong presumption favoring judicial review of administrative action.") The grave separation-of-powers concerns raised by DHS's interpretation confirm that Congress did not intend the ADA to preclude all judicial review of Executive compliance with appropriations laws.

3. a. DHS's preclusion argument relies heavily on *Global Health Council v. Trump*, 153 F.4th 1 (D.C. Cir. 2025), but even assuming that decision was correctly decided, it does not support DHS's position. In *Global Health Council*, this Court concluded that the Impoundment Control Act ("ICA") precluded judicial review of actions alleging that an impoundment of appropriated funds violated the ICA itself. *Id.* at 18-20 & n.17. The Court took care to qualify that its preclusion holding was limited to APA suits enforcing the ICA, and it declined to address "whether the ICA precludes suits under the APA to enforce appropriations acts." *Id.* at 20 n.17.[3]

---

[3] After the D.C. Circuit issued *Global Health Council*, the President issued a special message proposing to Congress the rescission of certain of the funds at issue in the case ($4 billion out of the $10.5 billion covered by the district court's preliminary injunction). *Dep't of State v. AIDS Vaccine Advoc. Coal.*, 146 S. Ct. 19, 19 (2025). The government sought a Supreme Court stay of the injunction as to the $4 billion. In an order that did not contain additional reasoning, the Supreme Court stayed the preliminary injunction only as to the $4 billion. *Id.* The Court held that the Executive had "made a sufficient showing" at the stay stage "that the Impoundment Control Act precludes respondents' suit, brought pursuant to the Administrative Procedure Act, to enforce the appropriations at issue here." The Court's stay order

Here, by contrast, Plaintiffs do not sue to enforce the ADA. Plaintiffs are seeking to enforce Section 527, which imposes a distinct prohibition on using appropriated funds for a particular purpose. *See* pp. 8-10, *supra*. Unlike in *Global Health Council*, here DHS must establish that in enacting the ADA, Congress intended to preclude actions to enforce distinct riders that eliminate executive discretion to use funds for specific purposes. That is a higher bar, which DHS does not come close to clearing for the reasons already stated. *Match-E-Be-Nash-She-Wish*, 567 U.S. at 222; *Am. Hosp. Ass'n v. Becerra*, 596 U.S. 724, 734 (2022).

If anything, this Court's reasoning in *Global Health Council* undermines DHS's position. The ICA provides a detailed remedial scheme for resolving impoundment disputes that, this Court emphasized, is akin to the statutory scheme at issue in *Block*: the ICA establishes "a complex scheme of notification of the Congress," and authorizes "suit by a specified legislative branch official" only upon Congress's exhaustion of the delineated notice process. 153 F.4th at 18-19. "As in *Block*," the Court reasoned, "it does not make sense that the Congress would craft a complex scheme of interbranch dialogue but *sub silentio* also provide a backdoor for citizen suits to enforce the ICA at any time and without notice to the Congress of the alleged violation." *Id.*

---

thus pertains only to the narrow context of funds subject to a pending rescission proposal and thus ongoing interbranch dialogue. *See* Zachary S. Price, *Making Sense of the Emergency Appropriations Decisions*, Harv. L. Rev. (Nov. 11, 2025).

By contrast, the ADA establishes no detailed remedial scheme for resolving ongoing appropriations violations. The ADA does not provide for any "complex scheme of interbranch dialogue," or any iterative process to resolve appropriations disputes. Unlike the ICA, the ADA does not authorize suits by a particular congressional official subject to an exhaustion requirement, and so does not supply any inference that Congress intended to exclude suits by others. While the ICA enables Congress to vindicate its appropriations authority in the courts, the ADA vests exclusive authority over its employee discipline procedures in the Executive—and it bears repeating that construing those Executive-administered remedies as exclusive would leave the Executive with unreviewable authority to determine its own compliance with all appropriations laws, including riders that are meant to constrain Executive action. Congress is highly unlikely to have intended that result. Thus, the ADA supplies no comparable inference that Congress intended it to occupy the remedial field—especially for violations of distinct appropriations conditions beyond the ADA itself.

b. In all events, *Global Health Council*'s reasoning should not be extended to new contexts, because doing so would raise significant separation-of-powers concerns. When Congress enacts appropriations to enable agencies to fulfill their statutory mandates, Congress expects those appropriations—and the policy choices they embody—to be implemented by the Executive Branch in its duty to execute the laws Congress enacts. The ICA and related budgetary statutes anticipate that the Executive may have legitimate reasons not to spend funds at the margins, and so establish a process for addressing disputes about already-appropriated funds. *See, e.g.*, 31 U.S.C. § 1512. But it is Congress—not the Executive—that is constitutionally vested with authority to enact federal policy into law and, through appropriations, to determine how much public money may or must be spent to carry out that policy. Thus, the Executive "does not have unilateral authority to refuse to spend [appropriated] funds" for "policy reasons." *In re Aiken Cnty.*, 725 F.3d 255, 261 n.1 (D.C. Cir. 2013)*; see also Train v. City of New York*, 420 U.S. 35, 41, 47-49 (1975). Indeed, the ICA itself was enacted "at a time when Congress was united in its furor over presidential impoundments," particularly those based on the Executive's policy disagreements with Congress. *City of New Haven, Conn. v. United States*, 809 F.2d 900, 906, 909 (D.C. Cir. 1987). Executive impoundments—which may violate statutes beyond the ICA itself—thus raise concerns that the Executive is attempting to substitute its own policy judgment for Congress's, effectively nullifying the statutes that the appropriations are meant to fund. *Global Health Council* should not be extended beyond the narrow confines of its holding that the APA may not be used to bring claims that the Executive has "acted contrary to law by violating the ICA" itself. 153 F.4th at 20.

II. Plaintiffs Have Standing

DHS is also wrong to contend that Plaintiffs lack standing on the ground that Plaintiffs assert only injury to Congress as an institution. Section 527 prohibits DHS from using appropriated funds to deny access to DHS facilities to "any" "Member of Congress" or "employee of the United States House of Representatives or the United States Senate designated by such a Member" when they seek access "for the purpose of conducting oversight." § 527(a), 138 Stat. at 619. When DHS denies an individual Member entry to a facility, therefore, the Member has suffered a personal injury under Section 527: "the denial of information to which the plaintiff" as an *individual* "claims to be entitled by law" by virtue of Section 527. *Comm. on Judiciary of United States House of Representatives v. McGahn*, 968 F.3d 755, 766 (D.C. Cir. 2020). That is a "quintessential injury in fact." *Id.*

Even if the injury were characterized as an injury to Congress's institutional oversight power, *cf. Raines v. Byrd*, 521 U.S. 811, 821 (1997), Section 527 reflects Congress's recognition that individual Members exercise delegated authority to conduct oversight, and thus have delegated authority to enforce the oversight power. *Cf. McGahn*, 968 F.3d at 766; *McSurely v. McClellan*, 553 F.2d 1277, 1286 (D.C. Cir. 1976). To conduct oversight, individual Members sought access to particular facilities. That is why Section 527 prohibits denial of access to "any" of the enumerated "persons," including any *individual* "Member of Congress" or their employees or designees who are "conducting oversight," and not to Congress as an institution.

III. The Court Should Apply Established Principles of Appropriations Law to Determine Whether the Challenged Policy Was Promulgated Using Funds Subject to Section 527

Because the courts have jurisdiction over the suit, this Court must determine whether DHS has violated Section 527 in issuing the challenged policies, or whether it permissibly used funding unencumbered by the rider. In that analysis, the Court must balance two considerations that are seemingly in some tension. First, because Section 527 restricts *particular* appropriated funds, DHS could lawfully promulgate (and may re-promulgate) the challenged policy with unencumbered funds that are genuinely otherwise available. At the same time, permitting the appropriations rider to be too easily circumvented by DHS's asserted retrospective accounting workarounds, DHS Br. 60-63, would risk undermining Congress's plenary authority over appropriations. The Court therefore should carefully scrutinize DHS's identification of unencumbered funding to ensure that its use of the funds is supported by established, generally-applicable principles of appropriations law. Amici offer the following observations about the relevant principles.

A. First, the district court correctly held that the "use[]" of funds prohibited by Section 527 encompasses the costs of promulgating the challenged policy. That is, DHS is incorrect that the act of "formulating policy" does not amount to "preventing" Members of Congress from accessing DHS facilities within the meaning of Section 527. Br. 61. Section 527's purpose is to prohibit DHS from erecting barriers to congressional access to DHS facilities. Its text thus sweeps broadly: "*None* of the funds appropriated" to DHS "by this Act may be used to prevent" Members from entering DHS facilities. § 527(a), 138 Stat. at 619. DHS itself plainly believed that promulgating the challenged policy was a necessary step in establishing its posture toward admitting Members to detention sites. It was thus also a necessary step in barring congressional access. If Section 527 is to be effective, therefore, it must be understood as forbidding the use of funds to promulgate policies that limit access.

B. The district court was also correct to hold that certain overhead costs associated with promulgating and enforcing the policy—e.g., salaries of employees involved in those efforts—constitute funds "used" to prevent access to DHS facilities. Courts have held that "[t]he use of any government resources—whether salaries, employees, paper, or buildings—to accomplish [the challenged conduct] would entail government expenditure." *Env't Def. Ctr. v. Babbitt*, 73 F.3d 867, 871-872 (9th Cir. 1995); *see Kimberlin v. U.S. Dep't of Just.*, 318 F.3d 228, 237 (D.C. Cir. 2003) ("[A]n appropriations law denying funding for certain activities generally amounts to a substantive ban on those activities, regardless of the amount of funding involved.") (Tatel, J., concurring in part and dissenting in part); *see* Stack &

Vanderbergh, *supra*, 97 Notre Dame L. Rev. at 157. Indeed, "under our constitutional scheme," the essential function of an appropriations rider is to place the forbidden activity outside "the realm of authorized government actions." Stith, *supra*, 97 Yale L.J. at 1361. A rider that prohibits using a particular appropriation for an activity must be construed as prohibiting the use of *any* funds from the relevant appropriation to facilitate that activity. That is necessary to preserve Congress's power over appropriations, which necessarily extends to restricting the Executive's use of funds.

At the same time, this Court need not decide whether some overhead expenditures (such as electrical expenses) should not be treated as having been "used" to promulgate and implement the policy because they would have been made regardless of the forbidden activity and they played no material role in facilitating it. That is because the district court concluded as a factual matter that "at the time the policy was issued" on January 8, the offices involved in formulating the policy, including the Secretary's office, "were funded through DHS's annual appropriated funds." JA522. Assuming that factfinding is correct, then funds subject to Section 527 were used to promulgate the policy.

C. Relatedly, with respect to DHS's February 2 re-promulgation of the policy, the district court found that DHS proceeded as though it was operating in a lapse of appropriations once the annual appropriation ended, despite the existence of One

Big Beautiful Bill Act ("OBBA") funding (which was unencumbered by Section 527). JA 533 & n.12. Based on that finding, the court correctly reasoned that the February 2 policy was also promulgated in violation of Section 527. Expenditures made for excepted work during the lapse in appropriations had to be retroactively ratified by the subsequently enacted continuing resolution, but that resolution carried forward Section 527's prohibitions. *See* JA 534; Consolidated Appropriations Act, 2026, Pub. L. No 119-75, div. H, § 104, 140 Stat. 173, 629.

D. DHS argues that it could cure any violation of Section 527 by retroactively charging expenditures associated with promulgating the policy to the OBBBA. In assessing that claim, the Court should apply the principles of appropriations law, as explained and interpreted by the Government Accountability Office ("GAO"). The GAO is a singular authority on appropriations—Congress legislates against the backdrop of GAO principles and publications, and courts regularly consult GAO guidance in resolving appropriations disputes. The Court should also be mindful of the importance of preventing the Executive from distorting appropriations principles to circumvent appropriations riders.

DHS's retroactive-accounting argument relies on a passage from GAO's Redbook stating that "[a]n agency may initially charge common-use items to a single appropriation as long as it makes the appropriate adjustments from other benefiting appropriations before or as of the end of the fiscal year." Br. 61-62. But that passage is inapposite. The quoted sentence appears in a discussion of "allocation of obligations for *administrative expenses* (utility costs, computer services, etc.) between or among programs funded under separate appropriations." Redbook at 7-9 (2006) (emphasis added). Thus, an agency can initially charge common-use administrative expenses that benefit multiple programs funded by different appropriations to one bucket of appropriations and then adjust the allocation among appropriations at the end of the year. That permission to allocate expenses to one *available* bucket of appropriations, subject to later adjustment, does not suggest permission to promulgate a policy using annual appropriations *in violation of* Section 527, subject to retroactive attribution to OBBBA funds. Nor is the promulgation of the policy a common-use administrative expense like utility costs or computer services.

The statutory authority cited by the Redbook, 31 U.S.C. § 1534, is to the same effect. That provision states that one appropriation may be charged for the benefit of another appropriation during the fiscal year if amounts are "available" for the activity in "*both* the appropriation to be charged and the appropriation to be benefited," and "subject to [any] limitations applicable to the appropriations." 31 U.S.C. § 1534(a) (emphasis added). This provision does not permit retroactively reallocating expenses that violate an appropriations rider to another appropriation. As the GAO explains: "The provision is 'primarily a bookkeeping convenience' and is not intended to 'authorize the augmentation of funds to any bureau or agency beyond that contained in its respective appropriation.'" *In re Use of Agencies' Appropriations to Purchase Computer Hardware for Department of Labor's Executive Computer Network*, B-238024, 70 Comp. Gen. 592, 596 (1991); *see also DHS's Use of Shared Services Within the Preparedness Directorate*, B-308762, 2007 WL 2737318, at *7 (2007) (Section 1534 is only "intended to facilitate common service activities" to "temporarily" adjust accounts, as long as the "amounts are available in both appropriations"). Here, funds from the annual appropriation were not "available" to promulgate or enforce the policy because of Section 527, and any retroactive reallocation to the OBBBA remains "subject to limitations" within the annual appropriation, including Section 527. The appropriations authorities on which DHS relies do not clearly give DHS the retroactive "adjustment" discretion it asserts here. DHS should not be able to rely on inapposite bookkeeping mechanisms to circumvent the appropriations rider.

CONCLUSION

The district court's order should be affirmed as to jurisdiction, and the Court should apply established principles of appropriations law in evaluating the parties' arguments on the merits.

Dated July 31, 2026

Respectfully submitted,

/s/ *Donald B. Verrilli, Jr.*

Donald B. Verrilli, Jr.
Ginger D. Anders
MUNGER, TOLLES & OLSON LLP
601 Massachusetts Ave. NW,
Suite 500E
Washington, DC 20001-5369
(202) 220-1100
Donald.Verrilli@mto.com
Ginger.Anders@mto.com

Gabriel M. Bronshteyn
MUNGER, TOLLES & OLSON LLP
560 Mission Street
Twenty-Seventh Floor
San Francisco, CA 94105
(415) 512-4000
Gabriel.Bronshteyn@mto.com

Counsel for Amici Curiae

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(g) of the Federal Rules of Appellant Procedure, the undersigned counsel hereby certifies that this brief complies with the type volume limitation of Rule 32(a)(7). As measured by the word-processing system used to prepare this brief, there are 6,486 words in the brief excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and D.C. Cir. Rule 32(e)(1).

Dated: July 31, 2026

/s/ Donald B. Verrilli, Jr.
Donald B. Verrilli, Jr.

CERTIFICATE OF SERVICE

I certify that on July 31, 2026, a true and correct copy of this Brief was filed via the Court's electronic filing system, which will forward a copy to all counsel of record. I certify that all participants in this case are registered CM/ECF users.

Dated: July 31, 2026

/s/ Donald B. Verrilli, Jr.
Donald B. Verrilli, Jr.