No. 19-16102, 19-16300, 19-16299, 19-16336

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SIERRA CLUB, et al.,

Plaintiffs-Appellees,

v.

DONALD J. TRUMP, in his official capacity as President of the United States, et al.,
Defendants-Appellants.

STATE OF CALIFORNIA, et al.,
Plaintiffs-Appellees-Cross-Appellants,

v.

DONALD J. TRUMP, in his official capacity as President of the United States, et al.,
Defendants-Appellants-Cross-Appellees.

On Appeal from the United States District Court
for the Northern District of California
Case No. 4:19-cv-00892-HSG

BRIEF OF *AMICUS CURIAE* STATE OF ARIZONA HOUSE OF REPRESENTATIVES FEDERAL RELATIONS COMMITTEE IN SUPPORT OF DEFENDANTS-APPELLANTS

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RULE 29 (a) (4) (D) STATEMENT OF INTEREST OF AMICUS CURIAE

This brief is respectfully submitted on behalf of the State of Arizona House of Representatives Federal Relations Committee (the "Committee") in support of Defendants-Appellants, asserting that plaintiff organizations Sierra Club and Southern Border Communities Coalition lack standing to sue in this matter. As noted in the Department of Justice's Brief for Defendants-Appellants (the "DOJ Brief") at pages 10 and 11, both the Yuma Sector project and the Tucson Sector projects 1, 2, and 3 are scheduled to be constructed in the State of Arizona. Thus, of the six projects at issue in this case, four are based in Arizona. The State of Arizona is significantly negatively impacted by drug cartels operating in the areas where these four projects are located, as reviewed in detail in the DOJ Brief. It is the position of the Committee that the projects at issue will significantly benefit Arizona and its residents by effectively curtailing the drug smuggling activity noted in the DOJ Brief. Thus the Committee, through its Chair, Representative Mark Finchem, has an interest in the outcome of this case, and has authorized its submission.[1]

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

INTRODUCTION

The DOJ has submitted a brief that effectively addresses the "zone of interest" aspect of whether plaintiffs can sustain their causes of action. This brief addresses the issue of standing with regard to plaintiff organizations Sierra Club and Southern Border Communities Coalition (SBCC).

Federal-court standing does not extend to "organizations . . . [that] seek to do no more than vindicate their own value preferences through the judicial process." *Sierra Club v. Morton*, 405 U.S. 727, 740 (1972). Yet that is the aim of Sierra Club and SBCC in this lawsuit. And that aim is all too attainable under certain misinterpretations of the current law of standing. This case provides an ideal vehicle for clarifying the law to ensure that the standing doctrine comports with the requirements of Article III, and preserves the separation of powers in accord with the President's sole power, authority and duty under Article II to "take Care that the Laws be faithfully executed." U.S. Const. Art. II, § 3.[2]

Sierra Club and SBCC bring this suit because they oppose the President's border-protection policy, a policy designed to enforce federal laws on immigration, drug trafficking, and criminal gang activity. Proclamation 9844, 84 Fed. Reg. 4949

[2] The Committee does not take the position that organizations cannot have standing to sue. The Committee asserts that where, as here, neither the organizations nor their members have not suffered any concrete injury, and are simply advocating a policy position through the courts, they have no standing to sue.

(Feb. 15, 2019). Their opposition to that policy comes through loud and clear in the declarations of their members. The declarants complain, at bottom, that the border wall and the policy underlying it are aesthetically and morally offensive.[3] *Cf. American Legion v. American Humanist Ass'n*, 139 S. Ct. 2067, 2103 (2019) (Gorsuch, J., concurring in the judgment). Indeed, one declarant takes offense at the mere "idea" of border wall projects. ECF No. 168-1, Exh. 7 ¶ 5. This lawsuit thus rests on clear but irrelevant hostility to a policy decision taken by the President in the exercise of his duty to "take Care that the Laws be faithfully executed." U.S. Const. Art. II, § 3. Such a suit does not belong in federal court.

Unfortunately, current law can plausibly, though erroneously, be argued to permit this suit. The relevant law concerns the standing of organizations to sue for themselves or their members, and the cognizability of asserted injuries to a person's "aesthetic and recreational values." *See Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982); *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333 (1977); *Sierra Club v. Morton*, 405 U.S. 727, 735 (1972). The law on these subjects

[3] *See, e.g.*, Appendix of Declarations in Support of Plaintiffs' Motion for Partial Summary Judgment, *Sierra Club v. Trump*, No. 4:19-cv-00892-HSG (June 12, 2019), ECF No. 168-1: Exh. 2 ¶ 10 (Declaration of Albert Del Val, stating that "I worry the wall would be incredibly ugly."); Exh. 8 ¶ 6 (Declaration of Carmina Ramirez asserting that proposed project "is meant to divide [her] community" and "directly affects [her] cultural identity" as a dual citizen of the U.S. and Mexico); Exh. 7 ¶ 8 (Declaration of Roy Armenta Sr., stating that border project will injure him "aesthetically and morally").

has devolved to the point that every major public policy decision immediately becomes the subject of multiple federal-court lawsuits brought and funded by an ever-growing mass of special interest organizations that hijack the judicial system to press policy prescriptions constitutionally the exclusive province of the other branches of government.

This case illustrates the problem: The national debate over border protection is sought to be litigated in federal court by a national organization, and a coalition of regional organizations, that happen to have members who claim to recreate near the border. Without denigrating the sincerity of such organizations, their members, or the members' recreational pastimes, we submit that the law should not be understood to confer standing to sue in this situation. Nor need the law be so understood, as we discuss below.

SUMMARY OF ARGUMENT

Plaintiffs Sierra Club and SBCC lack Article III standing. A decision upholding their standing would violate not only Article III but also Article II, because it would interfere with the President's power and duty to "take Care that the Laws be faithfully executed." U.S. Const. Art. II, § 3.

1. Plaintiffs lack Article III standing because (a) they cannot establish injury in fact to themselves; (b) they have not shown that they can sue on behalf of their

members; and, even if they could make that showing, (c) they cannot show that their members would have standing in their own right.

a. In asserting standing for themselves, the plaintiff organizations rely on *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982). *See* Excerpts of Record (ER) 65–66. But *Havens* does not support organizational standing where, as here, the asserted injury consists merely of a setback to an organization's advocacy efforts. Moreover, *Havens* is inapplicable because there the plaintiffs asserted *private rights*, whereas this suit seeks to vindicate *public rights*. *Havens* is inapplicable for the further reason that it was a suit against a private defendant, whereas this is a suit against federal executive-branch defendants. *See Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1552 (2016) (Thomas, J., concurring).

b. In asserting standing to sue for their members, plaintiffs will rely on *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333 (1977). *Hunt* established a three-part test for determining when as association can sue on behalf of its members. The *Hunt* test for associational standing, however, is anomalous and lacks precedential support. Moreover, the test does not ensure that plaintiff-organizations will fairly and faithfully represent the members or other constituents whose rights they seek to assert. In light of the *Hunt* test's flaws, we urge this Court to analyze plaintiffs' standing in this case under the actual criteria that the Court

cited in *Hunt* to uphold associational standing in that case. Plaintiffs fail to meet those criteria.

c. To sue on behalf of its members, plaintiffs must show that their members would have standing in their own right. As the district court recognized, those members assert injury to their aesthetic and recreational interests. While such non-economic interests might support standing in a proper case, they lack the concreteness and particularity required in a case like this one, which not only seeks to vindicate public rights but also to require the federal executive branch to "follow the law." *Spokeo*, 136 S. Ct. at 1552 (Thomas, J., concurring).

2. Granting standing in this case to Sierra Club and SBCC impermissibly encroaches upon the Executive Power in violation of the Take Care Clause because it removes the power to execute the laws from the President and places it in the hands of the Judiciary, together with self-appointed, unelected advocacy groups unaccountable to the people.

The Constitution, Article II, paragraph 1, mandates that "[t]he executive Power shall be vested in a President of the United States of America," placing the entire executive power in a single person: The President. Having placed the executive power solely in the President's hands, the Framers went on to mandate that the President "shall take Care that the Laws be faithfully executed. . . ."[4] The

[4] Constitution, Article II, Section 3.

Court has relied upon the Take Care Clause to define the limits of Article III standing to ensure that the President, rather than the federal judiciary, retains primary responsibility for the legality of executive decisions.[5] Moreover, as the "Chief Magistrate" of the nation,[6] the President has wide prosecutorial discretion.[7] Transferring enforcement power to unelected, self-appointed advocacy associations, as plaintiffs seek to do here, thus not only encroaches upon the President's power to faithfully execute the laws but also impinges upon the President's ability to determine strategy with regard to enforcement through prosecutorial discretion.

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[5] *See, e.g.*, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 577 (1992) (asserting that to allow Congress to "convert the undifferentiated public interest in executive officers' compliance with the law into an 'individual right' vindicable in the courts is to permit Congress to transfer from the President to the courts the Chief Executive's most important constitutional duty, to 'take Care that the Laws be faithfully executed'"); *Allen v. Wright*, 468 U.S. 737, 761 (1984) ("The Constitution, after all, assigns to the Executive Branch, and not to the Judicial Branch, the duty to 'take Care that the Laws be faithfully executed.' We could not recognize respondents' standing in this case without running afoul of that structural principle." (citation omitted) (quoting U.S. CONST. art. II, § 3)).

[6] The Federalist No. 70, at 429 (Clinton Rossiter ed. 1961).

[7] *See, e.g.*, *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (concluding that the Attorney General and U.S. Attorneys have wide prosecutorial discretion "because they are designated by statute as the President's delegates to help him discharge his constitutional responsibility to 'take Care that the Laws be faithfully executed'" (quoting U.S. CONST. art. II, § 3)); *Heckler v. Chaney*, 470 U.S. 821, 832 (1985) ("[A]n agency's refusal to institute proceedings shares to some extent the characteristics of the decision of a prosecutor in the Executive Branch not to indict—a decision which has long been regarded as the special province of the Executive Branch, inasmuch as it is the Executive who is charged by the Constitution to 'take Care that the Laws be faithfully executed.'" (quoting U.S. CONST. art. II, § 3)).

I. PLAINTIFFS LACK ARTICLE III STANDING.

Sierra Club and SBCC sue for themselves and their members.[8] This Court has recognized that an organization can establish standing to sue in these two different capacities. *See, e.g.*, *Smith v. Pac. Props. & Dev. Corp.*, 358 F.3d 1097, 1101 (9th Cir. 2004). Sierra Club and SBCC, however, cannot meet the requirements either for "organizational" standing or for "associational" standing.[9]

A. Plaintiffs Lack Organizational Standing.

In analyzing whether an organization has standing to sue on its own behalf, this Court has consistently relied on *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982). *See, e.g.*, *Nat'l Council of La Raza v. Cegavske*, 800 F.3d 1032, 1040 (9th Cir. 2015). But *Havens* does not support organizational standing in this case for three reasons. First, the nature of the plaintiff organization's alleged injury in *Havens* differ significantly from the injuries alleged here. Second, the plaintiff organization

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[8] *See* First Amended Complaint for Declaratory and Injunctive Relief, *Sierra Club v. Trump*, No. 4:19-cv-00892, at p. 3 ¶ 13 & p. 5 ¶ 17 (N.D. Cal. Mar. 18, 2019), ECF No. 26.

[9] We recognize that the standing analysis in this brief does not apply to the State plaintiffs in Nos. 19-16299 and 19-16336. We also recognize that this Court follows "[t]he general rule applicable to federal court suits with multiple plaintiffs . . . that once the court determines that one of the plaintiffs has standing, it need not decide the standing of others." *Leonard v. Clark*, 12 F.3d 885, 888 (9th Cir. 1993). Even so, analysis of Sierra Club's and SBCC's standing is necessary to determine whether their lawsuit, which is separate from that brought by the States, should be dismissed. Moreover, there are serious questions about the constitutionality of the "one good plaintiff is enough" rule. *See generally* Aaron-Andrew P. Bruhl, *One Good Plaintiff Is Not Enough*, 67 Duke L.J. 481 (2017).

in *Havens* asserted private rights, whereas the plaintiff organizations here seek to vindicate public rights. Finally, *Havens* was a suit against a private defendant, whereas this is a suit against the federal government.

1. *Havens* Does Not Support Standing Where, as Here, the Plaintiff Organizations Merely Allege Setbacks to Their Advocacy Goals.

The plaintiff in *Havens* was a nonprofit organization, "Housing Opportunities Made Equal" (HOME). 455 U.S. at 367. HOME's mission was to counsel and give referrals to low- and moderate-income people seeking housing. *Id.* at 368. HOME sued Havens Realty for lying to HOME's employee "tester" and one of HOME's clients about vacancies in its apartment complexes, lies that violated the federal Fair Housing Act. *Id*. at 368–69. The Court determined that Havens' lies "perceptibly impaired HOME's ability to give counseling and referral services" to its clients. *Id.* at 379. The Court held that "[s]uch concrete and demonstrable injury to the organization's activities—with the consequent drain on the organization's resources—constitutes far more than simply a setback to the organization's abstract social interests." *Id.*

As Judge Ikuta has explained, *Havens* supports standing when the plaintiff organization's mission "is to provide a specified type of service and a defendant's actions hinder the organization from providing that core service." *Fair Housing Council v. Roommate.com, LLC.*, 666 F.3d 1216, 1225 (9th Cir. 2012) (Ikuta., J.,

concurring in part and dissenting in part); *see also, e.g.*, *El Rescate Legal Servs., Inc. v. Exec. Off. of Immig. Review*, 959 F.2d 742, 748 (9th Cir. 1992). *Havens* does not support standing, however, to advocacy groups whose asserted injury consists merely of setbacks to their advocacy efforts. As the D.C. Circuit has repeatedly held, "[i]mpediments to pure issue-advocacy cannot establish standing." *E.g.*, *Elec. Privacy Info. Ctr. v. FAA*, 892 F.3d 1249, 1255 (D.C. Cir. 2018). *But cf. East Bay Sanctuary Covenant v. Trump*, 909 F.3d 1219, 1242 (9th Cir. 2018) (citing cases in which Ninth Circuit has upheld standing of advocacy groups that "attempt to show standing by pointing to the expenses of [their] advocacy."). A difference of opinion is simply not enough to confer standing to sue.

The D.C. Circuit's holdings follow from *Sierra Club v. Morton*, 405 U.S. 727 (1972). There, the Court held that the Sierra Club's "special interest" in preserving public land did not give that organization standing to challenge government action adverse to that interest. *Id*. at 739–41. A special-interest organization like the Sierra Club inevitably advances that interest by advocating for it.[10] Thus, if a special-interest organization could bypass the holding of *Sierra Club* merely by asserting setbacks to its advocacy efforts, *Sierra Club* would be meaningless.

[10] *See* Appendix 4, *Sierra Club*, 405 U.S. 727 (No. 70–34) (reproducing complaint, paragraph three of which alleged that "[f]or many years the SIERRA CLUB *by its activities and conduct has exhibited* a special interest in the conservation and the sound maintenance of the national parks, game refuges and forests of the country") (emphasis added).

The plaintiff organizations in this case are, by their own admission, advocacy organizations. *See* Amended Compl., *supra* note 8, at p. 3 ¶ 12 & p. 5 ¶ 16. They allege that they have suffered injury because their advocacy efforts opposing border wall construction have been thwarted by defendants' conduct. *Id.* at p. 4 ¶ 15, pp. 5–6 ¶ 19 & pp. 17–18 ¶ 85. That is precisely the sort of "setback to [an] organization's abstract social interests" that the Court held in *Sierra Club*—and reaffirmed in *Havens*—cannot constitute cognizable injury in fact. *Havens*, 455 U.S. at 379 (citing *Sierra Club*, 405 U.S. at 739).

Plaintiffs cannot transform these asserted setbacks into cognizable injury by alleging that they have had to divert additional resources to additional advocacy efforts against the border wall construction. *See*, *e.g.*, Amended Compl., *supra* note 8, at p. 5 ¶ 19 & p. 17 ¶ 85. Their diversion of additional resources to their present cause reflects a voluntary and inherently political decision. Indeed, it does not even serve Sierra Club's core mission of environmental advocacy. As such, it cannot constitute injury in fact. *E.g.*, *Elec. Privacy Info. Ctr. v. Presidential Advisory Comm'n on Election Integrity*, 878 F.3d 371, 379 (D.C. Cir. 2017), *cert. denied*, 139 S. Ct. 791 (2019); *see also Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 418 (2013) (holding that costs incurred by plaintiffs because of their subjective but unsubstantiated fear of government surveillance was "self-inflicted" injury not traceable to the government). *But see E. Bay Sanctuary Covenant*, 909 F.3d at 1241

(citing cases in which Ninth Circuit has "held that, under *Havens Realty*, 'a diversion-of-resources injury is sufficient to establish organizational standing' for purposes of Article III").

2. *Havens* Does Not Support Standing When, As Here, Plaintiffs Seek to Vindicate Public Rights.

The law of standing rests significantly on historical understandings of what types of disputes belong in the judicial branch and who are proper parties to litigate those disputes. *See, e.g.*, *Sprint Commc'ns Co., L.P. v. APCC Servs., Inc.*, 554 U.S. 269, 274–75 (2008). History distinguishes between the proper parties to bring suits asserting "private rights" from the proper parties to bring suits to vindicate "public rights." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1551 (2016) (Thomas, J., concurring). "'Private rights' are rights 'belonging to individuals, considered as individuals.'" *Id.* (quoting 3 W. Blackstone, Commentaries *2). "Public rights," in contrast, are "rights that involve duties owed 'to the whole community, considered as a community,'" *Id.* (quoting 4 Blackstone *5). At common law, suits to vindicate public rights generally could be brought only by the government, not by private plaintiffs. *Id.* Common law did recognize an exception: A private plaintiff could sue to vindicate public rights by showing that the defendant's violation of public rights also caused the plaintiff "'some extraordinary damage, beyond the rest of the [community].'" *Id.* (quoting 3 Blackstone *220).

This history must inform the analysis of plaintiffs' standing because it precludes *Havens* from supporting their standing. *Havens* was a suit asserting private rights. *See Spokeo*, 136 S. Ct. at 1553 (Thomas, J., concurring) (citing *Havens* as a suit asserting private rights). Specifically, the plaintiff HOME sought to vindicate "a statutorily created private right" to accurate housing information. *Id.* Here in contrast, plaintiffs Sierra Club and SBCC seek to vindicate public rights: namely, purported rights arising under statutes governing the transfer of *public* funds for construction projects on *public* lands. *See id*. at 1551–52 (citing suits involving public lands as example of public-rights suits); *see also Crowell v. Benson*, 285 U.S. 22, 51 (1932) (including among cases that involve public rights—and that can therefore be adjudicated by non-Article III entities—cases between private parties and the government involving congressional power over public lands).

"These differences between legal claims brought by private plaintiffs for the violation of public and private rights underlie modern standing doctrine." *Spokeo*, 136 S. Ct. at 1552 (Thomas, J., concurring). That is because suits asserting private rights do not implicate the separation of powers doctrine as acutely as those seeking to vindicate public rights. *Id.* Accordingly, when a private plaintiff asserts a private right, the standing doctrine's "concrete-harm requirement does not apply as rigorously" as when the private plaintiff seeks "to vindicate a *public* right embodied in a federal statute." *Id*. at 1553. In the latter situation, the plaintiff "must

demonstrate that the violation of that public right has caused him a concrete, individual harm distinct from the general population." *Id*.

This requirement for proof of distinctive harm has a long pedigree. At common law, for example, private plaintiffs suing for public nuisance had to show injury that differed in nature, not just degree, from that of the general public. *See, e.g.*, *Tyler v. Judges of Court of Registration*, 179 U.S. 405, 406 (1900) ("[E]ven in a proceeding which he prosecutes for the benefit of the public, as, for example, in cases of nuisance, [the plaintiff] must generally aver an injury peculiar to himself, as distinguished from the great body of his fellow citizens."); *Irwin v. Dixion*, 50 U.S. (9 How.) 10, 27–28 (1850) (to the same effect). A central purpose for the peculiar-harm requirement in public nuisance suits was to avoid allowing "every subject in the kingdom . . . to harass the offender with separate actions."[11]

In light of the historical distinction between private rights and public rights, Sierra Club and SBCC must meet a more demanding showing than required of the plaintiff in *Havens* to establish injury in fact. As discussed in subsection A.1 above, in fact, they cannot even meet the showing required in *Havens*; their allegations of

[11] Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing?*, 102 Mich. L. Rev. 689, 702 (2004) (quoting 3 Blackstone *219); *see also id*. ("Coke stressed the need for 'avoiding of multiplicity of suites") (quoting 1 Edward Coke, The First Part of the Institutes of the Laws of England 56a (London, W. Clarke & Sons 1853) (1628)).

setbacks to the advocacy objectives and diversion of funds for additional advocacy efforts are simply not cognizable and insufficient to confer standing.

3. *Havens* Does Not Support Standing When, As Here, Plaintiffs Sue Executive Branch Officials.

A third reason *Havens* does not support standing here is that *Havens* was a suit against a private defendant, whereas this is a suit against federal executive branch officials.

As discussed above, the standing doctrine's concrete-harm requirement applies more "rigorously" in public-rights actions than private-rights actions. Furthermore, the requirement applies "with special force" in public-rights actions, like the present one, in which the plaintiffs "seek to require an executive agency [or official] to 'follow the law.'" *Spokeo*, 136 S. Ct. at 1552 (Thomas, J., concurring).

In public-rights suits against federal executive-branch officials, separation of powers concerns are at their zenith. For a federal court to decide such a suit by a plaintiff who cannot establish the requisite injury "would be not to decide a judicial controversy, but to assume a position of authority over the governmental acts of another and co-equal department, an authority which plainly [federal courts] do not possess." *Massachusetts v. Mellon*, 262 U.S. 447, 488–89 (1923); *see also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 576 (1992) ("Vindicating the *public* interest

(including the public interest in Government observance of the Constitution and laws) is the function of Congress and the Chief Executive.").

B. Plaintiffs Lack Associational Standing.

In *Hunt v. Washington State Apple Advertising Commission*, the U.S. Supreme Court described a three-part test for determining when an association is permitted to sue as a representative of its members:

> [A]n association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

432 U.S. 333, 342 (1977). This Court has previously employed *Hunt*'s three-part test to analyze associational standing. *See, e.g.*, *Airline Serv. Providers v. L.A. World Airports*, 873 F.3d 1074, 1078 (9th Cir. 2017), *cert. denied*, 2019 U.S. LEXIS 4242 (U.S. June 24, 2019). *Hunt*'s three-part test, however, is anomalous and lacks precedential support. It also fails to ensure that associations fairly and faithfully represent their members' interests. Accordingly, we urge this Court to analyze Sierra Club's and SBCC's associational standing using the criteria that the Court actually relied upon in *Hunt* to uphold associational standing there. Sierra Club and SBCC cannot demonstrate that they can meet those criteria.

1. *Hunt's* 3-Part Test Is Flawed.

Hunt's 3-part test has three flaws.

First, it is neither fish nor fowl. It allows an association to sue "[e]ven in the absence of injury to itself." *Warth v. Seldin*, 422 U.S. 490, 511 (1975). In not requiring the plaintiff to show personal injury, the *Hunt* test differs from all other situations in which the Court has allowed a party to assert the rights of others. In third-party standing cases, for example, the plaintiff must show injury to itself. *See, e.g.*, *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 166 (1972) ("[I]n exceptional situations a *concededly injured party* may rely on the constitutional rights of a third party.") (emphasis added). Similarly, the plaintiffs in a class action must show injury to themselves. *E.g.*, *Spokeo*, 136 S. Ct. at 1547 n.6.

By dispensing with the personal-injury requirement, the *Hunt* test allows an association to sue in a purely representative capacity. The association serves a role like that like that of a guardian suing for an incompetent person, or an executor suing for an estate. But a guardian must be appointed by someone else, typically a family member or a court, and only after a judicial determination of propriety.[12] The same is true of executors.[13] In contrast, associations allowed to sue under *Hunt* are self-

[12] UNIF. PROBATE CODE § 5-201 (amended 2010) (addressing the appointment of a guardian for a minor); *id*. § 5-301 (addressing the appointment of a guardian for an incapacitated person by will or other writing).
[13] *E.g.*, *id*. §§ 3-203(a)(1), 3-307(a), 3-314.

appointed representatives without, apparently, any need to show that their members actually endorse the acts of the associations' leadership.

In short, the *Hunt* test falls between the stools of cases in which a litigant possessing injury in fact is allowed to assert the rights of others and cases in which a plaintiff lacking injury in fact sues in a purely representative capacity.

The *Hunt* test's second flaw is its unprecedented nature. The notion that an association that lacks its own injury can "borrow" its members' standing first arose in *Sierra Club v. Morton*, 405 U.S. 727 (1972). *See* 13A Charles Alan Wright et al., Federal Practice and Procedure § 3531.9.5 at 875 (3rd ed. 2008) (stating that *Sierra Club* "established the proposition that if members are injured, an organization that has not been injured" may have representational standing; and describing this situation as "borrowed member standing"). This statement was dictum, however, because the Sierra Club did not seek to represent its injured members. *Sierra Club*, 405 U.S. at 739. The Court nonetheless repeated the principle three years later in *Warth v. Seldin*, stating, "Even in the absence of injury to itself, an association may have standing solely as the representative of its members." 422 U.S. at 511. This statement, too, was dictum, because the Court held in *Warth* that the plaintiff-organizations' members lacked standing in their own right. *Id.* at 512–17. The Court turned the dicta into a holding for the first time in 1977, when in *Hunt* it articulated its three-part test and upheld the plaintiff organization's standing to sue on behalf of

its constituents without having determined that the plaintiff itself suffered injury. 432 U.S. at 343.

We know of only one case before *Hunt* in which the Court expressly upheld an association's standing to sue for its members without showing injury to itself: *National Motor Freight Traffic Ass'n v. United States*, 372 U.S. 246, 247 (1963) (per curiam). There, the Court upheld the standing of trade associations to sue for their members in challenging an order of the Interstate Commerce Commission (ICC). *Id.* In a one-paragraph per curiam opinion clarifying a prior order denying rehearing, the Court explained that the trade associations existed because of agreements approved by the ICC under a federal statute. *Id.* (citing 49 U.S.C. § 5b (1958)). The associations also "perform[ed] significant functions in the administration of the Interstate Commerce Act, including the representation of member carriers in proceedings before the Commission." *Id.* For those reasons, they "[were] proper representatives of the interests of their members." *Id. National Motor Freight Traffic Association* thus involved plaintiff-associations that had been authorized to represent their members by statute, ICC order, and administrative practice. Those distinctive factors, relied upon by the Court in an opinion issued without plenary consideration, prevent the opinion from supporting the *Hunt* test.

Moreover, the plaintiff in *National Motor Freight Traffic Association* was a *mutual benefit* association designed to represent its commercial members and

advance their interests individual as an industry. Neither of the plaintiffs herein can make that claim. The plaintiffs are public benefit associations designed to advance the public policy goals of their members that do not redound to the individual benefit of their members, as the commercial goals of trade associations do for their own. Recognizing this, the Internal Revenue Code treats them entirely differently for tax purposes. (*See*, Internal Revenue Code 501(c)(3) in contrast to IRS Code 501(c)(6)).

The *Hunt* test's third flaw is that its requirements are too lax to reliably ensure adequate representation. The test's first requirement is met as long as just one member of the organization can show standing in his or her own right. *See Warth*, 422 U.S. at 511, 515. The *Hunt* test's second requirement—that the lawsuit be "germane to the organization's" interest—"is often found without difficulty." *See* Wright & Miller, *supra*, § 3531.9.5, at 900. An association can usually meet the third requirement of the *Hunt* test—i.e., showing that the participation of individual members as parties is not required—simply by seeking declaratory or injunctive relief instead of damages. *Id.* § 3531.9.5, at 928.

An association that meets *Hunt*'s lax requirements will not necessarily represent its members fairly and faithfully. The suit might further the interests of only a "quite small" number of powerful members, rather than the majority's interests. *UAW v. Brock*, 477 U.S. 274, 296 (1986) (Powell, J., dissenting). Also, the association "may have reasons for instituting a suit—such as the publicity that

attends a major case—other than to assert rights of its members." *Id.* at 297. The *Hunt* test thus differs dramatically from "the typical class action," for example, in which "there must be an identity of interests among all plaintiffs before the court—an identity that can be counted upon to assure adequate representation." *Id.* at 296 n.*.

2. Plaintiffs Have Not Shown That They Can Faithfully and Fairly Represent Their Members under the Circumstances Relied Upon in *Hunt*.

Assuming *arguendo* that an association can ever sue purely as a representative of its members, without showing injury to itself, the appropriate circumstances are those upon which the decision in *Hunt* actually relied in upholding standing.

In *Hunt*, the Court cited three circumstances in upholding the Washington State Apple Advertising Commission's standing to bring a suit for its members challenging a North Carolina law that restricted the labelling of Washington State apples sold in North Carolina. First, the Commission "perform[ed] the functions of a traditional trade association" by serving a "specialized segment" of the population. *Hunt*, 432 U.S. at 344. Second, the commission's constituents "possess[ed] all of the indicia of membership in an organization": "They alone elect[ed] the members of the Commission; they alone [could] serve on the Commission; [and] they alone finance[d] its activities, including the costs of this lawsuit." *Id.* at 344–45. Third, the

suit involved a close connection between the economic interests of the Commission and those of its constituents. The challenged North Carolina law could diminish the sale of Washington State apples in that State, which could in turn decrease the assessments paid to the Commission. *Id.* The Court explained that "[t]his financial nexus between the interests of the Commission and its constituents" helped ensure the "concrete adverseness" required by Article III. *Id*. at 345.

If a plaintiff association established these three circumstances in a particular case, a court might reasonably presume that the association can adequately represent its members. Even then, however, the defendant would be entitled to rebut that presumption. The court would then have to decide whether the association would indeed fairly and faithfully represent its members' interests. That is just what a court must do in a class action. Fed. R. Civ. P. 23(a)(4).

3. Plaintiffs Lack Associational Standing Because They Cannot Show That Their Members Would Have Standing.

Even under the *Hunt* test, an association must show that its members have standing in their own right. *See Hunt*, 432 U.S. at 343. The U.S. Supreme Court has said that an organization's member can establish standing by showing injury to his or her aesthetic or recreational interests. *Sierra Club* 405 U.S. at 736 (dicta); *Lujan*, 504 U.S. at 562–63 (dicta). That statement, however, must be understood in light of the separation of powers doctrine underlying standing requirements. As discussed

above, the doctrine applies with "special force" in suits by private plaintiffs against federal executive officials seeking to vindicate public rights. *Spokeo*, 136 S. Ct. at 1552 (Thomas, J., concurring). Consistently with common law requirements, the plaintiff in such suits must show injury that is "peculiar" to the plaintiff in the sense that it differs in kind, not just degree, from that of other members of the public. *E.g.*, *Tyler*, 179 U.S. at 406. This showing is as necessary under the modern law of standing as it was under the common law of public nuisance to avoid the multiplicity of suits that would otherwise arise from every major policy decision in the executive branch. *See supra* note 11.

Injury to non-economic interests could conceivably satisfy the peculiar-harm requirement, but the interests recognized by law that are sufficient to do so differ markedly in nature and kind from those asserted herein. By analogy, common law courts recognized a cause of action for battery that caused no injury other than to the plaintiff's bodily autonomy. *See* Dan B. Dobbs et al., The Law of Torts §§ 33–34. Similarly, a trespass to real property was actionable without proof of actual harm because it interfered with the owner's right of exclusive possession. 8 David A. Thomas, Thompson on Real Property § 68.02(e). A third, modern example is the case law establishing the availability of nominal damages for procedural due process violations. *E.g.*, *Carey v. Piphus*, 435 U.S. 247, 266 (1978). Conceivably, a plaintiff might even establish "peculiar" and hence cognizable injury to a defendant's

wrongful use of public lands, such as when particular public lands are shown to have unique, spiritual significance to a particular Native American Tribe. *See Pit R. Tribe v. U.S. Forest Serv.*, 469 F.3d 768, 779 (9th Cir. 2006).

But plaintiffs Sierra Club and SBCC have not come close to showing a distinctive interest by their members in the lands affected by the construction projects at issue here. Declarations by plaintiffs' members allege those members' use of the affected lands for recreational activities like hiking, bird watching, and pleasure drives. Any member of the public can engage in the very same activities on those lands. Nor do plaintiffs' members sufficiently distinguish themselves from the rest of the public by alleging that they live near or regularly visit the affected lands. These allegations might bear on the imminence of future impairments to their aesthetic and recreational interests, but they do not show the impairments themselves are different in kind from the impairments that any other member of the public who wished to visit these areas—or other public lands, for that matter—could claim. *See Lujan*, 504 U.S. at 556.

II. GRANTING STANDING IN THIS CASE TO SIERRA CLUB AND SBCC IMPERMISSIBLY ENCROACHES UPON THE EXECUTIVE POWER IN VIOLATION OF THE TAKE CARE CLAUSE.

A. Granting Standing to Sierra Club and SBCC Encroaches Upon the President's Duty to Enforce the Law.

The Constitution makes it very clear that while Congress makes the laws, it is the President who enforces them. As Justice Scalia stated, speaking for the Court in *Printz v. United States*, 521 U.S. 898, 922 (1997), "The Constitution does not leave to speculation who is to administer the laws enacted by Congress." Similarly, in *Free Enterprise Fund v. Public Company Oversight Board,* 561 U.S. 477, 513–14 (2010), the Court stated:

> The Constitution that makes the President accountable to the people for executing the laws also gives him the power to do so. That power includes, as a general matter, the authority to remove those who assist him in carrying out his duties. Without such power, the President could not be held fully accountable for discharging his own responsibilities; the buck would stop somewhere else. Such diffusion of authority "would greatly diminish the intended and necessary responsibility of the chief magistrate himself." The Federalist No. 70, at 478.

The accountability of the President to the people is fundamental to the Constitution's system of representative self-governance. That system rests on the premise that: a) we elect the person who enforces our laws; b) we can determine how that person enforces our laws; c) we can hold that person accountable for how our laws are enforced; and d) we can take action to vote that person out of office if we disagree with how our laws are enforced.[14] Allowing self-appointed, unelected advocacy associations unaccountable to the people to step into the shoes of the President and enforce those laws through decisions rendered by unelected judges substantially alters our constitutional system of representative self-governance, impermissibly encroaching upon the President's constitutional duty to faithfully execute the laws. As the Court stated in *Lujan*, 504 U.S. at 577, to allow Congress to "convert the undifferentiated public interest in executive officers' compliance with the law into an 'individual right' vindicable in the courts is to permit Congress to transfer from the President to the courts the Chief Executive's most important constitutional duty, to 'take Care that the Laws be faithfully executed.'" *See also Allen v. Wright*, 468 U.S. 737, 761 (1984) ("The Constitution, after all, assigns to the Executive Branch, and not to the Judicial Branch, the duty to 'take Care that the Laws be faithfully executed.' We could not recognize respondents' standing in this

[14] This is the essence of the argument for accountability made by Madison in Federalist 70.

case without running afoul of that structural principle.") (citation omitted) (quoting U.S. CONST. art. II, § 3)).

As noted in Section I above, this principle is particularly important where, as here, a matter of public policy, not a private right, is at issue. The Sierra Club and SBCC seek to use the Courts to enforce their view of public policy over a policy implemented by the duly elected President of the United States. The Sierra Club and SBCC seek to prevent the will of the people in electing the current President, who ran his election on the issue very before the Court, from being carried out. They seek to set policy through the sole unelected branch of government instead of through of the duly elected representative of all the people.[15] Our Constitutional system of representative self-governance simply does not allow this.

[15] *See*, *e.g.*, *Myers v. United States*, 272 U.S. 52, 123 (1926):

> The President is a representative of the people just as the members of the Senate and of the House are, and it may be, at some times, on some subjects, that the President elected by all the people is rather more representative of them all than are the members of either body of the Legislature whose constituencies are local and not countrywide; and, as the President is elected for four years, with the mandate of the people to exercise his executive power under the Constitution, there would seem to be no reason for construing that instrument in such a way as to limit and hamper that power beyond the limitations of it, expressed or fairly implied.

B. Granting Standing to Sierra Club and SBCC Encroaches Upon the President's Prosecutorial Discretion.

The Court has long recognized that prosecutorial discretion is part and parcel of the President's power to execute the laws. *See, e.g.*, *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (concluding that the Attorney General and U.S. Attorneys have wide prosecutorial discretion "because they are designated by statute as the President's delegates to help him discharge his constitutional responsibility to 'take Care that the Laws be faithfully executed'" (quoting U.S. CONST. art. II, § 3)); *Heckler v. Chaney*, 470 U.S. 821, 832 (1985) ("[A]n agency's refusal to institute proceedings shares to some extent the characteristics of the decision of a prosecutor in the Executive Branch not to indict—a decision which has long been regarded as the special province of the Executive Branch, inasmuch as it is the Executive who is charged by the Constitution to 'take Care that the Laws be faithfully executed.'" (quoting U.S. CONST. art. II, § 3)).

Organizational standing as applied in this case, however, would conflict with the President's ability to exercise prosecutorial discretion to implement public policy goals. That is a result the Constitution will not allow.

CONCLUSION

For the reasons set forth above, the Committee urges the Court to dismiss the claims brought by the Sierra Club and SBCC for lack of standing.

RESPECTFULLY SUBMITTED this 7th day of August 2019.

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CERTIFICATE OF COMPLIANCE

I certify that pursuant to Federal Rules of Appellate Procedure 29, 32(a)(5), and 32(a)(7), the foregoing *amicus curiae* brief is proportionally spaced, has a typeface of 14 point Times New Roman, and contains 6,941 words, excluding those sections identified in Fed. F. App. P. 32(f).

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CERTIFICATE OF SERVICE

I certify that on August 7, 2019, the foregoing *amicus curiae* brief was served on all parties or their counsel of record through the CM/ECF system.

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