Nos. 19-17501, 19-17502, 20-15044

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 U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, NOS. 4:19-CV-00892-HSG, 4:19-CV-00872-HSG, HON. HAYWOOD S. GILLIAM, JR.

BRIEF FOR *AMICUS CURIAE* REP. ANDY BARR IN SUPPORT OF DEFENDANTS-APPELLANTS/CROSS-APPELLEES IN SUPPORT OF REVERSAL

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IDENTITY, INTEREST AND AUTHORITY TO FILE

Amicus curiae Rep. Andy Barr files this brief with the written consent of all parties.[1] *Amicus* has represented Kentucky's 6th congressional district since 2013. A lawyer by training, Rep. Barr also taught constitutional law at the University of Kentucky and Morehead State University when his practice was based in Kentucky. Rep. Barr supports the President's attention to the humanitarian and public-safety emergency on the southern border as both a citizen and as a Member of Congress. In his legislative capacity, Rep. Barr has a significant interest in protecting the statutory scheme that Congress enacted to delegate power in emergencies to the President, not to courts.

STATEMENT OF THE CASE

Executive-branch offices and officials (collectively, the "Government") have appealed the district court's injunction and partial judgment against using "reprogrammed" (*i.e.*, transferred) funds from within the Department of Defense ("DOD") budget for border-wall projects. The appellees in this consolidated appeal are several states and two membership groups (collectively, "Plaintiffs") that sued the Government to challenge emergency efforts to build or replace border barriers

[1] Pursuant to FED. R. APP. P. 29(a)(4)(E), the undersigned counsel certifies that: counsel for *amicus* authored this brief in whole; no counsel for a party authored this brief in any respect; and no person or entity — other than *amicus*, its members, and its counsel — contributed monetarily to this brief's preparation or submission.

on the southern border, including DOD actions under 10 U.S.C. §§ 284, 2808. The district court issued – but stayed – an injunction against the projects, then issued an appealable partial judgment regarding § 2808 projects. FED. R. CIV. P. 54(b). In a prior appeal for §284 projects, the Supreme Court stayed a preliminary injunction. *Trump v. Sierra Club*, 140 S. Ct. 1 (2019) ("the Government has made a sufficient showing at this stage that the plaintiffs have no cause of action to obtain review of the Acting Secretary's compliance with Section 8005"). Although Plaintiffs' underlying complaint raises multiple issues,[2] this appeal concerns claims under § 2808 for projects in excess of those funded for the Department of Homeland Security ("DHS") in fiscal 2019 by the Consolidated Appropriations Act 2019, PUB. L. NO. 116-6, 132 Stat. 2981 (2019) ("CAA").

SUMMARY OF ARGUMENT

Plaintiffs' aesthetic interests could constitute an "injury in fact" for Article III under environmental statutes like NEPA, but those private interests are neither legally protected interests for purposes of Article III (Sections I.A.1) nor within the prudential zone of interests of the relevant statutes (Section I.A.2). Appropriation

[2] Plaintiffs' other claims include a challenge under the National Environmental Policy Act, 42 U.S.C. §§ 42 U.S.C. § 4331-4347 ("NEPA"), and a challenge to the use of the National Emergencies Act, 50 U.S.C. §§ 1601-1651 ("NEA") for the President's actions at the southern border. *See* Presidential Proclamation on Declaring a National Emergency Concerning the Southern Border of the United States, 84 Fed. Reg. 4949 (Feb. 15, 2019).

statutes differ from the statute at issue in *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), in a way that precludes reliance on Plaintiffs' diverted-resources injury (Section I.A.3). Alternatively, the Court could rely on the relevant statutes' lack of judicially manageable standards to bar review under the political-question doctrine (Section I.B). Finally, as the Supreme Court recognized in staying a prior injunction, Plaintiffs lack both a cause of action under the Administrative Procedure Act ("APA") and the APA's waiver of sovereign immunity (Section I.C.1), and they cannot state a claim for non-APA equity review because they lack an interest such as liberty or property that equity review would protect (Section I.C.2).

On the merits, Plaintiffs claim arise under the relevant laws and appropriations bills, not under the Appropriations Clause (Section II.A), and the appropriations bill for the Department of Homeland Security ("DHS") do not repeal by implication DOD's separate authority for border-barrier construction (Section II.B).

In balancing the injunction's equities, Plaintiffs' injuries — tenuous, *if even cognizable*, under Article III — do not rise to the level of irreparable harm or outweigh the federal interests (Section III.A). Finally, the public interest favors the Government (Section III.B).

ARGUMENT

I. THE DISTRICT COURT LACKED JURISDICTION.

Federal courts are courts of limited jurisdiction. *Bender v. Williamsport Area*

Sch. Dist., 475 U.S. 534, 541 (1986). "It is to be presumed that a cause lies outside this limited jurisdiction, and the burden of establishing the contrary rests upon the party asserting jurisdiction." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). The parties cannot confer jurisdiction by consent or waiver, *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee,* 456 U.S. 694, 702 (1982), and federal courts instead have the obligation to assure themselves of jurisdiction before reaching the merits. *Steel Co. v. Citizens for a Better Env't.,* 523 U.S. 83, 95 (1998). As explained in this section, Plaintiffs lack standing to sue under § 8005, and the United States' sovereign immunity bars this litigation.

A. Plaintiffs lack Article III and prudential standing.

Under Article III, federal courts cannot issue advisory opinions, *Muskrat v. United States*, 219 U.S. 346, 356-57 (1911), but must instead focus on the cases or controversies presented by affected parties before the court. U.S. CONST. art. III, § 2. "All of the doctrines that cluster about Article III — not only standing but mootness, ripeness, political question, and the like — relate in part, and in different though overlapping ways, to … the constitutional and prudential limits to the powers of an unelected, unrepresentative judiciary in our kind of government." *Allen v. Wright,* 468 U.S. 737, 750 (1984) (interior quotation marks omitted). Under these limits, a federal court lacks the power to interject itself into public-policy disputes when the plaintiff lacks standing.

At its constitutional minimum, standing presents the tripartite test of whether the party invoking a court's jurisdiction raises a sufficient "injury in fact" under Article III, that is, a legally cognizable "injury in fact" that (a) constitutes "an invasion of a legally protected interest," (b) is caused by the challenged action, and (c) is redressable by a court. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-62 (1992) (interior quotation marks omitted). Moreover, plaintiffs must establish standing separately for each form of relief they request. *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996) ("standing is not dispensed in gross,"); *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 353 & n.5 (2006). Membership groups can often sue on behalf of their members if the members have standing, *Hunt v. Washington Apple Advertising Comm'n,* 432 U.S. 333, 343 (1977), but — with exceptions not relevant here — Article III requires associational plaintiffs to identify specific members with standing to ensure the court that the parties include an affected person, *FW/PBS, Inc. v. Dallas,* 493 U.S. 215, 235 (1990); *Summers v. Earth Island Institute,* 555 U.S. 488, 495 (2009).

In addition to the constitutional limits on standing, the judiciary has adopted prudential limits on standing that bar review even when the plaintiff meets Article III's minimum criteria. *See, e.g.*, *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.,* 454 U.S. 464, 475 (1982) (zone-of-intertest test); *Secretary of State of Md. v. Joseph H. Munson Co.,* 467 U.S. 947, 955 (1984)

(litigants must raise their own rights). Moreover, all these constitutional and prudential criteria must align to provide standing for a given injury. *Mountain States Legal Found. v. Glickman,* 92 F.3d 1228, 1232 (D.C. Cir. 1996).

Finally, a given plaintiff's lack of standing does not depend upon *someone else's* having standing: "The assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing." *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 227 (1974). The notion that *someone* must have standing assumes incorrectly "that the business of the federal courts is correcting constitutional errors, and that 'cases and controversies' are at best merely convenient vehicles for doing so and at worst nuisances that may be dispensed with when they become obstacles to that transcendent endeavor." *Valley Forge Christian Coll.*, 454 U.S. at 489. It may be that Congress — not a federal court — has the only institutional power that can be brought to bear here.

1. Plaintiffs' interests are insufficiently related to an "injury in fact" to satisfy Article III jurisdiction.

A plaintiff can, of course, premise its standing on non-economic injuries, *Valley Forge Christian Coll.*, 454 U.S. at 486, including a "change in the aesthetics and ecology of [an] area," *Sierra Club v. Morton*, 405 U.S. 727, 734 (1972). But the threshold requirement for "the irreducible constitutional minimum of standing" is that a plaintiff suffered an "injury in fact" through "an invasion of a *legally protected interest* which is … concrete and particularized" to that plaintiff. *Defenders of*

Wildlife, 504 U.S. at 560 (emphasis added). To be sure, the requirement for particularized injury typically poses the biggest problem for plaintiffs — for example, both *Valley Forge Christian College* and *Morton*, *supra*, turned on the lack of a particularized injury — but the requirement for a legally protected interest is even more basic.[3]

As the Supreme Court recently explained in rejecting standing for *qui tam* relators based on their financial stake in a False Claims Act penalty, not all *interests* are *legally protected* interests:

> There is no doubt, of course, that as to this portion of the recovery — the bounty he will receive if the suit is successful — a *qui tam* relator has a concrete private interest in the outcome of the suit. But the same might be said of someone who has placed a wager upon the outcome. *An interest unrelated to injury in fact is insufficient to give a plaintiff standing*. The interest must consist of obtaining compensation for, or preventing, the violation of a legally protected right. A *qui tam* relator has suffered no such invasion[.]

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[3] Aesthetic injuries do not qualify as legally protected interests here because the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, PUB. L. NO. 104-208, Div. C, 110 Stat. 3009, 3009-546 to 3009-724 ("IIRIRA"), gave DHS's predecessor the discretionary (and unreviewable) authority to waive environmental review for certain border-wall projects, *id.* at § 102(c)(1), 110 Stat. at 3009-555, and the Real ID Act of 2005, PUB. L. NO. 109-13, Tit. I, Div. B, 119 Stat. 231, 302-11, broadened that waiver authority, and transferred it to DHS. *Id.* § 102, 119 Stat. at 306 (codified at 8 U.S.C. § 1103 note); *In re Border Infrastructure Envtl. Litig.*, 915 F.3d 1213, 1221-26 (9th Cir. 2019) (majority); *accord id.* at 1226-27 (Callahan, J., dissenting).

Vt. Agency of Nat. Res. v. United States ex rel. Stevens, 529 U.S. 765, 772-73 (2000) (emphasis added, interior quotation marks, citations, and alterations omitted); *accord McConnell v. FEC*, 540 U.S. 93, 226-27 (2003). Thus, even harm to a pecuniary interest does not *necessarily* qualify as an injury in fact. Rather, "Art. III standing requires an injury with a nexus to the substantive character of the statute or regulation at issue." *Diamond v. Charles*, 476 U.S. 54, 70 (1986).[4] The statutes here have no nexus to Plaintiffs' alleged aesthetic injuries. Indeed, § 284 expressly *allows* building these border projects. For this reason, Plaintiffs have not suffered an injury in fact under the statutes at issue here.[5]

Fifty years ago, federal courts would have rejected as a generalized grievance any injuries to a plaintiff that challenged an otherwise lawful project based only on

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[4] After rejecting standing based on an interest in a *qui tam* bounty, *Stevens* held that *qui tam* relators have standing on an assignee theory (*i.e.*, the government has an Article III case or controversy and assigns a portion of it to the *qui tam* relator). *Stevens*, 529 U.S. at 771-73. Outside of taxpayer-standing cases that implicate the Establishment Clause, the nexus test of *Flast v. Cohen*, 392 U.S. 83 (1968), typically arises in cases challenging a failure to prosecute. *See*, *e.g.*, *Nader v. Saxbe*, 497 F.2d 676, 680-82 (D.C. Cir. 1974); *Linda R.S. v. Richard D.*, 410 U.S. 614, 617-18 (1973) ("in the unique context of a challenge to a criminal statute, appellant has failed to allege a sufficient nexus between her injury and the government action which she attacks"). Even without the *Flast* nexus test, Article III nonetheless requires that the claimed interest qualify as a "legally protected right." *Stevens*, 529 U.S. at 772-73.

[5] Although analogous to the prudential zone-of-interests test, *Stevens* and *McConnell* make clear that the need for a *legally protected interest* is an element of the threshold inquiry under Article III of the Constitution, not a merely prudential inquiry that a party could waive.

a challenge to the project's source of federal funding:

> This Court has, it is true, repeatedly held that … injury which results from lawful competition cannot, in and of itself, confer standing on the injured business to question the legality of any aspect of its competitor's operations. But competitive injury provided no basis for standing in the above cases simply because the statutory and constitutional requirements that the plaintiff sought to enforce were in no way concerned with protecting against competitive injury.

Hardin v. Ky. Utils. Co., 390 U.S. 1, 5-6 (1968) (citations omitted); *Alabama Power Co. v. Ickes*, 302 U.S. 464, 478-79 (1938). This Court need not find that *Ickes* and *Hardin* remain good law; *Stevens*, *McConnell*, and *Diamond* certainly do. Plaintiffs' alleged injuries may suffice to support standing for environmental review statutes, but they do not suffice under the statutes at issue here.

2. Plaintiffs' interests fall outside the relevant zones of interests.

Assuming *arguendo* that Plaintiffs had constitutional standing based on their injuries, *but see* Section I.A.1, *supra*, Plaintiffs would remain subject to the zone-of-interests test, which defeats their claims for standing to sue under the statutes that they invoke. Quite simply, nothing in those statutes supports an intent to protect aesthetic or other non-federal interests from military construction projects funded with transferred funds. For its part, § 284 *expressly allows* the challenged projects, 10 U.S.C. § 284(b)(7), and therefore does not support a right to stop those projects.

To satisfy the zone-of-interests test, a "plaintiff must establish that the injury

he complains of (*his* aggrievement, or the adverse effect *upon him*) falls within the 'zone of interests' sought to be protected by the statutory provision whose violation forms the legal basis for his complaint." *Air Courier Conference v. Am. Postal Workers Union*, 498 U.S. 517, 523-24 (1991) (interior quotation marks omitted, emphasis in original). For violations of appropriations legislation, the *statute* — not the Appropriations Clause — provides the relevant zone of interests. *Canadian Lumber Trade All. v. United States*, 517 F.3d 1319, 1334-35 (Fed. Cir. 2008); *Mount Evans Co. v. Madigan*, 14 F.3d 1444, 1452-53 (10th Cir. 1994). And not every frustrated interest meets the test:

> [F]or example, the failure of an agency to comply with a statutory provision requiring "on the record" hearings would assuredly have an adverse effect upon the company that has the contract to record and transcribe the agency's proceedings; but since the provision was obviously enacted to protect the interests of the parties to the proceedings and not those of the reporters, that company would not be "adversely affected within the meaning" of the statute.

Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 883 (1990). *Amicus* respectfully submits that the interests here are even further afield from the statutes involved than court reporters' fees are from a statute requiring hearings on the record. Not every adverse effect on a private interest falls within the zone of interests that Congress sought to protect in a tangentially related statute.

3. Plaintiffs' diverted resources do not satisfy Article III.

Although the prior proceedings did not address diverted-resource standing, Plaintiffs might assert that form of standing here. Because these injuries are self-inflicted and outside the relevant statutory zone of interests, *Amicus* respectfully submits that such injuries do not suffice to support standing.

This type of diverted-resource standing derives from *Havens Realty*. As Judge Millett of the U.S. Court of Appeals for the District of Columbia Circuit has explained, "[t]he problem is not *Havens*[; the] problem is what our precedent has done with *Havens*." *People for the Ethical Treatment of Animals v. U.S. Dept. of Agriculture*, 797 F.3d 1087, 1100-01 (D.C. Cir. 2015) (Millett, J., dissenting); *accord Animal Legal Def. Fund v. USDA*, 632 F. App'x 905, 909 (9th Cir. 2015) (Chhabria, J., concurring); *Fair Hous. Council of San Fernando Valley v. Roommate.com, LLC*, 666 F.3d 1216, 1225-26 (9th Cir. 2012) (Ikuta, J., dissenting). Under the unique statutory and factual situation in *Havens Realty*, a housing-rights organization's diverted resources provided it standing, but in most other settings such diverted resources are mere self-inflicted injuries. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 417-18 (2013) (self-censorship due to fear of surveillance insufficient for standing); *Pennsylvania v. New Jersey*, 426 U.S. 660, 664 (1976) (financial losses state parties could have avoided insufficient for standing). Indeed, if mere spending could manufacture standing, any private advocacy group could

establish standing against any government action merely by spending money to oppose it. But that clearly is not the law. *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972) (mere advocacy by an organization does not confer standing to defend "abstract social interests"). To confine federal courts to their constitutional authority, this Court should review the diverted-resources rationale for Article III standing.

Relying on *Gladstone, Realtors v. Bellwood*, 441 U.S. 91, 102-09 (1979), *Havens Realty* held that the Fair Housing Act at issue there extends "standing under § 812 … to the full limits of Art. III," so that "courts accordingly lack the authority to create prudential barriers to standing in suits brought under that section," 455 U.S. at 372, thereby collapsing the standing inquiry into the question of whether the alleged injuries met the Article III minimum of injury in fact. *Id.* The typical organizational plaintiff and typical statute lack several critical criteria from *Havens Realty*.

First, the *Havens Realty* organization had a statutory right (backed by a statutory cause of action) to truthful information that the defendants denied to it. Because "Congress may create a statutory right[,] … the alleged deprivation of [such rights] can confer standing." *Warth v. Seldin*, 422 U.S. 490, 514 (1975). Under a typical statute, by contrast, a typical organizational plaintiff has no claim to any rights related to its own voluntarily diverted resources.

Second, and related to the first issue, the injury that the plaintiff claims must

align with the other components of its standing, *Stevens*, 529 U.S. at 772; *Mountain States Legal Found. v. Glickman,* 92 F.3d 1228, 1232 (D.C. Cir. 1996); *Ecosystem Inv., Partners v. Crosby Dredging, L.L.C.*, 729 F.App'x 287, 299 (5th Cir. 2018) (collecting cases), including the allegedly cognizable right. In *Havens Realty,* the statutorily protected right to truthful housing information aligned with the alleged injury (costs to counteract false information given in violation of the statute). By contrast, under the DOD appropriations acts (or any typical statute), there will be no rights even *remotely* related to a third-party organization's discretionary spending.

Third, and most critically, the *Havens Realty* statute eliminated prudential standing, so the zone-of-interests test did not apply. When a plaintiff — whether individual or organizational — sues under a statute that *does not eliminate prudential standing*, that plaintiff cannot bypass the zone-of-interests test or other prudential limits on standing.[6] Typically, it would be fanciful to suggest that a statute has private, third-party spending in its zone of interests. Certainly, that is the case for the DOD appropriations. *See* Section I.A.2, *supra*.

Non-mutual estoppel does not apply to the federal government, *United States*

[6] For example, applying *Havens Realty* to diverted resources in *Action Alliance of Senior Citizens v. Heckler*, 789 F.2d 931, 939 (D.C. Cir. 1986) (R.B. Ginsburg, J.), then-Judge Ginsburg correctly recognized the need to ask whether those diverted resources fell within the zone of interests of the Age Discrimination Act. 789 F.2d at 939; *see also E. Bay Sanctuary Covenant v. Trump*, 909 F.3d 1219, 1239 (9th Cir. 2018) (applying zone-of-interests test).

v. Mendoza, 464 U.S. 154 (1984), and *stare decisis* cannot be applied so conclusively that, in effect, it operates as preclusion against non-parties to the prior litigation. *South Central Bell Tel. Co. v. Alabama,* 526 U.S. 160, 167-68 (1999). While Judge Millet acknowledged problematic precedent under *Havens Realty*, those "cases cannot be read as foreclosing an argument that they never dealt with." *Waters v. Churchill*, 511 U.S. 661, 678 (1994) (plurality); *Cooper Indus., Inc. v. Aviall Serv., Inc.,* 543 U.S. 157, 170 (2004). *Amicus* respectfully submits that this Court has a constitutional obligation to consider diverted-resource standing without regard to either issue preclusion or preclusive resort to *stare decisis* from decisions that did not expressly consider the foregoing issues.

B. Plaintiffs' claims raise non-justiciable political questions.

Article III also makes some issues non-justiciable as political questions: *Allen,* 468 U.S. at 750 (quoted *supra*). The Government argues that Plaintiffs lack prudential standing, but this Court need not reach standing to find this dispute non-justiciable under Article III.

Plaintiffs ask this Court to delve into areas that the NEA and the Constitution leave to Congress and the President to resolve between themselves in the political process. Here, there is both "a textually demonstrable constitutional commitment of the issue to a coordinate political department" and "a lack of judicially discoverable and manageable standards for resolving [the case]." *Vieth v. Jubelirer,* 541 U.S. 267,

277-78 (2004) (internal quotation marks omitted). As explained in Section I.B, *infra*, the lack of manageable standards for resolving this case also goes to the Court's jurisdiction under the APA's waiver of sovereign immunity. As the only unelected branch of government, courts are the *least* fit to answer such questions: "making judges supreme arbiters in political controversies … [would] dethrone [the people] and [make them] lose one of their … invaluable birthrights." *Luther v. Borden*, 48 U.S. 1, 52-53 (1849). Accordingly, *Amicus* respectfully submits that this Court should dismiss this litigation and leave this matter for the political branches to resolve politically, not in court.

C. Sovereign immunity bars Plaintiffs' challenge.

In addition to the lack of Article III jurisdiction, this action also falls outside the scope of the APA's waiver of sovereign immunity and thus is subject to an independent jurisdictional bar: "Sovereign immunity is jurisdictional in nature." *FDIC v. Meyer*, 510 U.S. 471, 475 (1994). Accordingly, this Court must consider immunity, even if the Government does not raise it.

"The United States, as sovereign, is immune from suit save as it consents to be sued." *United States v. Sherwood*, 312 U.S. 584, 586 (1941). "Absent a waiver, sovereign immunity shields the Federal Government and its agencies from suit," without regard to any perceived unfairness, inefficiency, or inequity. *Dep't of Army v. Blue Fox, Inc.*, 525 U.S. 255, 260 (1999). Moreover, the scope of such waivers is

strictly construed in favor of the sovereign. *Lane v. Pena*, 518 U.S. 187, 192 (1996). As relevant here, the 1976 APA amendments to 5 U.S.C. § 702[7] "*eliminat[ed]* the sovereign immunity defense in *all equitable actions* for specific relief against a Federal agency or officer acting in an official capacity." *Sea-Land Serv., Inc. v. Alaska R.R.*, 659 F.2d 243, 244 (D.C. Cir. 1982) (quoting S. REP. NO. 996, 94th Cong., 2d Sess. 8 (1976); H.R. REP. NO. 1656, 94th Cong., 2d Sess. 9 (1976), 1976 U.S. Code Cong. & Admin. News 6121, 6129) (R.B. Ginsburg, J.) (emphasis added). But that waiver has several restrictions that preclude review *in this action*.[8] Specifically, the APA excludes review for "statutes [that] preclude judicial review" and those that commit agency action to agency discretion. 5 U.S.C. §§ 701(a)(1)-(2), 703. Plaintiffs' actions fail these tests.

Allowing Plaintiffs' gambit to succeed here would undermine our system of government, which requires the political branches to resolve political issues. *Schuette v. Coalition to Defend Affirmative Action*, 572 U.S. 291, 311-12 (2014). "'The principle of immunity from litigation assures the states and the nation from

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[7] PUB. L. NO. 94-574, § 1, 90 Stat. 2721 (1976).

[8] In addition to the generally applicable limits in the APA's waiver of sovereign immunity, the NEA also provides that "[n]o law enacted after September 14, 1976, shall supersede [the NEA] unless it does so in specific terms, referring to [the NEA], and declaring that the new law supersedes the provisions of [the NEA]." 50 U.S.C. § 1621(b). The APA's waiver was enacted after September 14, 1976, *see* PUB. L. NO. 94-574, 90 Stat. at 2721, and does not supersede the NEA expressly.

unanticipated intervention in the processes of government.'" *Alden v. Maine*, 527 U.S. 706, 750 (1999) (quoting *Great Northern Life Ins. Co. v. Read*, 322 U.S. 47, 53 (1944)). As *Read* explained, waivers of immunity must be limited to the terms of the waiver to avoid the "crippling interferences" of government-by-lawsuit:

> The history of sovereign immunity and the practical necessity of unfettered freedom for government from crippling interferences require a restriction of suability to the terms of the consent, as to persons, courts and procedures.

Read, 322 U.S. 53-54. To its credit, the United States — acting through Congress — has waived its sovereign immunity for many suits against the sovereign, but the judiciary lacks jurisdiction to extend that waiver beyond its express terms: "'It needs no argument to show that the political power cannot be thus ousted of its jurisdiction and the judiciary set in its place.'" *Alden*, 527 U.S. at 751 (quoting *Louisiana v. Jumel*, 107 U.S. 711, 727-28 (1883)). Sovereign immunity compels this Court to reject Plaintiffs' proposed invasion of the Government's actions.

1. Plaintiffs cannot sue under the APA.

Although the APA's "generous review provisions must be given a hospitable interpretation," *Abbott Labs. v. Gardner*, 387 U.S. 136, 140-41 (1967) (interior quotation marks omitted), APA review does not apply here. Indeed, Plaintiffs seek to avoid the APA, presumably because the zone-of-interests test clearly limits APA review. *See Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153-

54 (1970) (zone-of-interests test applies to APA); Section I.A.2, *supra* (Plaintiffs cannot satisfy the zone-of-interests test). But, while APA review does not apply, the reasons are not those given by Plaintiffs.[9]

Judicial review is precluded "to the extent that … agency action is committed to agency discretion by law." 5 U.S.C. § 702(2); *accord id.* § 701(a)(2). One sign that Congress has committed an issue to executive officers' discretion is when a reviewing court would have "no law to apply" in reviewing the agency action. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971), *overruled on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977). Similarly, "review is not to be had if the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion." *Heckler v. Chaney,* 470 U.S. 821, 830 (1985). Indeed, this principle predates the APA, *Gray v. Powell,* 314 U.S. 402, 412 (1941), and forms a "common law" of "nonreviewability." Kenneth Culp Davis, *Nonreviewable Administrative Action,* 96 U. PA. L. REV. 749, 750-51 (1948). Review is particularly outside judicial expertise when, as here, "the duty to act turns on matters of doubtful or highly debatable

[9] The theory that Plaintiffs can avoid the APA based on "*ultra vires*" or constitutional review is unsound, given that the APA expressly allows review of agency action "contrary to constitutional right, power, privilege, or immunity" and "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2)(B)-(C). In any event, as explained in the next section, equity review does not aid Plaintiffs here.

inference from large or loose statutory terms." *Panama Canal Co. v. Grace Line, Inc.*, 356 U.S. 309, 318 (1958). Alternatively, the lack of judicially manageable standards provides a basis for rejecting the claims here as non-justiciable political questions. *See Vieth,* 541 U.S. at 277; Section I.B, *supra*.

The NEA has not given a reviewing court the "law to apply." As Rep. Drinan candidly acknowledged in trying to amend the NEA bill to give Congress control over non-wartime emergencies, "H.R. 3884 [has] no standard really, whatsoever, when and why the President can proclaim a national emergency." 121 CONG. REC. 27,632, 27,645 (Sept. 4, 1975) (Rep. Drinan), *reprinted in* S. Comm. on Gov't Operations & the Special Comm. on Nat'l Emergencies and Delegated Emergency Powers, 94th Cong., 2d Sess., The National Emergencies Act Source Book: Legislative History, Texts, and Other Documents, at 279 (1976). The amendment failed, 121 CONG. REC. AT 27,646, *reprinted in* NEA Source Book, at 280, confirming that the NEA lacks judicially manageable standards:

> Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language.

INS v. Cardoza-Fonseca, 480 U.S. 421, 442-43 (1987) (citation omitted). Because Congress purposefully enacted legislation that gives the President complete flexibility — and thus gives a reviewing court "no law to apply" to measure the President's exercise of that discretion — this Court should find the President's

declarations unreviewable and outside the APA's waiver of sovereign immunity.[10]

2. Plaintiffs cannot bring a non-APA suit in equity.

In order to sue in equity, Plaintiffs need more than an aesthetic injury that would — or at least *could* — suffice to confer standing under the APA. Instead, an equity plaintiff or petitioner must invoke a statutory or constitutional right for equity to enforce, such as life, liberty, or property under the Due Process Clause or equal protection under the Equal Protection Clause or the Fifth Amendment. *See*, *e.g.*, *United States v. Lee*, 106 U.S. 196, 220-21 (1882) (property); *Ex parte Young*, 209 U.S. 123, 149 (1908) (property); *Youngberg v. Romeo*, 457 U.S. 307, 316 (1982) (liberty); *cf. Wadley S. R. Co. v. Georgia*, 235 U.S. 651, 661 (1915) ("any party affected by [government] action is entitled, by the due process clause, to a judicial review of the question as to whether he has been thereby deprived of a right protected by the Constitution"). Plaintiffs' claimed injuries here fall short of what equity requires.

Unlike the APA and the liberal modern interpretation of Article III, pre-APA equity review requires "direct injury," which means "a wrong which directly results in the violation of a legal right." *Ickes*, 302 U.S. at 479. Without that elevated level

[10] Alternatively, the lack judicially manageable standards provides a basis for rejecting the claims here as non-justiciable political questions. *See Vieth,* 541 U.S. at 277; Section I.B, *supra*.

of direct injury, there is no review:

> It is an ancient maxim, that a damage to one, without an injury in this sense, (*damnum absque injuria*), does not lay the foundation of an action; because, if the act complained of does not violate any of his legal rights, it is obvious, that he has no cause to complain. Want of right and want of remedy are justly said to be reciprocal. Where therefore there has been a violation of a right, the person injured is entitled to an action. The converse is equally true, that where, although there is damage, there is no violation of a right no action can be maintained.

Id. (alterations, citations, and interior quotation marks omitted). In short, Plaintiffs do not have an action in equity. But even if Plaintiffs did have an action in equity, they still would need to have standing and to meet the zone-of-interests test, in which the relevant zone would be the zone protected by the appropriations statute that Plaintiffs seek to enforce. *Canadian Lumber Trade*, 517 F.3d at 1334-35; *Mount Evans Co.*, 14 F.3d at 1452-53; *see also* Gov't Br. at 19-25. As already explained, Plaintiffs cannot meet that test. *See* Section I.A.2, *supra*.

II. IF JURISDICTION EXISTED, THIS COURT SHOULD REJECT PLAINTIFFS' CLAIMS ON THE MERITS.

As explained in the prior section, the district court lacked jurisdiction. *See* Section I, *supra*. As explained in this section, Plaintiffs fail to state a claim on the merits, assuming *arguendo* that federal jurisdiction exists. Plaintiffs' arguments on the merits suffer from two critical weaknesses: (a) on the constitutional merits, the Government simply did not violate the Appropriations Clause when the Government

relied on — and complied with — pre-existing *statutory* authority to reprogram DOD budget funds to border-barrier construction authorized by Congress; and (b) on the statutory merits, the *DHS* budget authorization for 2019 did not impliedly repeal the pre-existing *DOD* statutes or authorizations.

A. The Government did not violate the Appropriations Clause.

Plaintiffs and the district court argue that the Government has violated the Appropriations Clause, but the real complaint is that the CAA did not adequately prevent the Government from exercising its pre-existing powers under the NEA and § 2808. It is frivolous to claim that duly enacted and entirely valid prior laws somehow retroactively violate the Constitution because Plaintiffs' allies in the U.S. House of Representative failed to circumvent those pre-existing laws with a new law. If Congress had wanted to seal off the President's NEA authority, the NEA expressly provides a process to do so. *See* 50 U.S.C. § 1621(b). The CAA did not follow that path, and this Court should squarely reject Plaintiffs' CAA-based claims to the contrary.

Specifically, because the Government complied with the requirements for reprogramming funds under 10 U.S.C. §§ 284, 2808 and the 2019 appropriations statutes, the money that the Government has spent or will spend on the border-barrier projects complies with the Appropriations Clause. By dealing exclusively with appropriated funds and the statutorily permitted transfer of appropriated funds, the

Government has not violated the Appropriations Clause. Even if the Government had violated one of the appropriations statutes, Plaintiffs cannot import *statutory* arguments into the constitutional claim. *See Dalton v. Specter*, 511 U.S. 462, 473 (1994); *Campbell v. Clinton*, 203 F.3d 19, 22 (D. C. Cir. 2000). Thus, Plaintiffs' constitutional argument lacks merit.

B. CAA's spending caps for DHS border-barrier projects in 2019 did not impliedly repeal DOD's existing authority for border projects.

Plaintiffs cannot argue that 10 U.S.C. §§ 284, 2808 prohibit any and all border-barrier construction; instead, they argue that the CAA's limits on DHS's 2019 border-barrier projects prevent DOD's circumventing the CAA's spending caps. In essence, Plaintiffs claim that the CAA's funding of a DHS border-barrier project in Texas impliedly repealed the DOD's pre-existing statutory and appropriations authority to use and to reprogram DOD funds for different border-barrier projects.

As the Supreme Court has explained, courts will not presume implied repeals "unless the intention of the legislature to repeal is clear and manifest" and "unless the later statute expressly contradicts the original act or … such a construction is absolutely necessary in order that the words of the later statute shall have any meaning at all." *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 662 (2007) (interior alterations, citations, and quotation marks omitted). While the presumption against implied repeal is always strong, *id.*, the presumption "applies

with especial force when the provision advanced as the repealing measure was enacted in an appropriations bill." *United States v. Will*, 449 U.S. 200, 221-22 (1980) (citing *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 190 (1978)). Here, the CAA's providing DHS with $1.375 billion to build specified Texas projects is entirely consistent with DOD's having other, pre-existing statutory authority to build other projects for other DOD purposes. Given its silence on DOD transfers and expenditures for border-wall funding, a *new DHS appropriation* cannot be read implicitly to repeal DOD's pre-existing authority.

III. THE PUBLIC INTEREST AND PLAINTIFFS' LACK OF IRREPARABLE HARM WEIGH AGAINST INJUNCTIVE RELIEF.

As the Government explains, injunctive relief is not automatic, even for meritorious claims within federal courts' jurisdiction. Gov't Br. at 43-44. This Court should reject the district court's balancing of the equities and assessment of the public interest, even if jurisdiction existed and Plaintiffs' claims had merit.

A. Plaintiffs' cognizable harm is trivial to non-existent, while the Government's interests are significant.

The Government has significant public-health and public-safety concerns at stake, while Plaintiffs aesthetic interests are trivial and likely not even cognizable. Plaintiffs thus lack any irreparable injury at all or, even if some small quantum existed, it would not outweigh the important federal interests.

First, factually, the Government's efforts to secure the project areas will make

the areas *more accessible* to the pursuit of Plaintiffs' aesthetic interests, not less accessible. Accordingly, Plaintiffs' claims of irreparable injury are not credible. Moreover, and quite simply, people will die — whether from border crossings, border interdictions, or drug use and related violence — if the district court's injunction were to remain in place. Additionally, the district court's enjoining the Executive Branch without Article III jurisdiction violates the separation of powers, which inflicts a separation-of-powers injury: "the deprivation of constitutional rights unquestionably constitutes irreparable injury." *Hernandez v. Sessions*, 872 F.3d 976, 994-95 (9th Cir. 2017) (interior quotation marks omitted). In short, the result of enjoining an important governmental action is grossly out of line with the claimed injuries.

Second, legally, injuries that qualify as sufficiently immediate under Article III can nonetheless fail to qualify under the higher bar for irreparable harm, *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 149-50, 162 (2010), and an absence of jurisdiction "negates giving controlling consideration to the irreparable harm." *Heckler v. Lopez*, 464 U.S. 879, 886 (1983) (Brennan, J., dissenting from the denial of motion to vacate the Circuit Justice's stay). Even if Plaintiffs could qualify for *standing* under *Havens Realty*, their self-inflicted expenditures cannot qualify as irreparable injury: "self-inflicted wounds are not irreparable injury." *Second City Music, Inc. v. City of Chicago*, 333 F.3d 846, 850 (7th Cir. 2003); *accord Novartis*

Consumer Health, Inc. v. Johnson & Johnson-Merck Consumer Pharm. Co., 290 F.3d 578, 596 (3d Cir. 2002) ("injury … may be discounted by the fact that [a party] brought that injury upon itself"); *Davis v. Mineta*, 302 F.3d 1104, 1116 (10th Cir. 2002). The best reading of the applicable laws holds that Plaintiffs lack cognizable interests, *see* Sections I.A.1-I.A.2, *supra*, which tips the balance of hardships decidedly in favor of the Government.

B. The public interest favors denial of injunctive relief.

The public interest also favors reversal. In public-injury cases, equitable relief that affects competing public interests "has never been regarded as strictly a matter of right, even though irreparable injury may otherwise result to the plaintiff" because courts also consider adverse effects on the public interest. *Yakus v. United States*, 321 U.S. 414, 440 (1944). The public interest lies in ameliorating the humanitarian and security crises at the border — as demonstrated by the President's declaration of an emergency.

CONCLUSION

For the foregoing reasons and those argued by the Government, this Court should vacate the injunction and reverse the district court's judgment.

Dated: January 31, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B) and 29(a)(5) because:

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STATEMENT OF RELATED CASES

Amicus curiae Rep. Andy Barr adopts the Statement of Related Cases filed with the opening brief of the federal defendants-appellants/cross-appellees.

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CERTIFICATE OF SERVICE

I hereby certify that on January 31, 2020, I electronically submitted the foregoing *amicus curiae* brief to the Clerk via the Court's CM/ECF system for filing and transmittal of a Notice of Electronic Filing to the participants in this appeal who are registered CM/ECF users.

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