Nos. 19-16102, 19-16299, 19-16300,
19-16336 (Consolidated)

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,

v.

DONALD J. TRUMP, *in his official capacity as President of the United States, ET AL.*,
Defendants-Appellants.

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 IN SUPPORT OF REVERSAL

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES AND REGULATIONS

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)€, 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 a preliminary injunction against the use of such funds for border-wall projects, then issued an appealable partial judgment based on one of Plaintiffs' several theories against the border-wall projects. FED. R. CIV. P. 54(b). A motions panel of this Court denied the Government's emergency motion to stay the injunction, but the Supreme Court granted a stay. *Trump v. Sierra Club*, No. 19A60, 2019 U.S. LEXIS 4491, at *1 (July 26, 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 only Plaintiffs' claims under § 284 and under § 8005 of DoD's fiscal-2019 appropriations bill, DoD Appropriations Act for Fiscal Year 2019, PUB. L. NO. 115-245, div. A, § 8005, 132 Stat. 2981, 2999 (Sept. 28, 2018). Although Plaintiffs do not dispute that DoD may use funds under § 284 for "the counterdrug activities … of any other department or agency of the Federal Government," 10 U.S.C. § 284(a),

[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). Although DoD funding under 10 U.S.C. § 2808 falls under the NEA, DoD actions under 10 U.S.C. § 284 do not require an emergency to transfer or reprogram funds.

such as "[c]onstruction of roads and fences and installation of lighting to block drug smuggling corridors across international boundaries of the United States," *id.* § 284(b)(7), Plaintiffs argue that § 8005 prohibits DoD's transfer of the relevant funds within DoD's budget to fund border-barrier projects under § 284.

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 under the statutes under which the District Court ruled (Sections I.A.1) nor within the prudential zone of interests of those statutes (Section I.A.2). Appropriation 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). Finally, as the Supreme Court recognized in staying the orders under appeal, Plaintiffs lack both a cause of action under the Administrative Procedure Act ("APA"), as well as the APA's waiver of sovereign immunity (Section I.B.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.B.2).

On the merits, provisions in 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), and that 2019 appropriations process

and DHS's subsequent request were not foreseen by either Congress or the military in the 2018 DoD appropriations process relevant to § 8005 (Section II.A). Moreover, Plaintiffs' injuries — tenuous, *if even cognizable*, under Article III — do not rise to the level of irreparable harm (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. 488-89, 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*

[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).

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[.]

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

[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.

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 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.

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[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.

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 stay proceedings did not raise — and the motions panel 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 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.

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[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).

B. Sovereign immunity bars Plaintiffs' challenge.

In addition to the lack of Article III jurisdiction, Plaintiffs' claims also fall outside the scope of the APA's waiver of sovereign immunity[7] and thus are subject to an independent jurisdictional bar: "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). The scope of such waivers, moreover, is strictly construed in favor of the sovereign. *Lane v. Pena*, 518 U.S. 187, 192 (1996). Because Plaintiffs' claims neither fall within the APA nor within the non-APA and pre-APA equitable exceptions to sovereign immunity, Plaintiffs lack jurisdiction for this litigation.

1. Plaintiffs cannot sue under the APA.

Subject to certain limitations, the APA provides a cause of action for judicial review to those "aggrieved by agency action within the meaning of a relevant statute." 5 U.S.C. § 702. For example, the APA excludes review under "statutes [that] preclude judicial review," those that commit agency action to agency discretion, and those with "special statutory review," non-final actions. 5 U.S.C. §§ 701(a)(1)-(2), 703, 704. As the Supreme Court recognized, Plaintiffs do not have a cause of action for judicial review. *Trump v. Sierra Club*, No. 19A60, 2019 U.S.

[7] The waiver of sovereign immunity was added to 5 U.S.C. § 702 in 1976. PUB. L. NO. 94-574, § 1, 90 Stat. 2721 (1976).

LEXIS 4491, at *1 (July 26, 2019) (quoted *supra*). Other APA limits apply to other parts of Plaintiffs' suit. For example, questions of the presence or absence of an emergency or priorities are committed to agency discretion within the meaning of the APA. 5 U.S.C. § 702(2); *accord id.* § 701(a)(2).

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), 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). 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.

2. Plaintiffs cannot bring a non-APA and pre-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 its federal equivalent in 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 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 26-41. As already explained, Plaintiffs cannot meet that test. *See* Section I.A.2, *supra*.

II. IF JURISDICTION EXISTED, A CLASS ACTION WOULD REMAIN AN IMPROPER VEHICLE FOR THIS LITIGATION.

As explained in the prior section, the District Court lacked jurisdiction for its injunction. *See* Section I, *supra*. As explained in this section, Plaintiffs fail to state a claim on the merits, assuming *arguendo* that federal jurisdiction existed.

A. <u>These DoD projects qualify as "unforeseen" within the meaning of § 8005.</u>

Plaintiffs allege — and the District Court held — that the transfers violated § 8005's proviso against making transfers for foreseen items: "such authority to transfer may not be used unless for higher priority items, based on *unforeseen military requirements*, than those for which originally appropriated." PUB. L. NO. 115-245, div. A, § 8005, 132 Stat. at 2999 (emphasis added). *Amicus* respectfully submits that, when Congress enacted DoD's 2019 appropriation in 2018, it was unforeseeable *to the military* both that Congress would deny funding to DHS in the DHS appropriation in 2019 and that DHS would request assistance from the military in 2019. *Amicus* further submits that that is all that § 8005's proviso requires with

respect to foreseeability. The entire basis for this *military* project arose *after* Congress enacted DoD's 2019 appropriation.

B. The CAA did not "deny" an item to DoD within the meaning of § 8005.

Plaintiffs have not argued that § 284 prohibits border-barrier construction, but rather argue that § 8005 and provisions of the Consolidated Appropriations Act of 2019, PUB. L. NO. 116-6, 132 Stat. 2981 (2019) ("CAA"), related to DHS prohibit DoD from replenishing available funds by transferring appropriated funds. *Amicus* respectfully submits that the Government handily dispatches Plaintiffs' arguments by showing that DHS requested DoD's assistance months after Congress enacted the 2019 DoD appropriation and that appropriating DHS $1.375 billion for DHS border-wall construction did not "deny" an "item" within the meaning of § 8005. *See* Gov't Br. at 43-48. Plaintiffs' and the District Court's contrary assertion posits that the CAA's funding of a different DHS border-wall project *sub silentio* repealed by implication the DoD's appropriation act authority to reprogram funds for a different border-wall project for drug interdiction.

With respect to repeals by implication, the Supreme Court recently has explained that a court will not presume repeal "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.*, and dispositive here, 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 certain projects in Texas is entirely consistent with DoD's having other, pre-existing statutory authority to build other projects for drug-interdiction 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 ASLO WEIGH AGAINST INJUNCTIVE RELIEF.

To the extent that Plaintiffs' suit lies in equity, this Court also may consider that the public interest supports the Government and that Plaintiffs lack irreparable harm. The Government has significant public-health and public-safety concerns at stake, while Plaintiffs aesthetic interests are trivial and likely not even cognizable.

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

With respect to Plaintiffs' claims of irreparable harm, transferring or reprogramming funds within the DoD budget has no immediate effect on anyone.

Even assuming *arguendo* that this Court would consider Plaintiffs' *ultimate* harm (namely, the aesthetic injuries from the eventual border wall constructed with those funds), Plaintiffs still have two problems, one factual and one legal.

First, factually, the Government's efforts to reduce drug trafficking in 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 injury.

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.

Dated: August 7, 2019

Respectfully submitted,

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Dated: August 7, 2019

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I hereby certify that on August 7, 2019, 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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