No. 19A60

In the Supreme Court of the United States

DONALD J. TRUMP, IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE UNITED STATES, *ET. AL.*,
Applicants,

v.

SIERRA CLUB, *ET AL.*,
Respondents.

On Application for a Stay Pending Appeal to the United States Court of Appeals for the Ninth Circuit and Pending Further Proceedings in this Court and Request for an Immediate Administrative Stay

To the Honorable Elena Kagan,
Associate Justice of the United States and
Circuit Justice for the Ninth Circuit

MOTION FOR LEAVE TO FILE *AMICUS* BRIEF, MOTION FOR LEAVE TO FILE BRIEF IN COMPLIANCE WITH RULE 33.2, *AMICUS CURIAE* BRIEF OF REP. ANDY BARR IN SUPPORT OF APPLICANTS

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MOTION FOR LEAVE TO FILE *AMICUS* BRIEF

Movant U.S. Rep. Andy Barr (KY-6) respectfully requests leave to file the accompanying brief as *amicus curiae* in support of the application to stay the injunctive relief entered by the District Court in this matter.* The federal applicants and the private respondents consented to this motion for leave to file.

IDENTITY AND INTERESTS OF MOVANT

Rep. Barr 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.

* Consistent with FED. R. APP. P. 29(a)(4)(E) and this Court's Rule 37.6, counsel for movant and *amicus curiae* authored these motions and brief in whole, and no counsel for a party authored the motions and brief in whole or in part, nor did any person or entity, other than the movant/*amicus* and its counsel, make a monetary contribution to preparation or submission of the motions and brief.

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.

REASONS TO GRANT LEAVE TO FILE

By analogy to this Court's Rule 37.2(b), movant respectfully seeks leave to file the accompanying *amici curiae* brief in support of the stay applicants. Because this motion is filed before the respondents' deadline to file an opposition, this filing should not disturb the accelerated briefing schedule ordered in this matter.

Movant respectfully submits that its proffered *amicus* brief brings several relevant matters to the Court's attention, beyond the issues in the application:

- First, the *amicus* brief discusses the All Writs Act, 28 U.S.C. § 1651(a), which aids this Court's jurisdiction to issue a stay now to preserve judicial review later. *See Amicus* Br. at 11-12.
- Second, on the issue of standing, the *Amicus* brief demonstrates that plaintiffs fail to meet the requirement for a legally protected interest with respect to an injury in fact. *See Amicus* Br. at 12-16.
- Third, on the issue of standing, the *Amicus* brief rebuts a potential claim to standing under *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), which respondents might raise in their opposition. *See Amicus* Br. at 18-20.

- Fourth, the *amicus* brief addresses the lack of a ripe claim to challenge intra-agency transfers of funds, as distinct from final agency action. *See Amicus* Br. at 20-21.
- Fifth, the *amicus* brief addresses the absence of either a cause of action in equity or a waiver of sovereign immunity under the Administrative Procedure Act. *See Amicus* Br. at 21-25.

These issues are all relevant to deciding the stay application, and movant Rep. Andy Barr respectfully submits that filing the brief will aid the Court.

Dated: July 18, 2019

Respectfully submitted,

/s/ Lawrence J. Joseph

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MOTION FOR LEAVE TO FILE UNDER RULE 33.2

Movant U.S. Rep. Andy Barr (KY-6) respectfully submits that the Court's rules require those moving or applying to a single Justice to file in 8½-by 11-inch format pursuant to Rule 22.2, as Rep. Barr does here. If Rule 21.2(b)'s requirements for motions to the Court for leave to file an *amicus* brief applied here, however, Rep. Barr would need to file 40 copies in booklet format, even though the Circuit Justice may not refer this matter to the full Court. Due to the expedited briefing schedule, the expense and especially the delay of booklet-format printing, and the rules' ambiguity on the appropriate procedure, Rep. Barr has elected to file pursuant to Rule 22.2. To address the possibility that the Circuit Justice may refer this matter to the full Court, however, movant files an original plus ten copies, rather than Rule 22.2's required original plus two copies.

Should the Clerk's Office, the Circuit Justice, or the Court so require, Rep. Barr

commits to re-filing expeditiously in booklet format. *See* S.Ct. Rule 21.2(c) (Court may direct the re-filing of documents in booklet-format). Movant respectfully requests leave to file the accompanying brief as *amicus curiae* — at least initially — in 8½-by 11-inch format pursuant to Rules 22 and 33.2, rather than booklet format pursuant to Rule 21.2(b) and 33.1.

For the foregoing reasons, the motion for leave to file in 8½-by 11-inch format should be granted.

Dated: July 18, 2019

Respectfully submitted,

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AMICUS CURIAE BRIEF IN SUPPORT OF APPLICANTS

Amicus Curiae Rep. Andy Barr (KY-6) ("Rep. Barr" or "*Amicus*") respectfully submits that the Circuit Justice — or the full Court, if this matter is referred to the full Court — should stay the injunctive relief entered in the District Court in this action until the federal applicants timely file and this Court duly resolves a petition for a writ of *certiorari*. Alternatively, because jurisdiction is lacking here, the Court could notice that defect and remand with instructions to dismiss. Representative Barr's interests are set out in the accompanying motion for leave to file.

INTRODUCTION

Executive-branch offices and officials (collectively, the "Government") have applied to stay the District Court's injunction against using "reprogrammed" (*i.e.*, transferred) funds from within the Department of Defense ("DoD") budget for border-wall projects. The respondents — two membership groups (collectively,

"Plaintiffs") — have sued the Government to challenge emergency efforts to build or replace border barriers 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 divided panel of the Ninth Circuit denied the Government's emergency motion to stay the injunction.

Although Plaintiffs' underlying complaint raises multiple issues,[1] this appeal and the stay application concern 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), 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.

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[1] 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.

STANDARD OF REVIEW

A stay pending the timely filing and ultimate resolution of a petition for a writ of *certiorari* is appropriate when there is "(1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant *certiorari*; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010). For "close cases," the Court "will balance the equities and weigh the relative harms to the applicant and to the respondent." *Id.* Where the All Writs Act, 28 U.S.C. § 1651(a) is implicated, the Court also considers the necessity or appropriateness of interim relief *now* to aid the Court's *future* jurisdiction. *See Edwards v. Hope Med. Group for Women,* 512 U.S. 1301 (1994) (requiring "reasonable probability that *certiorari* will be granted," a "significant possibility" of reversal, and a "likelihood of irreparable harm") (Scalia, J., in chambers).

SUMMARY OF ARGUMENT

Article III requires this Court to evaluate not only its own jurisdiction to hear the stay application, but also the jurisdiction of the courts below over Plaintiffs' claims. The All Writs Act provides this Court jurisdiction to aid its future appellate jurisdiction (Section II.A.1), but Plaintiffs lack a legally protected right under Article III and their claimed injuries would fall outside the zone of interests for the relevant statutes even if Plaintiffs satisfied Article III (Sections II.A.2-II.A.3). 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 II.A.4). Plaintiffs' challenge to the transfer of funds is not ripe, moreover, since their claimed injuries flow from the final action of committing the transferred funds and building border barriers (Section II.A.5). Finally, Plaintiffs lack both a cause of action under the Administrative Procedure Act ("APA") and the APA's waiver of sovereign immunity (Section II.A.6.a), and cannot state a claim for non-APA equity review (Section II.A.6.b).

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.2), and the transfers otherwise satisfy the appropriation statutes (Section II.B.1).

While the foregoing jurisdictional and merits issues suggest that the Government is likely to prevail, the other stay factors also support the Government. Injunctions in favor of plaintiffs who lack standing inflict a separation-of-powers injury on the Executive Branch that constitutes irreparable harm, and combines with the injunction's negative impact on the Executive Branch's ability to conduct foreign affairs and protect national security and public safety (Section III.A). By contrast, Plaintiffs' countervailing injuries are trivial and, indeed, arguably not cognizable (Section III.B). Finally, the public interest favors a stay, both because the public interest merges with the merits (which favor the Government) and because — in public-injury cases such as this — a private plaintiff cannot obtain an injunction against the government as easily as it could against a private plaintiff in like circumstances (Section III.C).

ARGUMENT

I. THE GRANT OF A WRIT OF *CERTIORARI* IS LIKELY.

There is a reasonable possibility that this Court will grant the Government's eventual petition for a writ of *certiorari* in this matter. In addition to the issues that the Government raises, *Amicus* notes a split between the Ninth Circuit and both the Federal and Tenth Circuits: the latter courts used the relevant appropriations statute to evaluate the zone-of-interests test, whereas the Ninth Circuit below used the Appropriations Clause. *Compare Canadian Lumber Trade All. v. United States*, 517 F.3d 1319, 1334-35 (Fed. Cir. 2008) *and Mount Evans Co. v. Madigan*, 14 F.3d 1444, 1452-53 (10th Cir. 1994) with Appl. at 63a. For that reason and those cited by the Government, this Court is likely to grant the Government's eventual petition for a writ of *certiorari* here.

II. THE GOVERNMENT IS LIKELY TO PREVAIL

The Government is likely to prevail on the merits not only because it is correct on the substantive merits, but also because Plaintiffs have neither standing nor a cause of action for judicial review of governmental action.

A. The courts below lacked jurisdiction.

Before reaching the question of the Government's likelihood of prevailing on the merits, this Court — or the Circuit Justice — first must establish federal jurisdiction, both for this Court's review and for the rulings of the courts below.

> Every federal appellate court has a special obligation to satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review, even though the parties are prepared to concede it. And if the record discloses that the lower court was without jurisdiction this

> court will notice the defect, although the parties make no contention concerning it. When the lower federal court lacks jurisdiction, we have jurisdiction on appeal, not of the merits but merely for the purpose of correcting the error of the lower court in entertaining the suit.

Steel Co. v. Citizens for a Better Env't., 523 U.S. 83, 95 (1998) (citations, interior quotation marks, and alterations omitted). The first half of the *Steel Company* jurisdictional inquiry is easy: this Court has jurisdiction over this stay application. *See* Section II.A.1, *infra*. The second half is also easy enough: Plaintiffs lack not only standing, but also a waiver of the Government's sovereign immunity. *See* Sections II.A.2-II.A.6, *infra*. Accordingly, as an alternative to the stay that the Government requests, this Court should fulfill its "special obligation to" determine jurisdiction, *id.*, find a lack of jurisdiction, and remand with instructions to dismiss the case.

1. The All Writs Act gives this Court jurisdiction *now* to preserve its *future* jurisdiction over the Government's eventual petition for a writ of *certiorari*.

The All Writs Act provides an alternate, supplemental form of jurisdiction to stay the District Court's interim relief, if only to preserve the full range of the controversy *now* for this Court's consideration upon the Government's *future* appeal to this Court:

> The All Writs Act empowers the federal courts to issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law. The exercise of this power is in the nature of appellate jurisdiction where directed to an inferior court, and *extends to the potential jurisdiction of the appellate court where an appeal is not then pending but may be later perfected*.

FTC v. Dean Foods Co., 384 U.S. 597, 603 (1966) (interior quotation marks and citations omitted, emphasis added). Although resort to the All Writs Act is an

extraordinary remedy — as indeed is any stay or injunction — the writ "has traditionally been used in the federal courts … to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so." *Will v. United States*, 389 U.S. 90, 95 (1967) (interior quotation marks omitted). While "only exceptional circumstances … will justify the invocation of this extraordinary remedy," those circumstances certainly include a "judicial usurpation of power," as happened here. *Id.* (interior quotation marks omitted); *accord Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33, 35 (1980); *Cheney v. United States Dist. Court*, 542 U.S. 367, 380 (2004). Here, leaving the injunctions in place would cause the reprogrammed funding to lapse at — or as a practical matter, some time *before* — the end of the Government's fiscal year. A lapse potentially would deny the Government the opportunity to challenge the injunctions.

2. Plaintiffs' interests are insufficiently related to an "injury in fact" to satisfy Article III 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.,* 523 U.S. at 95. As explained below, Plaintiffs lack standing to sue under § 8005, and thus are unlikely to prevail on the

merits.

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). In addition, 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-intertests test); *Secretary of State of Md. v. Joseph H. Munson Co.,* 467 U.S. 947, 955 (1984) (litigants must raise their own rights). 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). The Government argues that Plaintiffs lack prudential standing but appears to concede that Plaintiffs have constitutional standing. In fact, however, Plaintiffs lack both forms of standing.

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.[2]

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[2] 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).

As this 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[.]

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).[3] The statutes here have no nexus to Plaintiffs' alleged aesthetic injuries. Indeed, § 284 expressly *allows*

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[3] 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.

building these border projects. For this reason, Plaintiffs have not suffered an injury in fact under the statutes at issue here.[4]

Fifty years ago, this Court would have rejected as a generalized grievance any injuries to a plaintiff that challenged only the federal funding of an otherwise lawful project:

> 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.

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

Assuming *arguendo* that Plaintiffs had constitutional standing based on their injuries, *but see* Section II.A.2, *supra*, Plaintiffs would remain subject to the zone-of-interests test, which defeats their claims for standing to sue under the statutes that

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[4] 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.

they invoke. Quite simply, nothing in those statutes supports an intent to protect aesthetic or other private 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). 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.

4. Plaintiffs do not have standing under *Havens Realty*.

Although the Ninth Circuit did not rely on 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 and revoke 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 an organizational 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.[5] 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 II.A.3, *supra*.

5. Plaintiffs' challenge to the transfer of funds — as distinct from the allocation of funds to a project — is not ripe.

In addition to lacking standing, Plaintiffs also lack a ripe claim *vis-à-vis* the transfer of funds under § 8005: "A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas v. United States*, 523 U.S. 296, 300 (1998) (internal quotations and citations omitted). The mere transfer of funds within DoD's budget does not injure Plaintiffs at all. As this Court has long recognized, when "the order sought to be reviewed does not of itself adversely affect complainant but only affects his rights adversely on the contingency of future administrative action," "resort to the courts … is either premature or wholly beyond their province." *Rochester Tel. Corp. v. United States*, 307 U.S. 125, 130 (1939). This Court decided *Rochester Telephone* under

[5] 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.

"traditional conceptions of federal judicial power," *id.*, and it should do the same here.

6. 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[6] 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.

a. 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." 5 U.S.C. §§ 701(a)(1)-(2), 703. As relevant here, APA review extends only to actions made reviewable by statute and to *final* agency actions for which there is no other adequate remedy in court. 5 U.S.C. § 704. With respect to "[a] preliminary, procedural, or intermediate agency action" that is "not directly

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[6] 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).

reviewable," the action is reviewable as part of "the review of the final agency action." *Id.* As explained below, this provision precludes judicial action against the transfer of funds, as distinct from the final actions of the as-yet non-final border projects.[7]

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), the lower courts and 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 II.A.3, *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.

Because this Court should resolve the APA issue before resorting to equity, this Court should grant the stay to avoid having Plaintiffs' and the lower courts' premature challenge to the preliminary, procedural, or intermediate action of funds transfers stop the Government from taking the final action of committing the funds within the fiscal year. 5 U.S.C. § 704. A court reviewing that final action will have

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[7] 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).

the authority to assess the legality of the preliminary, procedural, or intermediate actions of transferring the funds. *FTC v. Standard Oil Co.*, 449 U.S. 232, 244-45 (1980); *accord id.* 247-48 (Stevens, J., concurring); *see also* Attorney General's Manual on the Administrative Procedure Act, at 101-02 (1947) ("many regulatory statutes … have provided for review of (and only of) 'final' agency orders, with the result that the judicial construction of such provisions will carry over to the interpretation of 'final' as used in [5 U.S.C. § 704]") (citing *Rochester Telephone*); *Burns v. Dir., Office of Workers' Comp. Programs*, 41 F.3d 1555, 1561-62 (D.C. Cir. 1994) (courts review non-final action with the final action) (citing 5 U.S.C. § 704 and *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 944 (5th Cir. 1991)). The transfer of funds would not be final agency action, even assuming *arguendo* that the transfers violated § 8005.

This Court should not allow the lower courts or Plaintiffs to "run out the clock" on the current fiscal year with this premature challenge to the transfer of funds. Without a stay, Plaintiffs could prevail on mootness grounds — with no substantive review on the merits — by tying the Government's hands until the funding lapses. While *Amicus* respectfully submits that this Court should remand with instructions to dismiss for lack of jurisdiction until the Government takes final action, a stay of the injunction pending appeal would achieve the same result in the short term and would allow the Ninth Circuit and this Court the opportunity to resolve the merits.

b. 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 this Court's 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* Appl. at 31. As already explained, Plaintiffs cannot meet that test. *See* Section II.A.3, *supra*.

B. The Government is likely to prevail on the merits.

In order to warrant a stay, there must be a "fair prospect" of the Government's prevailing. *Hollingsworth*, 558 U.S. at 190. As explained in the prior subsection, the Government is likely to prevail because federal courts lack jurisdiction over Plaintiffs' claims. *See* Section II.A, *supra*. As explained in this subsection, the Government likely will prevail on the merits, assuming *arguendo* that federal jurisdiction existed.

1. These DoD projects qualify as "unforeseen" within the meaning of § 8005.

The Ninth Circuit found 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* 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.

2. 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* Appl. at 31-32. Plaintiffs' and the panel majority'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, this Court recently 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). 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 DHS appropriation cannot be read implicitly to repeal DoD's pre-existing authority.

III. THE OTHER STAY CRITERIA TIP IN THE GOVERNMENT'S FAVOR.

Although the likelihood of this Court's granting a writ of *certiorari* and ruling for the Government on the merits would alone justify granting a stay, Rep. Barr addresses the balance of the equities. The Government has significant public-health and public-safety concerns at stake, and the public interest favors a stay; against those considerations, Plaintiffs aesthetic interests are trivial and likely not even cognizable. In short, the balances of equities tip decidedly in the Government's favor.

A. The Government's harm is weighty and irreparable.

For stays, the question of irreparable injury requires a two-part "showing of a threat of irreparable injury to interests that [the applicant] properly represents." *Graddick v. Newman,* 453 U.S. 928, 933 (1981) (Powell, J., for the Court[8]). "The first, embraced by the concept of 'standing,' looks to the status of the party to redress the injury of which he complains." *Id.* "The second aspect of the inquiry involves the nature and severity of the actual or threatened harm alleged by the applicant." *Id.* The Government meet both tests.

As for standing, the Government clearly has standing to defend its laws and regulatory actions. *Diamond,* 476 U.S. at 62-63. When it comes to irreparable harm, the Government's application explains the serious and irreparable harms raised by a

[8] Although *Graddick* began as an application to a circuit justice, the Chief Justice referred the application to the full Court. *Graddick,* 453 U.S. at 929.

delay in the border-barrier projects. *See* Appl. at 34. Quite simply, people will die — whether from border crossings, border interdictions, or drug use and related violence — if this Court allows the lower court's injunction to remain in place. Additionally, the District Court's enjoining the federal sovereign without Article III jurisdiction violates the separation of powers, which inflicts a separation-of-powers injury on the Executive Branch. "[T]he deprivation of constitutional rights unquestionably constitutes irreparable injury." *Hernandez v. Sessions*, 872 F.3d 976, 994-95 (9th Cir. 2017) (interior quotation marks omitted).[9] The Government will suffer irreparable injury unless this Court stays the injunction.

B. Plaintiffs' cognizable harm is trivial to non-existent.

With respect to Plaintiffs' claims of irreparable harm, a stay would not prejudice Plaintiffs' interests at all. Simply 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.

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[9] The Ninth Circuit's *Hernandez* line of cases derives from *Elrod v. Burns*, 427 U.S. 347, 373 (1976), but arguably removes *Elrod* from its First Amendment mooring. That line of cases nonetheless remains Circuit precedent.

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). The best reading of the applicable laws holds that Plaintiffs lack cognizable interests, *see* Sections II.A.2-II.A.3, *supra*, which tips the balance of hardships decidedly in favor of the Government.[10]

C. The public interest favors a stay.

The last stay criterion is the public interest. Where the parties dispute the lawfulness of government programs, this last criterion collapses into the merits. *Washington v. Reno*, 35 F.3d 1093, 1103 (6th Cir. 1994). If the Court agrees with the Government on the merits, the public interest will tilt decidedly in favor of the Government: "It is in the public interest that federal courts of equity should exercise their discretionary power with proper regard for the rightful independence of … governments in carrying out their domestic policy." *Burford v. Sun Oil Co.,* 319 U.S.

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[10] Although the Ninth Circuit did not rely on Plaintiffs' diverted resources under *Havens Realty* for standing, Plaintiffs could raise the issue here. Even if they qualified for standing under *Havens Realty*, 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).

315, 318 (1943). 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

This Court should stay the District Court's interim relief, pending the timely filing and resolution of a petition for a writ of *certiorari*. Alternatively, the Court should remand with instructions to dismiss this action.

Dated: July 18, 2019

Respectfully submitted,

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CERTIFICATE AS TO FORM

Pursuant to Sup. Ct. Rules 22 and 33, I certify that the foregoing motion for leave to file, motion for leave to file in compliance with Rule 33.2, and the accompanying *amicus* brief are proportionately spaced, have a typeface of Century Schoolbook, 12 points, and contain 3, 2, and 25 pages (and 487, 240, and 6,837 words) respectively, excluding this Certificate as to Form, the Table of Authorities, the Table of Contents, and the Certificate of Service.

Dated: July 18, 2019

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CERTIFICATE OF SERVICE

The undersigned certifies that, on this 18th day of July 2019, in addition to filing the foregoing document via the Court's electronic filing system, one true and correct copy of the foregoing document was served by U.S. Mail, postage pre-paid, with a PDF courtesy copy served via electronic mail on the following counsel:

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The undersigned further certifies that, on this 18th day of July 2019, an original and ten true and correct copies of the foregoing document were served on the Court by hand delivery.

Executed July 18, 2019, at Washington, DC,

/s/ Lawrence J. Joseph
Lawrence J. Joseph