No. 20-685

In the Supreme Court of the United States

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, *ET AL.*, Petitioners,

v.

SIERRA CLUB, *ET AL.*, *Respondents.*

On Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF REP. ANDY BARR IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

If the President declares "a national emergency in accordance with the National Emergencies Act (50 U.S.C. 1601 et seq.) that requires use of the armed forces," the Secretary of Defense has express statutory authority to "undertake military construction projects * * * not otherwise authorized by law that are necessary to support such use of the armed forces." 10 U.S.C. 2808(a). "Such projects may be undertaken only within the total amount of funds that have been appropriated for military construction, including funds appropriated for family housing, that have not been obligated." *Ibid.* In 2019, following the President's declaration of a national emergency requiring the use of the armed forces at the southern border, the then-Secretary of Defense authorized 11 military construction projects involving border barriers pursuant to Section 2808. The questions presented are as follows:

1. Whether respondents have a cognizable cause of action to obtain review of the Secretary's compliance with Section 2808 in reprioritizing appropriated but unobligated funds for the military construction projects being authorized

2. Whether the Secretary exceeded his statutory authority under Section 2808 in reprioritizing appropriated funds for the military construction projects being authorized.

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INTEREST OF *AMICUS CURIAE*

Amicus Curiae Rep. Andy Barr[1] ("Rep. Barr" or "*Amicus*") has represented Kentucky's 6th congress-ional district since 2013. A lawyer by training, he 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 a Member of Congress. In his legislative capacity, Rep. Barr has a significant interest in protecting the powers and flexibility that Congress delegated to the President and Executive-Branch agencies—not to courts—to respond to national emergencies and unforeseen contingencies. Rep. Barr filed an *amicus* briefs in support of review in No. 20-138, but this *amicus* brief focuses on the issues raised in this petition.

STATEMENT OF THE CASE

In the two underlying cases, various plaintiffs (collectively, "Plaintiffs") have sued Executive-branch offices and officials (collectively, the "Government") to challenge emergency efforts to build or replace barriers on the southern border. Those efforts include Department of Defense ("DoD") projects under 10 U.S.C. §§ 284, 2808. As relevant here, New Mexico and California (collectively, the "State Plaintiffs")

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[1] *Amicus* files this brief with all parties' written consent. Pursuant to Rule 37.6, counsel for *amicus* authored this brief in whole, no party's counsel authored this brief in whole or in part, and no person or entity—other than *amicus* and its counsel—contributed monetarily to preparing or submitting the brief.

brought one challenge, and the Southern Border Communities Coalition ("SBCC") and Sierra Club brought the other. Because the district court issued a partial judgment for projects under § 284, the appeal of that part of the case advanced more quickly. This Court already has stayed a preliminary injunction, *Trump v. Sierra Club*, 140 S.Ct. 1 (2019), denied a motion to lift the stay. *Trump v. Sierra Club*, 140 S.Ct. 2620 (2020), and granted a writ of *certiorari*, *Trump v. Sierra Club*, 208 L.Ed.2d 227 (U.S. 2020), in the other action ("No. 20-138"). The Government now seeks review of the part of the case concerning projects under § 2808.

Unlike § 284, actions under § 2808 are triggered by the President's declaring an emergency under the National Emergencies Act, 50 U.S.C. §§ 1601-1651 ("NEA"). *See* Presidential Proclamation on Declaring a National Emergency Concerning the Southern Border of the United States, 84 Fed. Reg. 4949 (Feb. 15, 2019).

SUMMARY OF ARGUMENT

The issues presented—Article III and prudential standing, the ability to sue the Government, and the flexibility that DoD has in a national emergency—all are important issues that warrant this Court's review (Section I).

Article III requires evaluating not only appellate jurisdiction, but also the jurisdiction of the courts below. Plaintiffs lack a legally protected right under Article III (Section II.A), and their claimed injuries would fall outside the zone of interests for the relevant statutes even if Plaintiffs satisfied Article III (Section II.B). Alternatively, the Court could rely on the

relevant statutes' lack of judicially manageable standards to bar review under the political-question doctrine (Section II.C), a lack that also shows the lack of a waiver of sovereign immunity because the issues are committed to agency discretion (Section II.D).

Plaintiffs cannot bring an action under the Administrative Procedure Act ("APA") because the APA uses the same zone-of-interests tests used for prudential standing to determine whether given plaintiffs have an APA action to enforce the statute on which they base their claims (Section III.A). Plaintiffs cannot sue in equity because they lack the "direct injury" needed to state a claim for non-APA equity review (Section III.B).

On the merits, the Government did not violate the Appropriations Clause when using appropriated DoD funds pursuant to § 2808, which DHS's 2019 appropriations bill did not repeal by implication, and Plaintiffs cannot state a claim that the Government's expending *appropriated funds* violated the Appropriations Clause (Section IV.A). Similarly, DoD's use of appropriated funds complied with § 2808 (Section IV.B).

ARGUMENT

I. THESE CASES PRESENT IMPORTANT ISSUES FOR THIS COURT'S REVIEW IN CONJUNCTION WITH NO. 20-138.

In granting first a stay and then *certiorari* on the projects under § 284, this Court has implicitly found a grant of *certiorari* likely for the projects under § 2808. The two halves of the case raise the same issues under Article III, sovereign immunity, and the availability of a cause of action. These factors all counsel for this

Court to grant the petition. Indeed, the NEA-related differences between § 284 and § 2808 would counsel for reviewing this action even if the Court had *denied* review in No. 20-138.

II. FEDERAL COURTS LACK JURISDICTION OVER PLAINTIFFS' CLAIMS.

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 below, this action suffers from several jurisdictional defects.

A. Plaintiffs lack Article III standing for their claims.

The injunction spans the entire southern border, but Plaintiff States do not include Texas or Arizona; thus, the Ninth Circuit clearly relied on the private Plaintiffs' standing. While not all of the arguments on standing apply to the State Plaintiffs, it is not important at the petition stage to identify the jurisdiction for each aspect of the injunction. At least some of the injunction relies on the environmentalist Plaintiffs for standing, and they lack standing. *See El Paso Cty. v. Trump*, 2020 U.S. App. LEXIS 37946, at

*28-29 (5th Cir. Dec. 4, 2020) (No. 19-51144); *El Paso Cty. v. Trump*, 50 ELR 20017 (5th Cir. 2020). *Amicus* focuses on three issues under Article III—both of which apply equally to No. 20-138—that warrant review.

First, Plaintiffs' interests are insufficiently related to an "injury in fact" to satisfy Article III jurisdiction. While environmental or aesthetic injury can provide the required injury, *Sierra Club v. Morton*, 405 U.S. 727, 734 (1972), "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. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (emphasis added). Not every injury is a legally protected injury. *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 772-73 (2000); *McConnell v. FEC*, 540 U.S. 93, 226-27 (2003). 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). Because Congress has exempted these border-wall actions from review under the environmental-review statutes, 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), environmental or aesthetic injuries are not "legally protected" here and lack any nexus with the alleged statutory and constitutional violations.

Second, objections based solely on how the federal government funds an otherwise-legal project qualify as generalized grievances.

> 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); *accord Alabama Power Co. v. Ickes*, 302 U.S. 464, 478-79 (1938). But even if *Ickes* and *Hardin* have been superseded, *Stevens*, *McConnell*, and *Diamond* certainly continue to control on the legally insubstantial nature of Plaintiffs' alleged injuries.

Third, the environmentalist Plaintiffs' injuries based on their own spending decisions do not satisfy Article III. The claimed type of diverted-resource standing is said to be derived from *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), but lacks key features here that applied in *Havens*: a cause of action, a right to the defendant's compliance, and a waiver of prudential standing. *See Havens*, 455 U.S. at 372. Without those features here, Plaintiffs' cannot claim Article III or prudential standing for their own 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). This Court should grant the petition to narrow diverted-resources standing to the unique facts and law at issue in *Havens*.

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

Assuming *arguendo* that Plaintiffs had constitutional standing based on their injuries, they would remain subject to the zone-of-interests test, which defeats their claims for standing to sue under the statutes that they invoke. Nothing in those statutes supports an intent to protect aesthetic or other private interests from military construction projects during a national emergency.

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). As the Government explains, Pet. at 18-19, not every frustrated interest meets the test. *See also Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 883 (1990) (court reporters not within the zone of interests of a statute requiring hearings on the record). *Amicus* respectfully submits that the interests here are even further afield from the statutes involved than court reporters' fees in *Nat'l Wildlife Fed'n*. Not every adverse effect on a private interest falls within the zone of interests that Congress sought to protect in a tangentially related statute.

The Ninth Circuit relied on an argument that the Appropriations Clause—not the appropriation statute at issue—supplies the relevant zone of interests. But an appropriation statute provides the zone for appropriation claims that involve alleged limits placed by that appropriation statute. *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). Even if the Government had violated an appropriation statute, that would not elevate *statutory* arguments into constitutional claims. *See Dalton v. Specter*, 511 U.S. 462, 473 (1994); *Campbell v. Clinton*, 203 F.3d 19, 22 (D. C. Cir. 2000). As this Court explained in *Dalton*, 511 U.S. at 472-73, not every action that exceeds statutory authority violates the Constitution.

C. The NEA issues are non-justiciable political questions.

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) (quoting *Vander Jagt v. O'Neill,* 699 F.2d 1166, 1178-79 (D.C. Cir. 1983) (Bork, J., concurring)). The Court need not reach standing to decide that the

issues Plaintiffs raise that concern the Government's compliance with the NEA during an emergency fall outside an Article III case or controversy here.

Plaintiffs and the lower courts would 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) (quoting *Baker v. Carr,* 369 U.S. 186, 217 (1962)). As explained in Section II.D, *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.

D. The United States has not waived sovereign immunity for these actions.

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. *See FDIC v. Meyer*, 510 U.S. 471, 475 (1994) ("Sovereign immunity is jurisdictional in nature"). Accordingly, this Court

must consider immunity, even if the Government did 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). The scope of such waivers, moreover, 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[2] "*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*.[3] Specifically, the APA excludes review for "statutes [that] preclude judicial review" and those

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

[3] 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.

that commit agency action to agency discretion. 5 U.S.C. §§ 701(a)(1)-(2), 703. For the reasons stated in the next two subsections, this action fall outside the APA's waiver of sovereign immunity.

1. **<u>Congress has not enacted judicially manageable standards to review this matter.</u>**

As relevant here, the APA excludes review for "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. The Plaintiffs' actions fall outside the APA's waiver of sovereign immunity because the defendants' actions are committed to agency discretion.

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 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 II.C, *supra.*

2. Sovereign immunity protects our democracy from government by judicial diktat.

Allowing the Plaintiffs' suit 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 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 the Plaintiffs' proposed invasion of the Government's response to a national emergency.

III. PLAINTIFFS LACK A CAUSE OF ACTION.

In addition to a lack of jurisdiction, Plaintiffs also lack a cause of action against the Government. *See* Pet. 17-28. This litigation thus represents an ideal vehicle for this Court to refine its rulings on when private parties and even States can sue the federal government.

A. Plaintiffs cannot sue under the APA's zone-of-interests test.

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. This Court's zone-of-interests test implements that limit on APA review, *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153-54 (1970), and mirrors the zone-of-interests test for prudential standing. *See* Section II.B, *supra*; *see also Thompson v. N. Am. Stainless, LP*, 562 U.S. 170, 178 (2011); *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 129-32 (2014). Plaintiffs thus lack an APA action for the same reason they lack standing.

B. Plaintiffs lack a "direct injury" needed to sue in equity.

The Plaintiffs pressed and the Ninth Circuit found a cause of action under the Constitution and for *ultra*

vires action, presumably to avoid the zone-of-interests test under APA review.[4] But Plaintiffs can fare no better in equity, which lacks the APA's "generous review provisions [that] must be given a hospitable interpretation." *Abbott Labs. v. Gardner*, 387 U.S. 136, 140-41 (1967) (interior quotation marks omitted). To the contrary, "[c]ourts of equity can no more disregard statutory and constitutional requirements and provisions than can courts of law." *Armstrong v. Exceptional Child Ctr.*, Inc., 575 U.S. 320, 327-28 (2015) (internal quotation marks omitted). To sue in equity, Plaintiffs need more than an interest that suffices for the zone-of-interests test.

Unlike an APA plaintiff, 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

[4] This legerdemain is unsound because the APA expressly allows review of, and a remedy against, 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).

protected by the Constitution”). Plaintiffs have no such right.

Specifically, 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. “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.” *Id.* (alterations, citations, and interior quotation marks omitted); *cf. Blessing v. Freestone,* 520 U.S. 337, 340 (1997); *City of Rancho Palos Verdes v. Abrams,* 544 U.S. 113, 119-20 (2005); *Gonzaga Univ. v. Doe,* 536 U.S. 273, 283 (2002). Plaintiffs’ claimed injuries here fall short of what equity requires. Plaintiffs are bystanders to the changes taking place—whether lawfully or not—on someone else’s property.[5]

IV. THE GOVERNMENT DID NOT VIOLATE ANY LAW.

If the Court reaches the merits, Plaintiffs’ merits arguments suffer from two critical weaknesses that warrant this Court’s review: (a) on the constitutional merits, the Government simply did not violate the Appropriations Clause when the Government relied

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[5] 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. As already explained, Plaintiffs cannot meet that test. *See* Section II.B, *supra*.

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 NEA or pre-existing *DoD* statutes or authorizations.

A. The Government did not violate the Appropriations Clause.

Plaintiffs and the lower courts argue that the Government has violated the Appropriations Clause, but the real complaint is that the Consolidated Appropriations Act 2019, PUB. L. NO. 116-6, 132 Stat. 2981 (2019) ("CAA") did not adequately prevent the Government from exercising its pre-existing powers under the NEA and § 2808.

All funds that the Government has spent or will spend on the border-barrier projects were appropriated to DoD under the Appropriations Clause. Federal courts cannot import *statutory* arguments into *constitutional* claims. *Dalton*, 511 U.S. at 473; *Campbell*, 203 F.3d at 22. But even if a hypothetical statutory violation could flout the Appropriations Clause, it would not flout Congress's will to allow border-barrier transfers that Congress itself has applauded in prior DoD appropriations. *See*, *e.g.*, H.R. REP. NO. 103-200, at 331 (1993) ("commend[ing]" DoD's efforts to support the reinforcement of "border fence along the 14-mile drug smuggling corridor along the San Diego-Tijuana border area"); *cf.* H.R. REP. NO. 110-652, at 420 (2008) (describing border fencing as an "invaluable counter-narcotics resource"). This Court should review the circumstances—*if any*—under which the lower courts

can read the Appropriations Clause to apply expansively to allegations of statutory violations.

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, 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). 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.

Because the Government complied with the requirements for reprogramming funds under 10 U.S.C. § 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. DoD did not violate § 2808.

As the Government explains, the discrete projects that the Government has funded under § 2808 all involve construction at, or permissible additions to, two current military installations. *See* Pet. at 28-32; 10 U.S.C. § 2801(c)(4) (linking status as a "military installation" to the exercise of military jurisdiction); *United States v. Apel*, 571 U.S. 359, 368 (2014) (recognizing that the definition of "military installation" is "synonymous with the exercise of *military jurisdiction*") (emphasis in original). Two results flow from this. First, the Government is not arguing that § 2808 would allow constructing a barrier across the entire southern border. Second, the claim that the Government violated § 2808 for *these projects* (*i.e.*, the Article III case or controversy

arguably before this Court)—as distinct from an abstract violation of § 2808 and the CAA—is unfounded. If this Court reaches the merits, it should find that DoD complied with § 2808, without second guessing the DoD on what actions are necessary to respond to a national emergency.

CONCLUSION

The petition for a writ of *certiorari* should be granted.

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Respectfully submitted,

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