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 stay applicants' opposition to the stay respondents' motion to lift the stay that this Court entered in 2019.* The federal applicants took no position on this motion, and the private respondents consented to it.

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

* 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.

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. Rep. Barr moved for leave to file a similar *amicus* brief in support of the original stay application in 2019. The *amicus* brief accompanying this motion has been updated to address recent developments and arguments and to omit arguments no longer relevant.

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' opposition to the stay respondents' motion to lift the stay. Because this motion is filed before the 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 raised by the parties:

- On the issue of aesthetic-injury 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 15-18.
- On the issue of diverted-resource standing, the *Amicus* brief rebuts the Ninth Circuit's analysis of standing under *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982). *See Amicus* Br. at 20-22. This issue was not presented in the stay

application, but the Ninth Circuit relied on *Havens* to find standing for one of the plaintiffs. *See* App. 21a-22a.

- On the zone-of-interests test, the *Amicus* brief addresses the relevant zones of interests under the Appropriations Clause and the individual appropriation statutes at issue. *See Amicus* Br. at 18-20.
- 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 23-27. In doing so, the *amicus* brief rebuts the authorities cited by the Ninth Circuit for the existence of such a cause of action. *Compare Amicus* Br. at 25 n.9 *with* App. 26a-27a. Given that the plaintiffs seek to enjoin federal officers with sovereign immunity, this issue goes to jurisdiction.

These threshold issues are all relevant to deciding whether to lift the stay and are jurisdictional issues that the Court should consider *sua sponte*. See *Kamen v. Kemper Fin. Servs.*, 500 U.S. 90, 97 n.4 (1991) (jurisdictional issues are an exception to courts' general hesitation to consider issues raised only by an *amicus*); *Demore v. Kim*, 538 U.S. 510, 516 (2003). In addition, the *amicus* brief also addresses the merits, *Amicus* Br. at 27-30, and the equities. *Amicus* Br. at 30-33. On the merits, the *amicus* brief argues for a heightened application to appropriation statutes of the canon against repeals by implication. *Amicus* Br. at 29-30.

For all these reasons, movant Rep. Andy Barr respectfully submits that filing the brief will aid the Court.

Dated: July 28, 2020

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 28, 2020

Respectfully submitted,

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AMICUS CURIAE BRIEF IN OPPOSITION TO LIFTING STAY

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 leave in place the Court's stay of the lower courts' injunctive relief until this Court duly resolves a timely filed petition for a writ of *certiorari*. Alternatively, because jurisdiction is lacking for the underlying litigation, 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

In the underlying litigation, the Southern Border Communities Coalition ("SBCC") and the Sierra Club (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, including Department of Defense

("DoD") actions under 10 U.S.C. §§ 284, 2808. In 2019, the Government applied to this Court for a stay, which this Court granted, of a lower court's injunction against the Government's using "reprogrammed" (that is, transferred) funds from within the DoD budget for border-wall projects. *Trump v. Sierra Club*, 140 S.Ct. 1 (2019). As the stay respondents, Plaintiffs now have moved this Court to lift the stay.

Although Plaintiffs' underlying complaint raises multiple issues,[1] 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). 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). Instead, Plaintiffs argue that § 8005 prohibits DoD from transferring the relevant funds within DoD's budget to fund border-barrier projects under § 284. In part, this argument relies on the interplay between § 8005 and the appropriation bill for the Department of Homeland Security ("DHS") — the Consolidated

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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). The Ninth Circuit expressly did not address these claims. App. 46a ("we need not — and do not — reach the merits of any other theory asserted by [Plaintiffs]").

Appropriations Act of 2019, PUB. L. NO. 116-6, 132 Stat. 2981 (2019) ("CAA") — which provided DHS $1.375 billion for specified border-wall construction projects by DHS.

Plaintiffs do not identify a distinct standard of review to lift a stay previously granted. Instead, Plaintiffs appear to argue that the stay no longer is necessary or appropriate under the standard pursuant to which this Court granted a stay pending the timely filing and ultimate resolution of a petition for a writ of *certiorari*: (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.*

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. 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.1.a-II.A.1.b). The appropriation statutes here 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.1.c). 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.2.a), and cannot state a claim for non-APA equity review (Section

II.A.2.b).

On the merits, the Government did not violate the Appropriations Clause when reprogramming appropriated funds pursuant to the DoD appropriation statute (Section II.B.1), and provisions in DHS's appropriations bill do not repeal by implication DoD's separate authority for border-barrier construction (Section II.B.3). For these reasons, the transfers complied with the appropriation statutes (Section II.B.2).

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, a harm that 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, not even 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* REMAINS LIKELY.

In granting the stay in 2019, this Court implicitly found 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* App. 37a-40a. In addition, notwithstanding Plaintiffs' claim that all courts to consider the issue have held against the government, the Ninth Circuit's 2-1 decision for Plaintiffs contrasts with the Fifth Circuit's 2-1 decision questioning the standing of similarly situated plaintiffs. *El Paso Cty. v. Trump*, 50 ELR 20017 (5th Cir. 2020). All other decisions come from district courts, which "lack authority to render precedential decisions binding other judges, even members of the same court." *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 428 (2011).

For these reasons and those cited by the Government, this Court remains likely to grant the Government's eventual petition for a writ of *certiorari* here.

II. THE GOVERNMENT REMAINS 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 the challenged governmental actions.

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, emphasis added). The first half of the *Steel Company* jurisdictional inquiry is easy: this Court has jurisdiction over this stay application. *See* 28 U.S.C. § 1651(a); *FTC v. Dean Foods Co.*, 384 U.S. 597, 603 (1966). 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.1.a-II.A.2, *infra.* Accordingly, as an alternative to maintaining the stay, this Court should fulfill its "special obligation to" determine jurisdiction, *Steel Co.,* 523 U.S. at 95, find a lack of jurisdiction, and remand with instructions to dismiss the case.

1. Plaintiffs lack Article III and prudential standing.

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.[2] As explained below, Plaintiffs lack standing 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). To qualify as "an invasion of a legally protected

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[2] The Fifth Circuit stayed a district court's similar injunction based on a "substantial likelihood that Appellees lack Article III standing," *see* Pls.' Mot. at 15 (quoting *El Paso Cty. v. Trump*, 50 ELR 20017 (5th Cir. 2020), which Plaintiffs deem "irrelevant" because the Government did not challenge Sierra Club's standing. *Id.* at 15 n. 2. But again, parties cannot confer standing by consent or waiver, and this Court reviews standing and jurisdiction *de novo*. *Steel Co.,* 523 U.S. at 95.

interest," moreover, an injury in fact must be both "concrete and particularized" to the plaintiff and "actual or imminent, not conjectural or hypothetical." *Id.* at 560 (internal quotation marks and citations omitted). The opposite of a "concrete and particularized" injury is "a generalized grievance" that is "plainly undifferentiated" with respect to the plaintiff and "common to all members of the public." *United States v. Richardson*, 418 U.S. 166, 176-77 (1974) (interior quotation marks omitted).

In addition, the judiciary has adopted prudential limits on standing that bar judicial 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-interests test); *Secretary of State of Md. v. Joseph H. Munson Co.,* 467 U.S. 947, 955 (1984) (litigants must raise their own rights); *Elk Grove Unified School Dist. v. Newdow*, 542 U.S. 1, 12 (2004) (litigants cannot sue over generalized grievances more appropriately addressed in the representative branches). Further, 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 previously has argued that Plaintiffs lack prudential standing but appeared to concede that Plaintiffs might have constitutional standing. In fact, however, Plaintiffs lack both forms of standing.

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.

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

The Ninth Circuit held that the Sierra Club has standing based on aesthetic injuries claimed by Sierra Club members. *See* App. 18a-21a. 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.

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 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). This Court recently denied a petition for a writ of *certiorari* in a challenge to IIRIRA § 102(c)(1), *Ctr. for Biological Diversity v. Wolf*, No. 19-975, 2020 U.S. LEXIS 3479 (June 29, 2020), and Plaintiffs here did not timely challenge the waivers under § 102(c)(2).

As this Court 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 at issue here, which do not include the environmental review statutes that have been waived, have no nexus to Plaintiffs' alleged aesthetic injuries, and do not protect their aesthetic interests. 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.[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

[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 (that is, 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.

[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.

> 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). This Court need not find that *Ickes* and *Hardin* remain good law on this point, however, because *Stevens*, *McConnell*, and *Diamond* certainly do. Plaintiffs' alleged injuries may suffice to support standing under environmental review statutes, but not under the statutes at issue here, under which aesthetic interests are not "legally protected."[5]

b. 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.1.a, *supra* (Sierra Club), II.A.1.c, *infra* (SBCC), 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 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

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[5] As explained in Section II.A.2.b, *infra*, Plaintiffs' claimed injuries are also insufficient to invoke equity jurisdiction.

'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.

Both the Ninth Circuit and Plaintiffs rely on the argument that the relevant zone of interests comes from the Appropriations Clause, not the appropriation statute at issue. *See* Pls.' Mot. at 27; App. 37a-40a. But an appropriation statute provides the zone for appropriation claims that involve alleged limits placed by that appropriation statute. *Canadian Lumber Trade*, 517 F.3d at 1334-35; *Mount Evans Co.*, 14 F.3d at 1452-53. 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. Plaintiffs do not have standing under *Havens*.

The Ninth Circuit held that SBCC has standing based on the resources that SBCC diverted to counteract the Government's border-wall projects. *See* App. 21a-22a. 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.

The claimed type of diverted-resource standing is said to be derived from *Havens*. But, 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 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*, 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 narrow the diverted-resources rationale for Article III standing to the unique circumstances in *Havens*.

The typical organizational plaintiff and typical statute lack several critical criteria from *Havens*. First, the *Havens* 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,* 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, relying on *Gladstone, Realtors v. Bellwood*, 441 U.S. 91, 102-09 (1979), *Havens* 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. Thus, in that case, the standing inquiry was reduced to the question of whether the alleged injuries met the Article III minimum of injury in fact. *Id.* Obviously, that reduction is not typical. 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 II.A.1.b, *supra*.

2. 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

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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.

[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).

fall within the APA nor within the non-APA equitable exceptions to sovereign immunity, the federal courts lack jurisdiction over 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.[8]

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 in APA cases); Section II.A.1.b, *supra* (Plaintiffs cannot satisfy the zone-of-interests test). The theory that Plaintiffs can avoid the APA based on "*ultra vires*" or constitutional review in equity is unsound, given that 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

[8] 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).

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.

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

The Ninth Circuit held that Plaintiffs have a cause of action for judicial review under the Constitution and for *ultra vires* action, *compare* 26a-31a *with* 31a-36a, but the two are essentially the same. "A constitutional limit on governmental power, no less than a federal statutory or regulatory one … circumscribes the government's authority even on decisions that otherwise would fall within its lawful discretion." *Loumiet v. United States*, 828 F.3d 935, 944 (D.C. Cir. 2016). The unifying common ground between both forms of review — if indeed they are two materially distinct forms — is an action in equity to enjoin an ongoing violation of federal law. The only difference is whether the source of that law is the Constitution or a statute.

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.

The Ninth Circuit tried — and failed — to address this argument with a string cite to decisions where plaintiffs brought actions under a variety of constitutional provisions. *See* App. 26a-27a. But all of these decisions involved core due-process or equal-protection interests.[9] Accordingly, these decisions do not apply to the Sierra Club's unprotected aesthetic interest in, for example, watching birds on someone else's property, or to SBCC's decisions to spend its money to oppose federal policy. *See* Sections II.A.1.a (Sierra Club), II.A.1.c (SBCC), *supra*.[10] For plaintiffs to invoke structural or procedural protections under the Constitution, they need an underlying *concrete* interest. *Bond*, 564 U.S. at 216-17; *Christopher v. Harbury,* 536 U.S. 403, 414-15 (2002) (denial-of-access rights are "ancillary to the underlying claim, without

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[9] *Compare id with Nat'l Labor Relations. Bd. v. Noel Canning*, 573 U.S. 513, 520 (2014) (financial penalty, implicating a property interest); *Bond v. United States*, 564 U.S. 211, 214 (2011) (criminal prosecution, implicating property and liberty interests); *Clinton v. City of New York*, 524 U.S. 417, 426-27 (1998) (equal-protection injury coupled with likely economic injury from higher prices); *INS v. Chadha*, 462 U.S. 919, 924-28 (1983) (deportation of lawful entrant who overstayed visa and sought suspension of deportation, implicating liberty interest); *United States v. McIntosh*, 833 F.3d 1163, 1168 (9th Cir. 2016) (criminal prosecution, implicating property and liberty interests).

[10] Later, in discussing the zone-of-interests test for a constitutional claim, the Ninth Circuit calls the Sierra Club's aesthetic injuries "liberty interests," App. 40a, but clearly they are not: "extending constitutional protection to an asserted right or liberty interest" requires "the utmost care … lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the [federal judiciary]." *Washington v. Glucksberg,* 521 U.S. 702, 720 (1997). This Court should reject the liberty-interest formulation implied by the Ninth Circuit's discussion of the Appropriations Clause's zone of interests.

which a plaintiff cannot have suffered injury by being shut out of court"). As with procedural standing for procedure's own sake, anything less is a "right *in vacuo*" and an "insufficient" predicate for an action in federal court. *Summers v. Earth Island Inst.*, 555 U.S. 488, 496 (2009).

Indeed, 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); *cf. Blessing v. Freestone,* 520 U.S. 337, 340 (1997) ("to seek redress through §1983, [plaintiffs] must assert the violation of a federal *right,* not merely a violation of federal *law*") (emphasis in original); *City of Rancho Palos Verdes v. Abrams,* 544 U.S. 113, 119-20 (2005) ("§1983 permits the enforcement of '*rights,* not the broader or vaguer 'benefits' or 'interests'") (*quoting Gonzaga Univ. v. Doe,* 536 U.S. 273, 283 (2002) (emphasis in *Gonzaga*)). In short, Plaintiffs would not have an action in equity even if the Government had violated the appropriation statutes here. None of the statutes that Plaintiffs seek to enforce gives Plaintiffs a right they can enforce in equity. To the

contrary, Plaintiffs are bystanders to the changes taking place — whether lawfully or not — on someone else's property.

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. As already explained, Plaintiffs cannot meet that test. *See* Section II.A.1.b, *supra*.

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

In granting the initial stay, this Court already has implicitly found 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 would prevail on the merits, assuming *arguendo* that federal jurisdiction existed. The Ninth Circuit found a violation of § 8005 based on its finding that the border-wall funding was not "unforeseen" within the meaning of § 8005 and that Congress had denied border-wall funding within the meaning of § 8005. App. 23a-24a. Both findings are plainly wrong.

1. The Government did not violate the Appropriations Clause.

Although Plaintiffs and the Ninth Circuit argue that the Government violated the Appropriations Clause, Pls.' Mot. 12; App. 24a-25a, DoD's reprogramming of funds complied with § 8005. *See* Sections II.B.2-II.B.3, *infra*. But even assuming that the Government violated § 8005, all funds that the Government has spent or will

spend on the border-barrier projects nonetheless were appropriated to DoD under the Appropriations Clause.

This Court should not import *statutory* arguments into a *constitutional* claim. *Dalton*, 511 U.S. at 473; *Campbell*, 203 F.3d at 22. Even if a hypothetical statutory violation — like the *reductio ad absurdum* of using Medicare funds for border-wall funding, Pls.' Mot. 27 — might qualify as a constitutional violation, here, even if a statutory violation existed, it would not flout Congress's will in such an obvious way; indeed, Congress previously has applauded border-wall transfers under § 8005's predecessors 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 not read the Appropriations Clause to apply expansively to allegations of statutory violations.

2. 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 these *military* projects arose *after* Congress enacted DoD's 2019 appropriation.

3. 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 combined with the CAA's provisions related to DHS together prohibit DoD from using § 8005 to transfer appropriated funds for projects under § 284. *Amicus* respectfully submits that appropriating DHS $1.375 billion for specified DHS border-wall construction projects in Texas did not "deny" an "item" *to DoD* within the meaning of § 8005. Plaintiffs' contrary assertion posits, *sub silentio*, that the CAA's funding of a DHS border-wall project repealed by implication the DoD's appropriation act's authority for DoD to reprogram funds for different border-wall projects 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). 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 appropriation of $1.375 billion for DHS to build certain projects in Texas is entirely consistent with DoD's having other, pre-existing statutory authority to build other projects for other purposes such as drug-interdiction. Given its silence on DoD transfers and expenditures for the border wall, DHS's appropriation cannot be read to imply a repeal of DoD's pre-existing authority.

III. THE OTHER STAY CRITERIA CONTINUE TO 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 and voluntary expenditures are trivial and likely not even cognizable. In short, the balance of equities continues to tip decidedly in the Government's favor. Indeed, it undermines Plaintiffs' claims that their injuries are redressable for Plaintiffs to claim now that leaving the stay in place will essentially moot this litigation.

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[11]). "The first,

[11] 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.

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 meets both tests.

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 initial stay application explains the serious and irreparable harms raised by a delay in the border-barrier projects. *See* Stay Appl. 34 (July 12, 2019). If anything, the situation has gotten worse since the summer of 2019. The COVID-19 pandemic raises the stakes for the nation and for border-security workers in preventing border crossings.

As was true in 2019, people will die — whether from border crossings, border interdictions, COVID-19 infections, or drug use and related violence — if this Court lifts the stay. Additionally, a lower court's enjoining the federal sovereign without Article III jurisdiction violates the separation of powers and 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).[12] Unlike Plaintiffs, the Government will suffer irreparable injury unless this Court stays the injunction.

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

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.

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' aesthetic interests are not cognizable. *See* Sections II.A.1.a-II.A.1.b, *supra*. Similarly, self-inflicted injuries are not cognizable, either as a legally protected interest under Article III, *see* II.A.1.c, *supra*, or as irreparable harm. *Second City Music, Inc. v. City of Chicago*, 333 F.3d 846, 850 (7th Cir. 2003) ("self-inflicted wounds are not irreparable injury"); *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). All these issues tip the balance of hardships decidedly in favor of the Government.

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 or jurisdiction, 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. 315, 318 (1943). But even a plaintiff likely to prevail on the merits is not automatically entitled to an injunction against the Government. *Winter v. NRDC, Inc.*, 555 U.S. 7, 32-33 (2008); *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982). 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 deny the motion to lift the previously entered stay. Alternatively, the Court should remand with instructions to dismiss this action.

Dated: July 28, 2020

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 27 pages (and 678, 240, and 7,570 words) respectively, excluding this Certificate as to Form, the Table of Authorities, the Table of Contents, and the Certificate of Service.

Dated: July 28, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that, on this 28th day of July 2020, 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 28th day of July 2020, an original and ten true and correct copies of the foregoing document were served on the Court by hand delivery.

Executed July 28, 2020, at Washington, DC,

/s/ Lawrence J. Joseph
Lawrence J. Joseph