No. 20-138

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 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

CHRISTOPHER J. HAJEC
IMMIGRATION REFORM LAW INSTITUTE
25 Massachusetts Av NW
Suite 335
Washington, DC 20001
(202) 232-5590
chajec@irli.org

LAWRENCE J. JOSEPH
Counsel of Record
1250 Connecticut Av NW
Suite 700-1A
Washington, DC 20036
(202) 355-9452
ljoseph@larryjoseph.com

QUESTIONS PRESENTED

In Section 8005 of the Department of Defense Appropriations Act, 2019, Pub. L. No. 115-245, Div. A, Tit. VIII, 132 Stat. 2999, Congress authorized the Secretary of Defense to transfer certain appropriated funds between Department of Defense (DoD) appropriations accounts "[u]pon determination by the Secretary … that such action is necessary in the national interest." Section 8005 contains a proviso stating "[t]hat such authority to transfer may not be used unless for higher priority items, based on unforeseen military requirements, than those for which originally appropriated and in no case where the item for which funds are requested has been denied by the Congress." *Ibid.* In 2019, the Acting Secretary of Defense transferred approximately $2.5 billion pursuant to Section 8005 and another similar provision to make funds available for DoD to respond to a request from the Department of Homeland Security for counterdrug assistance under 10 U.S.C. 284, including construction of fences along the southern border of the United States. The questions presented are as follows:

1. Whether respondents have a cognizable cause of action to obtain review of the Acting Secretary's compliance with Section 8005's proviso in transferring funds internally between DoD appropriations accounts.

2. Whether the Acting Secretary exceeded his statutory authority under Section 8005 in making the transfers at issue.

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INTEREST OF *AMICUS CURIAE*

Amicus Curiae Rep. Andy Barr[1] ("Rep. Barr" or "*Amicus*") has represented Kentucky's 6th congressional 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 moved for leave to file similar *amicus* briefs in support of the stay proceedings in this Court in 2019 and 2020, and in support of the petition for a writ of *certiorari*, and has now updated that brief to reflect the merits-stage procedural posture.

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

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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.

U.S.C. §§ 284, 2808. As relevant here, New Mexico and California (collectively, the "State Plaintiffs") brought one challenge, and the Southern Border Communities Coalition ("SBCC") and Sierra Club brought the other. This Court stayed a preliminary injunction against using "reprogrammed" (that is, transferred) funds from within the DoD budget in these border-wall efforts, *Trump v. Sierra Club*, 140 S.Ct. 1 (2019), denied a subsequent motion to lift the stay, *Trump v. Sierra Club*, 140 S.Ct. 2620 (2020), and granted a writ of *certiorari* to review the lower court's partial judgment on projects under § 284. *Trump v. Sierra Club*, 208 L.Ed.2d 227 (U.S. 2020).[2]

Although the underlying complaints raise other issues,[3] this appeal concerns only Plaintiffs' claims against using § 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) to fund additional projects under § 284. Plaintiffs do not challenge using § 284 for "the counterdrug activities … of any other department or agency of the Federal Government," 10 U.S.C. §

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[2] The Government seeks a writ of *certiorari* in No. 20-685 for the portions of the lower court's judgments on 10 U.S.C. § 2808.

[3] 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. Pet. App. 40a ("we need not—and do not—reach the merits of any other theory asserted by [Plaintiffs]").

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 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.

SUMMARY OF ARGUMENT

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 I.A), and their claimed injuries would fall outside the zone of interests for the relevant statutes even if Plaintiffs satisfied Article III (Section I.C). The appropriation statutes here lack elements from the statute in *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982)—namely, a cause of action, a right to the defendant's compliance, and a waiver of prudential standing—requisite for *Havens*-based reliance on diverted resources for standing (Section I.B).

Plaintiffs lack not only a cause of action under the Administrative Procedure Act ("APA") and its waiver of sovereign immunity (Section II.A) but also the "direct injury" needed to state a claim for non-APA equity review (Section II.B). While those limitations do not apply—in some circumstances—to violations of

the Constitution, Plaintiffs cannot state a claim that the Government's expending *appropriated funds* violated the Appropriations Clause (Section II.C).

On the merits, the Government did not violate the Appropriations Clause when reprogramming appropriated DoD funds pursuant to § 8005 (Section II.C). Further, provisions in DHS's appropriations bill did not repeal by implication DoD's separate authority for border-barrier construction (Section III.B), and these issues were unforeseen under § 8005 when Congress enacted § 8005 (Section III.A).

ARGUMENT

I. PLAINTIFFS LACK STANDING.

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, at least some of the injunction relies on the environmental Plaintiffs for standing, and they lack standing as the Fifth Circuit held for similar environmental plaintiffs. *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).

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.

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 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 argues that Plaintiffs fail the zone-of-interests test but do not challenge constitutional standing. In fact, 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* Pet. App. 12a-14a. 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). No timely challenge to the § 102(c)(2) waivers remains.[4]

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

[4] This Court denied a petition for a writ of *certiorari* in a challenge to § 102(c)(1), *Ctr. for Biological Diversity v. Wolf*, 207 L.Ed.2d 1096 (2020).

> 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).[5] 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.[6]

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[5] 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.

[6] *Stevens* and *McConnell* make clear that the need for a *legally protected interest*, though analogous to the prudential

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); *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."

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zone-of-interests test, is an element of the threshold inquiry under Article III of the Constitution, not a merely prudential test that a party could waive.

B. 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* Pet. App. 14a-15a. 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. *Morton,* 405

U.S. at 739 (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.[7] Typically, it would be fanciful to suggest that a statute has private, third-party spending in its zone of interests. Certainly, that is the case for the DoD appropriations. *See* Section I.C, *infra.*

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

Assuming *arguendo* that Plaintiffs had constitutional standing based on their injuries, *but see* Section I.A, *supra* (Sierra Club), I.B, *Supra* (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

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[7] For example, applying *Havens* 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.

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 cannot support a right to stop those projects. Plaintiffs must rely then on the zone of interests for § 8005. While the injury-in-fact arguments against the environmental Plaintiffs' standing in Sections I.A-I.B, *supra*, may not apply to the State Plaintiffs, the zone-of-interests argument does apply.

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.

The Ninth Circuit relied on an argument that the Appropriations Clause—not the appropriation statute at issue—supplies the relevant zone of interests. *See* Pet. App. 31a-34a. 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) *and 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.

II. PLAINTIFFS LACK A CAUSE OF ACTION.

In addition to lacking standing, Plaintiffs also lack a cause of action against the Government. *See* Gov't Br 20-40. 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.

Subject to other limitations not relevant here,[8] 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. That proviso and limitation is the zone-of-interests test. *Compare 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) *with* Section I.C, *supra* (Plaintiffs cannot satisfy the zone-of-interests test). Plaintiffs thus lack an APA action for the same reason they lack standing.

Although the APA's "generous review provisions must be given a hospitable interpretation," *Abbott Labs. v. Gardner*, 387 U.S. 136, 140-41 (1967) (interior quotation marks omitted), Plaintiffs sought to avoid the APA, presumably because the zone-of-interests test clearly limits APA review. 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 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.

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[8] These 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).

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

The Ninth Circuit found a cause of action under the Constitution and for *ultra vires* action, *compare* Pet. App. 20a-25a *with id.* 25a-30a, 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 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.

But "[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, moreover, Plaintiffs need more than an interest 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* Pet. App. 20a. 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 I.A (Sierra Club), I.B (SBCC), *supra*.[10] For plaintiffs to

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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," Pet. App. 34a, but those injuries clearly are not liberty interests under due process: "extending constitutional protection to an asserted right or liberty interest" requires "the utmost care … lest the liberty

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 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

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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.

> 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 I.C, *supra.*

C. The Government did not act *ultra vires* under the Appropriations Clause.

Although the Ninth Circuit held the Government to have violated the Appropriations Clause, Pet. App. 17a-18a, DoD's reprogramming of funds complied

with § 8005. *See* Section III, *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 allow the lower courts to 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—such as using Medicare funds for border-wall funding, *Ctr. for Biological Diversity v. Trump*, 50 ELR 20080 (D.D.C. 2020)—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"). In short, it would be revisionist history to argue that DoD did anything contrary to § 8005 here.

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.

III. THE GOVERNMENT DID NOT VIOLATE ANY LAW.

If this Court reaches the merits, it should reject Plaintiffs' arguments under the Appropriations

Clause, the CAA, and § 8005. Congress appropriated the DoD funds, the CAA did not impliedly repeal DoD authority under § 284, and DoD used § 8005 exactly as Congress intended.

A. The projects qualify as "unforeseen" under § 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.

B. The CAA did not "deny" an item 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.

Regarding repeals by implication, this Court recently explained that courts 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.

CONCLUSION

The lower courts' judgments should be reversed.

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Respectfully submitted,

CHRISTOPHER J. HAJEC
IMMIGRATION REFORM LAW INSTITUTE
25 Massachusetts Av NW
Suite 335
Washington, DC 20001
(202) 232-5590
chajec@irli.org

LAWRENCE J. JOSEPH
Counsel of Record
1250 Connecticut Av NW
Suite 700-1A
Washington, DC 20036
(202) 355-9452
ljoseph@larryjoseph.com