[ORAL ARGUMENT SCHEDULED FOR FEBRUARY 18, 2020]

No. 19-5176

# In the U.S. Court of Appeals for the District of Columbia Circuit

U.S. HOUSE OF REPRESENTATIVES,
*Plaintiff-Appellant,*

vs.

STEVEN T. MNUCHIN, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE UNITED STATES DEPARTMENT OF THE TREASURY, *ET AL.*,
*Defendants-Appellees.*

On Appeal from a final order of the U.S. District Court for the District of Columbia (Hon. Trevor N. McFadden, U.S. District Judge)

## *AMICUS CURIAE* BRIEF OF REP. ANDY BARR IN SUPPORT OF APPELLEES AND AFFIRMANCE

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## CORPORATE DISCLOSURE STATEMENT

*Amicus curiae* Rep. Andy Barr (KY-6) is not a corporate entity for which a corporate disclosure statement is required pursuant to Fed. R. App. P. 26.1 and D.C. Cir. Rules 27(a)(4) and 28(a)(1)(A).

Dated: December 29, 2019

Respectfully submitted,

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## CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), counsel for *amicus curiae* Rep. Andy Barr presents the following certificate as to parties, rulings, and related cases.

### A. Parties and *Amici*

Rep. Barr adopts the appellees' statement of parties and *amici*.

### B. Rulings under Review

Rep. Barr adopts the appellees' statement of rulings under review.

### C. Related Cases

Rep. Barr adopts the appellees' statement of related cases.

Dated: December 29, 2019

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# TABLE OF CONTENTS

# TABLE OF AUTHORITIES

## CASES

**STATUTES**

**LEGISLATIVE HISTORY**



**RULES AND REGULATIONS**



**OTHER AUTHORITIES**

# GLOSSARY

| | |
|---|---|
| APA | Administrative Procedure Act, 5 U.S.C. §§551-706 |
| CAA | Consolidated Appropriations Act of 2019, PUB. L. NO. 116-6, 132 Stat. 2981 |
| DHS | Department of Homeland Security |
| DOD | Department of Defense |
| ECF | Electronic Case Filing |
| JA | Joint Appendix |
| NEA | National Emergencies Act, 50 U.S.C. §§ 1601-1651 |

## IDENTITY, INTEREST AND AUTHORITY TO FILE

*Amicus curiae* Rep. Andy Barr ( "*Amicus*" or "Rep. Barr") files this brief with all parties' written consent.[1] Rep. Barr has represented Kentucky's 6th Congressional District since 2013. A lawyer by training, Rep. Barr also taught constitutional law at the University of Kentucky and Morehead State University when his practice was based in Kentucky. As both a citizen and as a Member of Congress, Rep. Barr supports the President's attention to the humanitarian and public-safety emergency on the southern border. 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 thus has an ongoing interest in federal immigration policy in both his official and personal capacities. For these reasons, Rep. Barr has direct interests in the issues here.

## STATEMENT OF THE CASE

Acting under a party-line authorization from the Bipartisan Legal Advisory Group, *see* First Am. Compl. at 27 & n.122 (¶57) (ECF #63); JA:431, the current House majority filed this suit against various federal Executive agencies and officers (collectively, the "Government") in the name of the United States House of

[1] Pursuant to FED. R. APP. P. 29(a)(4)(E), the undersigned counsel certifies that: counsel for *amicus* authored this brief in whole; no counsel for a party authored this brief in any respect; and no person or entity — other than *amicus*, its members, and its counsel — contributed monetarily to this brief's preparation or submission.

Representatives (the "House"). The suit challenges the Government's administrative efforts to defend our southern border. As the Complaint acknowledges, the House minority argues that "the appropriate recourse provided under Article I of the U.S. Constitution is to pass legislation." *Id.*

Although this action relates to the Presidential Proclamation on Declaring a National Emergency Concerning the Southern Border of the United States, 84 Fed. Reg. 4949 (Feb. 15, 2019), issued under the National Emergencies Act, 50 U.S.C. §§ 1601-1651 ("NEA"), the House does not challenge the emergency declaration *per se*. Instead, the House challenges several aspects of the Department of Defense ("DOD") and the Department of Homeland Security ("DHS") funding under those agencies' budgeting and appropriations statutes:

- The use of § 8005 of DOD's 2019 appropriation to transfer funds for projects under 10 U.S.C. § 284. *See* DOD Appropriations Act for Fiscal Year 2019, Pub. L. 115-245, div. A, § 8005, 132 Stat. 2981, 2999 (Sept. 28, 2018).
- The use of DOD funds under 10 U.S.C. § 2808 under NEA for border projects.
- Exceeding the limits on border-barrier construction set out in DHS's 2019 appropriation in the Consolidated Appropriations Act of 2019, PUB. L. NO. 116-6, 132 Stat. 2981 ("CAA"),

The House's complaint combines claims premised directly on the Appropriations Clause, U.S. CONST. art. I, § 9, cl. 7 and claims under the Administrative Procedure

Act, 5 U.S.C. §§ 551-706 ("APA").

*Amicus* adopts the facts as stated by the Government. Gov't Br. at 2-8.

## ARGUMENT

### I. THE DISTRICT COURT LACKS JURISDICTION TO GRANT THE HOUSE'S REQUESTED RELIEF.

Federal courts are courts of limited jurisdiction. *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986). "It is to be presumed that a cause lies outside this limited jurisdiction, and the burden of establishing the contrary rests upon the party asserting jurisdiction." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). The parties cannot confer jurisdiction by consent or waiver, *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee,* 456 U.S. 694, 702 (1982), and federal courts instead have the obligation to assure themselves of jurisdiction before reaching the merits. *Steel Co. v. Citizens for a Better Env't.,* 523 U.S. 83, 95 (1998). As explained below, this action suffers from several jurisdictional defects.

#### A. The district court lacks statutory subject-matter jurisdiction for this action.

Neither the House nor the Government address the district court's statutory subject-matter jurisdiction to hear this case, but its complaint cites two bases for that jurisdiction: 28 U.S.C. §§ 1331, 1345. *See* First Am. Compl. at 9 (¶10) (ECF #63); JA:413. Neither purported jurisdictional basis supports this action.

### 1. Federal-question jurisdiction does not extend to settled questions.

Although the House's complaint cites the Appropriations Clause as a basis for relief, that alone does not necessarily bring this case within the district court's federal-question jurisdiction:

> A claim invoking federal-question jurisdiction under 28 U.S.C. § 1331, … may be dismissed for want of subject-matter jurisdiction if it is not colorable, *i.e.*, if it is immaterial and made solely for the purpose of obtaining jurisdiction or is wholly insubstantial and frivolous.

*Arbaugh v. Y & H Corp.*, 546 U.S. 500, 513 n.10 (2006) (interior quotation marks and citations omitted). Claims can become too insubstantial for federal review if they are "so attenuated and unsubstantial as to be absolutely devoid of merit," "wholly insubstantial," "obviously frivolous," "plainly unsubstantial," or "no longer open to discussion" based *inter alia* on controlling Supreme Court or Circuit decisions. *Hagans v. Lavine*, 415 U.S. 528, 536-37 (1974); *Ass'n of Am. Physicians & Surgeons v. Sebelius*, 746 F.3d 468, 471-72 (D.C. Cir. 2014) (applying jurisdictional dismissal based on controlling precedent to Circuit, as opposed to Supreme Court, precedent). It is settled that the "Constitution does not contemplate an active role for Congress in the supervision of officers charged with the execution of the laws it enacts." *Bowsher v. Synar*, 478 U.S. 714, 722 (1986); *see also* Section II, *infra* (discussing the insubstantial nature of the House's merits claims). Thus, this action falls outside the district court's federal-question jurisdiction; the House's

attempt to invoke the judicial power to supervise the Executive Branch is foreclosed by binding precedent.

**2. The House is not the "United States" for purposes of 28 U.S.C. § 1345.**

The House also invokes statutory subject-matter jurisdiction under 28 U.S.C. § 1345, which provides original jurisdiction for "all civil actions, suits or proceedings commenced by the *United States*, or by any *agency or officer thereof expressly authorized to sue by Act of Congress*." 28 U.S.C. § 1345 (emphasis added). This jurisdictional basis does not include the House for several reasons.

First, the House is not the "United States." The House is not even the Congress of the United States; it is only one house thereof. Instead, the power and privilege of representing the United States belongs to the Department of Justice:

> Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefor, is *reserved to officers of the Department of Justice, under the direction of the Attorney General*.

28 U.S.C. § 516 (emphasis added). To the extent that this is an action by the United States, *Amicus* respectfully submits that the Attorney General should dismiss it as frivolous.

Second, the House is not an officer or agency of the United States. As relevant to Title 28, the terms "department" and "agency" are defined as follows:

> The term "department" means one of the executive departments enumerated in section 1 of Title 5, unless the context shows that such term was intended to describe the executive, legislative, or judicial branches of the government.
>
> The term "agency" includes any department, independent establishment, commission, administration, authority, board or bureau of the United States or any corporation in which the United States has a proprietary interest, unless the context shows that such term was intended to be used in a more limited sense.

28 U.S.C. § 451. In short, an agency means an *Executive-Branch* entity. That, obviously, does not include the House, the Congress, or even Legislative-Branch entities. *Chen v. Gen. Accounting Office*, 821 F.2d 732, 737 n.6 (D.C. Cir. 1987) (holding that Legislative-Branch entities are not "agencies"). Indeed, if the House were an agency, it would lack a cause of action under the APA. *Compare* 5 U.S.C. § 702 (giving persons an action for review) *with id.* §§ 701(2), 551(2) (excluding agencies from the definition of person); *cf. id.* § 551(1)(A) (excluding Congress from the definition of agency).

Third, even assuming *arguendo* that the House could be considered the United States or an agency thereof, no statute expressly authorizes the House to sue the Government.[2] *See EEOC v. Hernando Bank, Inc.*, 724 F.2d 1188, 1193 n.3 (5th Cir.

[2] Although 2 U.S.C. § 5571 authorizes House counsel "to enter an appearance" on behalf of the House "for the purpose of performing the counsel's functions," "without compliance with any requirements for admission to practice before such court." 2 U.S.C. § 5571(a), that does not qualify as expressly authorizing suit.

1984); *United States v. T&W Edmier Corp.*, 465 F.3d 764, 765 (7th Cir. 2006); *Greider v. Woods*, 177 F.2d 1016, 1018 (10th Cir. 1949). Thus, 28 U.S.C. § 1345 does not provide subject-matter jurisdiction for this action.

**B. This action is a non-justiciable political question.**

Under Article III, federal courts cannot issue advisory opinions, *Muskrat v. United States*, 219 U.S. 346, 356-57 (1911), but must instead focus on the cases or controversies presented by affected parties before the court. U.S. CONST. art. III, § 2. "'All of the doctrines that cluster about Article III — not only standing but mootness, ripeness, political question, and the like — relate in part, and in different though overlapping ways, to … the constitutional and prudential limits to the powers of an unelected, unrepresentative judiciary in our kind of government.'" *Allen v. Wright,* 468 U.S. 737, 750 (1984) (quoting *Vander Jagt v. O'Neill,* 699 F.2d 1166, 1178-79 (D.C. Cir. 1983) (Bork, J., concurring)). The Government argues that the House lacks standing, but this Court need not reach standing to find the lack of an Article III case or controversy here.[3]

[3] On standing, *Amicus* agrees with *U.S. House of Representatives v. Burwell*, 130 F. Supp. 3d 53, 74-75 (D.D.C. 2015), that the House as an institution can have standing when the Executive Branch violates the Appropriations Clause. But this case is not the same as *Burwell*: Congress has not only *appropriated the funds* but also *authorized the reprogramming of those funds* by the Executive Branch if certain conditions are met. Unlike the *constitutional* issue in *Burwell*, this case presents the *statutory* issue of whether the Government met the congressional conditions to allow reprogramming of appropriated funds.

The House asks this Court to delve into areas that the NEA and the Constitution leave to Congress and the President to resolve between themselves in the political process. Here, there is both "a textually demonstrable constitutional commitment of the issue to a coordinate political department" and "a lack of judicially discoverable and manageable standards for resolving [the case]." *Vieth v. Jubelirer*, 541 U.S. 267, 277-78 (2004) (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)). As explained in Section I.C.1 *infra*, the lack of manageable standards for resolving this case also goes to the Court's jurisdiction under the APA's waiver of sovereign immunity. As the only unelected branch of government, courts are the *least* fit to answer such questions: "making judges supreme arbiters in political controversies … [would] dethrone [the people] and [make them] lose one of their … invaluable birthrights." *Luther v. Borden*, 48 U.S. 1, 52-53 (1849). Accordingly, *Amicus* respectfully submits that this Court should dismiss this litigation and leave this matter for the political branches to resolve politically, not in court.

### C. The United States has not waived sovereign immunity for this action.

In addition to the lack of Article III jurisdiction, this action also falls outside the scope of the APA's waiver of sovereign immunity and thus is subject to an independent jurisdictional bar. *See FDIC v. Meyer*, 510 U.S. 471, 475 (1994) ("Sovereign immunity is jurisdictional in nature"). Accordingly, this Court must consider immunity, even if the Government did not raise it.

"The United States, as sovereign, is immune from suit save as it consents to be sued." *United States v. Sherwood*, 312 U.S. 584, 586 (1941). "Absent a waiver, sovereign immunity shields the Federal Government and its agencies from suit," without regard to any perceived unfairness, inefficiency, or inequity. *Dep't of Army v. Blue Fox, Inc.*, 525 U.S. 255, 260 (1999). Moreover, the scope of such waivers is strictly construed in favor of the sovereign. *Lane v. Pena*, 518 U.S. 187, 192 (1996). As relevant here, the 1976 APA amendments to 5 U.S.C. § 702[4] "*eliminat[ed]* the sovereign immunity defense in *all equitable actions* for specific relief against a Federal agency or officer acting in an official capacity." *Sea-Land Serv., Inc. v. Alaska R.R.*, 659 F.2d 243, 244 (D.C. Cir. 1982) (quoting S. REP. NO. 996, 94th Cong., 2d Sess. 8 (1976); H.R. REP. NO. 1656, 94th Cong., 2d Sess. 9 (1976), 1976 U.S. Code Cong. & Admin. News 6121, 6129) (R.B. Ginsburg, J.) (emphasis added). But that waiver has several restrictions that preclude review *in this action*.[5] Specifically, the APA excludes review for "statutes [that] preclude judicial review" and those that commit agency action to agency discretion. 5 U.S.C. §§ 701(a)(1)-

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

[5] In addition to the generally applicable limits in the APA's waiver of sovereign immunity, the NEA also provides that "[n]o law enacted after September 14, 1976, shall supersede [the NEA] unless it does so in specific terms, referring to [the NEA], and declaring that the new law supersedes the provisions of [the NEA]." 50 U.S.C. § 1621(b). The APA's waiver was enacted after September 14, 1976, *see* PUB. L. NO. 94-574, 90 Stat. at 2721, and does not supersede the NEA expressly.

(2), 703. In addition, the waiver of immunity extends only to actions made reviewable by statute and to *final* actions for which there is no other adequate remedy in court. 5 U.S.C. § 704.

**1. Congress has not enacted judicially manageable standards to review this matter.**

As relevant here, the APA excludes review for "statutes [that] preclude judicial review," those that commit agency action to agency discretion, and those with "special statutory review." 5 U.S.C. §§ 701(a)(1)-(2), 703. The House's action falls outside the APA's waiver of sovereign immunity because the defendants' actions are committed to agency discretion.

Judicial review is precluded "to the extent that … agency action is committed to agency discretion by law." 5 U.S.C. § 702(2); *accord id.* § 701(a)(2). One sign that Congress has committed an issue to executive officers' discretion is when a reviewing court would have "no law to apply" in reviewing the agency action. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971), *overruled on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977). Similarly, "review is not to be had if the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion." *Heckler v. Chaney,* 470 U.S. 821, 830 (1985). Indeed, this principle predates the APA, *Gray v. Powell,* 314 U.S. 402, 412 (1941), and forms a "common law" of "nonreviewability." Kenneth Culp Davis, *Nonreviewable Administrative Action,* 96

U. PA. L. REV. 749, 750-51 (1948). Review is particularly outside judicial expertise when, as here, "the duty to act turns on matters of doubtful or highly debatable inference from large or loose statutory terms." *Panama Canal Co. v. Grace Line, Inc.*, 356 U.S. 309, 318 (1958). Alternatively, the lack of judicially manageable standards provides a basis for rejecting the claims here as non-justiciable political questions. *See Vieth,* 541 U.S. at 277; Section I.B, *supra*.

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

Allowing the House's gambit to succeed here would undermine our system of government, which requires the political branches to resolve political issues. *Schuette v. Coalition to Defend Affirmative Action*, 572 U.S. 291, 311-12 (2014). "'The principle of immunity from litigation assures the states and the nation from unanticipated intervention in the processes of government.'" *Alden v. Maine*, 527 U.S. 706, 750 (1999) (quoting *Great Northern Life Ins. Co. v. Read*, 322 U.S. 47, 53 (1944)). As *Read* explained, waivers of immunity must be limited to the terms of the waiver to avoid the "crippling interferences" of government-by-lawsuit:

> The history of sovereign immunity and the practical necessity of unfettered freedom for government from crippling interferences require a restriction of suability to the terms of the consent, as to persons, courts and procedures.

*Read*, 322 U.S. 53-54. To its credit, the United States — acting through Congress — has waived its sovereign immunity for many suits against the sovereign, but the

judiciary lacks jurisdiction to extend that waiver beyond its express terms: "'It needs no argument to show that the political power cannot be thus ousted of its jurisdiction and the judiciary set in its place.'" *Alden*, 527 U.S. at 751 (quoting *Louisiana v. Jumel*, 107 U.S. 711, 727-28 (1883)). Sovereign immunity compels this Court to reject the House's proposed invasion of the Government's actions.

*Amicus* respectfully submits that this Court should look past the House majority's specious — and partisan — invocation of *the House's* institutional prerogatives and recognize what the House majority is, in fact, trying to do. This lawsuit seeks nothing less than to enlist the judiciary to recognize a one-house *repeal* of the prior legislation that authorizes the Government's actions. If the one-house veto violates the Constitution, *INS v. Chadha*, 462 U.S. 919, 946 (1983) (legislation requires bicameralism and presentment), then a one-house repeal certainly does.

## II. THE HOUSE'S MERITS ARGUMENTS ARE INSUBSTANTIAL.

The House's arguments on the merits suffer from two critical weaknesses: (a) on the constitutional merits, the Government simply did not violate the Appropriations Clause when the Government relied on — and complied with — pre-existing *statutory* authority to reprogram DOD budget funds to border-barrier construction authorized by Congress; and (b) on the statutory merits, the DHS budget authorization for 2019 did not impliedly repeal the pre-existing DOD statutes or authorizations.

### A. The Government did not violate the Appropriations Clause.

The House argued that the Government has violated the Appropriations Clause, but its real complaint is that the CAA did not adequately prevent the Government from exercising its pre-existing powers under the NEA and § 2808. It is frivolous to claim that duly enacted and entirely valid prior laws somehow retroactively violate the Constitution because the House failed to circumvent those pre-existing laws with a new law. If Congress had wanted to seal off the President's NEA authority, the NEA expressly provides a process to do so. *See* 50 U.S.C. § 1621(b). The CAA did not follow that path, and this Court should squarely reject the House's CAA-based claims to the contrary.

Specifically, because the Government complied with the requirements for reprogramming funds under 10 U.S.C. §§ 284, 2808 and the 2019 appropriations statutes, *see* Sections II.B-II.E, *infra*, the money that the Government has spent or will spend on the border-barrier projects complies with the Appropriations Clause. By dealing exclusively with appropriated funds and the statutorily permitted transfer of appropriated funds, the Government has not violated the Appropriations Clause. The Court cannot — as the House requests — import the House's *statutory* arguments into the constitutional claim. *See Dalton v. Specter*, 511 U.S. 462, 473 (1994); *Campbell v. Clinton*, 203 F.3d 19, 22 (D. C. Cir. 2000); *Burwell*, 130 F.

Supp. 3d at 74-75. In short, the House's constitutional argument lacks merit.[6]

### B. CAA's spending caps for DHS border-barrier projects in 2019 did not impliedly repeal DOD's existing authority for border projects.

The House has not argued that 10 U.S.C. §§ 284, 2808 prohibit any and all border-barrier construction, but rather that the CAA's limits on DHS's 2019 border-barrier projects prevent DOD's circumventing the CAA's spending caps. In essence, the House claims that the CAA's funding of a DHS border-barrier project in Texas impliedly repealed the DOD's pre-existing statutory and appropriations authority to use and to reprogram DOD funds for different border-barrier projects.

With respect to repeals by implication, the Supreme Court recently has explained that a court will not presume repeal "unless the intention of the legislature to repeal is clear and manifest" and "unless the later statute expressly contradicts the original act or … such a construction is absolutely necessary in order that the words of the later statute shall have any meaning at all." *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 662 (2007) (interior alterations, citations, and

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[6] As indicated, the House makes redundant claims under the Appropriations Clause and the APA. *See* 5 U.S.C. § 706(2)(B) (APA covers agency action "contrary to constitutional right, power, privilege, or immunity"). That overlap reprises the overlap between the House's purported constitutional claims and its statutory claims. *Cf. Canadian Lumber Trade All. v. United States*, 517 F.3d 1319, 1334-35 (Fed. Cir. 2008) (using zone of interests of appropriations statute rather than of the Appropriations Clause for alleged appropriations violations); *Mount Evans Co. v. Madigan*, 14 F.3d 1444, 1452-53 (10th Cir. 1994) (same). Mere pleading cannot transform a statutory claim into a constitutional claim.

quotation marks omitted). While the presumption against implied repeal is always strong, *id.*, and dispositive here, the presumption "applies with especial force when the provision advanced as the repealing measure was enacted in an appropriations bill." *United States v. Will*, 449 U.S. 200, 221-22 (1980) (citing *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 190 (1978)). Here, the CAA's providing DHS with $1.375 billion to build certain projects in Texas is entirely consistent with DOD's having other, pre-existing statutory authority to build other projects for other DoD purposes. Given its silence on DOD transfers and expenditures for border-wall funding, a *new DHS appropriation* cannot be read implicitly to repeal DOD's pre-existing authority.

**C. The House's claims under § 8005 lack merit.**

To the extent that it reaches the merits of the House's statutory claims under § 8005, the Court should reject those claims. Significantly, the House implicitly concedes that the Government may build border barriers with appropriated funds under § 284. *See* Section II.D, *infra*. Instead, the House argues only that the Government cannot use § 8005 to transfer *additional* appropriated funds. As explained below, the House is wrong about § 8005.

The House raises three statutory arguments against the § 8005 transfers: (1) the transfers are not for unforeseen circumstances, (2) the transfers violate § 8005 because the House denied the Executive Branch these funds, and (3) § 8005 does not authorize transfers for military construction. *See* House Br. at 40-41. As shown in

the three subsections below, each argument lacks merit. More fundamentally, the House's claims under § 8005 apply to the House substantive claims under § 2808, which were not even ripe yet when the district court dismissed the House's suit.[7] As explained in Section II.F, *infra*, if this Court finds jurisdiction, this Court should remand these claims for the district court to resolve in the first instance, rather than address them for the first time on appeal.

**1. DHS requested DOD's assistance months *after* Congress enacted the DOD appropriation.**

The House argues that the Government's transfers violated § 8005's proviso against making transfers for foreseen items: "such authority to transfer may not be used unless for higher priority items, based on *unforeseen military requirements*, than those for which originally appropriated." PUB. L. NO. 115-245, div. A, § 8005, 132 Stat. at 2999 (emphasis added). *Amicus* respectfully submits that, when Congress enacted DOD's 2019 appropriation in 2018, it was unforeseeable *to the military* both that Congress would deny funding to DHS in the DHS appropriation

[7] Under Article III, the Government's plans under § 2808 and § 8005 either were not ripe when the House sued, *Texas v. United States*, 523 U.S. 296, 300 (1998) ("[a] claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all") (internal quotations and citations omitted), or they were insufficiently concrete: "'some day' intentions — without any description of concrete plans, or indeed even any specification of when the some day will be — do not support a finding of the 'actual or imminent' injury that our cases require." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564 (1992). Either way, it was premature for the House to sue.

in 2019 and that DHS would request assistance from the military in 2019. *Amicus* further submits that that is all that § 8005's proviso requires with respect to foreseeability. The entire basis for this *military* project arose *after* Congress enacted DoD's 2019 appropriation. It was, therefore, unforeseen for purposes of § 8005.

**2. CAA's border-barrier project for DHS did not impliedly repeal § 8005 for DOD projects.**

The House claims that the CAA's appropriating DHS $1.375 billion for border-wall construction somehow denied the funds in question. If the CAA limited DOD's *pre-existing* authority, that limitation would — if accepted by this Court — amount to a repeal by implication of the DOD appropriation and funding statutes. As explained in Section II.B, *supra*, this Court must reject that argument because the two acts — DHS's 2019 appropriation and DOD's prior 2019 appropriation — can be read together to allow DOD's independent projects, regardless of DHS's 2019 projects.

**3. § 8005 does not limit transfers *for* military construction projects.**

With respect to military construction and § 8005, *Amicus* respectfully submits that the House misreads § 8005. The statutory language on which the House relies relates to transferring "funds made available … to [DOD] for military functions (except military construction) between such appropriations or funds … to be merged with and to be available for the same purposes, and for the same time period, as the

appropriation or fund to which transferred." PUB. L. NO. 115-245, div. A, § 8005, 132 Stat. at 2999. The military-construction exception applies to the fund or appropriation *from which* DOD transfers money, not to the fund or appropriation *to which* DOD transfers money. In other words, § 8005 allows transfer *to* military construction and restricts transfer *from* military construction. As such, § 8005 does limit the transfer of funds for military construction, as many historical examples show. *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, 420 (2008) (describing border fencing as an "invaluable counter-narcotics resource"). This Court should reject the House's narrow reading of § 8005.

**D. The House concedes that DOD may expend funds under § 284.**

The House implicitly concedes that the Government may build border barriers under § 284, notwithstanding the CAA's limit. Specifically, funds under § 284 are available for "the counterdrug activities … of any other department or agency of the Federal Government," 10 U.S.C. § 284(a), expressly including "[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). Insofar as a border barrier falls within § 284(b)(7)'s ambit as a fence to block smuggling corridors across the border, that ends the inquiry with respect to appropriated § 284 funds. The

only dispute about § 284 funds is whether the Government may transfer additional funds under § 8005 to replenish the funds available under § 284. As explained in Section II.C, *supra*, the House is wrong about § 8005.

**E. The House's claims under § 2808 lack merit.**

To the extent that the House's claims under § 2808 are distinct from its claims under § 8005, the claims lack merit.

By way of background, funds under § 2808 are available during declared emergencies for "military construction projects," 10 U.S.C. § 2808(a), which are defined to "include[] all military construction work," *id.* § 2801(b), which is defined to "include[] any construction, development, conversion, or extension of any kind carried out with respect to a military installation, whether to satisfy temporary or permanent requirements, or any acquisition of land or construction of a defense access road." *Id.* § 2801(a). In turn, "military installation" is defined as "a base, camp, post, station, yard, center, or other activity under the jurisdiction of the Secretary of a military department." *Id.* § 2801(c)(4). The discrete projects that the Government has funded under § 2808 all involve construction at, or permissible additions to, two current military installations. *See* 10 U.S.C. § 2801(c)(4) (linking status as a "military installation" to the exercise of military jurisdiction); *United States v. Apel*, 571 U.S. 359, 368 (2014) (recognizing that the definition of "military installation" is "synonymous with the exercise of *military jurisdiction*") (emphasis

in original).

In addition, the House's CAA-based arguments against reprogramming funds under § 2808 and the NEA fail to consider the unique emergency context of the Government's NEA-based actions. The NEA authorizes the President "to declare such national emergency" with regard to any statutes "authorizing the exercise, during the period of a national emergency, of any special or extraordinary power." 50 U.S.C. § 1621(a). Neither a reviewing court nor Plaintiffs can argue that the President violated the NEA: there is no judicial review of NEA actions, and Congress has twice failed to overturn the President's declaration via the only method that NEA allows. Furthermore, "[n]o law enacted after September 14, 1976, shall supersede [the NEA] unless it does so in specific terms, referring to [the NEA], and declaring that the new law supersedes the provisions of [the NEA]." 50 U.S.C. § 1621(b). As a post-1976 statute, the CAA could only have superseded the NEA expressly, but the CAA did no such thing. Indeed, the House cannot cite any law that expressly supersedes presidential authority under the NEA. Instead, the House's quarrel is with its own handiwork in the CAA for ineffectively limiting presidential flexibility to fund the border barrier via means other than the 2019 DHS appropriations bill.

### F. Even if the federal courts had jurisdiction and the House's claims had potential merit, this Court should remand rather rule on either the merits or interim relief.

If this Court finds that the House's claims fall within the federal courts' statutory and constitutional subject-matter jurisdiction and are not so insubstantial as to require dismissal out of hand, this Court should remand those claims for the district court to resolve in the first instance:

> Since we are a court of review, not of first view, we do not now resolve this question. Rather we leave it to the lower courts to decide in the first instance.

*McWilliams v. Dunn*, 137 S.Ct. 1790, 1801 (2017) (interior quotation marks and citation omitted). When "defensive pleas" or other merits issues "were not addressed by the [lower courts], … [appellate courts] do not consider them" on appeal after reversing the dismissal of the relevant claims. *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005). Reversal and remand are the appropriate remedy if this Court accepts the House's arguments.

The House also asks this Court to enter the preliminary injunction that the district court denied on jurisdictional grounds. This Court should not, and arguably cannot, provide that relief. Because the district court dismissed for lack of standing, the district court did not assess whether the House satisfied the criteria for a

preliminary injunction.[8] As the House acknowledges, the parties jointly requested entry of final judgment on all the House's claims, House Br. at 16, but the entry of final judgment mooted the district court's ruling on a preliminary injunction (*i.e.*, all relief merged into the final judgment). *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 314 (1999). If the House had wished to preserve the ability to seek interim relief on appeal, the House had to move for a stay pending appeal so that the district court would address the stay criteria. *See Competitive Enters. Inst. v. United States Dep't of Agric.*, 954 F. Supp. 265, 266-67 (D.D.C. 1996) (Lamberth, J.); *cf. Overseas Media Corp. v. McNamara*, 385 F.2d 308, 318 (D.C. Cir. 1967) (reversing dismissal on jurisdictional grounds and remanding for consideration of preliminary injunction denied on the reversed grounds). Here, the House failed to preserve its options, and this Court should not review the stay criteria in the first instance.

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[8] Of course, the district court found the House unlikely to prevail on the merits: "Absent an adequate jurisdictional basis for the Court's consideration of the merits, there is *no likelihood* that the Plaintiff will prevail on the merits." *Herwald v. Schweiker*, 658 F.2d 359, 363 (5th Cir. 1981) (emphasis added); *accord Nat'l Wildlife Fed'n v. Burford*, 835 F.2d 305, 328 (D.C. Cir. 1987) (a "plaintiff in this context must carry its affirmative burden of showing a likelihood of success on the merits," which "necessarily includes a likelihood of the court's *reaching* the merits") (Williams, J., concurring and dissenting) (emphasis in original); *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 690 (1973). But that leaves this Court without the district court's assessment of the other injunction or stay factors.

## CONCLUSION

This Court should affirm the District Court's dismissal of the House's claims.

Dated: December 29, 2019

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE WITH RULE 32**

1. The foregoing brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because the brief contains 5,474 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Circuit Rule 32.2.

2. The foregoing brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because the brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in Times New Roman 14-point font.

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**CERTIFICATE OF SERVICE**

I hereby certify that on the 29th day of December, 2019, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit using the appellate CM/ECF system, causing the service on counsel for the parties to this action via electronic means.

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