No. 19-51144

United States Court of Appeals for the Fifth Circuit

EL PASO COUNTY, TEXAS, *ET AL.*,
Plaintiffs-Appellees,

vs.

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

ON APPEAL FROM U.S. DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS, EL PASO DIVISION,
CIVIL NO. EP-19-CV-66-DB, HON. DAVID BRIONES

AMICUS CURIAE BRIEF OF REP. ANDY BARR IN SUPPORT OF APPELLANTS AND STAYING THE INJUNCTION

Christopher J. Hajec
Immigration Reform Law Institute
25 Massachusetts Ave, NW, Ste 335
Washington, DC 20001
Tel: 202-232-5590
Fax: 202-464-3590
Email: chajec@irli.org

Lawrence J. Joseph
DC Bar #464777
1250 Connecticut Av NW, Ste 700-1A
Washington, DC 20036
Tel: 202-355-9452
Fax: 202-318-2254
Email: ljoseph@larryjoseph.com

Counsel for Amicus Curiae

CERTIFICATE OF INTERESTED PERSONS

The case number is No. 19-51144. The case is styled as *El Paso County, Texas v. Trump*. The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These presentations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Amicus curiae Rep. Andy Barr (KY-6) adopts the Certificate of Interested Persons filed by *amicus curiae* Project for Government Oversight *et al.*, with the following additions:

Amici Curiae	**Counsel for *Amici Curiae***
U.S. Rep. Andy Barr (KY-6)	Immigration Reform Law Institute Lawrence J. Joseph

Dated: December 22, 2019

Respectfully submitted,

/s/ Lawrence J. Joseph

Lawrence J. Joseph, DC Bar #464777
1250 Connecticut Av NW Suite 700-1A
Washington, DC 20036
Telephone: (202) 355-9452
Facsimile: (202) 318-2254
Email: ljoseph@larryjoseph.com

Counsel for Amicus Curiae Rep. Andy Barr

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IDENTITY, INTEREST AND AUTHORITY TO FILE

Amicus curiae Rep. Andy Barr (hereinafter, "*Amicus*" or "Rep. Barr") files this brief in conjunction with the accompanying motion for leave to file.[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. 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 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

El Paso County and the Border Network for Human Rights ("BNHR") (collectively, "Plaintiffs") have sued various federal Executive officers (collectively, the "Government") to challenge a variety of actions related to the construction of a

[1] By analogy 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.

barrier on the southern border. As relevant here, Plaintiffs challenge the use of Department of Defense ("DOD") funding under 10 U.S.C. §§ 284, 2808 as inconsistent with the limited border-barrier funding appropriated to the Department of Homeland Security ("DHS") in the Consolidated Appropriations Act 2019, PUB. L. NO. 116-6, 132 Stat. 2981 ("CAA"). The district court enjoined DOD from spending funds in excess of DHS's 2019 funding as inconstant with the CAA, and the Government has appealed. In advance of the merits of this appeal, the Government has moved to stay the district court's injunction pending appeal.

SUMMARY OF ARGUMENT

Amicus supports the arguments made by the Government and supplements those arguments as follows with respect to standing and implied repeals. On standing, Plaintiffs' aesthetic interests could constitute an "injury in fact" for Article III under environmental statutes like the National Environmental Policy Act, 42 U.S.C. §§ 4331-4347, but those private interests are neither legally protected interests for purposes of Article III under the statutes under which the District Court ruled (Sections I.A) nor within the prudential zone of interests of those statutes (Section I.B). Appropriation statutes differ from the statute at issue in *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), in significant ways that preclude reliance on Plaintiffs' diverted-resources injury (Section I.C). On the merits, provisions in DHS's 2019 appropriations bill do not repeal by implication DOD's separate

authority for border-barrier construction (Section II).

ARGUMENT

I. PLAINTIFFS ARE UNLIKELY TO PREVAIL BECAUSE THEY LACK STANDING TO SUE.

Federal courts are courts of limited jurisdiction, *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986), and must assure themselves of jurisdiction before reaching the merits. *Steel Co. v. Citizens for a Better Env't.*, 523 U.S. 83, 95 (1998); *Herwald v. Schweiker*, 658 F.2d 359, 363 (5th Cir. 1981) ("[a]bsent an adequate jurisdictional basis for the Court's consideration of the merits, there is *no likelihood* that the Plaintiff will prevail on the merits") (emphasis added). "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).

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. 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) (internal quotation marks omitted). Federal courts "presume that

[they] lack jurisdiction unless the contrary appears affirmatively from the record," *Renne v. Geary*, 501 U.S. 312, 316 (1991), and parties cannot confer jurisdiction by consent or waiver, *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231 (1990). Plaintiffs thus have the burden to show Article III jurisdiction, and the Government demonstrates that they lack it. Gov't Br. at 6-12. *Amicus* supplements the Government's brief with the following points on standing and the political-question doctrine.

At its constitutional minimum, standing presents the tripartite test of whether the party invoking a court's jurisdiction raises an "injury in fact" under Article III: (a) legally cognizable injury, (b) caused by the challenged action, and (c) redressable by a court. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 561-62 (1992). Moreover, to qualify as "an invasion of a legally protected interest," 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" 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). Further, a plaintiff's "'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." *Defenders of Wildlife*, 504 U.S. at 564. Membership groups like BNHR can sue on behalf of their members if the members have standing,[2] *Hunt v. Washington Apple Advertising Comm'n,* 432 U.S. 333, 343 (1977), but — with exceptions not relevant here — Article III requires associational plaintiffs to identify specific members with standing to assure the court that the parties include an affected person, *FW/PBS,* 493 U.S. at 235; *Summers v. Earth Island Institute,* 555 U.S. 488, 495 (2009). BNHR does not even attempt to identify affected members, relying instead on its diverted resources.

In addition to the constitutional limits on standing, the judiciary has adopted prudential limits on standing that bar review even when the plaintiff meets Article III's minimum criteria. *See*, *e.g.*, *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.,* 454 U.S. 464, 475 (1982) (zone-of-intertest test); *Secretary of State of Md. v. Joseph H. Munson Co.,* 467 U.S. 947, 955 (1984) (litigants must raise their own rights). Moreover, all of these constitutional and

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[2] To challenge specific planned border-barrier projects, Plaintiffs must — and do not — identify members for each affected site. *Summers,* 555 U.S. at 495, 498-99. Without doing so, Plaintiffs lack standing to review the Government's action at that site. *Id.*; *FW/PBS*, 493 U.S. at 235. For example, in *Summers*, the plaintiffs adequately supported standing at one site, but their standing evaporated when the dispute became moot at that site. *Summers*, 555 U.S. at 495. Moreover, for each allegedly affected plaintiff, injury must flow from concrete plans, not "'some day' intentions." *Defenders of Wildlife,* 504 U.S. at 564. Standing to challenge one section of border-barrier construction does not equate to standing to challenge *all* border-barrier sections.

prudential criteria must align to provide standing for a given injury, *Ecosystem Inv., Partners v. Crosby Dredging, L.L.C.*, 729 F.App'x 287, 299 (5th Cir. 2018) (collecting cases), and 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).

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

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, *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.[3]

[3] Aesthetic injuries do not qualify as legally protected interests here because the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, PUB. L. NO.

As the Supreme Court recently explained in rejecting standing for *qui tam* relators based on the 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 pecuniary interests do not *necessarily* qualify as an injury in fact. A reputational interest, in addition to being unprotected here, Gov't Br. 7-8, is too diffuse because the County is not the ascertainable target of border policy. *Fiber Sys. Int'l v. Roehrs*, 470 F.3d

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104-208, Div. C, 110 Stat. 3009, 3009-546 to 3009-724 ("IIRIRA"), gave DHS's predecessor the discretionary (and unreviewable) authority to waive environmental review for certain border-barrier 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); *id.* at 1226-27 (Callahan, J., dissenting).

1150, 1166-67 (5th Cir. 2006); *Newspapers, Inc. v. Matthews*, 161 Tex. 284, 339 S.W.2d 890, 893 (Tex. 1960). "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).[4] The statutes here have no nexus to Plaintiffs' alleged injuries. Indeed, § 284 expressly *allows* building these border projects. For this reason, Plaintiffs have not suffered an injury in fact for the statutes at issue here.[5]

Fifty years ago, federal courts 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.

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[4] After rejecting standing based on an interest in a *qui tam* bounty, *Stevens* held that *qui tam* relators have standing on an assignee theory (*i.e.*, the government has an Article III case or controversy and assigns a portion of it to the *qui tam* relator). *Stevens*, 529 U.S. at 771-73. Outside of taxpayer-standing cases that implicate the Establishment Clause, the nexus test of *Flast v. Cohen*, 392 U.S. 83 (1968), typically arises in cases challenging a failure to prosecute. *See*, *e.g.*, *Nader v. Saxbe*, 497 F.2d 676, 680-82 (D.C. Cir. 1974); *Linda R.S. v. Richard D.*, 410 U.S. 614, 617-18 (1973) ("in the unique context of a challenge to a criminal statute, appellant has failed to allege a sufficient nexus between her injury and the government action which she attacks"). Even without the *Flast* nexus test, Article III nonetheless requires that the claimed interest qualify as a "legally protected right." *Stevens*, 529 U.S. at 772-73.

[5] 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.

> But competitive injury provided no basis for standing in the above cases simply because the statutory and constitutional requirements that the plaintiff sought to enforce were in no way concerned with protecting against competitive injury.

Hardin v. Ky. Utils. Co., 390 U.S. 1, 5-6 (1968) (citations omitted); *Alabama Power Co. v. Ickes*, 302 U.S. 464, 478-79 (1938). This Court need not find that *Ickes* and *Hardin* remain good law; *Stevens*, *McConnell*, and *Diamond* certainly do. Plaintiffs' alleged injuries may suffice to support standing for environmental review statutes, but they do not suffice under the statutes at issue here.

B. 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*, 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 interests from military construction projects funded with transferred funds. Plaintiffs, moreover, must fall within the zone of interests of the statutes that they invoke, not some more amorphous constitutional zone. *Canadian Lumber Trade All. v. United States*, 517 F.3d 1319, 1334-35 (Fed. Cir. 2008); *Mount Evans Co. v. Madigan*, 14 F.3d 1444, 1452-53 (10th Cir. 1994). Plaintiffs cannot meet the statutes' zone-of-interests test.

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.

C. Plaintiffs' diverted resources do not provide Plaintiffs with standing in their own right.

In addition to citing the County's reputational and pecuniary interests, Plaintiffs also claim injury in the form of BNHR's frustrated efforts or increased expenditures to counteract the Government's failure to follow Plaintiffs' understanding of the applicable laws. These are mere self-inflicted injuries that do

not provide standing. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 417-18 (2013). If mere spending could manufacture standing, any private advocacy group could establish standing against any government action, but that clearly is not the law. *Morton*, 405 U.S. at 739 (organizations lack standing to defend "abstract social interests"). This diverted-resource form of standing derives from *Havens*, 455 U.S. at 372-73, which is inapposite here. Under the unique statutory and factual situation in *Havens*, a housing-rights organization's diverted resources provided it standing, but in most settings such diverted resources are mere self-inflicted injuries. As applied here, the diverted-resource basis for standing extends — *at most* — to Plaintiffs' future environmental claims, which the DHS has the authority to waive. *See* note 3, *supra*.

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, thereby collapsing the standing inquiry into the question of whether the alleged injuries met the Article III minimum of injury in fact. *Id.* The typical organizational plaintiff and typical statute lack several critical criteria from *Havens*.

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 [those rights] can confer standing." *Warth v. Seldin,* 422 U.S. 490, 514 (1975). Under a typical statute, a typical organizational plaintiff has no claim to any rights related to its own voluntarily diverted resources.

Second, an organizational plaintiff's injury must align with the other components of its standing, *Ecosystem Inv.*, 729 F.App'x at 299 (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 unlawfully false information). By contrast, under a typical statute and here, there are no rights even *remotely* related to a third-party organization's spending.

Third, and most critically, the *Havens* statute eliminated prudential standing, so the zone-of-interest test did not apply. When a plaintiff — individual or organizational — sues under a statute that does not eliminate prudential standing, that plaintiff cannot bypass the zone-of-interest 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. Here, this Court or a future court might — or

[6] 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 diverted resources needed to fall within the relevant zone of interests. *Accord Ass'n of Cmty. Orgs. for Reform Now v. Fowler*, 178 F.3d 350, 362-63 (5th Cir. 1999).

might not — find that the environmental-review statutes seek to ease Plaintiffs' mission by protecting Plaintiffs' spending to review alleged environmental violations,[7] but none of Plaintiffs' *present* claims fall within the zone of interests of the cited statutory or constitutional provisions.

Non-mutual estoppel does not apply to the federal government, *United States v. Mendoza,* 464 U.S. 154 (1984), and *stare decisis* cannot be applied so conclusively that, in effect, it operates as preclusion against non-parties to the prior litigation. *South Central Bell Tel. Co. v. Alabama,* 526 U.S. 160, 167-68 (1999). While Plaintiffs identify some *Havens*-based precedent, those "cases cannot be read as foreclosing an argument that they never dealt with." *Waters v. Churchill*, 511 U.S. 661, 678 (1994) (plurality); *Cooper Indus., Inc. v. Aviall Serv., Inc.,* 543 U.S. 157, 170 (2004). *Amicus* respectfully submits that this Court has a constitutional obligation to consider diverted-resource standing without regard to either issue preclusion or preclusive resort to *stare decisis* from decisions that did not expressly consider the foregoing reasons that render *Havens* inapposite here.

II. PLAINTIFFS ARE UNLIKELY TO PREVAIL ON THE MERITS BECAUSE DHS'S 2019 APPROPRIATION DID NOT IMPLIEDLY REPEAL EITHER DOD'S 2019 APPROPRIATION OF PRIOR DOD AUTHORITY FOR BORDER-BARRIER CONSTRUCTION.

With respect to the merits, the district court erred in reading the limits in

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[7] The Government may waive future environmental claims. *See* note 3, *supra*.

DHS's 2019 appropriation as limiting DOD's 2019 appropriations or DOD's pre-existing authority to reprogram appropriated funds. As the Government argues, the two sets of statutes are not *irreconcilably* in conflict. *See* Gov't Mot. at 14-15. In other words, the DHS's appropriation did not impliedly repeal the prior DOD statutes.

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 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 border-barrier funding, a *new DHS appropriation* cannot be read implicitly to repeal DOD's

pre-existing authority.

CONCLUSION

This Court should stay the district court's injunction pending appeal.

Dated: December 23, 2019

Respectfully submitted,

/s/ Lawrence J. Joseph

Lawrence J. Joseph, DC Bar #464777
Law Office of Lawrence J. Joseph
1250 Connecticut Av NW, Ste 700-1A
Washington, DC 20036
Tel: 202-355-9452
Fax: 202-318-2254
Email: ljoseph@larryjoseph.com

Counsel for Amicus Curiae Rep. Andy Barr

Christopher J. Hajec
Immigration Reform Law Institute
25 Massachusetts Ave, NW, Ste 335
Washington, DC 20001
Tel: 202-232-5590
Fax: 202-464-3590
Email: chajec@irli.org

CERTIFICATE OF COMPLIANCE WITH RULE 32

No. 19-51144, *El Paso County, Texas v. Trump.*

1. The foregoing brief complies with the type-volume limitation of Fed. R. App. P. 27 because the brief contains 3,575 words, excluding the parts of the brief exempted from counting.

2. The foregoing brief complies with the typeface and type style requirements of Fed. R. App. P. 27 because the brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in Times New Roman 14-point font.

Dated: December 23, 2019

Respectfully submitted,

/s/ Lawrence J. Joseph

Lawrence J. Joseph, D.C. Bar #464777
1250 Connecticut Av NW, Ste 700-1A
Washington, DC 20036
Tel: 202-355-9452
Fax: 202-318-2254
Email: ljoseph@larryjoseph.com

Counsel for Amicus Curiae Rep. Andy Barr

CERTIFICATE OF SERVICE

No. 19-51144, *El Paso County, Texas v. Trump.*

I hereby certify that on the 23rd day of December, 2019, I electronically filed the foregoing document — under cover of the accompanying motion for leave to file — with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit using the appellate CM/ECF system, causing the service on counsel for the parties to this action via electronic means. In addition, I served the following counsel via U.S. Mail, postage prepaid, who are not CM/ECF participants:

Michael J. Gerardi
U.S. Department of Justice
20 Massachusetts Avenue, N.W.
Washington, DC 20530

John Charles Padalino
Suite 1540
401 Congress Avenue
Austin, TX 78701

Andrew Irwin Warden
U.S. Department of Justice
Civil Division
1100 L Street, N.W.
Washington, DC 20005

/s/ Lawrence J. Joseph

Lawrence J. Joseph, D.C. Bar #464777
1250 Connecticut Ave, NW, Suite 700-1A
Washington, DC 20036
Tel: 202-355-9452
Fax: 202-318-2254
Email: ljoseph@larryjoseph.com

Counsel for Amicus Curiae Rep. Andy Barr