No. 19-51144

United States Court of Appeals for the Fifth Circuit

EL PASO COUNTY, TEXAS; BORDER NETWORK FOR HUMAN RIGHTS
Plaintiffs-Appellees/Cross-Appellants,

vs.

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, In his official capacity; MARK ESPER, SECRETARY, DEPARTMENT OF DEFENSE, In his official capacity; CHAD F. WOLF, ACTING SECRETARY, U.S. DEPARTMENT OF HOMELAND SECURITY, In his official capacity; DAVID BERNHARDT, SECRETARY, U.S. DEPARTMENT OF THE INTERIOR, In his official capacity; STEVEN T. MNUCHIN, SECRETARY, U.S. DEPARTMENT OF TREASURY, In his official capacity; TODD T. SEMONITE, In his official capacity as Commanding General United States Army Corps of Engineers
Defendants-Appellants/Cross-Appellees.

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 FEDERAL APPELLANTS/CROSS-APPELLEES

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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.

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TABLE OF CONTENTS

Certificate of Interested Persons i

Table of Contents iii

Table of Authorities v

Identity, Interest and Authority to File 1

Statement of the Case 1

Summary of Argument 2

Argument 4

I. The District COurt lacked jurisdiction. 4

A. Plaintiffs lack standing. 4

1. Plaintiffs' interests are insufficiently related to an "injury in fact" to satisfy Article III jurisdiction. 7

2. Plaintiffs' interests fall outside the relevant zones of interests. 10

3. Plaintiffs' diverted resources do not provide Plaintiffs with standing in their own right. 11

B. Plaintiffs lack a cause of action under both the APA and equity. 15

1. Plaintiffs cannot sue under the APA. 15

2. Plaintiffs cannot bring a pre-APA suit in equity. 16

II. Plaintiffs fail to state a claim on the merits. 18

A. The 2019 DHS appropriation did not impliedly repeal DOD's independent authority for the challenged projects. 18

B. These DOD projects do not violate § 8005. 20

C. DOD did not violate § 284 or § 2808. 22

1. DOD did not violate § 284. 22

2. DOD did not violate § 2808. 23

Conclusion 23

TABLE OF AUTHORITIES

CASES

Abbott Labs. v. Gardner,
387 U.S. 136 (1967) 16

Action Alliance of Senior Citizens v. Heckler,
789 F.2d 931 (D.C. Cir. 1986).....14

Air Courier Conference v. Am. Postal Workers Union,
498 U.S. 517 (1991) 11

Alabama Power Co. v. Ickes,
302 U.S. 464 (1938) 10, 17

Allen v. Wright,
468 U.S. 737 (1984) 4

Ass'n of Cmty. Orgs. for Reform Now v. Fowler,
178 F.3d 350 (5th Cir. 1999).....14

Ass'n of Data Processing Serv. Orgs., Inc. v. Camp,
397 U.S. 150 (1970) 16

Bender v. Williamsport Area Sch. Dist.,
475 U.S. 534 (1986) 4

Blessing v. Freestone,
520 U.S. 337 (1997) 17-18

Canadian Lumber Trade All. v. United States,
517 F.3d 1319 (Fed. Cir. 2008).....10

Citizens to Preserve Overton Park, Inc. v. Volpe,
401 U.S. 402 (1971) 20

City of Rancho Palos Verdes v. Abrams,
544 U.S. 113 (2005) 18

Clapper v. Amnesty Int'l USA,
568 U.S. 398 (2013) 12

Cooper Indus., Inc. v. Aviall Serv., Inc.,
543 U.S. 157 (2004) 14

DaimlerChrysler Corp. v. Cuno,
547 U.S. 332 (2006) 7

Dep't of Army v. Blue Fox, Inc.,
525 U.S. 255 (1999) 15

Diamond v. Charles,
476 U.S. 54 (1986) 9-10

Ecosystem Inv., Partners v. Crosby Dredging, L.L.C.,
729 F.App'x 287 (5th Cir. 2018).....7, 13

Ex parte Young,
209 U.S. 123 (1908) 17

Fiber Sys. Int'l v. Roehrs,
470 F.3d 1150 (5th Cir. 2006).....9

Flast v. Cohen,
392 U.S. 83 (1968) 9

FW/PBS, Inc. v. City of Dallas,
493 U.S. 215 (1990) 5-6

Gladstone, Realtors v. Bellwood,
441 U.S. 91 (1979) 13

Hardin v. Ky. Utils. Co.,
390 U.S. 1 (1968) 10

Havens Realty Corp. v. Coleman,
455 U.S. 363 (1982) 3, 12-15

Heckler v. Chaney,
470 U.S. 821 (1985) 20

Herwald v. Schweiker,
658 F.2d 359 (5th Cir. 1981).....4

Hunt v. Washington Apple Advertising Comm'n,
432 U.S. 333 (1977) 6

In re Border Infrastructure Envtl. Litig.,
915 F.3d 1213 (9th Cir. 2019).....8

Kokkonen v. Guardian Life Ins. Co. of Am.,
511 U.S. 375 (1994) 4

Lane v. Pena,
518 U.S. 187 (1996) 15

Lewis v. Casey,
518 U.S. 343 (1996) 7

Linda R.S. v. Richard D.,
410 U.S. 614 (1973) 9

Lujan v. Defenders of Wildlife,
504 U.S. 555 (1992) 5-7

Lujan v. Nat'l Wildlife Fed'n,
497 U.S. 871 (1990) 11

McConnell v. FEC,
540 U.S. 93 (2003) 8-10

Mount Evans Co. v. Madigan,
14 F.3d 1444 (10th Cir. 1994) 10-11

Muskrat v. United States,
219 U.S. 346 (1911) 4

Nader v. Saxbe,
497 F.2d 676 (D.C. Cir. 1974).....9

Nat'l Ass'n of Home Builders v. Defs. of Wildlife,
551 U.S. 644 (2007) 19

Newspapers, Inc. v. Matthews,
161 Tex. 284, 339 S.W.2d 890 (Tex. 1960).....9

Renne v. Geary,
501 U.S. 312 (1991) 5

Secretary of State of Md. v. Joseph H. Munson Co.,
467 U.S. 947 (1984) 7

Sierra Club v. Morton,
405 U.S. 727 (1972) 7, 12

South Central Bell Tel. Co. v. Alabama,
526 U.S. 160 (1999) 14

Steel Co. v. Citizens for a Better Env't.,
523 U.S. 83 (1998) 4

Summers v. Earth Island Institute,
555 U.S. 488 (2009) 6

Trump v. Sierra Club,
140 S.Ct. 1 (2019).....3, 16

United States v. Lee,
106 U.S. 196 (1882) 17

United States v. Mendoza,
464 U.S. 154 (1984) 14

United States v. Richardson,
418 U.S. 166 (1974) 5

United States v. Will,
449 U.S. 200 (1980) 19

Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464 (1982) 6-7

Vt. Agency of Nat. Res. v. United States ex rel. Stevens,
529 U.S. 765 (2000) 8-10, 13

Wadley S. R. Co. v. Georgia,
235 U.S. 651 (1915) 17

Warth v. Seldin,
422 U.S. 490 (1975) 12

Waters v. Churchill,
511 U.S. 661 (1994) 14

Youngberg v. Romeo,
457 U.S. 307 (1982) 17

STATUTES

U.S. CONST. art. III..... 2-7, 9, 13, 17

U.S. Const. art. III, §2 4

Administrative Procedure Act,
5 U.S.C. §§ 551-706 ..... 3, 15-17

5 U.S.C. § 701(a)(1).....16

5 U.S.C. § 701(a)(2).....16

5 U.S.C. § 702 15

5 U.S.C. § 702(2) 16

5 U.S.C. § 703 16

5 U.S.C. § 706(2)(B).....16

5 U.S.C. § 706(2)(C).....16

10 U.S.C. § 284..... 2-3, 9, 18, 22

10 U.S.C. § 284(a) 22

10 U.S.C. § 284(b)(7).....3, 22
10 U.S.C. § 2801(a) 23
10 U.S.C. § 2801(b) 23
10 U.S.C. § 2801(c)(4).....23
10 U.S.C. § 2808 .....2-4, 18, 22-23
10 U.S.C. § 2808(a) 4, 23
National Environmental Policy Act,
42 U.S.C. §§ 4331-4347 3
PUB. L. NO. 94-574, § 1,
90 Stat. 2721 (1976) 15
Illegal Immigration Reform and Immigrant Responsibility Act of 1996,
PUB. L. NO. 104-208, Div. C, 110 Stat. 3009, 3009-546 to 3009-724 8
Illegal Immigration Reform and Immigrant Responsibility Act of 1996, § 102(c)(1),
PUB. L. NO. 104-208, Div. C, § 102(c)(1), 110 Stat. 3009, 3009-555 8
Real ID Act of 2005,
PUB. L. NO. 109-13, Tit. I, Div. B, 119 Stat. 231, 302-11.....8
Real ID Act of 2005, § 102,
PUB. L. NO. 109-13, Tit. I, Div. B, § 102, 119 Stat. 231, 306 8
DOD Appropriations Act for Fiscal Year 2019, § 8005,
PUB. L. NO. 115-245, div. A, § 8005,
132 Stat. 2981, 2999 (Sept. 28, 2018) 2-3, 20-22
Consolidated Appropriations Act 2019,
PUB. L. NO. 116-6, 132 Stat. 2981 (Feb. 15, 2019) 2, 18-22

LEGISLATIVE HISTORY

H.R. REP. NO. 103-200 (1993) 21
H.R. REP. NO. 110-652 (2008).....22

RULES AND REGULATIONS

FED. R. APP. P. 29(a)(4)(E) 1

IDENTITY, INTEREST AND AUTHORITY TO FILE

Amicus curiae Rep. Andy Barr (hereinafter, "*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. 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 also 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

The Border Network for Human Rights ("BNHR") and El Paso County (collectively, "Plaintiffs") have sued various federal Executive officers (collectively, the "Government") to challenge a variety of actions related to the construction of a barrier on the southern border. As relevant here, Plaintiffs challenge the use 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.

Department of Defense ("DOD") funding under 10 U.S.C. §§ 284, 2808 as inconsistent with those provisions, as well as the limits placed on the Department of Homeland Security ("DHS") for 2019 in the Consolidated Appropriations Act 2019, PUB. L. NO. 116-6, 132 Stat. 2981 (Feb. 15, 2019) ("CAA"). In addition, Plaintiffs challenge the transfer of appropriated funds between DOD accounts under a longstanding annual provision of DOD appropriations included as § 8005 in DOD's 2019 appropriate statute. *See* DOD Appropriations Act for Fiscal Year 2019, PUB. L. NO. 115-245, div. A, § 8005, 132 Stat. 2981, 2999 (Sept. 28, 2018).

The district court enjoined DOD from spending funds in excess of DHS's 2019 funding under § 2808 as inconstant with the CAA, and the Government appealed. The district court ruled against Plaintiffs on transferring and expending funds under § 284, and Plaintiffs cross-appealed. In an unreported decision, a motions panel of this Court stayed the district court's injunction pending appeal. Although the Government's opening brief primarily addresses the Government's appeal regarding § 2808, Rep. Barr addresses the merits of both the Governments' appeal regarding § 2808 and Plaintiffs' cross-appeal regarding § 284.

SUMMARY OF ARGUMENT

Amicus supports the arguments made by the Government and supplements those arguments as follows with respect to jurisdiction and the merits. 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.1) nor within the prudential zone of interests of those statutes (Section I.A.2). 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.A.3). Further, as the Supreme Court recognized in staying an injunction in a related case, *Trump v. Sierra Club*, 140 S.Ct. 1 (2019), Plaintiffs lack a cause of action under the Administrative Procedure Act, 5 U.S.C. §§ 551-706 ("APA"), as well as the APA's waiver of sovereign immunity (Section I.B.1), and they cannot state a claim for pre-APA equity review because they lack an interest such as liberty or property that equity review would protect (Section I.B.2).

On the merits, provisions in DHS's 2019 appropriations bill did not repeal by implication DOD's separate authority for border-barrier construction (Section II.A), and § 8005 does not bar DOD's reprogramming funds for these types of projects (Section II.B). Similarly, once the funds are reprogrammed, nothing in either § 284's authorization of "[c]onstruction of … fences and installation of lighting to block drug smuggling corridors across international boundaries of the United States," 10 U.S.C. § 284(b)(7), or § 2808's authorization of "military construction projects." 10

U.S.C. § 2808(a), bars these projects (Section II.C).

ARGUMENT

I. THE DISTRICT COURT LACKED JURISDICTION.

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). Here, Plaintiffs lack both standing and a cause of action against the Government.

A. Plaintiffs lack standing.

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 15-24. *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. To the extent that Plaintiffs' alleged injuries are even cognizable, those injuries are too generalized to support standing.

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*

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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.

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 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). The various components of Plaintiffs' arguments for standing do not align.

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

A plaintiff can 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]

As the Supreme Court 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.

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[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. 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).

A reputational interest, in addition to being unprotected here, Gov't Br. 17-18, is too diffuse because the County is not the ascertainable target of border policy. *Fiber Sys. Int'l v. Roehrs*, 470 F.3d 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

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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.

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); *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.

2. 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.1, *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 relevant 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.

3. Plaintiffs' diverted resources do not provide standing.

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*. For three independent reasons, however, the diverted-resource basis for standing in *Havens* does not apply to typical organizational plaintiffs like Plaintiffs here or to typical statutes like the appropriation statutes here.

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); *Stevens*, 529 U.S. at 772, 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. 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.* 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 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

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[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).

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

obligation to consider diverted-resource standing without regard to either issue preclusion or a preclusive resort to *stare decisis* from decisions that did not expressly consider the foregoing reasons that render *Havens* inapposite here.

B. Plaintiffs lack a cause of action under both the APA and equity.

In addition to the lack of standing, Plaintiffs' claims also fall outside the scope of the APA's waiver of sovereign immunity[8] and thus are subject to an independent jurisdictional bar: "Absent a waiver, sovereign immunity shields the Federal Government and its agencies from suit," without regard to any perceived unfairness, inefficiency, or inequity. *Dep't of Army v. Blue Fox, Inc.*, 525 U.S. 255, 260 (1999). The scope of such waivers, moreover, is strictly construed in favor of the sovereign. *Lane v. Pena*, 518 U.S. 187, 192 (1996). Because Plaintiffs' claims neither fall within the APA nor within the pre-APA equitable exceptions to sovereign immunity, Plaintiffs lack a cause of action and jurisdiction for this litigation.

1. Plaintiffs cannot sue under the APA.

Subject to certain limitations, the APA provides a cause of action for judicial review to those "aggrieved by agency action within the meaning of a relevant statute." 5 U.S.C. § 702. For example, the APA excludes review under "statutes [that] preclude judicial review," those that commit agency action to agency

[8] The waiver of sovereign immunity was added to 5 U.S.C. § 702 in 1976. PUB. L. NO. 94-574, § 1, 90 Stat. 2721 (1976).

discretion, and those with "special statutory review." 5 U.S.C. §§ 701(a)(1)-(2), 703. As the Supreme Court recognized, Plaintiffs do not have a cause of action for judicial review. *Trump v. Sierra Club*, 140 S.Ct at 1. Other APA limits apply to other parts of Plaintiffs' suit. For example, questions of the presence or absence of an emergency or priorities are committed to agency discretion within the meaning of the APA. 5 U.S.C. § 702(2); *accord id.* § 701(a)(2).

Although the APA's "generous review provisions must be given a hospitable interpretation," *Abbott Labs. v. Gardner*, 387 U.S. 136, 140-41 (1967) (interior quotation marks omitted), the APA clearly is limited by the zone-of-interests. *See Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153-54 (1970). As indicated in Section I.A.2, *supra*, Plaintiffs cannot meet that test. Moreover, any suggestion that Plaintiffs could avoid the APA based on "*ultra vires*" or constitutional review is unsound, given that the APA expressly allows review of 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, non-APA equity review does not aid Plaintiffs here.

2. Plaintiffs cannot bring a pre-APA suit in equity.

In order to sue in equity, Plaintiffs need more than an aesthetic or reputational injury that would — or at least *could* — suffice for 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.

Unlike the APA and the liberal modern interpretation of Article III, pre-APA equity review requires "direct injury," which means "a wrong which directly results in the violation of a legal right." *Ickes*, 302 U.S. at 479. Without that elevated level of direct injury, there is no review:

> It is an ancient maxim, that a damage to one, without an injury in this sense, (*damnum absque injuria*), does not lay the foundation of an action; because, if the act complained of does not violate any of his legal rights, it is obvious, that he has no cause to complain. Want of right and want of remedy are justly said to be reciprocal. Where therefore there has been a violation of a right, the person injured is entitled to an action. The converse is equally true, that where, although there is damage, there is no violation of a right no action can be maintained.

Id. (alterations, citations, and interior quotation marks omitted); *cf. Blessing v.*

Freestone, 520 U.S. 337, 340 (1997) ("to seek redress through §1983, [plaintiffs] must assert the violation of a federal *right,* not merely a violation of federal *law*") (emphasis in original); *City of Rancho Palos Verdes v. Abrams,* 544 U.S. 113, 119-20 (2005) ("§1983 permits the enforcement of '*rights,* not the broader or vaguer 'benefits' or 'interests'") (*quoting Gonzaga Univ. v. Doe,* 536 U.S. 273, 283 (2002) (emphasis in *Gonzaga*)). In short, Plaintiffs would not have an action in equity, even if the Government had violated the appropriation statutes here. Those statutes simply do not give Plaintiffs a right to enforce in equity.

II. PLAINTIFFS FAIL TO STATE A CLAIM ON THE MERITS.

With respect to the merits, the district court erred in reading the limits in DHS's 2019 appropriation as limiting DOD's 2019 appropriations or DOD's pre-existing authority to reprogram appropriated funds. Insofar as this Court's review is de novo and Plaintiffs have cross-appealed with respect to funding under § 284, *Amicus* addresses all four statutes: DHS's 2019 appropriation statute, DOD's 2019 appropriation statute, § 284 and § 2808. As explained in the following subsections, the Government's border-wall projects violate no provision of these four statutes.

A. The 2019 DHS appropriation did not impliedly repeal DOD's independent authority for the challenged projects.

As the Government argues, the DHS's restrictions under CAA and the DOD's appropriation-related statutes are not *irreconcilably* in conflict. *See* Gov't Br. at 30. 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. Plaintiffs' and the District Court's contrary assertion posits that the CAA's funding of a different DHS border-wall project *sub silentio* repealed by implication the DOD's appropriation act authority to reprogram funds for a different

border-wall project for drug interdiction. That argument is meritless.

B. These DOD projects do not violate § 8005.

Plaintiffs potentially may raise three statutory arguments against transferring funds under § 8005: (1) the transfers violate § 8005 because they did not address unforeseen circumstances, (2) the transfers violate § 8005 because the CAA denied the Executive Branch funds for this purpose, and (3) § 8005 does not authorize transfers for military construction. *See* PUB. L. NO. 115-245, div. A, § 8005, 132 Stat. at 2999. None of these potential arguments has merit.[9]

Plaintiffs cannot argue that § 8005's limitation to "unforeseen military requirements," *id.*, bars these transfers. 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 in 2019 and that DHS would request assistance from the military in 2019. That that is all that § 8005's proviso requires with respect to foreseeability. The entire basis for the *military* project arose *after* Congress enacted DOD's 2019 appropriation. The project was, therefore, unforeseen

[9] The requirement that transfers fund higher-priority projects, *id.*, is committed to DOD's discretion, with "no law to apply" under *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), and "no meaningful standard against which to judge the agency's exercise of discretion." *Heckler v. Chaney,* 470 U.S. 821, 830 (1985). A federal court has no judicially manageable standard to weigh — much less to set — DOD priorities.

for purposes of § 8005.

Not can Plaintiffs argue that Congress — through the CAA — denied funds for these DOD projects. The notion that the CAA limited DOD's *pre-existing* authority would — if accepted by this Court — amount to a repeal by implication of the DOD appropriation and funding statutes. As explained in Section II.A, *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.

Finally, Plaintiffs cannot argue that § 8005 prohibits transfers for military construction with regard 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"). In sum, nothing in § 8005 restricts the Government's border-barrier projects.

C. DOD did not violate § 284 or § 2808.

Having established that neither the CAA nor § 8005 restricts the Government's border-barrier projects, *see* Sections II.A-II.B, *supra*, *Amicus* now demonstrates that the border-barrier projects comply with § 284 and § 2808. Because the projects comply with the substantive provisions of § 284 and § 2808, Plaintiffs' inability both to rely on the CAA to cap DOD spending and to rely on § 8005 to block DOD's fund transfers dooms Plaintiffs' challenge to the underlying projects.

1. DOD did not violate § 284.

Plaintiffs cannot dispute that § 284 funds are available for "the counterdrug activities … of any other department or agency of the Federal Government." 10 U.S.C. § 284(a). Those activities expressly include "[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 substantive inquiry with respect to projects using § 284 funds.

2. DOD did not violate § 2808.

Plaintiffs cannot dispute that § 2808 funds are available during declared emergencies for "military construction projects." 10 U.S.C. § 2808(a). Such projects 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). Insofar as all the projects funded under § 2808 take place on military installations, *Amicus* respectfully submits that those projects fall within DOD's authority under § 2808.

CONCLUSION

The judgment of the district court against the Government should be reversed, and the judgment of the district court against Plaintiffs should be affirmed.

Dated: March 16, 2020

Respectfully submitted,

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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. 32(a)(7)(B) and 29(a)(5) because the brief contains 5,689 words, including footnotes, but excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii).

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 2016 in Times New Roman 14-point font.

Dated: March 16, 2020

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CERTIFICATE OF SERVICE

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

I hereby certify that on the 16th day of March, 2020, I electronically filed the foregoing document 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:

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