No. 20-138

In The
Supreme Court of the United States

DONALD J. TRUMP,
PRESIDENT OF THE UNITED STATES, ET AL.,

Petitioners,

v.

SIERRA CLUB, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICUS CURIAE* LANDMARK LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

Amicus Curiae Landmark Legal Foundation ("Landmark") files this brief on behalf of families who have suffered the loss of a loved-one caused by people living illegally in the United States ("Angel Families"). Landmark also files this brief on behalf of an organization, Advocates for Victims of Illegal Alien Crimes ("AVIAC"), that supports such families. The very existence of these individuals provides a unique perspective to several aspects of this case. They highlight the comparative triviality of Respondent Sierra Club's interests in hiking, birdwatching, photography, and other professional, scientific, recreational, and aesthetic activities. *Sierra Club v. Trump*, 963 F.3d 874, 884 (9th Cir. 2019). These families also show that the challenged transfer of funds relates to national security. A porous national border has led to the deaths of many American citizens around the country. The protection of American citizens and the nation is the purpose of national security. The Executive Branch's transfer of funds in the interest of national security

[1] The parties consented to the filing of this brief. Counsel for *Amicus Curiae* provided notices to counsel for parties of its intent to file this brief on August 21, 2020 and August 27, 2020. Petitioner consented to the filing of this brief on August 21, 2020. State Respondents consented on August 25, 2020. Respondent Sierra Club consented on August 27, 2020. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amici Curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

trumps individual Respondent States' more parochial interest in enforcing their respective state environmental laws.

When it comes to the District Court's balancing of the equities analysis, upheld by the panel's majority, the trivial harm to Plaintiffs' hiking, camping, bird-watching, and aesthetic enjoyment and use of public lands contrasts with the real, debilitating, and permanent harm suffered by these Angel Families. These families suffer from the knowledge that their loved ones suffered tragic and violent deaths. See *Brief for Amici Curiae Angel Families et al*. (Case. No. 19-16102, DktEntry 103 (9th Cir. 2019)). The harms alleged by the private and public parties pale in comparison to the reality these families endure.

Landmark urges this Court to find the President's emergency declaration redirecting funds consistent with applicable federal statutes. But even if not, the President's inherent authority to conduct foreign policy and to exclude immigrants who enter the country illegally authorizes the executive actions taken.

INTRODUCTION AND SUMMARY OF ARGUMENT

Granting certiorari affords the Court to resolve whether the aesthetic, hiking, fishing, and other private activities of a group of individuals or a state's environmental regulatory provisions may supersede a

president's action taken under an emergency declaration issued in response to a national security threat. The Court should reject the lower courts' conclusions in the affirmative and hold that the President acted in accord with his inherent and constitutional authority to promote national security and conduct our nation's foreign affairs.

When the President acts in this capacity, his authority is at its highest level and his actions entitled to the highest deference. Securing the nation's borders enhances national security in that it limits both the incursion of deadly narcotics and criminals who harm our nation's citizens. Enhancing security through construction of border barriers in areas of elevated threats falls within the President's recognized power to conduct foreign affairs.

Left to stand, the lower court's decision vests the judiciary with a new, undefined, and unconstitutional veto power over the Executive Branch's foreign affairs and national security policies. The obvious and dangerous result will be that private parties and federal courts will cripple the ability of the Chief Executive to execute his most solemn duty – to defend the nation and its people.

ARGUMENT

I. The President has authority to undertake emergency measures to secure the nation's borders.

The "Founders intended that the President have primary responsibility – along with the necessary power – to protect the national security and the Nation's foreign relations." *Hamdi v. Rumsfeld*, 542 U.S. 507, 580 (2004) (Thomas, J., dissenting). The "structural advantages" of "[d]ecision, activity, secrecy, and dispatch" that characterize the office of the presidency "are most important in the national security and foreign-affairs contexts." *Id.* at 581 (quoting The Federalist No. 70 at 472 (J. Cooke ed. 1961) (A. Hamilton)).

Justice Thomas looked to John Marshall, who explained "[t]he President is the sole organ of the nation in its external relations, and its sole representative with foreign nations." *Id.* (quoting 10 Annals of Cong. 613 (1800)). Thus, "the Constitution vests in the President 'the Executive Power,' Art. II, § 1, provides that he 'shall be the Commander in Chief of the' Armed Forces, § 2, and places in him the power to recognize foreign governments." *Id.* Transferring funds for construction of enhancements to border security falls within this authority.

A. The Constitution vests the President with broad executive powers to conduct foreign affairs.

"It is 'obvious and unarguable' that no governmental interest is more compelling than the security of the nation." *Haig v. Agee*, 453 U.S. 280, 307 (1981) (quoting *Aptheker v. Secretary of State*, 378 U.S. 500, 509) (1964)). The power to protect the nation "ought to exist without limitation . . . [b]ecause it is impossible to foresee or define the extent and variety of national exigencies, or the correspondent extent & variety of the means which may be necessary to satisfy them." See *Hamdi v. Rumsfeld*, 542 U.S. at 580 (Thomas, J., dissenting) (quoting The Federalist No. 23, at 147 (J. Cooke ed. 1961) (A. Hamilton)). Thus, the Court has "held that the President has constitutional authority to protect the national security and that this authority carries with it broad discretion." *Id.* at 581.

The nature of this power goes beyond the Constitution itself. The Constitution's Executive Vesting Clause provides that the "executive Power shall be vested in a president of the United States of America." U.S. Const., Art. II, Sec. I. As Professor Prakash explains, "executive Power" was not a throw-away line, it meant something significant to the Framers:

> The Executive Vesting Clause grants the president those authorities that were traditionally wielded by executives. . . . The clause also accords the President those foreign-affairs authorities not otherwise granted to Congress or shared by the Senate. . . . Because the

> Constitution nowhere assigns or shares these foreign affairs powers, they remain part of the executive power granted to the President by the Executive Vesting Clause. . . .

Saikrishna Prakash, The Heritage Guide to the Constitution (Regnery, 2005), p. 179-181.

The authority to conduct our nation's foreign affairs grants the President broad powers distinguishable from the limited Article II powers involving internal affairs. The source and scope of the President's authority to exercise his powers in these two classes are distinct. As "[t]he two classes of powers are different in both respect and of their origin and their nature," *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 315-316 (1936), the degree of the President's authority varies.

The principle that the executive can only exercise powers enumerated in the Constitution (and those powers necessary and proper to affect such powers) thus applies to internal matters – not in matters involving foreign affairs. *Id.* As for domestic matters, the Constitution identifies powers originally held by the individual states and vests those powers with the federal government. Remaining powers reside with the states and with the People. *Id.* at 316 (citing *Carter v. Carter Coal Co.*, 298 U.S. 238, 294 (1936)). The Constitution therefore specifically limits the power of the federal government. This limitation, however, contrasts markedly with the power of the federal government in foreign matters. As the states never

possessed international powers, these powers could never be "carved from the mass of state powers." *Id.* These powers existed before the formation of the union and during the colonial period were possessed by and under the control of the Crown.

With separation from Great Britain, powers of "external sovereignty" did not pass to the states in their individual capacities, "but to colonies in their collective and corporate capacity as the United States of America." *Id.* Even before the ratification of the Constitution, the colonies acted as a unit in foreign affairs – exercising powers of war and peace, raising an army, establishing a navy, and adopting the Declaration of Independence. *Id.* These powers of external sovereignty of the Unites States encompasses all powers "necessary to maintain an effective control of international relations." *Id.* at 318 (citing *Burnet v. Brooks*, 288 U.S. 378, 396 (1933)).

Participation by other branches in the exercise of the federal power over external affairs is "significantly limited." *Id.* at 319. As a result, the President "is the constitutional representative of the United States with regard to foreign nations." *Id.* His authority derives not through an exertion of legislative power but from the "plenary and exclusive power" as the "sole organ of the federal government in the field of international relations." *Id.* at 320. Thus, the President's exercise of power need not originate from an act of Congress – it must only conform to the Constitution's applicable provisions. *Id.* Consequently, in these matters, the President has "a degree of discretion and freedom from

statutory restriction which would not be admissible were domestic affairs alone involved." *Id.* Indeed, the President's authority over issues of foreign affairs "arises from the Constitution, rather than from any delegation. . . ." *Mow Sun Wong v. Campbell*, 626 F.2d 739, 744 n. 9 (9th Cir. 1980).

B. The President's transfer of funds for border security enhancements pursuant to an emergency declaration is a legitimate exercise of executive power.

Ensuring national security entails protecting the borders and preventing illegal narcotics trafficking. Transferring funds to the Department of Homeland Security ("DHS") for construction of the border wall to prevent drug trafficking tracks with DHS's primary mission to "monitor connections between illegal drug trafficking and terrorism, coordinate efforts to sever such connections, and otherwise contribute to efforts to interdict drug trafficking." 6 U.S.C. § 111(b)(1)(H).

Previous Presidents have recognized that drug trafficking threatens national security. In 1986, President Reagan designated international drug trade as a national security threat. National Security Decision Directive 221, April 8, 1986.[2] Income derived from drug trafficking, the Reagan Administration concluded, funded terrorism and destabilized foreign governments.

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[2] Available at https://fas.org/irp/offdocs/nsdd/nsdd-221.pdf (last visited Aug. 28, 2020).

Id. Later, in a National Security Presidential Directive ("NSPD"), the George W. Bush Administration ordered U.S. government agencies to "attack the vulnerabilities of drug trafficking organizations by disrupting key business sectors and weakening the economic basis of the drug trade." The illegal drug market in the United States, the Bush Administration noted, "is based on illegal narcotics grown or manufactured in foreign countries and smuggled across our nation's borders." NSPD-25.[3]

Directives such as these are much like Executive Orders except that publication is not required and they may be classified. Steven Aftergood, *What's the Difference Between an Executive Order and a Directive?* Federation of American Scientists, Feb. 14, 2014.[4] Access to secret information informs presidential decision making within this context and underscores the President's unique authority. As noted by Justice Jackson, "The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports are not and ought not to be published to the world." *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948). Courts therefore should be

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[3] NSPD-25 appears to be classified and unavailable. Quotations above appear on the U.S. Immigration and Customs website available at https://www.ice.gov/narcotics (last visited Aug. 30, 2020).

[4] Available at https://fas.org/blogs/secrecy/2013/02/eo_pd/ (last visited Aug. 30, 2020).

reluctant to "nullify actions of the Executive taken on information properly held secret." *Id.*

In short, neither the Court nor Respondents can know all the facts that led to the President's decision to order construction of the wall. The President's unique position gives him access to secret information that influences his actions. International drug trafficking has long been recognized as a national security threat. Construction of enhanced border security barriers to advance the purposes of an emergency declaration to reduce this threat to public safety is well within presidential authority.

C. The President's inherent authority and congressional authorization entitles the transfer of funds to the highest deference.

The President's authority to exclude aliens derives from his inherent executive power to control the foreign affairs of the nation. *U.S. ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950) (citing *Curtiss-Wright Export Corp.*). Thus, a "decision to admit or exclude an alien may be lawfully placed on the President." *Id.* at 543.

Transferring funds from the Department of Defense ("DOD") to the Department of Homeland Security for construction of a border wall falls within the President's power to exclude aliens from the United States. The President, through the DOD, has

power to take this action without the statutory authority of § 8005.

"When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. In these circumstances . . . [he may] be said . . . to personify the federal sovereignty." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-636 (1950) (Jackson, J., concurring).

Justice Jackson identified three tiers of presidential power in his concurrence in *Youngstown Sheet & Tube*. While acting under an express or implied authorization from Congress, his authority is at its most powerful. Presidential actions, therefore, command deference and are rendered invalid only if "the Federal Government as an undivided whole lacks power." *Id.* at 637. The President acts within the second tier when he "acts in absence of either a congressional grant or denial of authority." In this tier, "any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law." *Id.* Presidential power is at its lowest when he "takes measures incompatible with the expressed or implied will on Congress." *Id.*

Here, the Acting Secretary's (and, by extension, the President's) actions are permissible under both his inherent authority and under a delegation of authority from Congress. Under 10 U.S.C. § 284, the DOD may provide support to other federal agencies for

"counterdrug activities" upon request. The statute also states that DOD may provide funds for the "[c]onstruction of roads and fences . . . to block drug smuggling corridors across international boundaries of the United States." 10 U.S.C. § 284(b)(7). Sections of the wall will be built in regions of the border identified by DHS as high priority. Brief for Pet. at 7. Section 8005 of the Appropriations Act authorizes the Acting Secretary to transfer funds from other appropriation accounts to an appropriation account DOD uses to fund counternarcotic activity. Department of Defense Appropriation Act, 2019, Pub. L. No. 115-245, Div. A, Tit. VIII, § 8005, 132 Stat. 2999. Congress, therefore, contemplated the possibility that such a transfer could be necessary and established conditions for making such a transfer. Those conditions have been met.

The power to exclude aliens is a core power that derives from the inherent authority of the President. Thus, the President can construct the border wall with no delegation from Congress. The statutory sources in 10 U.S.C. § 284 and in § 8005 of the Appropriations Act provide more authority.

The President is acting at his highest level of power and transferring funding should receive the strongest presumption of legitimacy.

II. Respondents do not have a statutory cause of action under § 8005 of the Appropriations Act or the Administrative Procedure Act.[5]

The Department of Defense ("DOD") is authorized by 10 U.S.C. § 284 to support other agencies for "counterdrug activities" upon request. Section 8005 of the Appropriations Act authorizes the DOD to transfer up to four billion dollars provided the Department meets certain conditions. Department of Defense Appropriation Act, 2019, Pub. L. No. 115-245, Div. A, Tit. VIII, § 8005, 132 Stat. 2999. The transfer must be used for "higher priority items, based on unforeseen military requirements" and the purpose of the transfer cannot be one denied by Congress. *Id.*

DOD met these conditions and Respondents' interests do not fall within the zone of interests protected by the Appropriations Act. Nor do Respondents have a claim under the Administrative Procedure Act.

Statutory causes of actions "extend only to plaintiffs who[se] interests 'fall within the zone of interests protected by the law invoked.'" *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 129

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[5] This case presents troubling jurisdictional issues. To begin with, Plaintiffs' complaint is a classic example of forum-shopping. In addition, the District Court's preliminary and permanent injunction orders show the growing problem of "legally and historically dubious" nationwide injunctions entered by district courts in cases over which they do not have proper jurisdiction. *See Trump v. Hawaii*, 138 S. Ct. 2392, 2425 (2018) (Thomas, J., concurring).

(2014) (citing *Allen v. Wright*, 468 U.S. 737, 751 (1984)). And this limitation applies to "all statutorily created causes of action" and constitutes "a requirement of general application" unless "it is expressly negated." *Id.* (citing *Bennett v. Spear*, 520 U.S. 154, 163 (1997)). Further, "The relevant zone of interests is not that of the APA itself, but rather the zone of interests to be protected or regulated by the statute that the plaintiff says was violated." *E. Bay Sanctuary Covenant v. Trump*, 909 F.3d 1219, 1244 (9th Cir. 2018). While the zone of interest test is "not especially demanding," necessary connections must be present to afford private litigants a cause of action. *Lexmark*, 572 U.S. at 130 (citing *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 225 (2012)). Suits are barred when a party's "interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress authorized the plaintiff to sue." *Id.* Thus, the "breadth of the zone of interests varies according to the provisions of law at issue[], so that what comes within the zone of interests of a statute for purposes of obtaining judicial review of administrative action under the 'generous review provisions' of the APA may not do so for other purposes." *Id.* (citing *Bennett v. Spear*, 520 U.S. 154, 163 (1997)).

As § 8005 constitutes the "gravamen of the complaint," the interests protected by this provision should be analyzed to determine whether they have been violated. As noted in Judge Collins's dissent,

§ 8005 "is grant of general transfer authority that allows the Secretary of Defense . . . to transfer from one DOD 'appropriation' into another up to $4 billion of the funds that have been appropriated under the DOD Appropriations Act for 'military functions.'" *Sierra Club v. Trump*, 963 F.3d at 906 (Collins, J., dissenting). Judge Collins observes that the "particular provision of law upon which the plaintiff relies" only focuses on § 8005's "prohibition on using the transfer authority to effectively reverse Congress's specific decision to deny funds to DOD for that item." *Id.* Further, § 8005's restrictions preclude DOD "from transferring funds appropriated by Congress for 'military functions' for purposes that do not reflect 'military requirements.'" Judge Collins correctly concludes that relevant provisions of § 8005 "are focused solely on limiting DOD's ability to use the transfer authority to reverse the congressional judgments reflected in DOD's appropriations." *Id.* at 907.

Sierra Club claims and the lower court agreed that construction of a border wall would adversely affect its members' aesthetic, recreational, and environmental interests. Respondents, however, have never argued that transferring funds adversely affects their interests. Neither Sierra Club, private parties nor the state litigants can claim to be representing the interests of Congress. Nor are they DOD contractors that lost funding because of the transfer. Instead, they argue (and the lower court agrees) that the secondary action – construction of a border wall – would not be possible without "invoking Section 8005's transfer authority –

without this authority there was no money to build these portions of the border wall; therefore, construction is fairly traceable to the Section 8005 transfers." *Id.* at 886.

The lower court is incorrect. As specified in *Lujan*, the zone of interest test requires plaintiffs "to make a factual showing that the plaintiff itself, or someone else whose interests the plaintiff may properly assert, has a cognizable interest that falls within the relevant zone of interests." *Id.* at 908 (citing *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 885-899 (1990)). Respondents do not represent the interests of Congress nor do they represent the interests of DOD contractors affected by transferring funds. Thus, they do not have a cause of action under either statute.

III. Respondents do not have a constitutional claim.

The Court's decision in *Dalton v. Spencer* forecloses claims that transferring funds violates the Appropriations Clause. Decisions by the Court do "not support the proposition that every action by the President, or by another executive official, in excess of his statutory authority is ipso facto in violation of the Constitution." *Dalton v. Spencer*, 511 U.S. 462, 472 (1994). Instead, the Court has "often distinguished between claims of constitutional violation and claims that an official has acted in violation of his statutory authority." *Id.* Respondents fail the *Dalton* test.

Respondents rest their claims on whether the DOD complied with § 8005 of the Appropriations Act. DOD asserted authority to transfer the funds pursuant to § 8005. For that reason, courts must review any claims challenging the transfer within the framework of DOD's statutory authority. *Id.*

Additionally, upholding a claim that DOD's actions violate the Appropriations Clause establishes a dangerous precedent that should be addressed by the Court. As noted in *Dalton*, "if every claim alleging that the President exceeded his statutory authority were considered a constitutional claim, [limited exceptions that had previously been permitted] would be broadened beyond recognition." *Dalton*, 511 U.S. at 473-474. Thus, "[t]he distinction between claims that an official exceeded his statutory authority, on the one hand, and claims that he acted in violation of the Constitution, on the other, is too well established to permit this sort of evisceration." *Id.* at 474.

The consequences of validating the claim that when the President violates his statutory authority, he also violates the Appropriations Clause, are severe. Every action invites litigation and the President's authority to act will be rendered meaningless.

CONCLUSION

"Our system of government is such that the interest of the cities, counties, and states, no less than the interest of the people of the whole nation, imperatively requires that federal power in the field affecting foreign relations be left entirely free from local interference." *American Ins. Assn. v. Garamendi*, 123 S. Ct. 2374, 2388 (2003) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 63 (1941)) (internal citation omitted). If we are to sustain our system, the Court should grant the Petition and reverse the lower courts.

Respectfully submitted,

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