No. 20-138

In The
Supreme Court of the United States

DONALD J. TRUMP,
PRESIDENT OF THE UNITED STATES, et al.,

Petitioners,

v.

SIERRA CLUB, et al.,

Respondents.

On Writ Of Certiorari To The 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") and an organization, Advocates for Victims of Illegal Alien Crimes ("AVIAC"), that supports such families. They provide a unique perspective to several aspects of this case. These families illustrate that the challenged transfer of funds was made in furtherance of an important and legitimate end – national defense. A porous national border has led to the deaths of many American citizens around the country – not just in border states. The protection of American citizens and the nation as a whole is the goal of Department of Defense appropriations. As a general matter, the law authorizing the transfer of funds, Section 8005 of the Department of Defense Appropriations Act, 2019, Pub. L. No. 115-245, Div. A, Tit. VIII, 132 Stat. 2999,[2] sought the

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[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 December 8, 2020. All parties consented on December 8, 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 *Amicus Curiae, its members, or its counsel* made a monetary contribution to its preparation or submission.

[2] Additional transfer authority for $2 billion was provided under Department of Defense Appropriations Act § 9002, 132 Stat. 3042. Since Section 9002 is "subject to the same terms and

protection of the "national interest" by granting certain discretion to the Secretary of Defense. More specifically, Section 8005 protected Congress's interest that funds appropriated for national defense were used according to Congress's priorities. Respondents Sierra Club and the Southern Border Communities Coalition's interests in hiking, birdwatching, photography, and other professional, scientific, recreational, and aesthetic activities and Respondent States of California and New Mexico's environmental and sovereign interests in enforcing their respective state environmental laws, however, were not in the zone of interests Congress sought to protect through Section 8005.

Furthermore, the Respondents sought injunctive relief below, triggering analysis of the balance of equities between Respondents and the Government. The Petitioners' ("the Government") interest – the defense and protection of the American people – becomes less abstract through the Angel Families' example. The harm to the Sierra Club and Southern Border Communities Coalition's interest in hiking, camping, birdwatching, and aesthetic enjoyment and use of public lands seems trivial in comparison with the real, debilitating, and permanent harm suffered by the Angel Families. These families suffer from the knowledge that their loved ones suffered tragic and violent deaths and are similar to American citizens who have suffered from the influx of illegal, deadly narcotics and associated violence from drug trafficking. See *Brief for*

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conditions" as Section 8005, this brief refers to both transfer authorities collectively as Section 8005.

Amici Curiae Angel Families et al. (Case. No. 19-16102, DktEntry 103 (9th Cir. 2019)). The Government's broader interest to protect the people of the United States from the unlawful entry of people and drugs into the country also trumps the States' more local and limited interests in enforcing their respective environmental laws.

Landmark urges this Court to reverse the judgments of the court of appeals.

INTRODUCTION AND SUMMARY OF ARGUMENT

Congress provided discretion to the Secretary of Defense to transfer $4 billion of Department of Defense funds internally between DOD accounts if he determined that such transfers were in "the national interest." Department of Defense Appropriation Act, 2019, Pub. L. No. 115-245, Div. A, Tit. VIII, § 8005, 132 Stat. 2999. This delegation of discretion came with several conditions. Most pertinently, such transfers could only be made for "higher priority items based on unforeseen military requirements" not previously rejected by Congress. *Id.* All such conditions were met and funds were transferred between DOD appropriations accounts to support counterdrug operations along the southern border at the Department of Homeland Security's request. There was nothing improper or unlawful about the method by which the funds were appropriated under Section 8005 or enacted into law.

Respondents Sierra Club and the Southern Border Communities Coalition's ("the Organizations") and Respondent States of California and New Mexico's ("the States") brought separate lawsuits, claiming harm to the Organizations' professional, scientific, recreational, and aesthetic activities and the States' environment and sovereignty to enforce state environmental laws. The circuit court in *Sierra Club v. Trump*, 963 F.3d 874 (9th Cir. 2020) found that the Organizations had Article III standing to bring their lawsuit. *Id*. at 886. In addition, the circuit court found that they had causes of action to challenge the transfer of funds under the Appropriations Clause and under an equitable ultra vires claim, without addressing the Organizations' fallback claim under the Administrative Procedure Act. *Id*. at 897. Furthermore, the circuit court found that the transfer of funds for various border wall projects was unlawful. *Id*. at 887. In the companion case, *California v. Trump*, 963 F.3d 926 (9th Cir. 2020), the circuit court found that the States had Article III standing and had a cause of action under the APA. In their view, the States' interests as sovereign entities were congruent were those of Congress and fell within Section 8005's zone of interests. *Id*. at 941-942. In both cases, the court held that Section 8005 did not authorize the challenged transfer of funds because "the border wall was not an unforeseen military requirement" and "funding for the wall had been denied by Congress." *Sierra Club v. Trump*, 963 F.3d at 886-887.

Respondent Organizations and States have no cause of action because their interests were not remotely within the zone of interests protected by

Section 8005. The Appropriations Clause provides no implied cause of action and their ultra vires theory requires the same zone-of-interests analysis under stricter standards than one used under the APA. Thus, their constitutional claims are merely statutory claims "dressed up in constitutional garb." *Sierra Club v. Trump*, 963 F.3d at 909 (Collins, J., dissenting). Finally, the transfer of funds at issue were lawful and provided Respondents no legal rights.

ARGUMENT

I. Respondents do not have a statutory cause of action under Section 8005 of the Appropriations Act or the Administrative Procedure Act.

Statutory causes of actions are presumed to extend "only to plaintiffs whose 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 (2014) (citing *Allen v. Wright*, 468 U.S. 737, 751 (1984)). 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)). "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) (citing *Match-E-Be-Nash-She-Wish Band of Pottawatomi*

Indians v. Patchak, 567 U.S. 209, 224 (2012) (*Patchak I*) (internal quotations and alterations omitted). While the zone-of-interests 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 *Patchak I*, 567 U.S. at 225). 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 that plaintiff to sue." *Id.* (internal quotations omitted). 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 Section 8005 constitutes the "gravamen of the complaint" of the Respondents, the interests protected by this provision must be analyzed to determine whether they have been violated. "Section 8005 is a 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 (except military construction).'" *Sierra Club v. Trump*, 963 F.3d at 906 (Collins, J., dissenting). Judge Collins observed that the "particular provision of law upon which the plaintiff relies" seeks to prevent the transfer authority to effectively reverse Congress's specific decision to deny funds to DOD for that item." *Id.* Furthermore, Section

8005's restrictions preclude DOD "from transferring funds appropriated by Congress for 'military functions' for purposes that do not reflect 'military requirements.'" *Id*. Judge Collins correctly concluded that the relevant conditions of Section 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. Nowhere in Section 8005 is the Secretary of Defense tasked by Congress with weighing the effects of funds transfers on aesthetic, environmental or state sovereignty concerns during his determination process.

The Organizations claim and the lower court agreed that construction of a border wall on public lands would adversely affect its members' aesthetic, recreational, and environmental interests. Respondents, however, have never argued that *transferring funds* adversely affects their interests. Neither the Organizations nor the States can claim to be representing the interests of Congress. Nor are they directly affected by the transfer of funds, such as DOD contractors that lost funding because of the transfer. See Kate Stith, Congress' Power of the Purse, 97 Yale L.J. 1343, 1387 and n. 218 (1988). Instead, they argue and the lower court agreed 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-interests 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 statute's 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 the transfer of funds. Thus, they do not have a cause of action under either statute.

II. Respondents do not have a cause of action under the Constitution or an ultra vires theory.

The Organizations claimed that the Government violated the separation of powers, the Presentment Clause, and the Appropriations Clause whether or not Section 8005 authorized the transfer of funds at issue. U.S. Const. Art. I, § 7, cl. 2, 3; U.S. Const. Art. I, § 9, cl. 7. As Judge Collins observed, any constitutional claims which acknowledge the funds transfer was authorized are entirely frivolous. *Sierra Club v. Trump*, 963 F.3d at 910. The Respondents' constitutional claims which argue that the transfer was unauthorized fail as well. They are unlike other constitutional claims cited by the circuit court majority such as *United States v. McIntosh*, 833 F.3d 1163, 1173-1175 (9th Cir. 2016) because there the challengers were directly affected by unconstitutional government action, unlike the indirect harm suffered by Respondents. The claims also fail

because they revert back to the four corners of Section 8005. Thus, they are limited by the statute's express or implied rights to bring suit and return the focus to the statute's zone of interests. In Judge Collins words, they are merely statutory claims "dressed up in constitutional garb." *Sierra Club v. Trump*, 963 F.3d at 909.

In *Dalton v. Specter*, 511 U.S. 462 (1994), a presidential base closing decision was challenged because Executive Branch officials had not followed the substantive and procedural requirements set by statute. As a consequence, the circuit court claimed, the president's actions violated the Constitution's separation-of-powers requirements. The *Dalton* court disagreed, noting that caselaw did "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." *Id*. at 472. 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.*

As for an ultra vires claim, this Court's opinion in *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320 (2015) sheds light. In *Armstrong*, habilitation providers under Idaho's Medicaid plan who were reimbursed by the state claimed that their reimbursement rates were lower than federal statute permitted. The Court held that the Supremacy Clause did not confer a private right of action based on the clause's history and context within the Constitution. *Id.* at 324-325. The Court considered whether the providers could still

seek equitable relief under the statute and noted that, "The power of federal courts of equity to enjoin unlawful executive action is subject to express and implied statutory limitations." *Id*. at 327. As Judge Collins noted, any equitable claim under the APA or Section 8005 brings the Respondents back to the statute's zone of interests where they are not remotely included. *Sierra Club v. Trump*, 963 F.3d at 913-914.

III. The transfer of funds was lawful and met the conditions of Section 8005.

The conditions set by Congress in Section 8005 on the Secretary's transfer authority at issue in this case were met. Transfers could be made "based on unforeseen military requirements" and "in no case where the item for which funds are requested has been denied by the Congress."

The panel majority found that the funds had been denied by Congress due to its earlier denial of border wall funding. *California v. Trump*, 963 F.3d at 948-949. Judge Collins, however, correctly noted that the condition refers to "whether Congress, *during DoD's appropriations process*, denied an 'item' that corresponds to the 'item for which funds are requested.'" *Id*. at 971 (emphasis in original). He continued that, "Under that standard, this case is easy. The States do not contend (and could not contend) that Congress ever 'denied' such an item to DoD during DoD's appropriations process." *Id.*

As to the question of whether DOD support to the Department of Homeland Security was a military requirement, it should first be noted that drug trafficking has long been a focus of national security policy. Drug trafficking funds terrorist groups that destabilize foreign governments. Accordingly, as far back as the 1980s, President Ronald Reagan designated the international drug trade as a national security threat. National Security Decision Directive 221, April 8, 1986.[3]

Although it acts primarily in a supporting role, counterdrug operations are one of the missions of the U.S. military. 10 U.S.C. § 284. Subsection (a) states that "the Secretary of Defense may provide support for the counterdrug activities or activities to counter transnational organized crime of any other department or agency of the Federal Government." The purposes for this support specifically include "construction of roads and fences and installation of lighting to block drug smuggling corridors across international boundaries of the United States." 10 U.S.C. § 284(b)(7). Furthermore, the Department of Defense is the lead agency for the detection and monitoring of aerial and maritime transit of illegal drugs into the United States. 10 U.S.C. § 124(a)(1). This responsibility is carried out in support of the counterdrug activities of law enforcement agencies from the federal to local level. 10 U.S.C. § 124(a)(2).

To further demonstrate that counterdrug operations is a military activity, the Joint Chiefs of Staff

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

publishes a manual on Counterdrug Operations. Joint Chiefs of Staff, Joint Pub. 3-07.4, Counterdrug Operations (5 February 2019).[4] This manual suggests that counterdrug operations are difficult to foresee. "The strategic environment is uncertain and complex and evolves rapidly. It is fluid, with changing alliances, partnerships, and national and transnational threats that rapidly emerge, disaggregate, and reemerge. These factors significantly affect how [counterdrug] operations are conducted." *Id.* at I-15.

In the States' case below, the circuit court held that "both the requirement to build a wall on the southern border as well as the DHS request to DoD to build that wall were anticipated and expected" and thus not unforeseen. *California v. Trump*, 963 F.3d at 946. Judge Collins in dissent argued in response that "the question is not whether a particular item 'was unforeseen *in general*'; '[r]ather, the question under section 8005 is whether it was unforeseen at the time of the budget request and enactment of appropriations.' " *Id.* at 974 (citing U.S. GAO, B-330862, Department of Defense – Availability of Appropriations for Border Fence Construction at 7-8 (Sept. 5, 2019)) (emphasis in original).

Congress has provided discretion or power to Executive Branch officials to spend funds in emergency or unforeseen situations in several instances for the military, law enforcement and foreign affairs. 22 U.S.C. § 5859a(d)(4) (granting the Secretary of Defense the

[4] Available at https://fas.org/irp/doddir/dod/jp3-07-4.pdf (last visited Dec. 10, 2020).

ability to exceed congressional spending limits for non-proliferation activities in light of "significant unforeseen" events); 10 U.S.C. § 2216(d) (granting spending discretion to the Secretary of Defense or branch secretaries within the fund established to ensure completion of an ongoing acquisition program); 22 U.S.C. § 2671(a) (granting the Secretary of State the ability to make expenditures "for unforeseen emergencies arising in the diplomatic and consular service"); 28 U.S.C. § 530C(b)(E) (granting the Attorney General the ability to spend allocated funds on "unforeseen emergencies of a confidential character"); 8 U.S.C. § 1555 (allowing specified INS funds to be spent on "unforeseen emergencies of a confidential character"); 54 U.S.C. § 103101(c) (granting the Secretary of Interior access to funds "to maintain law and order in emergency and other unforeseen law enforcement situations").

The only caselaw focusing on the determination of what is "unforeseen" in such situations shows that it is within the Executive Branch's discretion. In a case involving a since amended version of 25 U.S.C. § 2008, the Tenth Circuit Court of Appeals considered statutory language that required the Secretary of Interior to provide additional funds for the operation of Indian schools "where necessitated by cases of emergencies or unforeseen contingencies." In the circuit court's view, the meaning of " 'emergencies or unforeseen contingencies' – unfortunately is not entirely clear." *Alamo Navajo School Bd. v. Andrus*, 664 F.2d 229, 232 (10th Cir. 1981), *cert. denied*, 456 U.S. 963 (1982). Ultimately, the circuit court concluded that "Congress intended the

determination of what constitutes an emergency or unforeseen contingency to be discretionary with the Secretary." *Id*. Accordingly, the determination of what an unforeseen military requirement was properly within the Secretary of Defense's discretion.

The conditions set by Congress on the transfer of funds were met. The transfer of funds to support counterdrug operations at the request of the Department of Homeland Security was lawful. The Respondents have no valid cause of action against the Government.

Finally, although the Government does not challenge the Respondents' standing, "the court has an independent obligation to assure that standing exists, regardless of whether it is challenged by any of the parties." *Summers v. Earth Island Inst.*, 555 U.S. 488, 499 (2009). Then-Judge Antonin Scalia wrote that "the judicial doctrine of standing is a crucial and inseparable element of [the principle of separation of powers], whose disregard will inevitably produce – as it has during the past few decades – an overjudicialization of the processes of self-governance." Antonin Scalia, The Doctrine of Standing as an Essential Element of the Separation of Powers, 17 Suffolk U. L. Rev. 881 (1983). Justice Scalia later addressed the need for particularized harm in this Court's standing jurisprudence in *Lujan*. Although the parties in this case may have standing under *Lujan*, this case is an example of parties at the outer limits of standing attempting to bring the judiciary into a dispute best left to the political

branches. As Professor Stith wrote, "judicial enforcement may not be the most efficient or effective way of ensuring compliance with legislative conditions in federal spending programs." Stith, at 1388.

CONCLUSION

The Court should reverse the judgments of the court of appeals.

Respectfully submitted,

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