

No. 20-138

IN THE

Supreme Court of the United States



DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, *et al.*,
—v.— *Petitioners,*

SIERRA CLUB, *et al.*,
_____ *Respondents.*

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, *et al.*,
—v.— *Petitioners,*

STATES OF CALIFORNIA AND NEW MEXICO,
_____ *Respondents.*

ON WRITS OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICI CURIAE*
87 RELIGIOUS ORGANIZATIONS
IN SUPPORT OF RESPONDENTS

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INTERESTS OF *AMICI CURIAE*¹

Led by the Muslim Bar Association of New York, *amici* are American religious or religiously-affiliated organizations who represent a wide array of faiths and denominations. *Amici* include congregations and houses of worship, as well as professional, civil liberties, and immigrant rights groups who work with or represent faith communities. As discussed in more detail below, *amici*'s interests are implicated by the Executive Branch's attempt to abrogate Congress's spending power, as well as the attendant risk posed by an unchecked Executive Branch to members of disfavored religious groups.

Amici are: Albuquerque Mennonite Church; Albuquerque Monthly Meeting of the Religious Society of Friends (Quaker); American Association of Jewish Lawyers and Jurists; American Baptist Churches of Metropolitan New York; Anshe Chesed; Association of U.S. Catholic Priests (AUSCP); Campus Ministry of Roman Catholic Archdiocese of New York at Hostos and Bronx Community College of the City University of New York; Catholic Charities of the Archdiocese of New York; Catholic Diocese of El Paso; Catholic Legal Immigrant Network, Inc. (CLINIC); Central Conference of American Rabbis; Central Pacific Conference of the United Church of

¹ Pursuant to Sup. Ct. R. 37.6, counsel for *amici curiae* represent that they have authored the entirety of this brief, and that no person other than the *amici curiae* or their counsel has made a monetary contribution to the preparation or submission of this brief. All parties provided written consent for *amici curiae* to file this brief.

Christ; Church Council of Greater Seattle; Church of Our Saviour/La Iglesia de Nuestro Salvador; Congregation Beit Simchat Torah; Congregation B'Nai Jeshurun; Congregation Beth Elohim (Brooklyn, NY); Congregation of Our Lady of Charity of the Good Shepherd, US Provinces; Congregation Shaarei Shamayim; Council on American-Islamic Relations – California Chapter; Council on American-Islamic Relations – Michigan Chapter; Council on American-Islamic Relations – New York Chapter; Cuba Presbyterian Church (NM); Dominican Development Center; East End Temple (NY); El Paso Monthly Meeting of the Religious Society of Friends; Emergency Shelter Network; Engage Action; Episcopal City Mission (MA); Episcopal Diocese of Long Island; Faith in New Jersey; Faith in New York; First Congregational Church of Kalamazoo; First Congregational United Church of Christ (Albuquerque, NM); First Unitarian Church of Portland Oregon; Franciscan Friars of the Province of St. Barbara; Global Justice Institute; Greater New York Labor-Religion Coalition; Hope Border Institute; Hyattsville Mennonite Church; ICNA Council for Social Justice; Islamic Society of Basking Ridge; Islamic Society of Central Jersey; Jewish Center for Justice; Justice and Witness Missional Team of the Hawaii Conference, United Church of Christ; Keshet; Lab/Shul; Leadership Conference of Women Religious (LCWR); Living Interfaith Church, Lynnwood, WA; Lutheran Immigration and Refugee Service; Maryknoll Office for Global Concerns; Men of Reform Judaism; Muslim Urban Professionals (MUPPIES); Muslim Bar Association of New York; Muslim Public Affairs Council; Muslims for Progressive Values; National Advocacy Center of the Sisters of the Good

Shepherd; National Disaster Interfaith Network; NETWORK Lobby for Catholic Social Justice; New Jersey Interfaith Coalition; New Sanctuary Movement of Philadelphia; New York Annual Conference Immigration Task Force of the United Methodist Church; New York Conference of the United Church of Christ; New York Disaster Interfaith Services; New York Justice for Our Neighbors; New York State Council of Churches; Northern California Nevada Conference of the United Church of Christ; Oregon Interfaith Movement for Immigrant Justice; Pacific Northwest Conference of the United Church of Christ; Presbytery of the Pacific; San Bernardino Community Service Center, Inc.; Santa Fe Monthly Meeting of Friends (Quakers); Social Action Committee of the First Unitarian Universalist Church of Austin (TX); Southwest Conference of the United Church of Christ; St. Francis Community Services / Catholic Legal Assistance Ministry; Temple Israel of Hollywood (CA); The Daughters of Charity of St. Vincent de Paul, USA; Trinity Church Wall Street; Truah; Union for Reform Judaism; Unitarian Universalist FaithAction New Jersey; Unitarian Universalist Mass Action Network; Unitarian Universalist Service Committee (UUSC); Unitarian Universalists for Social Justice; United Methodist Women; University Christian Ministry at Northwestern; Women of Reform Judaism.

SUMMARY OF ARGUMENT

The Appropriations Clause of the United States Constitution provides that: “No money shall be drawn from the Treasury but in Consequence of Appropriations made by Law.” President Trump

ignored that mandate by shrugging off Congress's rejection of \$5.7 billion in appropriations for a proposed border wall, and purporting to divert funds that had been appropriated for other purposes. This challenge ensued.

Amici have a direct interest in preventing the Executive from ignoring the Appropriations Clause. President Trump's effort to build a wall is targeted at a specific disfavored group, namely immigrants entering the United States through the southern border. But the risks of an unchecked executive with access to unlimited funds to implement its agenda are shared by all potentially-disfavored groups. *Amici*, religious groups whose members have, throughout history, faced discrimination by powerful executive branches of government both here and abroad, are acutely conscious of the need for a balance of powers. Indeed, several *amici* represent groups that have been targeted by President Trump, such as Muslims, immigrants, and refugees, and all *amici* are justly concerned that the Executive Branch could, if permitted, use this newfound power to re-direct appropriations to impinge on the rights of disfavored religious groups.

For the reasons set forth herein and in Respondents' and other *amici*'s briefs, *amici* urge the Court to affirm the Ninth Circuit's judgment.

ARGUMENT**I. PETITIONERS' VIOLATION OF THE
APPROPRIATIONS CLAUSE THREATENS
AMICPS RELIGIOUS LIBERTY**

Petitioners attempt to seize specifically-appropriated funds to make good on a campaign promise to build a border wall that bears no rational relationship to the purposes for which those funds were allocated. That kind of presidential authority is unprecedented in the United States. *Amici* have a rational fear that, unless reined in by this Court, future administrations will use that authority to impinge on religious liberty.

**A. America's founding traces to an
unrestrained executive's attempt to
persecute disfavored religious groups
and threats remain today.**

The danger that an unrestrained executive poses to disfavored religious groups is intertwined with the history of this country. During the early 1620s, King Charles I of England was locked in a prolonged battle with Parliament over its refusal to authorize funds requested by the King, in part due to Parliament's concerns regarding the King's respect for the rights of religious minorities, particularly Puritans. In 1629, King Charles dissolved Parliament so he could obtain the funds without obstruction.² This caused what is

² The History of Parliament: The House of Commons 1624-1629 (ed. Andrew Thrush and John P. Ferris 2010), <https://>

today known as the “Great Migration” of Puritans from England to escape religious persecution by an unrestrained king. Thousands of Puritans fled to America and established the Massachusetts Bay Colony, one of the first English settlements in what became the United States.³

The danger of an unrestrained executive is similarly pronounced today. Under the administration of George W. Bush, the Patriot Act enabled DHS to monitor the private communications of American Muslims without a court order.⁴ Federal agents insisted that even “benign private communication with actors in Muslim-majority countries,” such as “sending remittances back to family or friends” or “completing the religious pilgrimage to Saudi Arabia,” could create a “suspicion of terror activity” that justified the warrantless surveillance of American Muslims.⁵ President Obama’s administration initiated the “Countering Violent Extremism” (“CVE”) program in 2011. Although “couched in neutral terms,” this program “in practice [] focused almost exclusively on American-

www.historyofparliamentonline.org/volume/1604-1629/survey/parliament-1628-1629.

³ New England Historical Society, *The Great Migration of Picky Puritans, 1620-40*, <http://www.newenglandhistoricalsociety.com/the-great-migration-of-picky-puritans-1620-40/>.

⁴ Khaled A. Beydoun, *Acting Muslim*, 53 Harv. C.R.-C.L. L. Rev. 1, 30 (2018).

⁵ *Id.*

Muslim communities.”⁶ CVE empowered DHS to “strategically map[] and then tap[] informants within mosques, student organizations . . . and other places for religious and political discussion and gathering.”⁷ DHS maintained this focus notwithstanding the fact that, since the 9/11 attacks, “nearly twice as many people have been killed by white supremacists, antigovernment fanatics and other non-Muslim extremists than by radical Muslims,” as reported in the *New York Times*.⁸ Under the Trump administration, CVE—which the President said he intended to rename the “Countering Islamic Extremism” program⁹—has focused at least 85% of its grants on targeting minority groups, particularly Muslims.¹⁰ The Trump administration proposed cutting funding to CVE, but not because it unlawfully

⁶ Faiza Patel, *Countering Violent Extremism*, Brennan Center (March 16, 2017), <https://www.brennancenter.org/our-work/research-reports/countering-violent-extremism>.

⁷ Beydoun, *supra* note 4, at 35 (citation and internal quotation marks omitted).

⁸ Scott Shane, *Homegrown Extremists Tied to Deadlier Toll Than Jihadists in the U.S. Since 9/11*, *The New York Times* (June 24, 2015), <https://www.nytimes.com/2015/06/25/us/tally-of-attacks-in-us-challenges-perceptions-of-top-terror-threat.html>.

⁹ Dustin Volz, Reuters, *U.S. Senators Denounce Trump Plan to Focus Counter-Extremism Program on Islam* (Feb. 9, 2017), <https://www.reuters.com/article/us-usa-trump-extremists-program-idUSKBN15O2QT>.

¹⁰ Faiza Patel, Andrew Lindsay, and Sophia DenUyl, Brennan Center for Justice, *Countering Violent Extremism in the Trump Era* (June 15, 2018), <https://www.brennancenter.org/analysis/countering-violent-extremism-trump-era>.

targeted American Muslims; rather, the administration believed CVE did not target Muslims aggressively enough. The President reportedly objected to the program's interest in community engagement, as opposed to "empower[ing] the police to arrest suspected terrorists," and its even minimal focus on white supremacist groups, as opposed to American Muslims exclusively.¹¹

B. An unchecked executive threatens disfavored religious groups, despite other constitutional protections.

The existence of other constitutional protections for religious freedoms does not allay *amici's* concern that the erosion of the Appropriations Clause threatens religious liberty and religious individuals generally. The United States' recent and not-so-recent past demonstrates that the threat to disfavored religious populations by an unchecked executive is real. America's history shows that an executive branch unrestrained by the legislature poses significant danger to disfavored religious groups. See *supra* Part. I.A. And the Trump Administration's record demonstrates that other constitutional rights cannot secure sufficient protections against such threats—especially where policies born from bigotry can be dressed in national-security garb. See *Trump v. Hawaii*, 138 S. Ct. 2392, 2417 (2018) (discussing statement by campaign advisor Rudy Giuliani that

¹¹ Peter Beinart, The Atlantic, *Trump Shut Programs to Counter Violent Extremism* (Oct. 29, 2018), <https://www.theatlantic.com/ideas/archive/2018/10/trump-shut-counter-violent-extremism-program/574237/>.

when Trump “first announced it, he said, ‘Muslim ban.’ He called me up. He said, ‘Put a commission together. Show me the right way to do it legally.’”).

Congress has previously stepped in to protect religious groups with statutory protections where constitutional protections fall short. In *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), notwithstanding the First Amendment, this Court found that the State of Oregon could deny unemployment benefits to individuals who lost their jobs because of their peyote use during religious ceremonies. *Id.* at 890. The Court reached its conclusion despite the fact that ingesting peyote was “a sacrament of the Native American Church” and “vital to respondents’ ability to practice their religion.” *Id.* at 903 (O’Connor, J., concurring). In response, with near unanimous support, Congress passed the Religious Freedom Restoration Act (“RFRA”) to bolster protections for religious liberty. Pub. L. No. 103-141, 107 Stat. 1488 (Nov. 16, 1993), codified at 42 U.S.C. § 2000bb through 42 U.S.C. § 2000bb-4. While this Court found RFRA unconstitutional as applied to the states, *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997), it has enforced RFRA’s supplemental protections against Executive Branch actions that encroach on religious freedom, *see Burwell v. Hobby Lobby Stores*, 573 U.S. 682, 726, 736 (2014) (finding HHS contraceptive mandate violated RFRA); *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 425, 439 (2006) (finding seizure of controlled substance used during religious ceremonies and potential prosecution violated RFRA).

Similar to Congress's passage of RFRA to protect religious groups, here, Congress refused to allocate funds for a border wall to protect another vulnerable population—immigrants. *See infra* Parts III–IV. As in the RFRA context, the Executive Branch's attempt to overturn Congress's will must be stopped. *See Burwell*, 573 U.S. at 726, 736; *Gonzales*, 546 U.S. at 425, 439.

C. The risk of an unchecked executive does not end with the Trump Administration.

While the Trump Administration casts the risks of an unrestrained executive in stark relief, the dangers do not end with Trump's presidency. If this Court permits the Executive Branch to transfer the funds at issue here in direct contravention of the Appropriations Clause, the lesson for future executives will be clear: the president may ignore all coequal branches of government regardless of their specific, constitutionally-mandated authority to decide the matter at issue, and may do so at the expense of individual liberty.

This threat concerns not only members of groups who are disfavored today, but also members of any religious faith that may be disfavored in the future. Indeed, many faiths have been the target of hatred and mistrust over the course of U.S. history. Rhode Island was founded by a Protestant dissenter, Roger Williams, who had been banished from the

Massachusetts Bay Colony for his religious views.¹² Pennsylvania and Delaware were founded by William Penn as a sanctuary for Quakers from religious discrimination.¹³ The Mormons settled in Utah only after being driven out of Missouri and Illinois.¹⁴ A Texas state court once had to make clear that the Equal Protection Clause prohibited the “systematic exclusion of Catholics from grand jury service.” See *Casarez v. State*, 857 S.W.2d 779, 784 n.4 (Ct. App. Tx. 1993) (describing the 1925 case *Juarez v. State*, 102 Tex. Crim. 297, Crim. App. (1925)). The national origins quota system, which played a major role in the United States turning away Jewish refugees fleeing the Holocaust, was in fact conceived in part to limit Jewish immigration.¹⁵ *Amici* of all faiths therefore understand that when the president can redirect funds at will—even in the face of congressional opposition—nothing stands in the way of using such funds to surveil, harass, and sanction disfavored religious groups.

¹² Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1425 (1989).

¹³ *Id.*

¹⁴ Paul Wake, *Fundamental Principles, Individual Rights, and Free Government: Do Utahns Remember How to Be Free?*, 1996 Utah L. Rev. 661, 672 (1996).

¹⁵ Kevin R. Johnson, *Race, the Immigration Laws, and Domestic Race Relations: A ‘Magic Mirror’ into the Heart of Darkness*, 73 Ind. L.J. 1111, 1129 (1998).

II. THE CONSTITUTIONAL SEPARATION OF POWERS SERVES TO PROTECT INDIVIDUAL LIBERTY

The Founding Fathers recognized that the constitutional separation of powers affords critical protections against threats by the government to individual liberties. “The accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny.” The Federalist No. 47 (James Madison). As this Court has observed, “[l]iberty is always at stake when one or more of the branches seek to transgress the separation of powers.” *Clinton v. City of New York*, 524 U.S. 417, 450 (1998).

The Appropriations Clause serves as one of the Constitution’s most critical safeguards of individual liberty through the separation of powers. It provides that “[n]o money shall be drawn from the Treasury but in Consequence of Appropriations made by Law.” U.S. Const., art I, § 9 cl. 7. The “straightforward and explicit command of the Appropriations Clause” is that “no money can be paid out of the Treasury unless it has been appropriated by an act of Congress.” *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 424 (1990) (quoting *Cincinnati Soap Co. v. United States*, 301 U.S. 308, 321 (1937)).

The power of the purse is “the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people,” The Federalist No. 58 (James Madison), as it hinders the executive’s efforts to consolidate power. See Joseph Story, Commentaries on the Constitution of the

United States § 531, at 372 (1833) (“And the [legislature] has, and must have, a controlling influence over the executive power, since it holds at its own command all the resources by which a chief magistrate could make himself formidable. It possesses the power over the purse of the nation and the property of the people.”). As the Ninth Circuit noted, this “Clause is ‘a bulwark of the Constitution’s separation of powers.’” Pet. App. 272a (quoting *U.S. Dep’t of Navy v. Fed. Labor Relations Auth.*, 665 F.3d 1339, 1347 (D.C. Cir. 2012) (Kavanaugh, J.)). It ensures “that public funds will be spent according to the letter of the difficult judgments reached by Congress as to the common good and not according to the individual favor of Government agents.” *Richmond*, 496 U.S. at 428.

The arrogation of the appropriations power by the Executive Branch presents a particular threat to the individual liberties of disfavored groups, including disfavored religious groups. Religious individuals are especially vulnerable to a president, unchecked by Congress, who finds it expedient to intrude upon the rights of certain religious groups or to appeal to constituencies that disfavor those groups. When consolidated in the executive, the power to allocate and spend government money endangers religious liberty because “[m]oney is the instrument of policy and policy affects the lives of citizens.” *Clinton*, 524 U.S. at 451. Without the constraints of the Appropriations Clause, a president desiring to punish or reward a particular religious group has a heightened ability to do so. *See id.* (“The individual loses liberty in a real sense if [the appropriations

power] is not subject to traditional constitutional constraints.”).

Congress reinforced the principles of the separation of powers and the Appropriation Clause by codifying them in legislation requiring Congress to make appropriations explicitly and specifically. For example, “[a]ppropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law.” 31 U.S.C. § 1301(a). In addition, “a law may be construed to make an appropriation out of the Treasury . . . only if the law specifically states that an appropriation is made.” *Id.* § 1301(d). In other words, “all uses of appropriated funds must be affirmatively approved by Congress; the mere absence of a prohibition is not sufficient.” *U.S. Dep’t of Navy*, 665 F.3d at 1348; *see also United States v. MacCollom*, 426 U.S. 317, 321 (1976) (“The established rule is that the expenditure of public funds is proper only when authorized by Congress, not that public funds may be expended unless prohibited by Congress.”).

III. PETITIONERS’ DIVERSION OF FUNDS VIOLATES THE APPROPRIATIONS CLAUSE

As the Ninth Circuit recognized, Petitioners’ attempt to divert funds towards the construction of a southern border wall, in the face of clear congressional disapproval, is a blatant violation of the separation of powers and the Appropriations Clause. Petitioners claim authority to divert funds for the proposed border wall from the Department of Defense (“DOD”) pursuant to 10 U.S.C. § 8005 and § 284. Neither of

these statutes contains the requisite grant of appropriations by Congress for the proposed border wall.

As an initial matter, Congress explicitly rejected President Trump's request for \$5.7 billion for a proposed border wall. On January 6, 2019, in the midst of a government shutdown due to Congress's refusal to appropriate funding for the proposed border wall, the Office of Management and Budget ("OMB") formally requested \$5.7 billion from Congress for this purpose. J.A. 131-35. On February 14, 2019, one day before the government would shut down once again, Congress passed the FY 2019 Appropriations Act, which provided for \$1.375 billion for "construction of primary pedestrian fencing, including levee pedestrian fencing, in the Rio Grande Valley Sector" of the border. H.J. Res. 31 § 230(a)(1). Congress afforded no other funding for the construction of a wall or fencing on the border. Petitioners' diversion of funds above and beyond the \$1.375 billion appropriated by Congress constitutes "measures incompatible with the expressed or implied will of Congress, [when the president's] power is at its lowest ebb." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring). In such a situation, the president "can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter." *Id.* Because the president has no constitutional power to make appropriations, Congress's rejection of additional funds for the proposed border wall conclusively precludes Petitioners' diversion of funds. See U.S. Const. art. I, § 9, cl. 7; 31 U.S.C. § 1301.

The statutes invoked by Petitioners do not confer the authority to make the desired appropriations, as the Ninth Circuit correctly held. Petitioners rely on 10 U.S.C. § 8005 to transfer funds for military personnel into DOD’s drug interdiction account and subsequently transfer those funds to the Department of Homeland Security (“DHS”) for border wall construction pursuant to 10 U.S.C. § 284. Pet’r Br. at 40-47. Section 8005 requires that transfers be made only “based on unforeseen military requirements” and “in no case where the item for which funds are requested has been denied by Congress.” FY 2019 DOD Appropriations Act, Pub. L. No. 115-245, § 8005, 132 Stat. 2981, 2999 (2018). Here, the circumstances purportedly requiring construction of the border wall are not “unforeseen,” as President Trump has advocated for the proposed border wall at least since 2015, and “[t]he smuggling of drugs in to the United States at the southern border is a longstanding problem.” Pet. App. 108a. Nor can construction of the proposed border wall be considered a “military requirement.” As the Ninth Circuit noted, relying on the ordinary meaning of “military,” Petitioners “have argued neither that the border wall construction projects are related to the use of soldiers or arms, nor that there is a war on the southern border.” *Id.* at 113a. Instead, Petitioners assert that because the Department of Defense “*may* provide support for the counterdrug activities . . . of any other department or agency” insofar as those activities include, *inter alia*, “[c]onstruction of roads and fences . . . to block drug smuggling corridors across international boundaries of the United States,” *see* 10 U.S.C. § 284(a) (emphasis added); *id.* § 284(b)(7), such assistance qualifies as a “military requirement,” Pet’r Br. at 6-7, 46-47. Such

a tortured construction—transforming a civil agency’s request into a “military requirement”—flies in the face of the bedrock principle that courts construe undefined words in a statute “in accordance with [their] ordinary or natural meaning.” *FDIC v. Meyer*, 510 U.S. 471, 476 (1994). Finally, as discussed above, Congress has explicitly denied the funds requested which forecloses any diversion of funds under the statute.

Petitioners attempt to evade this Court’s review of their unconstitutional actions by arguing that the Supreme Court’s decision in *Dalton v. Spector*, 511 U.S. 462 (1994), precludes judicial review of Executive action that merely exceeds statutory authority conferred by Congress. In Petitioners’ view, by invoking a statute under which it has exceeded its authority, the Executive can insulate itself entirely from judicial scrutiny. *Dalton* stands for no such thing. *Dalton* certainly does state that “every action by the President . . . in excess of his statutory authority is [not] *ipso facto* in violation of the Constitution.” 511 U.S. at 472. But as the Ninth Circuit stated, “*Dalton* does not hold that *every* action in excess of statutory authority is *not* a constitutional violation”; “[r]ather, *Dalton* suggests that some actions in excess of statutory authority may be constitutional violations, while others may not.” Pet. App. 23a (emphasis in original). Unlike this case, *Dalton* did not involve a violation of “an express prohibition of the Constitution.” *Id.* Because an appropriation may only be made by “an act of Congress,” *Richmond*, 496 U.S. at 424, any Appropriations Clause violation necessarily exceeds the authority granted to the Executive by Congress.

Because Congress has explicitly rejected the appropriations that Petitioners are attempting to divert and none of the statutes cited by Petitioners authorize such diversion, Petitioners are in violation of the Appropriations Clause. *See MacCollom*, 426 U.S. at 321.

IV. PETITIONERS' VIOLATION OF THE APPROPRIATIONS CLAUSE AIMS TO HARM IMMIGRANTS AS A DISFAVORED GROUP

President Trump has made no secret of his views towards immigrants, particularly immigrants from Mexico, Central America, and Muslim-majority countries. And President Trump has frequently reiterated his desire to build a wall along the southern border. Petitioners attempt to cast aside the Appropriations Clause and the constitutionally-protected separation of powers to carry out President Trump's campaign promise to "build the wall."

A. President Trump advocated for a border wall as part of his harsh rhetoric toward immigrants.

Since he announced his candidacy, the border wall has been a key component of President Trump's political strategy. On the first day of his campaign, the President told his supporters that "[i]t is way past time to build a massive wall to secure our southern

border.”¹⁶ He also famously declared: “When Mexico sends us its people, they’re not sending their best. . . . They’re sending people that have lots of problems, and they’re bringing those problems with us. They’re bringing drugs. They’re bringing crime. They’re rapists.” He continued: “It’s coming from more than Mexico. It’s coming from all over South and Latin America, and it’s coming probably—probably—from the Middle East.”¹⁷

Since then, President Trump has called for a wall on the southern border hundreds of times.¹⁸ In doing so, he has publicly referred to immigrants entering the country through the southern border as “animals,”¹⁹ reiterated his comments about immigrants being rapists,²⁰ and shared stories of

¹⁶ Erica Werner, AP, *When is a Wall not a Wall? GOP Redefines Trump’s Border Wall* (Apr. 26, 2017), <https://apnews.com/article/6c2d9d9c0b5b467a8d5ca8b5a520ca93>.

¹⁷ Time, *Here’s Donald Trump’s Presidential Announcement Speech* (June 16, 2015), <http://time.com/3923128/donald-trump-announcement-speech/>.

¹⁸ See generally Trump Twitter Archive, <https://www.thetrumparchive.com/?searchbox=%22wall%22> (filtering for tweets containing the word “wall” since June 16, 2015 yields 479 results as of January 13, 2021).

¹⁹ Gregory Korte and Alan Gomez, USA Today, *Trump Ramps Up Rhetoric on Undocumented Immigrants. ‘These Aren’t People. These Are Animals.’* (May 16, 2018), <https://www.usatoday.com/story/news/politics/2018/05/16/trump-immigrants-animals-mexico-democrats-sanctuary-cities/617252002/>.

²⁰ Michelle Mark, Business Insider, *Trump Just Referred to One of His Most Infamous Campaign Comments: Calling Mexicans*

immigrants allegedly committing crimes in the United States.²¹ He tweeted: “With Caravans marching through Mexico and toward our Country, Republicans must be prepared to do whatever is necessary for STRONG Border Security. Dems do nothing. If there is no Wall, there is no Security. Human Trafficking, Drugs and Criminals of all dimensions – KEEP OUT!”²²

President Trump’s rhetoric is unmoored from reality. Studies show that immigrants are about half as likely as native-born Americans to commit crimes, including serious crimes.²³ States with higher rates of undocumented immigrants as a share of population tend to have significantly lower rates of crime.²⁴ The

Rapists’ (Apr. 5, 2018), <https://www.businessinsider.com/trump-mexicans-rapists-remark-reference-2018-4>.

²¹ Aaron Rugar, Vox, *Trump’s Fear-Stoking Immigration Policy, in Two White House Retweets* (Apr. 3, 2019), <https://www.vox.com/2019/4/3/18294290/white-house-retweets-immigrant-crime-stories>.

²² Donald J. Trump (@realDonaldTrump), Twitter (Feb. 3, 2019, 2:03 PM), <https://www.thetrumparchive.com/?searchbox=%22Trafficking%2C+Drugs+and+Criminals+of+all+dimensions+%E2%80%93+KEEP+OUT%22>. Due to President Trump’s suspension from Twitter, the original tweets are not available. Reference is made to <https://www.thetrumparchive.com/>, which documents the President’s tweets.

²³ Alex Nowrasteh, Cato Institute, *Criminal Immigrants in Texas*, (Feb. 26, 2018), <https://object.cato.org/sites/cato.org/files/pubs/pdf/irpb-4-updated.pdf>.

²⁴ Michael T. Light and Ty Miller, *Does Undocumented Immigration Increase Violent Crime?*, 56:2 CRIMINOLOGY 370,

city of El Paso provides a useful illustration: situated across the Rio Grande from Ciudad Juarez, El Paso's population is more than 80% Hispanic, and its Hispanic residents are mostly of Mexican descent. Yet El Paso is one of the safest cities in the United States, with a homicide rate (2.9 per 100,000 residents) closer to London (1.6 per 100,000) than to the average rate in the United States (approximately 5 per 100,000).²⁵ Contrary to the President's claims, crime in El Paso reached historic lows *before* Congress authorized a fence to be built in 2006.²⁶

B. The border wall is another in a series of Executive attempts to carry out anti-immigrant policies in violation of the Constitution.

This dispute represents the latest in a series of attempts by the Trump Administration to act on the President's freewheeling campaign promises regarding immigration, without regard to the Constitution or limited statutory authorities. Within days of his inauguration, the President signed Executive Order 13768, aiming to eliminate federal

<https://onlinelibrary.wiley.com/doi/epdf/10.1111/1745-9125.12175>.

²⁵ Aaron J. Chalfin, University of Pennsylvania Department of Criminology, *Do Mexican Immigrants Cause Crime*, <https://crim.sas.upenn.edu/fact-check/do-mexican-immigrants-cause-crime> (last visited Jan. 19, 2021).

²⁶ Jane C. Timm, NBC News, *Fact Check: Trump Claims a Wall Made El Paso Safe. Data Shows Otherwise* (Feb. 11, 2019), <https://www.nbcnews.com/politics/donald-trump/fact-check-trump-claims-wall-made-el-paso-safe-data-n969506>.

funding to so-called “sanctuary cities.” The First, Third, Seventh, and Ninth Circuits all found the conditions placed on funding unlawful, *City of Providence v. Barr*, 954 F.3d 23 (1st Cir. 2020); *City of Philadelphia v. Attorney Gen. of United States*, 916 F.3d 276 (3d Cir. 2019), *reh’g denied* (June 24, 2019); *City & Cty. of San Francisco v. Trump*, 897 F.3d 1225, 1234 (9th Cir. 2018); *City of Chicago v. Sessions*, 888 F.3d 272 (7th Cir. 2018), *reh’g en banc granted in part, opinion vacated in part*, No. 17-2991, 2018 WL 4268817 (7th Cir. June 4, 2018), *vacated*, No. 17-2991, 2018 WL 4268814 (7th Cir. Aug. 10, 2018), while the Second Circuit has upheld the Administration’s actions, *State of New York v. Dep’t of Justice*, 951 F.3d 84 (2d Cir. 2020).²⁷

In September 2017, the Trump Administration attempted to rescind the Deferred Action for Childhood Arrivals (“DACA”),²⁸ an action later enjoined as arbitrary and capricious by this Court. *Dep’t of Homeland Sec. v. Regents of the Univ. of California*, 140 S. Ct. 1891 (2020). Despite the Court’s ruling, the Trump Administration still refused to

²⁷ The Administration petitioned for a writ of certiorari in the Ninth Circuit case, Pet. for Writ of Cert., *Barr v. City & Cty. of San Francisco*, 20-666 (Nov. 13, 2020), while the City and State of New York sought certiorari in the Second Circuit matter, Pet. for Writ of Cert., *City of New York v. Dep’t of Justice*, 20-795 (Dec. 7, 2020); Pet. for Writ of Cert., *State of New York v. Dep’t of Justice*, 20-796 (Dec. 7, 2020).

²⁸ Mike Ellis, Rafael Bernal, and Rebecca Savransky, The Hill, *Trump Rescinding DACA Program* (Sept. 5, 2017), <https://thehill.com/latino/348848-sessions-says-DACA-to-end-in-six-months>.

accept new DACA applications,²⁹ blatantly ignoring a Federal District Court's order to do so. *Casa de Maryland, Inc. v. Wolf*, 20-cv-02118, 2020 WL 5500165, at *34 (D. Md. Sept. 11, 2020).

And on May 7, 2018, then-Attorney General Jeff Sessions announced that the Department of Justice would prosecute all parents entering the United States illegally with their children, effectively implementing a family-separation policy that resulted in approximately 3,000 children being separated from their parents.³⁰ A court again enjoined the action as illegal, *Ms. L. v. United States Immigration & Customs Enf't ("ICE")*, 310 F. Supp. 3d 1133, 1149 (S.D. Cal. 2018), but not before it caused catastrophic and irreparable damage to thousands of families.³¹

The illegal diversion of funds for border wall construction is part and parcel of the same set of

²⁹ Joel Rose, NPR, *Trump Administration Refuses to Accept ew DACA Applicants Despite Court Rulings* (July 28, 2020), <https://www.npr.org/2020/07/28/896334928/trump-administration-will-reject-new-daca-applications-administration-official-s>.

³⁰ Miriam Jordan, The New York Times, *Family Separation May Have Hit Thousands More Migrant Children Than Reported* (Jan. 17, 2019), <https://www.nytimes.com/2019/01/17/us/family-separation-trump-administration-migrants.html>; Aric Jenkins, Time, *Jeff Sessions: Parents and Children Illegally Crossing the Border Will Be Separated* (May 7, 2018), <http://time.com/5268572/jeff-sessions-illegal-border-separated/>.

³¹ See, e.g., Society for Research in Child Development, *The Science is Clear: Separating Families Has Long-Term Damaging Psychological and Health Consequences for Children, Families, and Communities* (June 20, 2018), <https://www.srcd.org/policy-media/statements-evidence/separating-families>.

policies aimed against immigrants. Although the data belie the President’s claim that there is a “crisis” at the border,³² the President’s supporters overwhelmingly view illegal immigration as a major problem that a southern border wall can solve.³³ This type of unilateral executive action—targeting a disfavored group because it is politically expedient—

³² Joshua Barajas, PBS, *Trump Says There’s a ‘Crisis’ at the Border. Here’s What the Data Says* (Jan. 8, 2019), <https://www.pbs.org/newshour/politics/trump-says-theres-a-crisis-at-the-border-heres-what-the-data-says> (observing that (a) the majority of drugs that cross the southwest border arrive through official ports of entry, (b) the U.S. Department of State recently found “no credible evidence” indicating that international terrorist groups have sent operatives into the U.S. through the southern border, and (c) unauthorized migration to the United States has fallen significantly from its peak in the early 2000s).

³³ In a poll performed weeks prior to the 2018 midterm elections, Republicans ranked illegal immigration as the biggest national problem, with 75% of Republican voters saying it is a very big problem. See Pew Research Center, *Little Partisan Agreement on the Pressing Problems Facing the U.S.* (Oct. 15, 2018), <https://www.people-press.org/2018/10/15/little-partisan-agreement-on-the-pressing-problems-facing-the-u-s/>. The same poll showed that 64% of Republicans thought that the treatment of people in the U.S. illegally was a small problem or not a problem at all. *Id.* A poll performed in January 2019, in the midst of the government shutdown over President Trump’s proposed border wall, showed that 82% of Republicans or those leaning Republican favored substantially expanding the wall along the U.S.-Mexico border, up from about 63% in 2016. See Pew Research Center, *Most Border Wall Opponents, Supporters Say Shutdown Concessions Are Unacceptable* (Jan. 16, 2019), <https://www.people-press.org/2019/01/16/most-border-wall-opponents-supporters-say-shutdown-concessions-are-unacceptable/>.

is precisely what the Appropriations Clause was designed to guard against.

CONCLUSION

President Trump has long sought to build a wall on the southern border. Congress has consistently resisted his requests for appropriations to fund that effort. In response, the President attempted to “re-appropriate” funds that were allocated to other purposes. As history demonstrates, such unrestrained executive action poses a significant threat to disfavored religious groups. *Amici* therefore respectfully urge the Court to affirm the lower courts’ orders declaring that the transfers at issue are unlawful and granting Respondents’ request for a permanent injunction restraining Petitioners from diverting funds towards construction of a wall on the southern border.

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Respectfully submitted,

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