

No. 19-16102

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SIERRA CLUB, et al.,
Plaintiff's-Appellees,

v.

DONALD J. TRUMP, in his official capacity as President of the United States, et
al.,
Defendants-Appellants.

On Appeal from the United States District Court
For the Northern District of California

**BRIEF FOR *AMICI CURIAE* ANGEL FAMILIES: SABINE DURDEN, DON
ROSENBERG, BRIAN McCANN, JUDY ZEITO, MAUREEN MULRONEY,
MAUREEN LAQUERRE, DENNIS BIXBY; AND ADVOCATES FOR
VICTIMS OF ILLEGAL ALIEN CRIMES IN SUPPORT OF
DEFENDANTS-APPELLANTS URGING REVERSAL OF THE DISTRICT
COURT**

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STATEMENT OF INTEREST OF *AMICI CURIAE*¹

Heartbroken, but determined, *Amici Curiae* come to this Court to provide a unique perspective to the legal and equitable issues presented in this case. Each of them has lost a loved one at the hands of an individual living illegally in the United States. For decades, Congress has failed to address this nation's broken immigration system. Its failure is compounded by the refusal of so-called "sanctuary" states and local jurisdictions to cooperate with federal immigration enforcement authorities attempting to enforce existing law. Indeed, many of these jurisdictions, including California and most of the states supporting it in the underlying companion action, are implementing policies designed to actively obstruct immigration law enforcement.

Landmark Legal Foundation respectfully presents this brief on behalf of Sabine Durden, Don Rosenberg, Brian McCann, Judy Zieto, Maureen Mulroney, Maureen Laquerre, and Dennis Bixby. *Amici* also include Advocates for Victims of Illegal Alien Crimes (AVIAC), a support organization created by and for these

¹ The Parties have provided consent for the filing of this brief. 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. Pursuant to Rule 26.1, *Amicus Curiae* AVIAC states that is a nonprofit entity that does not have a parent corporation and is not owned in any way by a publicly held corporation.

and other “Angel Families.”² *Amici* agree with the Defendants that Plaintiffs are not proper parties to challenge the Department of Defense’s internal transfer of funds and that the transfers comply with applicable statutes.

Amici write separately to provide proper context to the District Court’s breathtakingly inadequate balancing of the equities in its preliminary and permanent injunction orders. There is no abstraction or speculative harm in their accounts. There is pain, suffering, loss, anger, and frustration. And all of it is the direct result of a failed immigration system and a porous southern border, which as Defendants have demonstrated, facilitate rampant drug smuggling and its corollary, human trafficking and smuggling.³ These Angel Families’ experiences establish the likelihood that others will be harmed in the future. They stand in the shoes of

² Angel Families are those who have lost a loved-one to a death caused by an individual living illegally in the United States. AVIAC helps families cope both with their unthinkable loss and with a legal system that in our experience often treats the criminal better than the victims. The organization also guides families to counseling and financial aid resources. AVIAC is a 501(c)(3) tax exempt organization that also educates the public, our federal, state and local governments, political leaders, and the media about the extent of crime and tremendous financial burden caused by illegal immigration. AVIAC has served approximately 150 families during its two years of existence.

³ *Amici* acknowledge there are many good and hardworking people who are in this country illegally. But that is not the case for *all* who are here illegally. Moreover, all have broken the law. A secure border and regulated flow of immigrants are fundamental to a nation’s ability to maintain a safe and civil society. Where Congress refuses to act, and when state and local law enforcement either cannot or will not assist the federal government in removing known bad actors from the country, it is the President’s duty to take action.

all Americans who are threatened by the ongoing lack of border security and immigration law enforcement.

Amici also write to point out that even if the transfer of funds did not comply with Section 8005 or 10 U.S.C Section 284, the President has the inherent authority to make this interagency transfer to protect the nation's borders and its national security.

INTRODUCTION

Amici families are sadly typical of dozens of others who are members of AVIAC. They are of various political stripes, ethnicities, and religious backgrounds. None wishes there was a need to be involved in this litigation. And all are committed to doing everything they can to prevent other families from suffering like they are suffering.

In each tragic case presented in this brief, the individual responsible for a loved-one's death was in this country illegally. Most were known to local or federal law enforcement for prior bad acts. In some cases, there was a preexisting deportation order, voluntary removal order, or detainer in place that had not been honored. Many cases involve traffic offenses. Some cases involve brutal murders. None should ever have happened.

When it comes to the District Court's balancing of the equities analysis, the trivial harm to Plaintiffs' hiking, camping, birdwatching, and aesthetic enjoyment

and use of public lands stands in stark contrast with the real, debilitating, and permanent harm suffered by these Angel Families. The possible strain on advocacy groups' resources found by the District Court likewise pales in comparison to the reality *Amici* endure.

Regarding Plaintiffs' statutory claims, *Amici* urge 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.

Amici Curiae urge this Court to reverse the District Court's injunction orders and direct it to dismiss the underlying complaint and companion case.

ARGUMENT

A. A proper balancing of the equities tilts strongly against Plaintiffs' alleged harms.

This case turns in part on whether transfer of funds made by the Department of Defense is in the public interest. District Ct. Opinion at 6. Sierra Club argues (and the lower court agreed) that its membership "will suffer irreparable harm to their recreational and aesthetic interests." District Ct. Opinion at 6, Pl.'s Mot. for S.J. at 20-22. This case also partially turns on whether the hardships incurred by Sierra Club outweigh the hardships incurred by the Government should transferring funds be disallowed. District Ct. Opinion at 7.

As acknowledged by the lower court, the Ninth Circuit has recognized that “the public has a ‘weighty’ interest ‘in efficient administration of the immigration laws at the border...” District Ct. Opinion at 7-8 (*citing E. Bay Sanctuary Covenant v. Trump*, 909 F.3d 1219, 1255 (9th Cir. 2018)).

As a result of a porous southern border and lax enforcement of immigration laws, these families suffer every day from the loss of their loved ones. Just a few of those families include these *Amici*:

- Sabine Durden’s 30-year-old son Dominic was killed while riding his motorcycle to his job as a 9-1-1 communications officer in the Riverside, California, sheriff’s office. He died when a car driven by an illegal alien made an illegal turn into Dominic’s path, throwing him to his death. The driver had two prior felony charges for grand theft and armed robbery. He also had two prior DUI charges, both of which were reduced to misdemeanor charges. Despite his long prior record, the man served only 35 days in a local jail and then 1.5 years in the immigration detention center as punishment for Dominic’s death. He was deported on March 18, 2014 back to Guatemala, but is believed to be back in California.
- Bonni Driscoll’s daughter Lacy Ferguson was shot in the head by a drive-by shooter and died at a gas station on August 24, 2003. Her murderer was in the U.S. illegally. Two others were shot and wounded in the same attack.

The killer escaped to his native Mexico. Ten years later, Modesto, California, cold case detectives identified the shooter. Mexican officials arrested the man and extradited him to Stanislaus County, California, for prosecution. He was convicted and is serving 61 years to life in a California penitentiary.

- Don Rosenberg's son Drew was a second year law student in San Francisco when the motorcycle he was riding was struck by an individual who was in the United States illegally. Accelerating in an attempt to flee, the driver ran over Drew's body. Drew's helmet came off and was wedged under the car's rear tire. The driver backed up over Mr. Rosenberg's son and then drove over him again, crushing him for a third time. Five men at the scene lifted the car off of Drew, who was dead. The driver was initially charged with vehicular homicide, but the charges were reduced to a misdemeanor by the San Francisco County judge. The driver spent 45 days in jail. He has since been deported.

- Brian McCann's brother Dennis was killed on June 8, 2011 by an illegal alien who was driving while intoxicated at three times the legal limit. The driver, who had a previous DUI conviction, hit Dennis as he crossed a downtown Chicago street. Trying to flee the scene, the driver dragged Mr. McCann to his death while frantic bystanders tried to get the driver to stop

his car. Despite a detainer request from immigration officials, Cook County, Illinois, authorities, citing a recently adopted policy prohibiting county officials from cooperating with federal immigration officials, released the driver to his family without informing federal law enforcement. The man disappeared and remains at large.

- Judy Zieto's 20-year-old son Blake Michael Zieto was killed on November 18, 2006 in Denham Springs, Louisiana. Blake was riding his motorcycle when an illegal alien from Mexico crashed into him nearly head on. Blake was trapped under the vehicle. Attempting to flee, the driver rocked the truck back and forth over Blake. The motorcycle gas tank caught fire causing the truck to burst in flames. Blake died on the way to the hospital. Rather than call for help, the driver, who had been living illegally in Denham Springs for several years and had a criminal record, fled the scene leaving Blake to burn alive under his truck. The killer disappeared and remains at large.

- Maureen Maloney's 23-year-old son Matthew Denice died on August 20, 2011 in Milford, Massachusetts, after an intoxicated illegal alien driver ran through a stop sign, colliding with Matthew on his motorcycle. Had the driver stopped to help, Matthew would have survived. Instead, the driver tried to flee, running over Matthew and causing him to become lodged under

the truck. Matthew was dragged a quarter of a mile to his death while horrified witnesses were banging on the truck and screaming for the driver to stop. The driver ran over a curb causing Matthew to become dislodged. He then backed up over Matthew and, along with a passenger who was also in the U.S. illegally, fled. Eventually the driver was captured and charged with second degree murder. After years of delay, the killer was convicted of vehicular manslaughter.

- Maureen Laquerre's brother Richard V. Grossi was killed in Milford, Massachusetts, on September 12, 2009 when a woman who had overstayed her vacation visa by four years ran through a blinking red light and stop sign and T-boned Richard's car. After fighting for his life for six weeks, Richard died on October 21, 2009. The driver initially pled guilty to vehicular homicide but withdrew her plea after the judge indicated he would impose a two-year prison sentence. The driver instead requested deportation, which occurred prior to her new trial date.
- Dennis Bixby's 19-year-old daughter Amanda was killed near her family's Tonganoxie, Kansas, home when an illegal alien ran a stop sign causing a multi-vehicle highway crash. Despite an initial charge for vehicular homicide, the driver was released from custody after eight hours.

Eventually, he pled no contest to failure to yield and speeding charges and was fined \$228 dollars. The driver is believed to still be in the U.S. illegally.

Amici Curiae urge this Court to consider a more proper balance between the Sierra Club's membership interests in hiking, bird watching, and fishing in designated drug smuggling corridors on the one hand, and the interests of American citizens who, like *Amici*, are likely to suffer the incredible pain associated with the loss of their family members. Balancing the interests of hikers and bird watchers with the interests of the American public, whose safety and security interests are threatened, weighs heavily in favor of the public.

B. Plaintiffs do not have a statutory cause of action under § 8005 of the Appropriations Act or the Administrative Procedure Act.

The Department of Defense 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 \$4 billion provided certain conditions are met. DOD Appropriations Act § 8005, 132 Stat. 2999. The transfer must go to “higher priority items, based on unforeseen military requirements” and the purpose of the transfer cannot be one previously denied by Congress. *Id.*

DOD met these conditions and Plaintiffs' interests do not fall within the zone of interests protected by the Appropriations Act. But even if they did, Plaintiffs do not have a claim under the Administrative Procedure Act (“APA”).

Statutory causes of action extend “only to plaintiffs whose interest ‘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) (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984)). “[T]he 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 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 *Match-E-Be-Nash-She-Wish Band of Pottawatomis Indians v. Patchak*, 567 U.S. 209, 225 (2012)). Plaintiff’s suits are barred when its “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.* Plaintiffs’ interests do not fall within the framework of the Appropriations Act.

Plaintiffs’ claim that building a border wall will adversely affect its membership’s aesthetic, recreational, and environmental interests. Notably, they do not assert that transferring *funds* adversely affects its interests. Plaintiffs are not DOD contractors that lost funding because of the transfer. Rather, they argue that a secondary action—construction of a border wall—will affect their recreational and aesthetic interests. These arguments are too tenuous to support a valid claim.

As the funds were not allocated for interests germane to these Plaintiffs, therefore, it does not fall within necessary “zone of interests” to support a statutory claim under either the Appropriations Act or the APA.⁵

C. Plaintiffs do not have a constitutional claim.

The Supreme Court’s decision in *Dalton v. Specter* forecloses the claim that transferring funds violates the Appropriations Clause. Supreme Court precedent does “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. Specter*, 511 U.S. 462, 472 (1994). Instead, the Supreme Court has “often distinguished between claims of constitutional violation and claims that an official has acted in violation of his statutory authority.” *Id.* Thus, allegations of constitutional violations will be upheld in instances where the plaintiff alleges the “only basis of authority asserted was the President’s inherent constitutional power.” *Id.* Claims of abuse of constitutional powers arise when “no statutory authority [is] claimed.” *Id.*

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 are illustrative of 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). Here, the Plaintiffs’ jurisdictional and venue allegations are far-fetched and the District Court’s balancing of the equities analysis is so tenuous as to indicate the court’s endorsement of Plaintiffs’ policy preferences rather than sound legal reasoning.

Plaintiffs' claim rests on whether the Department of Defense complied with § 8005 of the Appropriations Act. DOD only asserted authority to transfer the funds pursuant to § 8005 and consideration of claims challenging this action should be in a statutory authority framework. Brief for Defendants-Appellants at 2.

Furthermore, upholding a claim that DOD actions violate the Appropriations Clause will set a dangerous precedent. As noted in *Dalton*, "if every claim alleging that the President exceeded his statutory authority were considered a constitutional claim, [the extremely limited exception to the prohibition of such claims] would be broadened beyond recognition." *Dalton*, 511 U.S. at 474 n.5 (citing *Franklin v. Massachusetts*, 505 U.S. 788 (1992)). 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." *Dalton*. 511 U.S. at 474.

Consider the consequences of permitting every claim that the President has violated his statutory authority to also be considered an Appropriations Clause violation. Every action would be suspect, and the President's authority would be rendered meaningless.

D. The President has inherent authority to take measures to transfer funds for construction of a border wall.

Even if this Court determines that the President's transfer of DOD funds does not comply with statutory requirements, it should find the transfer proper under the President's inherent national security power and singular authority to conduct foreign affairs. This inherent authority provides broad powers that are distinguishable from the more limited exercise of powers involving internal affairs. The source and scope of the President's authority to exercise his powers in these two classes are distinct. As, "the two classes of powers are different both in respect of their origin and their nature," *U.S. v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 315 (1936), the degree of the President's authority varies.

The principle that the federal government can exercise no powers except those enumerated in the Constitution (and those powers necessary and proper to effectuate such powers) thus applies to internal matters—not in matters involving foreign affairs. *Id.* at 315-316. As for domestic matters, the Constitution identifies powers originally held by the individual states and vests those powers with the federal government. Remaining powers are reserved to the states. *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.” *Curtiss-Wright Exp. Corp.*, 299 U.S. at 316. These powers existed before the formation of the union and during the colonial period, were possessed and under the control of the Crown. *Id.*

With separation from Great Britain, powers of “external sovereignty” did not pass to the states in their individual capacities, “but to the 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 of an army, establishing a navy, and adopting the Declaration of Independence. *Id.* These powers of external sovereignty existed before the ratification and therefore do not depend on any “affirmative grants of the Constitution” and include “the power to exclude undesirable aliens.” *Id.* at 318 (*citing Fong Yue Ting v. United States*, 149 U.S. 698, 705 *et seq.* (1893)). In short, sovereignty of the United States encompasses all powers “necessary to maintain an effective control of international relations.” *Curtiss-Wright Exp. Corp.*, 299 U.S. at 318 (*citing Burnet v. Brooks*, 288 U.S. 378, 396 (1933)).

Participation 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 is afforded “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).

The President’s authority to exclude aliens derives from his inherent power to control the foreign affairs of the nation. *U.S. ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950) (*relying on Curtiss-Wright Export Corp.*). Thus, a “decision to admit or exclude an alien may be lawfully placed on the President.” *Id.* at 543. And the President “may, in turn, delegate the carrying out of this function to a responsible executive officer of the sovereign. . .” *Id.*

Transferring funds from the Department of Defense 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.

E. The President's inherent authority along with authorization from Congress means the transfer of funds is entitled to the highest deference.

“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 (Jackson, J., concurring).

Justice Jackson identified three tiers of presidential power in his concurrence in *Youngstown Sheet & Tube*. When acting under either an express or implied authorization from Congress, his authority is at its most powerful. His actions, therefore, demand deference and are only considered invalid if “the Federal Government as an undivided whole lacks power.” *Id.* at 637. The President acts within the second tier of power 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 of Congress.” *Id.*

Here, the Acting Secretary of Defense (and, by extension, the President's) actions are permissible under his inherent authority. The Acting Secretary (again, and by extension, the President) is also acting under his delegation of authority

from Congress. Under 10 U.S.C. § 284 the Department of Defense may provide support to other federal agencies for “counterdrug activities” upon request. The statute further 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 wall will be built in regions of the border identified by DHS as high priority. Brief for Defendants-Appellants at 9. 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. Congress contemplated the possibility that such a transfer could be necessary and established conditions for making such a transfer. Those conditions have been met, legitimizing the action.

The power to exclude aliens is a core power that derives from the inherent authority of the President. The President, therefore, can construct the border wall with no delegation from Congress. The statutory sources in 10 U.S.C. § 284 and § 8005 of the Appropriations Act provide additional authority. The President is acting at his highest level of power and transferring funds should receive the strongest presumption of legitimacy.

CONCLUSION

Each of these families and the many more they represent urge this Court to reverse the District Court's injunctions and direct the dismissal of these cases.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the requirements of Federal Rules of Appellate Procedure 27(d) and 32(c) because it uses a proportionately spaced Times New Roman font, has a typeface of 14 points, and contains 3677 words.

DATED: August 7, 2019

/s/ Richard P. Hutchison
Richard P. Hutchison

CERTIFICATE OF SERVICE

I certify that on August 7, 2019, I electronically filed the foregoing document with the Clerk of the Court of the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all other participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

DATED: August 7, 2019

/s/ Richard P. Hutchison
Richard P. Hutchison