No. 19-16102

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SIERRA CLUB, *et al.*,

Plaintiffs-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

AMICUS CURIAE BRIEF OF THE AMERICAN CENTER FOR LAW AND JUSTICE, SUPPORTING APPELLANTS AND APPELLANTS' EMERGENCY MOTION TO STAY

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The American Center for Law and Justice ("ACLJ") is a non-profit legal corporation dedicated to the defense of constitutional liberties secured by law. The ACLJ has no parent corporation and issues no stock.

STATEMENT PURSUANT TO F.R.A.P. 29(a)(4)(E)

Pursuant to F.R.A.P. 29(a)(4)(E), *Amicus Curiae* the ACLJ states as follows: No party's counsel authored the brief in whole or in part. No party or a party's counsel contributed money that was intended to fund preparing or submitting the brief. No person — other than *Amicus Curiae*, its members, or its counsel — contributed money that was intended to fund preparing or submitting the brief.

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STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

Amicus Curiae, the American Center for Law and Justice (the "ACLJ"), is an organization dedicated to the defense of constitutional liberties and structures secured by law. Counsel for the ACLJ have presented oral argument, represented parties, and submitted *amicus* briefs before the United States Supreme Court and numerous state and federal courts around the country in cases concerning the First Amendment, national security, and immigration law, including *Trump v. Hawaii*, 138 S. Ct. 2392 (2018); *United States v. Texas*, 136 S. Ct. 2271 (2016); *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007); and *McConnell v. FEC*, 540 U.S. 93 (2003). The ACLJ submits this brief on behalf of over 190,000 of its members who support a secure border.

ARGUMENT

On February 15, 2019, the President of the United States proclaimed the existence of a national emergency under the National Emergencies Act, 50 U.S.C. § 1631, *et seq.*, necessitating, among other actions, the construction of a wall across the southern border. Declaring a Nat'l Emergency Concerning the S. Border of the United States, Pres. Proc. No. 9844, 84 Fed. Reg. 4949 (Feb. 15, 2019) ("Emergency Declaration"). In spite of the District Court's visible disapproval of the Emergency

[1] Counsel for Appellants and Appellees consented to the filing of this *amicus* brief.

Declaration, it is both indisputable and undisputed that both Congress and the President followed the executive and legislative procedure set forth by Congress itself in the National Emergencies Act to provide a political check on the President's power concerning national emergencies.[2] It is equally indisputable and undisputed that, consistent with that procedure, Congress was unwilling to terminate the President's Emergency Declaration.[3]

Congress enacted the National Emergencies Act both recognizing the President's power to declare a national emergency and granting to him certain statutory resources to utilize in his discretion. It is thus neither the Appellees' nor the Court's proper role to determine whether there is an emergency on the southern border. Appellants have made this determination based on legitimate criteria they have reviewed and in accordance with what they view as necessary to serve vital national security interests. At all times, Appellants have proceeded under their duly authorized powers. "[T]he Executive's evaluation of the underlying facts is entitled

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[2] Both Chambers of Congress voted on a House Joint Resolution, H.J. Res 46, to terminate the President's Emergency Declaration. On March 15, 2019, the President vetoed this Joint Resolution. Subsequently, on March 26, 2019, Congress failed to override the Presidential with a vote of 248-181, falling well short of the constitutionally required two-thirds threshold.

[3] The District Court's insinuation of disapproval of the Emergency Declaration reveals its lack of understanding of the seriousness of both the requirement and unforeseen nature of that requirement for the § 8005 funds Congress has authorized Appellants to transfer into the DOD's § 284(b) drug interdiction account.

to appropriate weight, particularly in the context of litigation involving 'sensitive and weighty interests of national security and foreign affairs.'" *Trump v. Hawaii*, 138 S. Ct. 2392, 2421–22 (2018) (quoting *Holder v. Humanitarian Law Project*, 561 U.S. 1, 33–34 (2010)). From an objective legal perspective, there is an undisputed national emergency.

Dealing with the underlying facts giving rise to the President's Emergency Declaration has engendered unforeseen incidental costs, including unforeseen military requirements such as additional roads, fences, and lighting. Thankfully, in a different statute, Congress has explicitly authorized the Executive Branch to use funds, 10 U.S.C. § 284(b)(7), and to transfer funds, § 8005 of the Department of Defense and Labor, Health and Human Services, and Education Appropriations Act ("FY 2019 DODAA"), Pub. L. No. 115–245 (to be printed at 132 Stat. 2981, 2999) (2018), for exactly such an unforeseen military requirement. Pursuant to well-established jurisprudential and separation of powers principles, the courts are not properly situated to intervene and substitute policy judgments for that of the political branches – especially when issues of national security, foreign affairs, and immigration are involved;[4] and especially when Congress provides no private cause

[4] *See Mathews v. Diaz*, 426 U.S. 67, 81-82 (1976) ("Any rule of constitutional law that would inhibit the flexibility of the political branches of government to respond

of action[5] to plaintiffs, like Appellees, who are nowhere near any imaginable articulation of the zone of interests test.[6]

To be sure, Appellants' authority to utilize § 284 drug-interdiction account funds – and their authority under § 8005 to transfer additional funds to that account enjoined by the court below – are not specifically dependent upon the President's Emergency Declaration. *See* District Court's Order, 16-17 (Doc. # 7-2). The

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to changing world conditions should be adopted only with the greatest caution. The reasons that preclude judicial review of political questions also dictate a narrow standard of review of decisions made by the Congress or the President in the area of immigration and naturalization."); *Trump v. Hawaii*, 138 S. Ct. 2392, 2419–20 (2018) (quoting *Mathews*, 426 U.S. at 81–82; *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 577 (1992) (rejecting plaintiffs' incorrect position that "would enable the courts, with the permission of Congress, to assume a position of authority over the governmental acts of another and co-equal department, to become virtually continuing monitors of the wisdom and soundness of Executive action." (internal quotations and citations omitted)); *see also Trump*, 138 S. Ct. at 2421 ("But we cannot substitute our own assessment for the Executive's predictive judgments on such matters," *i.e.*, whether an executive branch policy was wise, effective or does little to serve national security interests, "all of which 'are delicate, complex, and involve large elements of prophecy.'" (quoting *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948))); *Regan v. Wald*, 468 U. S. 222, 242–243 (1984) (declining invitation to conduct an "independent foreign policy analysis").

[5] *See* Appellants' Emergency Motion, 17-18 (Doc. # 7) (explaining how § 8005 governs the relationship between Executive Branch and Congress and provides no private cause of action).

[6] Indeed, the District Court did not imagine a zone of interests within which these Appellees could stand; but instead, dispensed with the test altogether. Order, 28-30 (misapplying *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378 (2015), and incorrectly concluding zone of interests test does not apply to implied actions for equitable relief).

unchallenged Emergency Declaration and the overwhelming facts of the national security and humanitarian crisis leading to the issuance of that Emergency Declaration, while not dispositive, are still informative and relevant to a proper understanding of the Appellants' § 8005 actions enjoined by the District Court. Many of the same facts giving rise to the national emergency give rise to the unforeseen military requirement for Department of Defense ("DOD") support to the Department of Homeland Security ("DHS"). The District Court categorically failed to understand this reality.

Among other things, Appellees asked the District Court to preliminarily enjoin Appellants' utilization of 10 U.S.C. § 284(b)(7) drug-interdiction account appropriation funds – and certain funds to be transferred to that account pursuant to § 8005 of the FY 2019 DODAA – to support the construction of roads, fences, and lighting at certain locations Appellants have determined to be necessary in light of national security interests. In pertinent part, the District Court partially granted Appellees' motion, "f[inding] Plaintiffs are entitled to a preliminary injunction as to Defendants' use of Section 8005's reprogramming authority to channel funds into the drug interdiction fund so that those funds may be ultimately used for border barrier construction in El Paso Sector Project 1 and Yuma Sector Project 1." Order, 27 (Doc. # 7-2).

I. APPELLANT DOD'S TRANSFER OF FUNDS PURSUANT TO § 8005 OF THE FY 2019 DODAA INTO ITS § 284(b)(7) DRUG-INTERDICTION ACCOUNT TO SUPPORT DHS WITH ROADS, FENCES, AND LIGHTING, IS LAWFUL BECAUSE IT IS AUTHORIZED BY CONGRESS AND DETERMINED TO BE FOR UNFORESEEN MILITARY REQUIREMENTS.

The District Court wrongly concluded that Appellants' utilization of the authority granted by § 8005 exceeds the limitations contained in that provision for two reasons: *First*, "Plaintiffs have shown a likelihood of success as to their argument that Congress previously denied 'the item for which funds are requested,' precluding the proposed transfer." Order, 32 (Doc. # 7-2). *Second*, "[s]eparate and apart from the Court's analysis above regarding whether Congress previously denied funding for the relevant item, Plaintiffs also have shown a likelihood of success as to their argument that Defendants fail to meet the 'unforeseen military requirement' condition for the reprogramming of funds under Section 8005." *Id.* at 35. Appellees' contentions fail to warrant the extraordinary and drastic relief eagerly awarded by the District Court.

Section 284(b) provides that "[t]he purposes for which the Secretary [of Defense] may provide support" to other agencies include "[c]onstruction 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), (b)(7). According to the transfer authority granted in § 8005 of the FY 2019 DODAA, the Secretary of

Defense may transfer the funds at issue, "*[p]rovided*, [t]hat such authority to transfer may not be used unless for higher priority items, based on unforeseen military requirements, than those for which originally appropriated and in no case where the item for which funds are requested has been denied by the Congress." FY 2019 DODAA.

A. Congress Has Not Denied, *but Instead Has Expressly Authorized*, Defendants' § 8005 Transfer and Utilization of § 284(b)(7) Drug-Interdiction Account Funds for Roads, Fences and Lighting.

The District Court mistakenly determined that the "item" for which § 8005 funds were being transferred by Appellants was a general "steel barrier for the Southwest border" desired by the President, for which the President asked Congress for "$5.7 billion for construction." Order, 32 (Doc. # 7-2). In the FY 2019 Consolidated Appropriations Act ("CAA"), Pub. L. No. 116-6 (to be printed at 133 Stat. 13) (2019), "passed by Congress and signed by the President, Congress appropriated only $1.375 billion for the construction of pedestrian fencing, of a specified type, in a specified sector, and appropriated no other funds for barrier construction." Order, 32-33 (Doc. # 7-2). To the District Court, this meant Congress

denied funds for item for which §8005 funds were being transferred by Appellants. However, the Court was mistaken.[7]

In this case, the correct "item" to which the § 8005 "denied by the Congress" restriction applies is roads, fences, and lighting constructed by the DOD, in support of the DHS, in countering international criminal and drug trafficking activity within Yuma Sector Project 1 and El Paso Sectors Project 1, all pursuant to 10 U.S.C. § 284(b)(7). That is explicitly what the § 8005 funds are being transferred to accomplish. And that is what the District Court enjoined.

The District Court conceded there was no direct denial by Congress for the item at issue. Order, 34 (Doc. # 7-2) ("Defendants point to nothing in the language or legislative history of the statutes in support of their assertion that only explicit congressional denial of funding for '[Section] 284 projects,' or even DoD projects generally, would trigger Section 8005's limitation."); *id.* at 38 ("Defendants' decision not to refer specifically to Section 284 in their $5.7 billion funding request deprived Congress of even the *opportunity* to reject or approve this funding item.").

The Court, however, incorrectly *blamed Appellants* for Congress' failure to directly deny Yuma and El Paso Sector improvements or change the requirements

[7] The District Court points to no provision of the CAA that purports to deauthorize Appellant *DOD*'s preexistent and separate § 8005 transfer and utilization of § 284(b)(7) drug-interdiction account funds for roads, fences and lighting.

of § 8005 or 10 U.S.C. § 284(b). *Id.* at 38. *But the law does not require the Appellants to request funds for a § 8005 item*. Instead, it merely provides that if funds for such an item have been denied by Congress, Appellants cannot rely on § 8005 to circumvent that congressional denial. In short, the District Court created and imposed upon Appellants a duty not found in the law.[8]

Ultimately, Congress expressly authorized Appellants' § 8005 transfer by way of passing § 8005 itself. Regardless of whether Appellants gave Congress "the opportunity" (as the District Court put it), Congress could have acted if it wished to prohibit the support it had *already* authorized the DOD to provide to the DHS. It did not. There was no denial barring Appellants' utilization of § 8005 and the Appellants – not the Appellees – are likely to succeed in this regard.

[8] The District Court's reliance on committee letters purporting to deny Appellants' § 8005 transfer is surprising. Order, 38 (Doc. # 7-2) (citing RJN Ex. 35 ("The committee denies this request. The committee does not approve the proposed use of [DoD] funds to construct additional physical barriers and roads or install lighting in the vicinity of the United States border."); *id.* Ex. 36 ("The Committee has received and reviewed the requested reprogramming action . . . . The Committee denies the request."). The Court failed to explain, nor could it possibly, how these partisan committee letters could in any way constitute, substitute for, or express the voice of Congress *vis-à-vis* a majority vote on the floor of both chambers as is the legally and constitutionally required process.

B. There is An *Unforeseen* Military Requirement for DOD's § 8005 Transfer and Utilization of § 284(b)(7) Drug-Interdiction Account Funds for Roads, Fences and Lighting in the Yuma and El Paso Sectors.

Appellants *have* identified an unforeseen military requirement for the challenged DOD support. With that, it is the President, and other Appellants, who have statutory power to identify an unforeseen military requirement, not the Appellees and not the judiciary. *See* National Emergencies Act; 10 U.S.C. § 284(b); FY 2019 DODAA, § 8005.

First, the President illustrated his determination on this matter, in part, by declaring a national emergency consistent with the National Emergencies Act. As the President explained in his Emergency Declaration, "despite the executive branch's exercise of existing statutory authorities, the situation has worsened in certain respects in recent years"; and, "[b]ecause of the gravity of the current emergency situation, it is necessary for the Armed Forces to provide additional support to address the crisis." Emergency Declaration (Feb. 15, 2019).

Second, the DHS identified the unforeseen nature of its need by and within its request to the DOD for § 284 support. On February 25, 2019, the DHS requested the DOD "[t]o support DHS's action under Section 102 of IIRIRA," explaining that "DHS is requesting that DoD, pursuant to its authority under 10 U.S.C. § 284(b)(7), assist with the construction of fences, roads, and lighting within the Project Areas to

block drug-smuggling corridors across the international boundary between the United States and Mexico." DHS Memorandum, Request for Assistance Pursuant to 10 U.S.C. § 284, 2 (Feb. 25, 2019) (Doc. # 7-3, p. 7). Within its request for support, the DHS explained that, "[w]ithin the Project Areas, DHS is experiencing large numbers of individuals and narcotics being smuggled into the country illegally." *Id.* at 1 (Doc. # 7-3, p. 6). The DHS also explained that:

> [t]he Project Areas identified are adjacent to some of the most densely populated metropolitan areas of Mexico and are also home to some of the strongest and most violent drug cartels in the world. *Deterring and preventing illegal cross-border activity will help stem the flow of illegal narcotics and entries in these areas. Similarly, the improved ability to impede, deny, and be mobile within the Project Areas creates a safer operational environment for law enforcement*.

Id. at 2 (Doc. # 7-3, p. 7) (emphasis added). Further, the DHS stated with respect to the Yuma Sector,

> [t]he replacement of *ineffective pedestrian fencing in this area is necessary because the older, wire mesh design is easily breached and has been damaged to the extent that it is ineffective*. Additionally, this area is notorious for border violence and narcotics smuggling. Furthermore, while the deployment of vehicle barrier in the Yuma Sector initially curtailed the volume of illegal cross-border vehicular traffic, *transnational criminal organizations quickly adapted their tactics* switching to foot traffic, cutting the barrier, or simply driving over it to smuggle their illicit cargo into the United States. Thus, in order to respond to these changes in tactics, DHS now requires pedestrian fencing.

Id. at 4 (Doc. # 7-3, p. 9) (emphasis added). The DHS's request for DOD support also identified and described similar facts concerning the El Paso Sector, *id.* at 8 (Doc. # 7-3, p. 13), as well as other sectors of the border, *id.* at 3 (Doc. # 7-3, p. 8) (addressing El Centro Sector); *id.* at 5 (Doc. # 7-3, p. 10) (addressing Tucson Sector). Congress clearly provided that the DHS may request, and the DOD may provide, support in just such instances. 10 U.S.C. § 284(a)(1) (authorizing DOD to support counter-drug activities of other agencies when "such support is requested").

Third, the DOD identified the unforeseen nature of the need for support both by and within its notifications to the DHS and to Congress concerning its § 284(b)(7) support for the DHS and § 8005 funds transfer in furtherance of that support. In the DOD's March 25, 2019, response to DHS's request for support, Acting Secretary of Defense Patrick Shanahan expressly cited the DOD's statutory authority under 10 U.S.C. § 284(b)(7) and acknowledged that "[t]he work requested by DHS to block these identified drug smuggling corridors involves construction of fences (including a linear ground detection system), construction of roads, and installation of lighting (supported by grid power and including imbedded cameras)." Letter, Acting DOD Secretary Patrick Shanahan, to DHS Secretary Kirstjen Nielsen (Mar. 25, 2019) (Doc. # 7-3, p. 17). "Accordingly, at this time, I have decided to undertake Yuma Sector Projects 1 and 2 and El Paso Sector Project 1 by constructing 57 miles of 18-

foot-high pedestrian fencing, constructing and improving roads, and installing lighting as described in your February 25, 2019 request." *Id.*

According to the DOD's notification to Congress, "This reprogramming action provides funding in support of higher priority items, based on unforeseen military requirements, than those for which originally appropriated; and is determined to be necessary in the national interest." Office of the Under Secretary of Defense (Comptroller), DOD Serial No. FY 19-01 RA, Reprogramming Action (Mar. 25, 2019) (Doc. # 7-3, p. 24).

The DOD's notification to Congress further stated that:

> Funds are required to provide support for counter-drug activities of the [DHS]. DHS has identified areas along the southern border of the United States that are being used by individuals, groups, and transnational criminal organizations as drug smuggling corridors, and determined that the construction of additional physical barriers and roads in the vicinity of the United States border is necessary in order to impede and deny drug smuggling activities. DHS requests DoD assistance in the execution of projects to replace existing vehicle barriers or dilapidated pedestrian fencing with new pedestrian fencing, construct roads, and install lighting.

Id. Clearly, the requirement for roads, fences, and lighting constructed by the DOD to support the DHS in countering international criminal activity and drug trafficking at our Nation's southern border was determined to be and identified as unforeseen by Appellants. The § 8005 "unforeseen" restriction, therefore, does not bar Appellants' fund transfers into DOD's drug-interdiction account for § 284(b)(7)

support. Appellees undoubtedly failed to establish a likelihood of success on this contention.

CONCLUSION

Appellants have taken no *ultra vires* action. The United States Constitution grants to the President inherent foreign affairs and national security powers. U.S. Const. art. II; *Harisiades v. Shaughnessy*, 342 U.S. 580, 588 (1952) (recognizing that immigration control is an integral part of article II authorities "in regard to the conduct of foreign relations [and] the war power"). "The Supreme Court has 'long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control.'" *Cardenas v. United States*, 826 F.3d 1164, 1169 (9th Cir. 2016) (quoting *Fiallo v. Bell*, 430 U.S. 787, 792 (1977)). This kind of power must include the power to protect and secure the border. Appellants have utilized those powers *within a congressionally enacted and appropriated structure*. Appellants' § 8005 transfer accomplishes precisely that which the Constitution vested and Congress expressly authorized *and funded* Appellants with the power to do.

For these reasons and others, *Amicus Curiae* respectfully urges this Court to stay the District Court's Preliminary Injunction.

Dated: June 10, 2019

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