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* *pro hac vice* application pending

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

Jane Doe, et al.,

Plaintiffs,

v.

Donald J. Trump, et al.,

Defendants.

Case No. 8:20-cv-00858-SVW-JEM

**Notice of Motion and Motion for
Leave to File An Amicus Curiae
Brief in Support of the Defendants'
Motion to Dismiss**

Hearing Date: August 17, 2020

Time: 1:30 p.m.

Courtroom: 10A

1 Please take notice that on August 17, 2020, at 1:30 P.M. in Courtroom 10A,
2 movant Attorneys United for a Secure America (AUSA) will move for an order
3 permitting it to participate as *amicus curiae* in support of the government's mo-
4 tion to dismiss, which is currently scheduled to be heard on July 13, 2020.

5 This motion is made on the grounds that the Court has inherent authority
6 to allow the participation of an *amicus curiae*. AUSA's participation as *amicus*
7 *curiae* would be helpful and desirable and will facilitate a more complete un-
8 derstanding of the issues before the Court. This motion is based on this notice
9 of motion and motion, the accompanying memorandum of points and author-
10 ities, the proposed amicus brief attached to this motion, all papers and plead-
11 ings on file in this action, and any further evidence or argument that may be
12 presented to the Court in connection with the motion.

13 The motion is made following the conference of counsel pursuant to Local
14 Rule 7-3, which occurred on June 22, 2020 (with counsel for the defendants)
15 and June 24, 2020 (with counsel for the plaintiffs). The plaintiffs and defendants
16 oppose the motion.

Respectfully submitted.

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Dated: July 1, 2020

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Jane Doe, et al.,

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Donald J. Trump, et al.,

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Case No. 8:20-cv-00858-SVW-JEM

**Memorandum of Points and
Authorities in Support of Motion for
Leave to File An Amicus Curiae
Brief in Support of the Defendants'
Motion to Dismiss**

Hearing Date: August 17, 2020

Time: 1:30 p.m.

Courtroom: 10A

1 Attorneys United for a Secure America (AUSA) respectfully moves for
2 leave to participate as *amicus curiae* in support of the defendants' motion to
3 dismiss. The plaintiffs and defendants are opposed to this motion. A copy of
4 the proposed amicus brief is attached as an exhibit.

5 Attorneys United for a Secure America (AUSA) is a non-partisan affilia-
6 tion of attorneys dedicated to pursuing cases that serve the national interest
7 when it comes to immigration law. This means prioritizing national security,
8 defending our borders, safeguarding the public, protecting jobs, and valuing
9 America's precious natural resources.

ARGUMENT

10 A "district court has broad discretion to appoint *amici curiae*." *Hoptowitz v.*
11 *Ray*, 682 F.2d 1237, 1260 (9th Cir. 1982), *abrogated on other grounds by Sandin*
12 *v. Conner*, 515 U.S. 472 (1995). The "classic role" of *amici curiae* is "assisting
13 in a case of general public interest, supplementing the efforts of counsel, and
14 drawing the court's attention to law that escaped consideration." *Miller-Wohl*
15 *Co., Inc. v. Commissioner of Labor and Industry*, 694 F.2d 203, 204 (9th Cir.
16 1982).

17 The AUSA's proposed amicus brief discusses numerous issues that are
18 undiscussed in the parties' briefing. These include: the constitutional prob-
19 lems with the relief that the plaintiffs are requesting, the improper inclusion
20 of the President and Senator McConnell as named defendants in this lawsuit,
21 and the public interest in requiring the plaintiffs to disclose their identities and
22 preventing anonymous litigation from being used to shield criminal activities

1 that should be exposed and punished. *See, e.g., Missouri v. Harris*, No. 2:14-cv-
2 00341-KJM- KJN, 2014 WL 2987284 at *2 (E.D. Cal. Jul. 1, 2014) (“An *ami-*
3 *cus* brief should normally be allowed when, among other considerations, the
4 *amicus* has unique information or perspective that can help the court beyond
5 the help that the lawyers for the parties are able to provide.” (internal citation
6 omitted)).

CONCLUSION

7 The AUSA’s motion for leave to participate as *amicus curiae* and submit a
8 brief in support of the defendants’ motion to dismiss should be granted.

Respectfully submitted.

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Dated: July 1, 2020

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**Brief of the Attorneys United for a
Secure America as Amicus Curiae in
Support of the Defendants' Motion
to Dismiss**

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1 **INTEREST OF AMICUS CURIAE**

2 Attorneys United for a Secure America (AUSA) is a non-partisan affilia-
3 tion of talented attorneys dedicated to pursuing cases that serve the national
4 interest when it comes to immigration law. This means prioritizing national
5 security, defending our borders, safeguarding the public, protecting jobs, and
6 valuing America’s precious natural resources.¹

7 **ARGUMENT**

8 The complaint should be dismissed for all the reasons set forth in the
9 government’s thorough and well-reasoned brief. But the complaint suffers
10 from additional defects as well.

11 **I. THE RELIEF REQUESTED IN THE COMPLAINT IS**
12 **UNCONSTITUTIONAL**

13 The prayer for relief asks this Court to issue an injunction “prohibiting
14 enforcement of the laws as written” and directing defendants to apply a differ-
15 ent statute that the Court would impose by judicial decree. *See* First Amended
16 Complaint (ECF No. 28) at 18–19. The plaintiffs also ask for “a declaratory
17 judgment striking from the CARES Act those provisions that are violative of
18 the protections afforded to Plaintiff and those similarly situated under the
19 United States Constitution, federal statutes, and those cases interpreting the
20 same under which this Court is bound under the principles of stare decisis.”

1. No counsel for a party authored any part of this brief. And no one other than the amicus or its members or counsel financed the brief’s preparation or submission.

1 *Id.* at 20. The courts have no power to issue declaratory or injunctive relief of
2 this sort.

3 A federal court has no ability or authority to “strike” language from a duly
4 enacted statute, even when the statutory language contradicts the Constitu-
5 tion. When a court declares a statute unconstitutional, the statute remains on
6 the books as originally written, and it continues to exist until it is amended or
7 repealed by the legislature that enacted it. *See, e.g., Legal Tender Cases*, 79 U.S.
8 (12 Wall.) 457 (1870) (overruling *Hepburn v. Griswold*, 75 U.S. (8 Wall.) 603
9 (1870), and enforcing the Legal Tender Act of 1862, without requiring reen-
10 actment of the Act after *Hepburn* had declared it unconstitutional); *Winsness*
11 *v. Yocom*, 433 F.3d 727, 728 (10th Cir. 2006) (McConnell, J.) (“There is no
12 procedure in American law for courts or other agencies of government—other
13 than the legislature itself—to purge from the statute books, laws that conflict
14 with the Constitution as interpreted by the courts.”). A court may enjoin de-
15 fendants who are enforcing a statute, but it has no authority to act on the stat-
16 ute itself. *See Massachusetts v. Mellon*, 262 U.S. 447, 488 (1923) (“If a case for
17 preventive relief be presented, the court enjoins, in effect, not the execution
18 of the statute, but the acts of the official, the statute notwithstanding.”); *Ok-*
19 *palobi v. Foster*, 244 F.3d 405, 426 n.34 (5th Cir. 2001) (en banc) (“An injunc-
20 tion enjoins a defendant, not a statute.”). The judiciary does not wield a “writ
21 of erasure” that allows it to formally delete (or “strike”) statutory language
22 that it believes to be unconstitutional. *See* Jonathan F. Mitchell, *The Writ-of-*
23 *Erasure Fallacy*, 104 Va. L. Rev. 933 (2018); *Texas v. United States*, 945 F.3d

1 355, 396 (5th Cir. 2019) (“The federal courts have no authority to erase a duly
2 enacted law from the statute books, [but can only] decline to enforce a statute
3 in a particular case or controversy.” (citation and internal quotation marks
4 omitted)).

5 The plaintiffs’ prayer for relief appears to have been influenced by com-
6 monly used rhetoric in the legal profession that implies that litigants “chal-
7 lenge” statutes, and that courts “strike down” statutes when pronouncing
8 them unconstitutional. *See, e.g., New York State Rifle & Pistol Ass’n, Inc. v. City*
9 *of New York*, 140 S. Ct. 1525, 1526 (2020) (per curiam) (“In the District Court,
10 petitioners challenged a New York City rule regarding the transport of fire-
11 arms.”); *Citizens United v. Federal Election Commission*, 558 U.S. 310, 346
12 (2010) (describing *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978),
13 as having “struck down” a state-law prohibition on corporate independent ex-
14 penditures related to referenda issues). But litigants are not “challenging” the
15 underlying statute when they sue to enforce their constitutional rights. They
16 are challenging the behavior of the defendants that they have sued—which
17 may or may not be authorized by the allegedly unconstitutional statute. And
18 they cannot obtain a remedy that “strikes down” or revises the statute; the
19 only relief that courts may offer is a judicial declaration of the plaintiffs’ rights
20 and an injunction to stop the defendants’ unlawful behavior.

21 The plaintiffs’ requested relief also violates the Appropriations Clause,
22 which provides that “no money shall be drawn from the treasury but in conse-
23 quence of an appropriation made by law.” U.S. Const. art. I, § 9, cl. 7. The

1 plaintiffs are asking this Court to compel the defendants to draw money from
2 the Treasury in the absence of any congressional enactment authorizing those
3 expenditures. *See* First Amended Complaint (ECF No. 28) at 19. Courts can-
4 not issue remedies that compel federal officers to spend money that Congress
5 has never appropriated. *See Office of Personnel Management v. Richmond*, 496
6 U.S. 414, 425 (1990) (“Any exercise of a power granted by the Constitution to
7 one of the other branches of Government is limited by a valid reservation of
8 congressional control over funds in the Treasury.”).

9 **II. NEITHER PRESIDENT TRUMP NOR SENATOR MCCONNELL**
10 **IS A PERMISSIBLE DEFENDANT**

11 In recent years it has become fashionable to include the President of the
12 United States as a named defendant in lawsuits challenging executive action,
13 and this is especially true in lawsuits challenging the Trump Administration’s
14 immigration policies. *See, e.g., Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018).
15 This is improper, and the Court should remove the President’s name from the
16 caption. Lawsuits challenging the legality of executive action should be
17 brought against the President’s subordinates, and not against the President
18 himself. *See Mississippi v. Johnson*, 71 U.S. 475, 501 (1866) (“[T]his court has
19 no jurisdiction of a bill to enjoin the President in the performance of his official
20 duties; and that no such bill ought to be received by us.”); *Franklin v. Massa-*
21 *chusetts*, 505 U.S. 788, 802–03 (1992) (plurality opinion); *id.* at 825–29 (Scalia,
22 J., concurring); *id.* at 827 (“The principals in whom the executive and legisla-
23 tive powers are ultimately vested—viz., the President and the Congress (as

1 opposed to their agents)—may not be ordered to perform particular executive
2 or legislative acts at the behest of the Judiciary.”); *al-Marri v. Rumsfeld*, 360
3 F.3d 707, 708 (7th Cir. 2004).

4 Senator McConnell should also be immediately dismissed from this law-
5 suit. There is no Article III case or controversy between the plaintiffs and Sen-
6 ator McConnell because Senator McConnell has no role in enforcing the
7 CARES Act. More importantly, the Speech or Debate Clause immunizes the
8 Senator from lawsuits over his legislative activities. *See Eastland v. U.S. Ser-*
9 *vicemen’s Fund*, 421 U.S. 491, 501 (1975).

10 **III. THE PLAINTIFFS SHOULD NOT BE PERMITTED TO** 11 **PROCEED ANONYMOUSLY**

12 The Federal Rules of Civil Procedure require plaintiffs to disclose their
13 names in the complaint, and they make no provision for anonymous litigation.
14 *See Fed. R. Civ. P. 10(a); W.N.J. v. Yocom*, 257 F.3d 1171, 1172 (10th Cir. 2001)
15 (“The Rules provide no exception that allows parties to proceed anonymously
16 or under fictitious names such as initials.”). Because Rule 10(a) requires plain-
17 tiffs to disclose their names and makes no allowance for anonymous litigation,
18 a plaintiff may proceed under a pseudonym only when some higher source of
19 law—such as a federal statute, the Constitution, or a decision of the Ninth
20 Circuit—compels a departure from the Rule’s regime of disclosure.

21 The Ninth Circuit instructs courts to consider five factors when deciding
22 whether a litigant may proceed anonymously: (1) the severity of the threatened

1 harm; (2) the reasonableness of the anonymous party's fears; (3) the anony-
2 mous party's vulnerability to such retaliation; (4) the prejudice to the oppos-
3 ing party; and (5) the public interest." *Doe v. Kamehameha Sch./Bernice Pauahi*
4 *Bishop Estate*, 596 F.3d 1036, 1042 (9th Cir. 2010). The public interest in this
5 case overwhelmingly supports disclosure, especially if the plaintiffs are pro-
6 ceeding anonymously to conceal crimes committed by their spouses or the em-
7 ployers of those spouses.

8 Illegal entry into the United States is a federal crime. *See* 8 U.S.C. § 1325.
9 Employing an illegal alien is a federal crime as well. *See* 8 U.S.C. § 1324a. Of
10 course, not every illegal alien in the United States is guilty of a criminal border
11 crossing; some illegal aliens are here because they overstayed their visas. And
12 not every alien who lacks a social-security number was illegally employed. But
13 many individuals who lack social-security numbers are associated with crimi-
14 nal activities of this sort, and the public interest demands that these crimes be
15 exposed and punished. The plaintiffs should not be allowed to proceed anon-
16 ymously if they are seeking to conceal criminal activities committed by their
17 spouses or their employers.

18 **IV. THE PLAINTIFFS' CONSTITUTIONAL CLAIMS ARE**
19 **MERITLESS**

20 The constitutional claims in this case are beyond meritless. The claim that
21 the statute classifies on account of alienage is false. The statute classifies be-
22 tween those who have social-security numbers and those that don't; it draws

1 no distinction between citizens and aliens. And the claim that the statute vio-
2 lates the supposed constitutional “right to marry” is sophistry. The plaintiffs
3 are free to marry whomever they want, and their situation is no different from
4 an individual who lost out on a CARES Act credit because she married a high-
5 income earner. The Court should swiftly dispatch these constitutional claims.

6 **CONCLUSION**

7 The government’s motion to dismiss should be granted.

Respectfully submitted.

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