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COURT URGED NOT TO UNDERMINE EFFORTS TO PREVENT ILLEGAL ENTRY INTO U.S.

(Ambros-Marcial v. United States)

The Washington Legal Foundation this week urged a federal district court in Arizona not to permit immigrants-rights groups to undermine border security measures by suing the federal government for failing to establish water stations in the Arizona desert. WLF argued that although 100 or more aliens die in the Arizona desert from dehydration every year while attempting to cross the border illegally, making such crossings easier by establishing water stations would serve only to encourage more illegal immigration.

In a brief filed in *Ambros-Marcial v. United States*, WLF argued that a lawsuit for damages filed by relatives of Mexicans who died in the Arizona desert should be dismissed. WLF argued that the Federal Tort Claims Act (FTCA) does not grant the federal courts jurisdiction over tort claims based on "discretionary functions" of the federal government -- such as a decision whether to install water stations.

WLF filed its brief on behalf of itself, the Allied Educational Foundation, and Friends of Immigration Law Enforcement. WLF filed with the *pro bono* assistance of David Hardy, a Tucson, Arizona attorney.

"If the plaintiffs were to recover damages in this suit, the federal government would from a practical standpoint be required to install water stations," said WLF Chief Counsel Richard Samp after filing WLF's brief. "Because the vast desert wilderness is too large to patrol closely, only the harsh desert conditions serve to deter aliens from attempting the trek. If water stations are added, that deterrent effect will be eliminated," Samp said.

The Plaintiffs are the relatives of 11 aliens who perished in May 2001 in an area within the Arizona desert known as the Cabeza Prieta National Wildlife Refuge. The Refuge is managed by the U.S. Department of Interior. In early 2001, representatives of Humane Borders, a social welfare organization, sought (but were denied) permission from Interior to place water stations in the Refuge. The Plaintiffs allege that one of the proposed water stations would have been placed in the exact area where their relatives died. They allege that the United States was negligent in refusing to permit installation of the water stations, given that Interior employees were well aware

that many illegal aliens were dying from lack of water while attempting to cross the Refuge. Plaintiffs allege that their relatives would not have died had Humane Borders been permitted to install its proposed water stations.

In its brief, WLF argued that although the federal government waived its sovereign immunity to some tort suits when it enacted the FTCA, it specifically exempted any waiver for tort suits challenging a "discretionary function" of the government. WLF argued that government action (or inaction) constitutes a "discretionary function" when, as here, the action is susceptible to being based upon social, economic, or political policy. Since Interior denied Humane Border's request because it did not want to interfere with border security measures, that denial qualifies as a "discretionary function" that is exempt from FTCA challenge, WLF argued.

WLF also argued that the suit is improper because it threatens to undermine the federal government's ability to secure the southwest border. WLF argued that, particularly in light of the threat that foreign terrorists will use the southwest border to move weapons and personnel into this country, it is vitally important that the courts not second-guess Executive Branch decisions regarding the proper level of border security.

WLF is a public interest law and policy center with supporters in all 50 States, including many in Arizona. WLF devotes a significant portion of its resources to efforts to promote national security.

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For further information, contact WLF Chief Counsel Richard Samp, (202) 588-0302. A copy of WLF's brief is available on its web site, www.wlf.org.