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12 IN THE UNITED STATES DISTRICT COURT
13 FOR THE NORTHERN DISTRICT OF CALIFORNIA
14 OAKLAND DIVISION
15

16 **STATE OF CALIFORNIA; STATE OF**
17 **COLORADO; STATE OF**
18 **CONNECTICUT; STATE OF**
19 **DELAWARE; STATE OF HAWAII;**
20 **STATE OF ILLINOIS; STATE OF**
21 **MAINE; STATE OF MARYLAND;**
22 **COMMONWEALTH OF**
23 **MASSACHUSETTS; ATTORNEY**
24 **GENERAL DANA NESSEL ON BEHALF**
25 **OF THE PEOPLE OF MICHIGAN;**
26 **STATE OF MINNESOTA; STATE OF**
27 **NEVADA; STATE OF NEW JERSEY;**
28 **STATE OF NEW MEXICO; STATE OF**
NEW YORK; STATE OF OREGON;
STATE OF RHODE ISLAND; STATE OF
VERMONT; COMMONWEALTH OF
VIRGINIA; and STATE OF WISCONSIN;

Plaintiffs,

v.

Case No. 4:19-cv-00872-HSG

**FIRST AMENDED COMPLAINT FOR
DECLARATORY AND INJUNCTIVE
RELIEF**

DONALD J. TRUMP, in his official capacity
as President of the United States of America;
UNITED STATES OF AMERICA; U.S.
DEPARTMENT OF DEFENSE; PATRICK
M. SHANAHAN, in his official capacity as
Acting Secretary of Defense; **MARK T.**
ESPER, in his official capacity as Secretary of
the Army; **RICHARD V. SPENCER**, in his
official capacity as Secretary of the Navy;
HEATHER WILSON, in her official capacity
as Secretary of the Air Force; **U.S.**
DEPARTMENT OF THE TREASURY;
STEVEN T. MNUCHIN, in his official
capacity as Secretary of the Treasury; **U.S.**
DEPARTMENT OF THE INTERIOR;
DAVID BERNHARDT, in his official capacity
as Acting Secretary of the Interior; **U.S.**
DEPARTMENT OF HOMELAND
SECURITY; KIRSTJEN M. NIELSEN, in
her official capacity as Secretary of Homeland
Security;

Defendants.

INTRODUCTION

1. The States of California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland, Minnesota, Nevada, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, Wisconsin, the Commonwealths of Massachusetts and Virginia, and Attorney General Dana Nessel on behalf of the People of Michigan (collectively, “Plaintiff States”), bring this action to protect their residents, natural resources, and economic interests from President Donald J. Trump’s flagrant disregard of fundamental separation of powers principles engrained in the United States Constitution. Contrary to the will of Congress, the President has used the pretext of a manufactured “crisis” of unlawful immigration to declare a national emergency and redirect federal dollars appropriated for drug interdiction, military construction, military personnel, and law enforcement initiatives toward building a wall on the United States-Mexico border. This includes the diversion of funding that each of the Plaintiff States receive. Defendants must be enjoined from carrying out President Trump’s unconstitutional and unlawful scheme.

2. President Trump has veered the country toward a constitutional crisis of his own making. For years, President Trump has repeatedly stated his intention to build a wall across the United States-Mexico border. Congress has repeatedly rebuffed the President’s insistence to fund a border wall, recently resulting in a record 35-day partial government shutdown over the border wall dispute.¹ After the government reopened, Congress approved, and the President signed into law, a \$1.375 billion appropriation for fencing along a specific stretch of the southern border, but Congress made clear that funding could not be used to build President Trump’s proposed border wall.

3. After an agreement was reached on the spending bill to prevent another government shutdown, on February 15, 2019, President Trump declared an intention to redirect federal funds toward the construction of a border wall. On the same day, the Administration

¹ References to “border wall” in this First Amended Complaint (“Complaint”) refer to any barrier or border-related infrastructure and/or project relating to the construction of a barrier or border-related infrastructure along the southern border that President Trump has called for and has not been approved by Congress.

1 announced an executive action (“Executive Action”) to make up to \$6.7 billion in additional
2 funding available for construction of the border wall, including through the declaration of a
3 national emergency under the National Emergencies Act (“Emergency Declaration,” combined
4 with the “Executive Action,” the “Executive Actions”).

5 4. Use of those additional federal funds for the construction of a border wall is
6 contrary to Congress’s intent in violation of the U.S. Constitution, including the Presentment
7 Clause and Appropriations Clause. This use would divert funding that has been appropriated to
8 support Plaintiff States’ law enforcement and counter-drug programming efforts, as well as
9 military construction and other Department of Defense projects in Plaintiff States, for the non-
10 appropriated purpose of constructing a border wall. Even if the Administration could
11 constitutionally redirect funds toward the construction of the border wall, the Administration does
12 not satisfy the criteria in the statutes that it invokes to enable it to do so. In addition, Defendants’
13 actions to divert funding from state and local law enforcement, military construction, and other
14 appropriated Department of Defense projects toward a border wall for which funding has not
15 been appropriated by Congress is arbitrary and capricious and exceeds Defendants’ authority in
16 violation of the Administrative Procedure Act (“APA”).

17 5. If the Administration were to use the funding sources identified in the Executive
18 Actions for the purpose of building a border wall, Plaintiff States collectively stand to lose
19 millions of dollars in federal funding that their national guard units receive for domestic drug
20 interdiction and counter-drug activities, and millions of dollars received on an annual basis for
21 law enforcement programs from the Treasury Forfeiture Fund, harming the public safety of
22 Plaintiff States. The redirection of funding from authorized military construction and other
23 Department of Defense projects located in Plaintiff States will cause damage to their economies.
24 Plaintiff States will face harm to their proprietary interests by the diversion of funding from
25 military construction projects or military pay for the States’ national guard units. And the
26 diversion of any funding toward construction of a wall along California’s and New Mexico’s
27 southern borders will cause irreparable environmental damage to those States’ natural resources.
28

6. There is also no objective basis for President Trump’s Emergency Declaration. By the President’s own admission, an emergency declaration is not necessary. The federal government’s own data prove there is no national emergency at the southern border that warrants construction of a wall. U.S. Customs and Border Protection (“CBP”) data show that unlawful entries are well below historic highs set nearly two decades ago. Border Patrol staffing and budgets have markedly increased in recent years, and undetected unlawful entries have plummeted; the Trump Administration itself has claimed that it is more difficult to illegally cross the southern border today than ever before. The U.S. State Department and intelligence agencies recognize that there is a lack of credible evidence that terrorists are using the southern border to enter the United States. Federal data confirm that immigrants are less likely to commit violent crimes than native-born Americans. CBP data demonstrate that dangerous drugs are much more likely to be smuggled through, not between, official ports of entry—rendering a border wall ineffectual at preventing their entry into this country.

7. Notwithstanding the illegality of and wholesale lack of necessity for the Emergency Declaration, the Trump Administration has expressed its intent to move quickly with the construction of the border wall. Many contracts are close to being signed. A senior advisor to the White House reportedly said the Administration will proceed with construction at a speed that will “shock” people. The thwarting of congressional intent to fund a vanity project that not only will fail to safeguard national security, but is positioned to cause significant harm to the public safety, public fisc, environment, and well-being of Plaintiff States and their residents, cries out for judicial intervention.

8. For these reasons, and those discussed below, the Court should declare that the Executive Actions directing the diversion of federal funds and other resources for border wall construction are unlawful and unconstitutional, and enjoin Defendants from taking any action in furtherance of President Trump's Executive Actions.

JURISDICTION AND VENUE

9. This Court has jurisdiction because this action arises under the United States Constitution and the laws of the United States. Jurisdiction is proper under the judicial review

1 provisions of the APA, 5 U.S.C. sections 701-06. This Court also has jurisdiction under 28
2 U.S.C. sections 1331 and 2201.

3 10. An actual, present, and justiciable controversy exists between the parties within the
4 meaning of 28 U.S.C. section 2201(a), and this Court has authority to grant declaratory and
5 injunctive relief under 28 U.S.C. sections 2201 and 2202.

6 11. Venue is proper in this judicial district under 28 U.S.C. section 1391(e) because
7 the California Attorney General and the State of California have offices at 455 Golden Gate
8 Avenue, San Francisco, California and at 1515 Clay Street, Oakland, California, and therefore
9 reside in this district, and no real property is involved in this action. This is a civil action in
10 which Defendants are agencies of the United States or officers of such an agency.

11 12. Assignment to the San Francisco Division of this District is proper pursuant to
12 Civil Local Rule 3-2(c)-(d) and 3-5(b) because Plaintiff State of California and Defendant United
13 States both maintain offices in the District in San Francisco.

14 **PARTIES**

15 **PLAINTIFF STATE OF CALIFORNIA**

16 13. The State of California, represented by and through its Attorney General, is a
17 sovereign state of the United States of America.

18 14. Attorney General Xavier Becerra is the chief law officer of the State of California
19 and has the authority to file civil actions to protect California's rights and interests, the
20 environment, and the natural resources of this State. Cal. Const., art. V, § 13; Cal. Gov't Code
21 §§ 12511, 12600-12. This challenge is brought pursuant to the Attorney General's independent
22 constitutional, common law, and statutory authority.

23 15. As head of the California Department of Justice, Cal. Gov't Code section 12510,
24 Attorney General Becerra also has standing to bring this action because funding for law
25 enforcement throughout the State is at stake. *See Pierce v. Sup. Ct.*, 1 Cal. 2d 759, 761-62 (1934)
26 (Attorney General "has the power to file any civil action or proceeding directly involving the
27 rights and interests of the state . . . and the protection of public rights and interest.").

1 16. Governor Gavin Newsom is the chief executive officer of the State. The Governor
2 is responsible for overseeing the operations of the State and ensuring that its laws are faithfully
3 executed. As the leader of the executive branch, the Governor is the chief of California's
4 executive branch agencies, including those whose injuries are discussed in this Complaint. Cal.
5 Const., art. V, § 1. Governor Newsom is the Commander-in-Chief of the California National
6 Guard. Cal. Const., art. V, § 7; Cal. Mil. & Vet. Code § 550 et seq.

7 17. California, as one of several affected states located within President Trump's
8 declared "national emergency" southern border area, has an interest in ensuring public safety
9 within its borders and protecting its economic interests and the rights of its residents. California
10 shares over 140 miles of its southern border with Mexico.² The orderly flow of goods and people
11 across the border is a critical element in California's success as the fifth-largest economy in the
12 world.

13 18. California is aggrieved by the actions of Defendants and has standing to bring this
14 action because of the injury due to the loss of federal drug interdiction, counter-narcotic, and law-
15 enforcement funding to the State caused by Defendants' diversion of funding and resources.

16 19. The threat of losing funding to conduct drug interdiction and counter-narcotic
17 activity prevents California from moving forward with critical criminal narcotics programs and
18 threatens the public safety of all Californians. The diversion of funding from the Treasury
19 Forfeiture Fund will harm public safety by impacting critically necessary funding for law
20 enforcement officers and their agencies.

21 20. California is aggrieved by the actions of Defendants and has standing to bring this
22 action because of the injury to the State and its residents caused by Defendants' reduction of
23 federal defense spending in California due to diversion of funding to the border wall.

24 21. California has an interest in protecting the economic health and well-being of its
25 residents. *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 607 (1982).

27 ² Janice Cheryl Beaver, *U.S. International Borders: Brief Facts*, Cong. Res. Serv. (Nov. 9,
28 2006), <https://tinyurl.com/y49jq9vv>.

22. California has an interest in preventing the diminution of specific tax revenues caused by reduced construction on California military installations and the corresponding reduction in economic activity. *Wyoming v. Oklahoma*, 502 U.S. 437, 448-50 (1992).

23. California has an interest in its exercise of sovereign power over individuals and entities within the State, including enforcement of its legal code. *Snapp*, 458 U.S. at 601; *Hawaii v. Trump*, 859 F.3d 741, 765 (9th Cir. 2017), *rev'd on other grounds*, 138 S. Ct. 2392 (2018).

24. The diversion of military construction and other Department of Defense funding for projects supporting or used by California's National Guard units harms the State. Any diversion of military funding intended for the California National Guard harms the State as well.

25. The diversion of military construction funding from projects in California will harm California's economy.

26. The State would suffer economic harm from diversion of funding from military construction projects on California bases. More defense contractor funding is spent in California than in any other state, and such funding generates significant state and local tax revenues, employment, and economic activity.

27. California has an interest in the natural resources of this State—such as wildlife, fish, and water—that are held in trust by the State for its residents and are protected by state and federal laws. *Sierra Forest Legacy v. Sherman*, 646 F.3d 1161, 1178 (9th Cir. 2011).

28. In the areas of California’s borderlands where construction of a border wall will take place, dozens of sensitive plant and animal species that are listed as “endangered,” “threatened,” or “rare” will be seriously at risk.

29. Defendants' diversion of funding and resources to construct a wall along the southern border will create environmental harm and deprive California of its procedural right to protect its public trust resources.

30. Defendants' unconstitutional actions undermine California's sovereignty and harm the State through their effects on California residents, businesses, and the environment.

PLAINTIFF STATE OF COLORADO

31. The State of Colorado is a sovereign state of the United States of America.

1 32. The State of Colorado brings this action by and through its Attorney General,
2 Philip J. Weiser. The Attorney General has authority to represent the State, its departments, and
3 its agencies, and “shall appear for the state and prosecute and defend all actions and proceedings,
4 civil and criminal, in which the state is a party.” Colo. Rev. Stat. § 24-31-101.

5 33. The State of Colorado will suffer injury because of the actions of Defendants and
6 has standing to bring this action for at least three reasons.

7 34. First, Defendants intend to fund the wall using money from the Pentagon’s drug
8 interdiction program, which will likely impact funding to Colorado and affect Colorado’s ability
9 to address drugs illegal under state law in Colorado.

10 35. Second, Colorado is home to many major military bases, including the Air Force
11 Academy, Buckley Air Force Base, Cheyenne Mountain Air Force Base, Peterson Air Force
12 Base, Schriever Air Force Base, and Fort Carson Army Base. These military bases play a critical
13 role in our nation’s defense and to the economy of the State of Colorado. The use of funding for
14 a southern border wall rather than for necessary maintenance and repairs to these military bases
15 harms Colorado and its economy.

16 36. Third, Colorado has received money from the Treasury Forfeiture Fund in the past,
17 and expects to receive comparable monies in the future absent diversion to fund the construction
18 of a wall. According to audits of the Treasury Forfeiture Fund, in 2018, Colorado received
19 \$877,000 in equitable sharing from the Treasury Forfeiture Fund; in 2017, Colorado received
20 \$316,000; in 2016, Colorado received \$303,000; in 2015, Colorado received \$1,746,000; and in
21 2014, Colorado received \$228,000.

22 **PLAINTIFF STATE OF CONNECTICUT**

23 37. The State of Connecticut, represented by and through its Attorney General, is a
24 sovereign state of the United States of America.

25 38. Attorney General William Tong is the chief legal officer of the State of
26 Connecticut and has the authority to file civil actions to protect Connecticut’s rights and interests.
27 Conn. Const., art. IV, § 4; Conn. Gen. Stat. §§ 3-124 et seq. This challenge is brought pursuant to
28

1 the Attorney General's authority and responsibility to protect Connecticut's sovereign, quasi-
2 sovereign, and proprietary interests.

3 39. Governor Ned Lamont is the chief executive officer of the State. The Governor is
4 responsible for overseeing the operations of the State and ensuring that its laws are faithfully
5 executed. As the leader of the executive branch, the Governor is the chief of Connecticut's
6 executive branch agencies, including those whose injuries are discussed in this Complaint. Conn.
7 Const. art IV, § 5.

8 40. On information and belief, Connecticut is aggrieved by the actions of Defendants
9 and has standing to bring this action because of the injury caused by Defendants' unlawful and
10 unconstitutional diversion of funding from military construction projects in Connecticut to
11 construction of a border wall in Texas, Arizona, New Mexico, and California. Defendants'
12 actions will hurt Connecticut's economy and, by damaging the State's critical security
13 infrastructure, threaten the safety of Connecticut's National Guard and of all Connecticut
14 residents.

15 41. Further, on information and belief, Defendants' diversion of funding aimed at drug
16 interdiction and counter-narcotic activity threatens to hurt the State's law enforcement agencies
17 and compromise the public safety of all Connecticut residents. Connecticut has received and—
18 absent the unlawful and unconstitutional actions of Defendants—intends to continue to receive
19 equitable sharing funding through the Treasury Forfeiture Fund. Defendants' diversion of that
20 funding threatens the budgets of Connecticut law enforcement agencies and the public safety of
21 all Connecticut residents.

22 **PLAINTIFF STATE OF DELAWARE**

23 42. The State of Delaware, represented by and through its Attorney General, is a
24 sovereign state of the United States of America.

25 43. Attorney General Kathleen Jennings is the chief legal officer of the State of
26 Delaware and has the authority to file civil actions to protect Delaware's rights and the rights of
27 Delaware citizens. 29 Del. C. § 2504. The Attorney General's powers and duties include
28 litigating matters in our nation's federal courts on matters of public interest. The Attorney

1 General has the authority to file suit to challenge action by the federal government that threatens
2 the public interest and welfare of Delaware residents as a matter of constitutional, statutory, and
3 common law authority.

4 44. Governor John Carney is the chief executive officer of the State of Delaware. The
5 Governor is responsible for overseeing the operations of the State of Delaware and is required to
6 take care that Delaware's laws be faithfully executed. Del. Const., Art. III, §§ 1, 8.

7 45. Delaware is aggrieved by the actions of Defendants and has standing to bring this
8 action because of the injury due to loss of federal funding to the State caused by Defendants'
9 unconstitutional and unlawful diversion of funding discussed herein.

10 46. Defendants have and intend to continue to misappropriate equitable sharing funds
11 gained through forfeiture of assets in the context of Delaware's enforcement of state and federal
12 law. As such, Delaware will be deprived of such funds that are owed to it to carry on law
13 enforcement activities.

14 47. Delaware has received money from the Treasury Forfeiture Fund in the past, and
15 expects to receive comparable monies in the future absent diversion to fund the construction of a
16 wall. According to audits of the Treasury Forfeiture Fund, in 2018, Delaware received more than
17 \$1.3 million in equitable sharing from the Treasury Forfeiture Fund; in 2017, Delaware received
18 \$349,045; in 2016, Delaware received more than \$1.2 million; in 2015, Delaware received
19 \$331,134; and in 2014, Delaware received more than \$2.5 million. These resources are used to
20 supplement and enhance law enforcement agencies' state-appropriated funding.

21 48. With a federally funded budget of over \$1 million, any diversion of annual federal
22 funding intended for the Delaware National Guard's drug interdiction programs will harm
23 Delaware given the success of such programs resulting in the annual confiscation of illegal drugs
24 and by and through the support it provides to state and local law enforcement agencies for this
25 purpose.

26 49. Defendants' unlawful and unconstitutional diversion of funds away from projects
27 authorized and appropriated for disbursement and use within the State of Delaware will cause it
28 injury in fact, which is traceable to Defendants' conduct as set forth herein.

1 **PLAINTIFF STATE OF HAWAII**

2 50. The State of Hawaii, represented by and through its Attorney General, is a
3 sovereign state of the United States of America.

4 51. Attorney General Clare E. Connors is the chief legal officer of the State of Hawaii
5 and has authority to appear, personally or by deputy, for the State of Hawaii in all courts, criminal
6 or civil, in which the State may be a party or be interested. Haw. Rev. Stat. § 28-1. The
7 Department of the Attorney General has the authority to represent the State in all civil actions in
8 which the State is a party. *Id.* § 26-7. This challenge is brought pursuant to the Attorney
9 General's constitutional, statutory, and common law authority. *See* Haw. Const. art. V, § 6; Haw.
10 Rev. Stat. Chapter 28; Haw. Rev. Stat. § 26-7.

11 52. As the chief law enforcement officer of the State of Hawaii, the Attorney General
12 has ultimate responsibility for enforcing the penal laws of the State, and thus has a strong interest
13 in protecting public safety. Haw. Rev. Stat. §§ 28-2 & 28-2.5; *Amemiya v. Sapienza*, 629 P.2d
14 1126, 1129 (Haw. 1981).

15 53. Hawaii has an interest in its exercise of sovereign power over individuals and
16 entities within the State, including the enforcement of its legal code.

17 54. Hawaii is aggrieved by the actions of Defendants and has standing to bring this
18 action because of the injury due to the loss of federal drug interdiction, counter-narcotic, and law
19 enforcement funding to the State caused by Defendants' diversion of funds.

20 55. Hawaii participates in federally-funded drug interdiction and counter-narcotic
21 programs, such as the National Guard Counterdrug Program. Diversion of this funding will
22 reduce the funds available to Hawaii for accomplishing critical drug interdiction and counter-
23 narcotic efforts, and will therefore threaten public safety in Hawaii.

24 56. State and local law enforcement agencies in Hawaii have received funds from the
25 Treasury Forfeiture Fund in the past and anticipate doing so again in the future. Unless diverted,
26 these funds would be available to Hawaii's state and local law enforcement agencies. Diversion
27 of funding therefore will harm public safety by reducing the availability of critical funds for state
28 and local law enforcement officers and their agencies.

57. Hawaii is aggrieved by the actions of Defendants, including Defendants' diversion of funds, and has standing to bring this action because of the injury to the State and its residents caused by the reduction of federal defense spending in Hawaii.

58. Hawaii has an interest in protecting its State economy and the economic health and well-being of its residents.

59. Diversion of funding from military construction projects in Hawaii will harm the State and its residents by injuring Hawaii's economy. Defense spending, which includes military construction projects, is the second-largest segment of Hawaii's economy and, as of 2017, represents 7.2 percent of the State's Gross Domestic Product—the second highest percentage in the nation. Hawaii has several major military installations, including Joint Base Pearl Harbor-Hickam, Schofield Barracks, Fort Shafter, Marine Corps Base Hawaii (Kaneohe Bay), Camp Smith, Tripler Army Medical Center, Wheeler Army Airfield, and the Pacific Missile Range Facility at Barking Sands. On information and belief, Hawaii is subject to losing in excess of \$311 million in military construction funds.

60. Defense spending in Hawaii contributes to economic activity, employment, and increased tax revenues, all of which would be harmed if that funding is diverted, thereby injuring the State of Hawaii. As of 2017, defense spending injects \$6.4 billion into Hawaii's economy, is responsible for 58,625 jobs, and accounts for \$4.6 billion in total payroll (and the associated income tax revenue).

PLAINTIFF STATE OF ILLINOIS

61. The State of Illinois is a sovereign state of the United States of America.

62. This action is being brought on behalf of the State by Attorney General Kwame Raoul, the State's chief legal officer. *See* Ill. Const., Art. 5, § 15; 15 Ill. Comp. Stat. 205/4.

63. J. B. Pritzker is the governor of Illinois, and under Illinois law has the “supreme executive power” and the duty to ensure “the faithful execution of the laws.” Ill. Const., Art. V, § 8.

64. On information and belief, Illinois is aggrieved by the actions of Defendants and has standing to bring this action because of the injury due to the loss of federal funding to the

1 State from the Treasury Forfeiture Fund. The loss of funding for state and local law enforcement
2 operational needs threatens the public safety of all Illinois residents.

3 65. On information and belief, Illinois is aggrieved by the actions of Defendants and
4 has standing to bring this action because of the injury due to the loss of federal funding to the
5 State caused by Defendants' diversion of funding. The loss of funding to conduct drug
6 interdiction and counter-narcotics activity threatens the public safety of all Illinois residents.

7 66. On information and belief, Illinois is also aggrieved by the actions of Defendants
8 and has standing to bring this action because of the injury due to the loss of federal funding
9 resulting from the diversion of military construction projects from Illinois to the construction of a
10 border wall on the nation's southern border.

11 67. In filing this action, the Attorney General seeks to protect the residents and
12 agencies of Illinois from harm caused by Defendants' illegal conduct, prevent further harm, and
13 seek redress for the injuries caused to Illinois by Defendants' actions. Those injuries include
14 harm to Illinois's sovereign, quasi-sovereign, and proprietary interests.

15 **PLAINTIFF STATE OF MAINE**

16 68. The State of Maine, represented by and through its Attorney General, is a
17 sovereign state of United States of America.

18 69. The Attorney General of Maine, Aaron M. Frey, is a constitutional officer with the
19 authority to represent the State of Maine in all matters, and serves as its chief legal officer with
20 general charge, supervision, and direction of the State's legal business. Me. Const. art. IX, Sec.
21 11; 5 M.R.S., §§ 191 et seq. The Attorney General's powers and duties include acting on behalf
22 of the State and the people of Maine in the federal courts on matters of public interest. The
23 Attorney General has the authority to file suit to challenge action by the federal government that
24 threatens the public interest and welfare of Maine residents as a matter of constitutional, statutory,
25 and common law authority.

26 70. The Governor of Maine, Janet T. Mills, is the chief executive officer of the State.
27 The Governor is responsible for overseeing the operations of the State and ensuring that its laws
28 are faithfully executed. As the leader of the executive branch, the Governor is the chief of

1 Maine's executive branch agencies, including those whose injuries are discussed in this
2 Complaint. Me. Const. art V, § 1. Governor Mills is the Commander-in-Chief of the Maine
3 National Guard. 37-B M.R.S. §§ 103 et seq.

4 71. Maine is aggrieved by the actions of Defendants and has standing to bring this
5 action because of the injury due to the loss of federal funding to the State caused by Defendants'
6 diversion of funding.

7 72. Maine is aggrieved by the actions of Defendants and has standing to bring this
8 action because of the injury to the State and its residents caused by Defendants' reduction of
9 federal defense spending in Maine due to diversion of funding to the border wall.

10 73. Maine has an interest in protecting the health, safety, and well-being of its
11 residents, including protecting its residents from harms to their economic health.

12 74. Maine has an interest in the State's economic vitality and workforce.

13 75. Maine has an interest in preventing diminution of its tax revenues.

14 76. The diversion of military construction funding from authorized projects in Maine
15 will harm Maine's economy.

16 77. The State would suffer economic harm from diversion of funding from authorized
17 military construction projects in Maine.

18 78. Maine participates in the equitable sharing program, pursuant to which eligible
19 Maine law enforcement agencies are entitled to reimbursement from the Treasury Forfeiture Fund
20 for law enforcement agency expenditures associated with seizures and forfeitures, 31 U.S.C.
21 section 9705(a)(1)(B)(iii).

22 79. During the federal fiscal years 2009 through 2018, eligible law enforcement
23 agencies within the State of Maine were entitled to receive or received approximately \$4.9
24 million dollars in equitable sharing funds from the Treasury Forfeiture Fund account, or an
25 average of approximately \$490,000 annually.

26 80. In addition to the state-wide impact that loss of Treasury Forfeiture Funds would
27 have on all law enforcement agencies within Maine, the State of Maine, Department of Inland
28

1 Fisheries & Wildlife, Maine Warden Service (“Maine Warden Service”) will be impacted by the
2 non-payment of an approved pending claim for Treasury Forfeiture Fund equitable sharing.

3 81. By letter dated September 7, 2018, the Maine Warden Service was notified by the
4 Department of Treasury, Internal Revenue Service that the Maine Warden Service was entitled to
5 equitable sharing at the rate of 3 percent of \$238,956.42 (or \$7,168), the net amount available for
6 equitable sharing related to the liquidation of two parcels of land seized during a joint law
7 enforcement operation conducted in 2014.

8 82. To date, the Maine Warden Service has not received payment of its equitable
9 share.

10 83. The diversion of Treasury Forfeiture Funds will harm Maine by depriving Maine
11 of the proceeds of equitable sharing to which it is entitled and by impacting public safety
12 generally by reducing critically necessary funding for law enforcement officers and their agencies
13 within Maine.

14 **PLAINTIFF STATE OF MARYLAND**

15 84. The State of Maryland is a sovereign state of the United States of America.
16 Maryland is represented by and through its chief legal officer, Attorney General Brian E. Frosh.
17 Under the Constitution of Maryland, and as directed by the Maryland General Assembly, the
18 Attorney General has the authority to file suit to challenge action by the federal government that
19 threatens the public interest and welfare of Maryland residents. Md. Const. art. V, § 3(a)(2); 2017
20 Md. Laws, J. Res. 1.

21 85. Maryland is aggrieved by the actions of Defendants and has standing to bring this
22 action due to the loss of federal funding to the State caused by Defendants’ diversion of federal
23 funds. The loss of funding to conduct drug interdiction and counter-narcotic activity would
24 threaten the public safety of all Marylanders.

25 86. Maryland is also aggrieved by the actions of Defendants and has standing to bring
26 this action because of the injury due to the diversion of funding for military construction projects.
27 On information and belief, Maryland stands to lose up to \$513 million in military construction
28 funding for currently planned projects at Fort Meade and Joint Base Andrews.

1 87. Additionally, Maryland has received money from the Treasury Forfeiture Fund in
2 the past, and expects to receive comparable monies in the future absent diversion to fund the
3 construction of a border wall. During the fiscal year that ended September 30, 2018, Maryland
4 state and local law enforcement agencies received \$1.79 million in equitable sharing payments
5 from the Treasury Forfeiture Fund for their participation in successful seizure and forfeiture
6 activities; the previous year, that amount was \$1.32 million. The Maryland State Police has
7 regularly received equitable sharing payments from the Treasury Forfeiture Fund for its
8 contributions to operations that led to forfeitures. In 2018, the Maryland State Police received
9 over \$429,000 in equitable sharing payments from the Treasury Forfeiture Fund. The Maryland
10 State Police currently has over 50 requests pending with the Treasury Forfeiture Fund for
11 equitable shares relating to forfeited assets worth over \$8.3 million. The diversion of funds from
12 the Treasury Forfeiture Fund could deprive the Maryland State Police of its fair share of the
13 forfeited assets, impacting its budget and hindering law enforcement activities, negatively
14 affecting the public safety and welfare of Maryland citizens.

15 **PLAINTIFF COMMONWEALTH OF MASSACHUSETTS**

16 88. The Commonwealth of Massachusetts, represented by and through its Attorney
17 General, is a sovereign state of the United States of America.

18 89. Attorney General Maura Healey is the chief law enforcement officer in
19 Massachusetts and has both statutory and common-law authority to bring lawsuits to protect the
20 interests of the Commonwealth of Massachusetts and the public interest of the people. *Feeney v.*
21 *Commonwealth*, 366 N.E.2d 1262, 1265-66 (Mass. 1977); Mass. Gen. Laws Ch. 12, § 3, 10.

22 90. Massachusetts is aggrieved by the actions of Defendants and has standing to bring
23 this action because of injury due to the probable loss of federal drug interdiction and counter-
24 narcotic funding, asset forfeiture funds, and military construction funds to and in Massachusetts,
25 caused by Defendants' unlawful diversion of funding to pay for border wall construction.

26 91. Losing drug interdiction and counterdrug activities funding would hamper
27 Massachusetts' efforts to combat the opioid crisis, which continues to cause grave harm to
28 Massachusetts residents and the public health.

1 92. The Department of Defense allocated \$2.3 million to Massachusetts for drug
2 interdiction and counterdrug activities in fiscal year (or “FY”) 2019. Of that allocation,
3 Massachusetts has not yet received more than \$965,000.

4 93. The Massachusetts National Guard uses these funds to combat drug trafficking
5 organizations operating in our communities, and to support federal, state, and local law
6 enforcement agencies in their efforts to decrease illicit drug supply and demand while reducing
7 opioid overdose deaths.

8 94. Specifically, the Massachusetts National Guard uses Department of Defense drug
9 interdiction and counter-narcotic funds to provide investigative case analysis support, linguist
10 services, transportation support, inter-agency training, and reconnaissance.

11 95. These funds are particularly important in Massachusetts, where the number of fatal
12 opioid-related overdoses has increased by over 420 percent from 2000 to 2018. Heroin and
13 fentanyl trafficking and consumption remain a major threat, due to widespread availability, high
14 demand, low costs, and high incidence of addiction. Local agencies often have neither the
15 resources nor the expertise to properly conduct extensive drug investigations, and illegal narcotics
16 are rarely manufactured, distributed and consumed all within the same municipality. The
17 Massachusetts National Guard drug interdiction and counter-narcotic programs provide critically
18 important support for these agencies in pursuing inter-agency and inter-jurisdictional work.

19 96. Massachusetts will also be harmed due to the loss of federal asset forfeiture funds
20 to state and local law enforcement agencies in Massachusetts.

21 97. Massachusetts receives Treasury Forfeiture Funds through equitable sharing when
22 participating in asset forfeiture activities with certain federal law enforcement agencies.

23 98. In fiscal year 2018, state and local law enforcement agencies in Massachusetts
24 received approximately \$307,000 in currency and \$34,000 in property through the Treasury
25 Forfeiture Fund’s equitable sharing program. These resources are used to supplement and
26 enhance law enforcement agencies’ state appropriated funding.

27 99. The Massachusetts State Police and Massachusetts Port Authority received a
28 combined \$481,822 in fiscal year 2017 and \$35,286 in fiscal year 2018 from the Treasury

1 Forfeiture Fund's equitable sharing program.

2 100. In fiscal year 2019, the Massachusetts State Police has already received \$13,980
3 through the Treasury Forfeiture Fund's equitable sharing program, and the Massachusetts Office
4 of the Attorney General has received \$17,313.

5 101. On information and belief, Massachusetts law enforcement agencies have
6 submitted requests for equitable sharing funds that remain pending with the Treasury Department.

7 102. Massachusetts will be additionally harmed due to the loss of funding for military
8 construction projects in Massachusetts.

9 103. Funds that could be diverted include, but may not be limited to, \$90 million
10 appropriated by Congress for a new compound semiconductor facility and microelectronics
11 integration facility at Hanscom Air Force Base's Lincoln Laboratory, which is affiliated with the
12 Massachusetts Institute of Technology, and \$42.6 million appropriated by Congress for
13 construction of a new hangar at Westover Air Force Base.

14 104. In addition, the Massachusetts National Guard has been allocated \$9.7 million in
15 funding for a multi-purpose machine gun range for fiscal year 2020. \$8.9 million of these funds
16 have not yet been obligated.

17 105. Not only are these military construction projects important to national security,
18 military readiness, and well-being of our service members, they are important generators of
19 economic activity for Massachusetts.

20 **PLAINTIFF ATTORNEY GENERAL DANA NESSEL ON BEHALF**
21 **OF THE PEOPLE OF MICHIGAN**

22 106. The People of Michigan are the sovereign of one of the states of the United States
23 and are represented by and through the Michigan Attorney General Dana Nessel.

24 107. Attorney General Dana Nessel is the chief legal officer of the State of Michigan
25 and her powers and duties include acting in federal court in matters of concern to the People of
26 Michigan, to protect Michigan residents. *Fieger v. Cox*, 734 N.W.2d 602, 604 (Mich. Ct. App.
27 2007); Mich. Comp. Laws §§ 14.28, 14.101. This action is brought to protect the interests of the
28 People of Michigan.

1 108. The Michigan National Guard has over 10,000 soldiers and airmen, employs over
2 700 state employees on a full-time basis through the Department of Military and Veterans Affairs,
3 and operates over 40 facilities in the state. The Michigan Department of Military and Veterans
4 Affairs receives a majority of its funding from the federal government. On information and
5 belief, it performs missions training and prepares citizen soldiers and airmen to respond to,
6 among other things, state emergencies, military support, and protection of local
7 communities. Loss of funding negatively impacts this vital service for the People of Michigan.

8 109. The People of Michigan are aggrieved by the actions of Defendants and have
9 standing to bring this action because of the injury due to the loss of federal funding to the People
10 of Michigan caused by Defendants' diversion of funding. The loss of funding to conduct drug
11 interdiction and counter-narcotic activity threatens the public safety of all Michigan residents.

12 110. Michigan receives Treasury Forfeiture Funds through equitable sharing when
13 participating in asset forfeiture activities with certain federal law enforcement agencies.

14 111. Michigan has received money from the Treasury Forfeiture Fund in the past, and
15 expects to receive comparable monies in the future absent diversion to fund the construction of a
16 wall. According to audits of the Treasury Forfeiture Fund, in 2018, Michigan received \$375,000
17 in equitable sharing from the Treasury Forfeiture Fund; in 2017, Michigan received \$333,000; in
18 2016, Michigan received more than \$1.3 million; in 2015, Michigan received more than \$1.3
19 million; and in 2014, Michigan received more than \$2 million. These resources are used to
20 supplement and enhance law enforcement agencies' state appropriated funding.

21 112. The People of Michigan will also be harmed due to the loss of federal asset
22 forfeiture funds to state and local law enforcement agencies in Michigan.

23 **PLAINTIFF STATE OF MINNESOTA**

24 113. The State of Minnesota, represented by and through its Attorney General, is a
25 sovereign state of the United States of America.

26 114. Attorney General Keith Ellison is the chief legal officer of the State of Minnesota
27 and his powers and duties include acting in federal court in matters of State concern and to protect
28 Minnesota residents. Minn. Stat. § 8.01. This action is brought to protect Minnesota's sovereign,

1 quasi-sovereign, and proprietary interests.

2 115. Governor Tim Walz is the chief executive officer of the State of Minnesota,
3 custodian of state property and federal funds made available to the State, and the Commander-in-
4 Chief of the state military. Minn. Const., art. V, § 3; Minn. Stat. §§ 4.01 & .07. As the chief
5 executive officer and Commander-in-Chief of the State of Minnesota, Governor Walz leads
6 executive branch agencies injured by the actions described in this Complaint.

7 116. The Minnesota National Guard has over 13,000 soldiers and airmen, employs
8 more than 2,000 people on a full-time basis, and operates over 60 facilities in the state. The
9 Minnesota National Guard receives more than 96 percent of its funding from the federal
10 government. It performs missions training and prepares citizen soldiers and airmen to respond to,
11 among other things, the Governor of Minnesota for state emergency response, military support,
12 and protection of local communities. Loss of funding negatively impacts this vital service for the
13 State of Minnesota.

14 117. For example, diverting federal funding for the Minnesota National Guard's
15 counterdrug programs and domestic drug interdiction activities to construct a wall along the
16 United States-Mexico border would harm Minnesota's law enforcement agencies and
17 compromise the health and safety of Minnesota residents.

18 118. In addition, diverting federal funding from necessary military construction projects
19 in Minnesota, including National Guard projects, to construct a wall along the United States-
20 Mexico border would also harm Minnesota, its economy, and its residents.

21 119. Law enforcement agencies in Minnesota, and the Minnesotans they protect and
22 serve, are also harmed by the diversion of funding from the Treasury Forfeiture Fund to construct
23 a wall along the United States-Mexico border. Law enforcement agencies in Minnesota
24 participate in the Treasury Forfeiture Fund's strategic mission "to use high-impact asset forfeiture
25 in investigative cases to disrupt and dismantle criminal enterprises."³ For example, in Fiscal Year

26
27 ³ See Off. of Inspector Gen., Dep't of the Treasury, *Audit of the Department of the*
28 *Treasury Forfeiture Fund's Financial Statements for Fiscal Years 2018 and 2017* at 2 (Dec. 13,
2018), <https://tinyurl.com/y6ovg5s3>.

2018, a Minnesota-based investigation and prosecution of a nationwide wire fraud scheme primarily targeting elderly Hmong people resulted in the forfeiture of \$1,612,451.84.⁴

120. Law enforcement agencies in Minnesota have pending requests for money from the Treasury Forfeiture Fund and will likely have additional requests in the future. The delay, reduction, or denial of payment resulting from the diversion of funding from the Treasury Forfeiture Fund to construct a wall along the United States-Mexico border harms these law enforcement agencies and compromises the health and safety of Minnesota residents.

PLAINTIFF STATE OF NEVADA

121. The State of Nevada, represented by and through its Attorney General, is a sovereign state of the United States of America.

122. Attorney General Aaron D. Ford is the chief legal officer of the State of Nevada and has the authority to commence actions in federal court to protect the interests of the State. Nev. Rev. Stat. 228.170.

123. Governor Stephen F. Sisolak is the chief executive officer of the State of Nevada. The Governor is responsible for overseeing the operations of the State and ensuring that its laws are faithfully executed. Nev. Const., art. 5, § 1. Governor Sisolak is the Commander-in-Chief of the Nevada state military forces. Nev. Const., art. 5, § 5.

124. On information and belief, Nevada is aggrieved by the actions of Defendants and has standing to bring this action because of the injury to the State and its residents caused by the reduction of federal funding to the State due to Defendants' diversion of funding to a southern border wall.

125. Any diversion of military construction funding from Nevada will harm the State's economy. Nevada is home to several military bases, including Nellis Air Force Base, Creech Air Force Base, Hawthorne Army Depot Base, and Naval Air Station Fallon. These military bases play a critical role in our nation's defense and to the State's economy. The use of funding for a southern border wall rather than for necessary expenses at these military bases harms Nevada and its economy.

⁴ *Id.* at 5.

1 126. Any diversion of federal counter-narcotic funding from Nevada will harm the
2 State. The use of funding for a southern border wall rather than to conduct drug interdiction and
3 counter-narcotic activity in the State threatens the public safety of all Nevadans.

4 127. Nevada is harmed by the diversion of funds from the Treasury Forfeiture Fund.
5 Since State Fiscal Year (SFY) 2015, the Nevada Office of the Attorney General (OAG) has
6 received approximately \$422,211.94 in equitable sharing from the Treasury Forfeiture Fund.
7 This total includes equitable sharing payments of \$35,777.35 in SFY 2015; \$369,469.30 in SFY
8 2016; \$831 in SFY 2017; and \$16,134.29 in SFY 2018. The OAG has not received any equitable
9 sharing payments in SFY 2019. These payments resulted from the OAG's participation in
10 criminal investigations that resulted in successful seizure and forfeiture activities. The OAG has
11 approximately six outstanding forfeiture requests where the office expects to receive between 10-
12 35 percent of the value of seized and forfeited assets once those investigations are completed.
13 The diversion of these funds from the Treasury Forfeiture Fund could deprive the OAG of its
14 share of pending forfeited assets, impacting its future budget and hindering other law
15 enforcement, training, and criminal prosecution activities.

16 128. Defendants' unconstitutional actions undermine Nevada's sovereignty and harm
17 the State through their effects on Nevada's residents and its economy.

18 **PLAINTIFF STATE OF NEW JERSEY**

19 129. The State of New Jersey is a sovereign state of the United States of America.

20 130. This action is being brought on behalf of the State by Attorney General Gurbir S.
21 Grewal, the State's chief legal officer. *See* N.J. Stat. Ann. § 52:17A-4(e), (g).

22 131. New Jersey is aggrieved by the actions of Defendants and has standing to bring
23 this action because of the injury due to the loss of federal funding to the State caused by
24 Defendants' diversion of funding. The threat of a loss of funding to conduct drug interdiction and
25 counter-narcotic activity prevents critical criminal counter-narcotics programs and threatens the
26 public safety of all New Jersey residents. The diversion of funding from the Treasury Forfeiture
27 Fund will harm public safety by impacting critically necessary funding for law enforcement
28 officials and their agencies.

132. New Jersey is aggrieved by the actions of Defendants and has standing to bring this action because of the injury due to the loss of federal funding to the State caused by Defendants' diversion of funding. The threat of a loss of funding to conduct drug interdiction and counter-narcotic activity prevents critical criminal counter-narcotics programs and threatens the public safety of all New Jersey residents.

133. New Jersey conducts joint law enforcement activity with federal agencies and receives equitable sharing payments through the Treasury Forfeiture Fund on a regular basis. The diversion of funding from the Treasury Forfeiture Fund will harm public safety by impacting critically necessary funding for law enforcement officials and their agencies.

134. In filing this action, the Attorney General seeks to protect the residents and agencies of New Jersey from harm caused by Defendants' illegal conduct, prevent further harm, and seek redress for the injuries caused to New Jersey by Defendants' actions. Those injuries include harm to New Jersey's sovereign, quasi-sovereign, and proprietary interests.

PLAINTIFF STATE OF NEW MEXICO

135. The State of New Mexico, represented by and through its Attorney General, is a sovereign state of the United States of America.

136. Attorney General Hector Balderas is the chief legal officer of the State of New Mexico. He is authorized to prosecute all actions and proceedings on behalf of New Mexico when, in his judgment, the interest of the State requires such action. N.M. Stat. Ann. § 8-5-2(B). This challenge is brought pursuant to Attorney General Balderas's statutory and common law authority.

137. Governor Michelle Lujan Grisham possesses the “supreme executive power” of the State of New Mexico. N.M. Const., art. V, § 4. She has the responsibility to execute the laws of the State and preserve the public peace. *Id.* She also has the authority to oversee the State’s agencies that will be affected by Defendants’ actions. N.M. Const., art. V, § 5.

138. New Mexico shares over 179 miles of its southern border with Mexico.⁵

This close relationship gives New Mexico a special interest in the economic and public safety

⁵ *U.S. International Borders*, *supra* note 2.

1 consequences of cross-border activity. Attorney General Balderas has worked with law
2 enforcement counterparts in Mexico to facilitate international extraditions, implement
3 technologies to combat human trafficking, and train prosecutors.⁶ Trade across New Mexico's
4 southern border is a crucial component of the State's economy, with Mexico its largest export
5 partner.⁷

6 139. New Mexico is aggrieved by Defendants' actions and has standing to bring this
7 lawsuit. Defendants' diversion of federal funding to conduct drug-interdiction and counter-
8 narcotics efforts threatens the safety and health of all New Mexicans.

9 140. New Mexico will also be harmed by Defendants' diversion of military
10 construction funding. Some \$85 million of this funding currently is allocated to construct a MQ-
11 9 Formal Training Unit at Holloman Air Force Base in Otero County, New Mexico.⁸ Another
12 \$40 million is allocated to White Sands Missile Range in New Mexico to build an information
13 systems facility.⁹ The loss of these projects would harm New Mexico's economy, particularly in
14 the communities surrounding these military installations.

15 141. If Defendants use the diverted funding to construct any of their border wall in New
16 Mexico, it will also impose environmental harm to the State. The environmental damage caused
17 by a border wall in New Mexico would include the blocking of wildlife migration, flooding, and
18 habitat loss.¹⁰ Further, this border wall would be constructed on state land, taking the State's

19
20 ⁶ Ryan Boetel, *Attorney General Announces Pilot Project for Mexico Extraditions*,
21 Albuquerque J. (July 25, 2018), <https://tinyurl.com/y2zdbc8h>; PR Newswire, *TrustStamp and the*
22 *Conference of Western Attorneys General Alliance Partnership Introduce Technology to Ease*
23 *Data Sharing Among Law Enforcement* (Aug. 30, 2018), <https://tinyurl.com/y2seu64t>; Carol
24 Clark, *AG Balderas Trains Mexican Prosecutors, Forensic Scientists, Investigators in Effort to*
25 *Stop Crime From Crossing Border*, Los Alamos Daily Post (Nov. 3, 2017),
26 <https://tinyurl.com/y3mcvrms>.

27 ⁷ Int'l Trade Admin., *New Mexico Exports, Jobs, & Foreign Investment* (Feb. 2018),
28 <https://tinyurl.com/y25tsost>.

⁸ Alamogordo Daily News, *Holloman Getting \$85M for Construction Project* (Feb. 3,
2018), <https://tinyurl.com/y5u7vx4k>.

⁹ Miriam U. Rodriguez, *WSMR to Build State of the Art Information Systems Facility*,
U.S. Army (Jan. 10, 2018), <https://tinyurl.com/y3yr24yr>.

¹⁰ See Robert Peters et al., *Nature Divided, Scientists United: US-Mexico Border Wall*
27 *Threatens Biodiversity and Binational Conservation*, 68 *BioScience* 740, 743 (Oct. 2018),
28 <https://tinyurl.com/y3t4ymfn>.

1 sovereign property.¹¹

2 **PLAINTIFF STATE OF NEW YORK**

3 142. The State of New York, represented by and through its Attorney General, is a
4 sovereign state of the United States of America. The Attorney General is New York State's chief
5 law enforcement officer and is authorized to pursue this action pursuant to N.Y. Executive Law
6 section 63.

7 143. Upon information and belief, New York is aggrieved by the actions of Defendants
8 and has standing to bring this action because of the injury due to the loss of federal funding to the
9 State caused by Defendants' diversion of federal funds. The loss of funding to conduct drug
10 interdiction and counter-narcotic activity would injure the State's law enforcement agencies and
11 threaten the public safety of all New Yorkers.

12 144. New York participates in the Treasury Forfeiture Fund through state law
13 enforcement agencies, state prosecutorial agencies, and joint federal-state task forces, and
14 regularly receives equitable sharing payments to state agencies from forfeitures generated by joint
15 law enforcement operations with federal law enforcement. Defendants' unlawful diversion of
16 funding from the Treasury Forfeiture Fund will harm the public safety of New York's residents
17 by impacting critically necessary funding for law enforcement officers and their agencies.

18 145. Upon information and belief, Defendants' unlawful diversion of funding from
19 military construction projects in New York to construction of a border wall will injure New
20 York's economy and, by damaging the State's critical security infrastructure, threaten the safety
21 of New York's National Guard and of all New York residents.

22 **PLAINTIFF STATE OF OREGON**

23 146. Plaintiff State of Oregon, acting through its Attorney General, Ellen Rosenblum, is
24 a sovereign state in the United States of America.

25 147. Attorney General Rosenblum is the chief law officer of Oregon and is empowered
26 to bring this action on behalf of the State of Oregon and the affected state agencies under ORS

27 _____
28 ¹¹ See Deming Headlight, *N.M. Land Commish Aubrey Dunn Rejects Settlement Offer from CBP* (Aug. 17, 2018), <https://tinyurl.com/y557wpcb>.

1 160.060, ORS 180.210, and ORS 180.220.

2 148. On information and belief, Oregon is aggrieved by the actions of Defendants and
3 has standing to bring this action because of the injury due to the loss of federal funding to the
4 State caused by Defendants' diversion of federal funds. The loss of funding to conduct drug
5 interdiction and counter-narcotic activity, including funding that supports Oregon's work in this
6 area with other States, would threaten the public safety of all Oregonians.

7 149. On information and belief, the diversion of military construction funds will harm
8 Oregon. Defendants' diversion of funding from military construction projects in Oregon to
9 construction of a border wall in Texas, New Mexico, Arizona, and California would impact
10 Oregon's economy. In particular and without limitation, any diversion of funds from U.S. Army
11 Corps of Engineers projects in Oregon would harm Oregon's environment and could cause
12 flooding and other dangers to the health and safety of Oregonians.

13 150. Oregon has received money from the Treasury Forfeiture Fund in the past and
14 expects to receive comparable monies in the future absent diversion to fund the construction of a
15 wall. According to federal audits of the Treasury Forfeiture Fund in 2018, Oregon received more
16 than \$9 million in equitable sharing from the Treasury Forfeiture Fund over the years 2008-2017.
17 These resources are used to supplement and enhance law enforcement agencies' state-
18 appropriated funding.

19 **PLAINTIFF STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS**

20 151. The State of Rhode Island, represented by and through its Attorney General, is a
21 sovereign state of the United States of America.

22 152. Attorney General Peter F. Neronha is the chief law officer of the State of Rhode
23 Island and has the authority to file civil actions to protect Rhode Island's rights and the rights of
24 Rhode Island citizens. The Attorney General has the authority to file suit to take legal action
25 against the federal government for the protection of the public interest and welfare of Rhode
26 Island citizens as a matter of constitutional, statutory, and common law authority. R.I. Const. art.
27 IX, sec. 12; R.I. Gen. Laws §§ 42-9-1, et seq.; *see also State v. Lead Industries Ass'n*, 951 A.2d
28 428 (R.I. 2008).

1 153. The Governor of Rhode Island, Gina M. Raimondo, is the chief executive officer
2 of the State of Rhode Island. The Governor oversees the operations of the State and is in charge
3 of the State military, the Rhode Island National Guard, which is comprised of the Rhode Island
4 Army National Guard, Rhode Island Air National Guard, and the Historic Rhode Island Militia.

5 154. The Rhode Island National Guard is the oldest military branch in the United States
6 and consists of over 3,300 members (2,178 in the Army National Guard, 1,136 in the Air National
7 Guard) and operates 14 armories, three air bases, two training sites, 10 support buildings, four
8 organization maintenance facilities, and one combined support maintenance facility and is
9 responsible for responding to statewide civil emergencies declared by the Governor, as well as
10 supporting the defense of the nation and national security interests, including actively
11 participating in counterdrug efforts.

12 155. The Rhode Island National Guard is financed with approximately 74 percent
13 federal funds and federal equipment housed and secured at these facilities and is valued in excess
14 of \$500 million. The estimated annual impact on the State attributed to National Guard programs
15 exceeds \$238 million.¹²

16 156. The Rhode Island National Guard, Counterdrug Support program (“RING-CD”),
17 coordinates and provides unique military skills and resources to support state and federal law
18 enforcement and community-based organizations in their efforts to disrupt and dismantle various
19 aspects of the illicit markets supporting the drug and narcotic trade.

20 157. RING-CD provides support to state and federal law enforcement agencies with
21 embedded criminal intelligence analysts, the local offices of the U.S. Drug Enforcement
22 Administration (“DEA”), the U.S. Postal Inspector Service (“USP”), the Food and Drug
23 Administration Office of Criminal Investigations (“FDA”), the U.S. Internal Revenue Service
24 (“IRS”), the U.S. Marshall Service, the Rhode Island State Police Narcotics, High Intensity Drug
25 Trafficking Area (“HIDTA”), and Financial Crimes Units, and the Providence Police
26 Department.¹³

27 ¹² State of Rhode Island and Providence Plantations, *Fiscal Year 2019 Budget*, Vol. IV,
28 103-111 (Jan. 2018), <http://tinyurl.com/y3nucc5s>.

¹³ R.I. Nat’l Guard, *Joint Units*, <https://ri.ng.mil/Joint-Units/>.

1 158. RING-CD provides support to Rhode Island State Police and local law
2 enforcement that is essential to combat illicit drug markets in Rhode Island, as well as ensuring
3 the health and safety of officers, investigators, and other law enforcement personnel from the
4 evolving dangers that the drug trade poses.¹⁴

5 159. For Fiscal Year 2018, the Rhode Island National Guard received approximately
6 \$852,000 in connection with the U.S. Department of Defense National Guard Counterdrug
7 program for state drug interdiction and counterdrug activities.

8 160. For Fiscal Year 2019, the U.S. Department of Defense allocated approximately
9 \$900,000 to be paid in monthly installments to the Rhode Island National Guard in connection
10 with the U.S. Department of Defense National Guard Counterdrug program for state drug
11 interdiction and counterdrug activities.

12 161. For Fiscal Year 2019, the Rhode Island National Guard has received
13 approximately \$450,000 under the National Guard Counterdrug program and approximately
14 \$450,000 remains outstanding.

15 162. The Rhode Island State Police is a full-service, statewide law enforcement agency
16 whose mission is to fulfill the law enforcement needs of the people with the highest degree of
17 fairness, professionalism, and integrity, and protect the inherent rights of the people of Rhode
18 Island to live in freedom and safety.

19 163. The Rhode Island State Police receives funds from the Treasury Forfeiture Fund in
20 connection with law enforcement activities jointly performed by and between the Rhode
21 Island State Police and federal law enforcement agencies.

22 164. In 2018, the Rhode Island State Police received approximately \$26,960.10 from
23 the Treasury Forfeiture Fund in connection with joint law enforcement actions.

24 _____
25 ¹⁴ For example, in 2018 RING-CD procured a Liquid Chromatography Mass
26 Spectrometer. This device supports Rhode Island's efforts to combat the dramatic effects of
27 opioid abuse. The Rhode Island Department of Health Forensic Toxicology Laboratory
28 previously identified a significant lag in confirming the presence of illicit trace evidence to the
Law Enforcement Community. This device, and RING memorandum of agreement with the
Department of Health, targets that capability gap. This system began supporting casework in
Rhode Island during the last fiscal year. R.I. Nat'l Guard, *Annual Report 2018*,
<http://tinyurl.com/y2qagky6>.

165. So far, in 2019, the Rhode Island State Police has received approximately \$19,305.77 from the Treasury Forfeiture Fund in connection with joint law enforcement actions.

166. At present, the Rhode Island State Police has 59 forfeiture requests pending for U.S. currency and property seized during investigations between the Rhode Island State Police and federal law enforcement agencies. The forfeitures seized in connection with these pending applications is estimated to be valued at approximately \$4,285,721.81 of which Rhode Island is entitled to a *pro rata* share.

167. Upon information and belief, the Executive Actions seek to divert some or all funds referenced in the prior paragraph from the Treasury Forfeiture Fund. These funds have been shared or distributed to Rhode Island in the past and Rhode Island presently has applications pending for equitable sharing relating to the Treasury Forfeiture Fund.

168. Rhode Island is aggrieved by the actions of Defendants and has standing to bring this action because of the loss of federal funding from the Treasury Forfeiture Fund.

169. Diversion of funds from the Treasury Forfeiture Fund will deprive Rhode Island of access to funds that would otherwise be available for law enforcement purposes, negatively impacting the public safety and welfare of Rhode Island citizens.

PLAINTIFF STATE OF VERMONT

170. The State of Vermont, represented by and through its Attorney General, is a sovereign state of the United States of America.

171. Attorney General Thomas J. Donovan is the chief legal officer of the State of Vermont and has the authority to file civil actions to protect Vermont's rights and interests. Vt. Stat. Ann. tit. 3, §§ 152, 157.

172. Vermont is aggrieved by the actions of Defendants and has standing to bring this action because of the injury due to the loss of federal drug interdiction, counter-narcotic, and law enforcement funding to the State caused by Defendants' diversion of funding. The threat of losing funding to conduct drug interdiction and counter-narcotic activity threatens the public safety of all Vermonters.

173. Vermont participates in the Treasury Forfeiture Fund through state and local law

1 enforcement agencies. These Vermont law enforcement agencies regularly receive equitable
2 sharing payments from the Treasury Forfeiture Fund and expect to receive comparable payments
3 in the future absent diversion to fund the construction of a wall.

4 174. The diversion of funding from the Treasury Forfeiture Fund will harm public
5 safety by impacting critical funding for these law enforcement agencies and their officers.

6 **PLAINTIFF COMMONWEALTH OF VIRGINIA**

7 175. The Commonwealth of Virginia is a sovereign state of the United States of
8 America.

9 176. The Commonwealth of Virginia brings this action by and through its Attorney
10 General, Mark R. Herring. The Attorney General has authority to represent the Commonwealth,
11 its departments, and its agencies in “all civil litigation in which any of them are interested.” Va.
12 Code Ann. § 2.2-507(A).

13 177. On information and belief, the Commonwealth of Virginia will be injured by the
14 diversion of funding from the Treasury Forfeiture Fund. The Commonwealth participates as an
15 equitable sharing partner in the Fund and, from 2013 to 2017, received over \$122 million in
16 distributions to state and local law enforcement. On information and belief, the announced
17 diversion of forfeiture funding will diminish the future funding available for the
18 Commonwealth’s participating law enforcement agencies, thereby decreasing the resources
19 available for future investigations to the detriment of the safety and welfare of Virginia’s citizens
20 and law enforcement officers.

21 178. On information and belief, the Commonwealth of Virginia will be injured by the
22 diversion of funding from the Treasury Forfeiture Fund. The Commonwealth participates as an
23 equitable sharing partner in the Fund and, in the past five years, has received over \$79 million in
24 distributions to state and local law enforcement. On information and belief, the announced
25 diversion of forfeiture funding will diminish the funding available for the Commonwealth’s
26 participating law enforcement agencies.

27 179. On information and belief, the Commonwealth of Virginia would likewise be
28 aggrieved if Defendants divert federal funding under the National Guard Drug Interdiction and

1 Prevention Program for use on a southern border wall. This loss of funding—to the tune of
2 approximately \$3 million for Virginia—to implement counter-narcotics and drug interdiction
3 measures would threaten the public safety of all Virginians.

4 **PLAINTIFF STATE OF WISCONSIN**

5 180. The State of Wisconsin is a sovereign state of the United States of America.

6 181. Governor Tony Evers is the chief executive officer of the State of Wisconsin and
7 has the duty to “take care that the laws be faithfully executed.” Wis. Const. art. V, §§ 1, 4. The
8 Governor is the commander-in-chief of the military and naval forces of the State, including the
9 Wisconsin National Guard. Wis. Const. art. V, § 1.

10 182. Attorney General Joshua L. Kaul is the chief legal officer of the State of
11 Wisconsin and has the authority to file civil actions to protect Wisconsin’s rights and interests.
12 *See* Wis. Stat. § 165.25(1m). The Attorney General’s powers and duties include appearing for
13 and representing the State, on the governor’s request, “in any court or before any officer, any
14 cause or matter, civil or criminal, in which the state or the people of this state may be interested.”
15 Wis. Stat. § 165.25(1m).

16 183. The State of Wisconsin brings this action by and through its Attorney General,
17 Joshua L. Kaul.

18 184. In filing this action, the Attorney General seeks to redress and prevent injuries to
19 the State and its residents caused by Defendants’ illegal diversion of federal funds to build the
20 border wall. These injuries include harms to Wisconsin’s sovereign, quasi-sovereign, and
21 proprietary interests.

22 185. Wisconsin has an interest in protecting the State’s economy and security, as well
23 as the health, safety, and welfare of its residents.

24 186. Wisconsin has an interest in protecting its tax revenues, including those resulting
25 from economic activity in communities near military bases in Wisconsin.

26 187. On information and belief, Defendants’ diversion of funds for the border wall
27 includes over \$29 million in military construction funding for projects currently planned in
28 Wisconsin.

188. Wisconsin is home to multiple military bases, which play a critical role in our nation's defense and in Wisconsin's economy. On information and belief, Defendants' diversion of funds from necessary maintenance and repairs at these military bases would harm Wisconsin's economy and the economic welfare of Wisconsin residents.

189. Additionally, the Wisconsin National Guard has over 10,000 soldiers and airmen who are trained to assist civil authorities in protecting life and property, and in preserving peace, order, and public safety during emergencies, as directed by the Governor of Wisconsin. The Wisconsin National Guard receives a majority of its funding from the federal government.

190. On information and belief, the diversion of military construction funding for projects supporting or used by the Wisconsin National Guard would interfere with the Wisconsin National Guard's ability to provide these services for the State, thereby injuring the State and its residents.

191. Further, on information and belief, Defendants' diversion of funds for the border wall also includes funds otherwise allocated to Wisconsin or its agencies for drug interdiction and counter-narcotics efforts.

192. On information and belief, Defendants' diversion of funds otherwise allocated for drug interdiction and counter-narcotics efforts in Wisconsin would prevent state law enforcement agencies from implementing critical programs and initiatives, thereby threatening the State's security and economic welfare, as well as the health, safety, and welfare of Wisconsin residents.

193. On information and belief, Defendants' diversion of funding from the Treasury Forfeiture Fund would harm public safety in Wisconsin by impacting critically necessary funding for law enforcement officers and their agencies.

DEFENDANTS

194. Defendant Donald J. Trump, the President of the United States of America, is responsible for the actions and decisions that are being challenged by Plaintiffs in this action and is sued in his official capacity.

195. Defendant United States of America is responsible for enforcing laws that are consistent with the United States Constitution.

1 196. Defendant Department of Defense (“DOD”) is the federal agency to which
2 Congress has appropriated the military construction and drug interdiction funding implicated by
3 the President’s Executive Actions. Defendant DOD is an executive department of the United
4 States of America pursuant to 5 U.S.C. section 101, and a federal agency within the meaning of
5 28 U.S.C. section 2671. As such, it engages in agency action within the meaning of 5 U.S.C.
6 section 702, and is named as a defendant in this action pursuant to 5 U.S.C. section 702.

7 197. Defendant Patrick M. Shanahan, acting Secretary of Defense, oversees the DOD
8 and is responsible for the actions and decisions that are being challenged by Plaintiffs in this
9 action. Defendant Shanahan is sued in his official capacity pursuant to 5 U.S.C. section 702.

10 198. Defendant Mark T. Esper, Secretary of the Army, oversees the United States Army
11 within DOD, and is responsible for the actions and decisions that are being challenged by
12 Plaintiffs in this action. Defendant Esper is sued in his official capacity pursuant to 5 U.S.C.
13 section 702.

14 199. Defendant Richard V. Spencer, Secretary of the Navy, oversees the United States
15 Navy within DOD, and is responsible for the actions and decisions that are being challenged by
16 Plaintiffs in this action. Defendant Spencer is sued in his official capacity pursuant to 5 U.S.C.
17 section 702.

18 200. Defendant Heather A. Wilson, Secretary of the Air Force, oversees the United
19 States Air Force within DOD, and is responsible for the actions and decisions that are being
20 challenged by Plaintiffs in this action. Defendant Wilson is sued in her official capacity pursuant
21 to 5 U.S.C. section 702.

22 201. Defendant Department of the Treasury (the “Treasury”) is the federal agency
23 responsible for the Treasury Forfeiture Fund that is implicated by the President’s Executive
24 Actions. Defendant the Treasury is an executive department of the United States of America
25 pursuant to 5 U.S.C. section 101, and a federal agency within the meaning of 28 U.S.C. section
26 2671. As such, it engages in agency action within the meaning of 5 U.S.C. section 702, and is
27 named as a defendant in this action pursuant to 5 U.S.C. section 702.

28 202. Defendant Steven T. Mnuchin, Secretary of the Treasury, oversees the Treasury

1 and is responsible for the actions and decisions that are being challenged by Plaintiffs in this
2 action. Defendant Mnuchin is sued in his official capacity pursuant to 5 U.S.C. section 702.

3 203. Defendant Department of Homeland Security (“DHS”) is the federal agency
4 responsible for providing border security along the United States-Mexico border in a manner that
5 is consistent with the laws and Constitution of the United States. Defendant DHS is an executive
6 department of the United States of America pursuant to 5 U.S.C. section 101, and a federal
7 agency within the meaning of 28 U.S.C. section 2671. As such, it engages in agency action
8 within the meaning of 5 U.S.C. section 702, and is named as a defendant in this action pursuant to
9 5 U.S.C. section 702.

10 204. Defendant Kirstjen M. Nielsen, Secretary of DHS, oversees DHS and is
11 responsible for the actions and decisions that are being challenged by Plaintiffs in this action.
12 Defendant Nielsen is sued in her official capacity pursuant to 5 U.S.C. section 702.

13 205. Defendant Department of the Interior (“DOI”) is the federal agency responsible for
14 managing federal lands.

15 206. Defendant David Bernhardt, acting Secretary of the Interior, oversees the
16 Department of the Interior, and is responsible for the actions that are being challenged by
17 Plaintiffs in this action. Defendant Bernhardt is sued in his official capacity.

18 **FACTUAL ALLEGATIONS**

19 **I. PRESIDENT TRUMP HAS LONG CLAIMED THAT A “CRISIS” AT THE BORDER** 20 **REQUIRES BUILDING A BORDER WALL, BUT HAS NOT DECLARED A NATIONAL** **EMERGENCY UNTIL NOW**

21 207. Dating back to at least August 2014, President Trump has advocated for a wall
22 along the southern border.¹⁵

23 208. In his speech announcing his candidacy for President in June 2015, President
24 Trump claimed that a border wall is needed to stop a tide of illegal immigration, and that he
25 would build it as President and have Mexico pay for the wall.¹⁶ In the same speech, he also

26 ¹⁵ Donald J. Trump (@realDonaldTrump), Twitter (Aug. 5, 2014, 1:34 PM),
27 <https://tinyurl.com/ydre3ep>.

28 ¹⁶ Time, *Here’s Donald Trump’s Presidential Announcement Speech* (June 16, 2015),
<https://tinyurl.com/qzk4wrv>.

1 stated, “When Mexico sends its people, they’re not sending their best . . . They’re bringing drugs.
2 They’re bringing crime. They’re rapists.” This claim and his promise to build a wall and have
3 Mexico pay for it became a consistent theme of his campaign.

4 209. President Trump repeatedly stated that the border wall he planned to build would
5 help prevent terrorism, crime, and drug smuggling. For example, on October 4, 2014, President
6 Trump tweeted, “The fight against ISIS starts at our border. ‘At least’ 10 ISIS have been caught
7 crossing the Mexico border. Build a wall!”¹⁷ More recently, on February 3, 2019, President
8 Trump tweeted, “If there is no Wall, there is no Security. Human Trafficking, Drugs and
9 Criminals of all dimensions - KEEP OUT!”¹⁸

10 210. On July 13, 2016, President Trump tweeted, “We will build the wall and MAKE
11 AMERICA SAFE AGAIN!”¹⁹

12 211. On August 27, 2016, President Trump tweeted that “[h]eroin overdoses are taking
13 over our children and others in the MIDWEST. Coming in from our southern border. We need
14 strong border & WALL!”²⁰

15 212. In a speech shortly before the 2016 presidential election, President Trump stated
16 that “[o]n day one [of his Administration], we will begin working on an impenetrable, physical,
17 tall, power [sic], beautiful southern border wall” to “help stop the crisis of illegal crossings” and
18 “stop the drugs and the crime from pouring into our country.”²¹

19 213. As President, President Trump has continued to repeatedly mention the need for
20 the border wall and his intention to build it.

21 214. On January 27, 2017, President Trump discussed his proposed border wall with
22 Mexico’s then-President Enrique Peña Nieto, in which he reportedly pressured Mexico to pay for
23

24 ¹⁷ Donald J. Trump (@realDonaldTrump), Twitter (Oct. 8 2014, 2:26 PM),
25 <https://tinyurl.com/yxntlamo>.

26 ¹⁸ *Id.* (Feb. 3, 2019, 2:03 PM), <https://tinyurl.com/yywmw9yx>.

27 ¹⁹ *Id.* (Jul. 13, 2016, 2:56 PM), <https://tinyurl.com/gm8yty6>.

28 ²⁰ *Id.* (Aug. 27, 2016, 7:17 AM), <https://tinyurl.com/y3f6bp9s>.

²¹ N.Y. Times, *Transcript of Donald Trump’s Immigration Speech* (Sept. 1, 2016),
<https://tinyurl.com/yalom4hl>.

1 the border wall and stated that he “[has] been talking about it for a two-year period.”²²

2 215. On February 28, 2017, President Trump delivered an address to a joint session of
3 Congress in which he stated that in order to “restore integrity and the rule of law at our
4 borders . . . we will soon begin the construction of a great, great wall along our southern
5 border.”²³

6 216. Additional statements by President Trump regarding the border wall include a
7 campaign rally speech on August 22, 2017 (“[W]e are building a wall on the southern border
8 which is absolutely necessary.”),²⁴ and tweets on January 26, 2017 (“badly needed wall”),²⁵
9 February 23, 2018 (“MS-13 gang members are being removed by our Great ICE and Border
10 Patrol Agents by the thousands, but these killers come back in from El Salvador, and through
11 Mexico, like water. . . . We need The Wall!”),²⁶ June 21, 2018 (“We shouldn’t be hiring judges
12 by the thousands, as our ridiculous immigration laws demand, we should be changing our laws,
13 building the Wall, hire Border Agents and Ice [sic] and not let people come into our country
14 based on the legal phrase they are told to say as their password.”),²⁷ December 19, 2018
15 (“Because of the tremendous dangers at the Border, including large scale criminal and drug
16 inflow, the United States Military will build the Wall!”),²⁸ and December 31, 2018 (“I
17 campaigned on Border Security, which you cannot have without a strong and powerful Wall. Our
18 Southern Border has long been an ‘Open Wound,’ where drugs, criminals (including human
19 traffickers) and illegals would pour into our Country. Dems should get back here an [sic] fix
20 now!”).²⁹

21 ²² Greg Miller, *Trump Urged Mexican President to End His Public Defiance on Border*
22 *Wall, Transcript Reveals*, Wash. Post (Aug. 3, 2017), <https://tinyurl.com/y3gqdf2m>.

23 ²³ White House, *Remarks by President Trump in Joint Address to Congress* (Feb. 28,
2017), <https://tinyurl.com/y4kvpj7n>.

24 ²⁴ Time, *President Trump Ranted for 77 Minutes in Phoenix. Here’s What He Said* (Aug.
24 23, 2017), <https://tinyurl.com/ycxt2woc>.

25 ²⁵ Donald J. Trump (@realDonaldTrump), Twitter (Jan. 26, 2017, 5:55 AM),
<https://tinyurl.com/zm26eaf>.

26 ²⁶ *Id.* (Feb. 23, 2018, 3:28 AM), <https://tinyurl.com/y9xypa55>.

27 ²⁷ *Id.* (June 21, 2018, 5:12 AM), <https://tinyurl.com/y3zaqk7d>.

28 ²⁸ *Id.* (Dec. 19, 2018, 5:43 AM), <https://tinyurl.com/y95cnd8r>.

²⁹ *Id.* (Dec. 31, 2018, 5:29 AM), <https://tinyurl.com/y6stmopr>.

1 217. Indeed, President Trump has made it clear that his plan to build the border wall
2 would go forward regardless of the actual need for one. During a speech to the National Rifle
3 Association, President Trump stated in the context of statistics showing a decrease in unauthorized
4 border crossings that “we will build the wall no matter how low this number gets or how this goes.
5 Don’t even think about it. Don’t even think about it.”³⁰

6 218. The salient facts regarding the ostensible “crisis” that President Trump repeatedly
7 invoked in these numerous statements have not significantly changed since his inauguration as
8 President in January 2017.

9 219. President Trump acknowledged this when he stated that the “emergency” at the
10 border “began a long time [ago],” citing 2014 as the beginning of the ostensible “crisis at the
11 border.”³¹

12 220. There is no evidence of change to the historic pattern of unauthorized immigrants
13 committing crimes at substantially lower rates than native-born Americans.³²

14 221. The federal government’s own data also show that the vast majority of the drugs
15 smuggled into the country that the President has singled out as dangerous (methamphetamine,
16 heroin, cocaine, and fentanyl)³³ continue to come through, not between, ports of entry.³⁴

17 222. There continues to be a lack of credible evidence that terrorists are using the
18 southern border as a means of entering the United States, as a State Department report produced
19 under the Trump Administration makes clear.³⁵

20 ³⁰ White House, *Remarks by President Trump at the National Rifle Association*
21 *Leadership Forum* (Apr. 28, 2017), <https://tinyurl.com/y5dtnaej>.

22 ³¹ White House, *Remarks by President Trump Before Marine One Departure* (Jan. 10,
2019), <https://tinyurl.com/yyc5w5dk>.

23 ³² See, e.g., Alex Nowrateh, *The Murder of Mollie Tibbetts and Illegal Immigrant Crime: The Facts*, Cato Institute (Aug. 22, 2018), <https://tinyurl.com/y5boc9me> (showing that “[t]he
24 illegal immigrant conviction rate for homicide was 44 percent below that of native-born
Americans in 2016 in Texas”) (emphasis in original).

25 ³³ White House, *President Donald J. Trump’s Address to the Nation on the Crisis at the*
26 *Border* (Jan. 8, 2019), <https://tinyurl.com/y5uloxyg>.

27 ³⁴ CBP, *CBP Enforcement Statistics FY2018*, <https://tinyurl.com/y9c4c6ft> (showing that
28 through August 2018, federal agents seized 88 percent of cocaine, 90 percent of heroin, 87
percent of methamphetamine, and 80 percent of fentanyl at ports of entry in this fiscal year).

³⁵ U.S. Dep’t of State, Bureau of Counterterrorism, *Country Reports on Terrorism 2017*

1 223. In his own public statements, President Trump has made clear that his emergency
2 declaration was triggered by his inability to secure funding for the border wall from Congress
3 rather than an actual national emergency at the border.

4 224. When asked by the media about his plans to declare a national emergency relating
5 to the border wall, President Trump stated his preference for “do[ing] the deal through Congress,”
6 but that if the deal did not “work out” he would “almost . . . definitely” declare a national
7 emergency.³⁶ While he reiterated his claims that the volume of drugs, criminals, and gangs
8 coming through the border between ports of entry constituted a “crisis,” President Trump
9 repeatedly cited the ongoing impasse with Congress as his rationale for the emergency
10 declaration.³⁷

11 225. Around the same time, when asked by the media what his threshold was for
12 declaring a national emergency, President Trump responded, “My threshold will be if I can’t
13 make a deal with people that are unreasonable.”³⁸

14 226. On February 1, 2019, President Trump made clear in an interview that he was
15 planning to wait until February 15, the deadline for a congressional conference committee to avert
16 another government shutdown, before issuing an emergency declaration.³⁹ President Trump
17 claimed he was already building the border wall, and strongly implied that he needed neither
18 additional funding nor an emergency declaration to build it.⁴⁰

19
20 205 (Sept. 2018), <https://tinyurl.com/y93n5fes>.

21 ³⁶ *Trump Remarks before Marine One Departure*, *supra* note 31.

22 ³⁷ *Id.*

23 ³⁸ George Sargent, *Trump: I Have the ‘Absolute Right’ to Declare a National Emergency*
24 *if Democrats Defy Me*, Wash. Post (Jan 9, 2018), <https://tinyurl.com/y4vmtezb>.

25 ³⁹ N.Y. Times, *Excerpt from Trump’s Interview with the New York Times* (Feb. 1, 2019),
26 <https://tinyurl.com/y9gsosk4>; see also CBS, *Transcript: President Trump on “Face the Nation”*
27 (Feb. 3, 2019), <https://tinyurl.com/y8l38g72> (President Trump describing emergency declaration
28 as an “alternative” to the process that Congress was engaged in to avert another shutdown, which
was to end on February 15).

⁴⁰ *New York Times Interview*, *supra* note 39 (President Trump stating: “I’m building the
wall right now. . . . it’s been funded We’ll be up to, by the end of this year, 115 miles
At least And that doesn’t include large amounts of wall that we’ll be starting before the end
of the year. So we’ll be up to hundreds of miles of wall between new wall and renovation wall in
a fairly short period of time And I’ll continue to build the wall, and we’ll get the wall

1 227. During a press conference that same day, when asked whether he would consider
2 other options besides the emergency declaration, President Trump stated that “we will be looking
3 at a national emergency, because I don’t think anything is going to happen [in Congress]. I think
4 the Democrats don’t want border security.”⁴¹ President Trump also repeated his view that the
5 wall was already being built “with funds that are on hand . . . we’re building a lot of wall right
6 now, as we speak . . . [a]nd we’re getting ready to hand out some very big contracts with money
7 that we have on hand and money that comes in.”⁴²

8 **II. CONGRESS HAS APPROPRIATED LIMITED FUNDING TOWARD A BORDER BARRIER**
9 **AND NO FUNDING TOWARD PRESIDENT TRUMP’S PROPOSED BORDER WALL**

10 228. Congress has exercised its Article I powers by appropriating funds for the
11 construction of border barriers and related infrastructure when Congress deemed it appropriate.
12 During the period of 2005 through 2011, Congress appropriated funding for the construction of
13 hundreds of miles of border barriers.⁴³ Currently, there is a total of 705 miles of primary,
14 secondary, or tertiary fencing along 654 miles of the southwest border.⁴⁴

15 229. In the 115th Congress, between 2017 and 2018, Congress considered, but
16 repeatedly declined to adopt, legislation appropriating funding for President Trump’s proposed
17 border wall.⁴⁵

18 _____
19 finished. Now whether or not I declare a national emergency, that you’ll see”); *see also* Donald J.
20 Trump (@realDonaldTrump), Twitter (Jan. 31, 2019, 9:43 AM), <https://tinyurl.com/y56tevok>
21 (“Wall is being built!”).

22 ⁴¹ White House, *Remarks by President Trump in Meeting on Human Trafficking on the*
23 *Southern Border* (Feb. 1, 2019), <https://tinyurl.com/y5ghp3eh>.

24 ⁴² *Id.*

25 ⁴³ Gov’t Accountability Office, *Additional Actions Needed to Better Assess Fencing’s*
26 *Contributions to Operations and Provide Guidance for Identifying Capability Gaps*, GAO-17-
27 331 (Feb. 16, 2017), at 7-10, <https://tinyurl.com/yaqbny6e>; Gov’t Accountability Office, *Secure*
28 *Border Initiative Fence Construction Costs*, GAO-09-244R (Jan. 29, 2009), at 4-11,
<https://tinyurl.com/y2kgefp5>.

⁴⁴ U.S. Border Patrol, *Mileage of Pedestrian and Vehicle Fencing by State* (Aug. 2, 2017),
<https://tinyurl.com/y6f27h4e>.

⁴⁵ *See, e.g.*, The WALL Act of 2018, S. 3713, 115th Cong. (2018) (proposed \$25 billion
appropriation for border wall; no committee action); 50 Votes for the Wall Act, H.R. 7073, 115th
Cong. (2018) (proposed \$25 billion appropriation for funding for border wall; no committee
action); Build the Wall, Enforce the Law Act of 2018, H.R. 7059, 115th Cong. (2018) (proposed

1 230. Near the end of the 115th Congress, Congress worked on a funding bill before the
2 December 22, 2018 deadline when federal funding ran out for a number of federal departments.
3 On December 11, 2018, President Trump held a televised meeting with the Democratic leaders of
4 Congress (then-House Minority Leader Nancy Pelosi and Senate Minority Leader Chuck
5 Schumer) to discuss the funding deadline. At that meeting, President Trump said he wanted \$5
6 billion to build a portion of the border wall. President Trump said at that meeting, “If we don’t
7 get what we want one way or the other, whether it’s through you, through a military, through
8 anything you want to call, I will shut down the government, absolutely.” President Trump
9 reiterated that he would be “proud to shut down the government for border security.” At the
10 meeting, Leaders Schumer and Pelosi said they disagreed with the President on providing funding
11 for the border wall.⁴⁶

12 231. On December 19, 2018, the Senate passed by voice vote a bill to fund the
13 government through February 8, 2019 that did not include any funding for a border wall.
14 Department of Defense Appropriations Act of 2018, H.R. 695, 115th Cong. (2018).

15 232. After the Senate passed the temporary funding bill, on December 20, 2018,
16 President Trump announced that “I’ve made my position very clear. Any measure that funds the
17 government must include border security,” which he clarified must include funding for a wall.⁴⁷

18
19 \$16.6 billion appropriation for border wall; no committee action); Fund and Complete the Border
20 Wall Act, H.R. 6657, 115th Cong. (2018) (proposed authorization of funding for border wall; no
21 committee action); American Border Act, H.R. 6415, 115th Cong. (2018) (proposed \$16.6 billion
22 appropriation for border wall; no committee action); Border Security and Immigration Reform
23 Act of 2018, H.R. 6136, 115th Cong. (2018) (proposed \$16.6 billion appropriation for border
24 wall; voted down by House 301 to 121); Securing America’s Future Act of 2018, H.R. 4760,
25 115th Cong. (2018) (proposed construction of physical barrier, including border wall; voted down
26 by House 231-193); Border Security and Deferred Action Recipient Relief Act, S. 2199, 115th
27 Cong. (2017) (proposal to make available \$38.2 million for planning for border wall construction;
28 no action in Senate); Make America Secure Appropriations Act, H.R. 3219, 115th Cong. (2017)
(proposed \$38.2 million appropriation for border wall; passed House of Representatives, but no
action by Senate).

⁴⁶ CSPAN, *President Trump Meeting with Democratic Leaders* (Dec. 11, 2018),
<https://tinyurl.com/ycalrz3x>.

⁴⁷ CNN, *Trump: “I’ve Made My Position Very Clear” on Spending Bill* (Dec. 20, 2018),
<https://tinyurl.com/yy9cvzdd>.

1 233. On December 20, 2018, the House of Representatives approved a short-term
2 funding bill appropriating \$5.7 billion for “U.S. Customs and Border Protection – Procurement,
3 Construction, and Improvements.” Department of Defense Appropriations Act of 2018, H.R.
4 695, 115th Cong. (2018). The Senate never passed the House-approved version of the legislation.

5 234. With no agreement between Congress and the President on funding, on December
6 22, 2018, the federal government partially shut down.

7 235. On January 3, 2019, Nancy Pelosi became Speaker of the House. The day before,
8 Speaker Pelosi reiterated in a televised interview that the House would be providing “[n]othing
9 for the wall.”⁴⁸ On January 3, the House of Representatives approved a short-term funding bill
10 without any funding for a border wall. Consolidated Appropriations Act of 2019, H.R. 21, 116th
11 Cong. (2019). The Senate never passed the House-approved version of the legislation.

12 236. The Office of Management and Budget formally requested \$5.7 billion from
13 Congress for the border wall on January 6, 2019.⁴⁹

14 237. On January 19, 2019, President Trump addressed the nation regarding the partial
15 government shutdown and laid out his immigration proposal. In his remarks, he repeated his
16 unsupported claims of an immigration enforcement crisis at the border in connection with his
17 continued proposal for \$5.7 billion in funding for a wall, stating that “[a]s a candidate for
18 president, I promised I would fix this crisis, and I intend to keep that promise one way or the
19 other.”⁵⁰

20 238. When he announced the congressional agreement that ended the government
21 shutdown on January 25, 2019, President Trump stated: “If we don’t get a fair deal from
22 Congress, the government will either shut down on February 15th, again, or I will use the powers
23 afforded to me under the laws and the Constitution of the United States to address this

24
25 ⁴⁸ Tal Axelrod, *Pelosi on Negotiations with Trump: “Nothing for the Wall”*, The Hill,
(Jan. 2, 2019), <https://tinyurl.com/y77o89hp>.

26 ⁴⁹ Letter from Russell T. Vought, Acting Director, Off. of Mgmt. and Budget, to Sen.
Richard Shelby (Jan. 6, 2019), <https://tinyurl.com/y224y59q>.

27 ⁵⁰ White House, *Remarks by President Trump on the Humanitarian Crisis on our*
28 *Southern Border and the Shutdown* (Jan. 19, 2019), <https://tinyurl.com/y7gdj6s8>.

1 emergency.”⁵¹

2 239. After weeks of negotiation, on February 14, 2019, Congress passed the
3 Consolidated Appropriations Act, 2019 (H.J. Res. 31) (the “2019 Appropriations Act”). The
4 2019 Appropriations Act provides \$1.375 billion for “construction of primary pedestrian fencing,
5 including levee pedestrian fencing, in the Rio Grande Valley Sector” of the border. H.J. Res. 31
6 § 230(a)(1). That is the only funding in the 2019 Appropriations Act that Congress designated for
7 the construction of a barrier.

8 240. The 2019 Appropriations Act also imposes limitations on how the fencing may be
9 constructed. The amount designated for fencing in the Rio Grande Valley Sector “shall only be
10 available for operationally effective designs deployed as of the date of the Consolidated
11 Appropriations Act, 2017 (Public Law 115-31), such as currently deployed steel bollard designs,
12 that prioritize agent safety.” *Id.* § 230(b). The Consolidated Appropriations Act of 2017 was
13 enacted on May 5, 2017. *See* Pub. L. No. 115-31. Thus, the 2019 Appropriations Act authorized
14 fencing only using designs already “deployed” nearly two years ago. The Consolidated
15 Appropriations Act of 2017 likewise does not authorize the construction of a concrete or any
16 other solid wall. *Id.*

17 241. Congress made clear its intent that it was not appropriating any funding toward the
18 construction of a wall. Senator Patrick Leahy, Vice Chairman of the Senate Appropriations
19 Committee, who was actively involved in negotiations on the 2019 Consolidated Appropriations
20 Act, stated, “The agreement does not fund President Trump’s wasteful wall.” 165 Cong. Rec.
21 S1362 (daily ed. Feb 14, 2019). Senator Schumer, the Senate Minority Leader, noted that, “The
22 agreement will provide smart border security, increasing support for technologies at our ports of
23 entry. It will not fund the President’s expensive, ineffective wall.” 165 Cong. Rec. S1363 (daily
24 ed. Feb. 14, 2019). The congressional record in the House of Representatives is no different.
25 *See, e.g.*, 165 Cong. Rec. H2019 (daily ed. Feb. 14, 2019) (statement of Rep. Price) (“This
26 agreement denies the President billions of dollars for an unnecessary wall.”); 165 Cong. Rec.

27 _____
28 ⁵¹ White House, *Remarks by President Trump on the Government Shutdown* (Jan. 25,
2019), <https://tinyurl.com/y4mplplb>.

1 H2020 (daily ed. Feb. 14, 2019) (statement of Rep. Aguilar) (“What this bill will not do is . . .
2 fund the President’s wall from sea to shining sea, a wall that he said Mexico would pay for.”).

3 242. On February 15, 2019, President Trump signed the 2019 Consolidated
4 Appropriations Act into law.

5 **III. PRESIDENT TRUMP’S EXECUTIVE ACTION AND EMERGENCY DECLARATION**

6 243. That same day, the Trump Administration announced that the President was taking
7 Executive Action to redirect funding beyond what was appropriated by Congress toward
8 construction of a border wall. The Administration outlined specific plans for the diversion of an
9 additional \$6.7 billion “that will be available to build the border wall once a national emergency
10 is declared and additional funds have been reprogramed.”⁵² The Administration identified the
11 following funding for diversion to “be used sequentially”:

- 12 • \$601 million from the Treasury Forfeiture Fund;
- 13 • Up to \$2.5 billion under the Department of Defense funds transferred for Support for
14 Counterdrug Activities (10 U.S.C. § 284); and
- 15 • Up to \$3.6 billion reallocated from Department of Defense military construction projects
16 under the President’s declaration of a national emergency (10 U.S.C. § 2808).⁵³

17 244. In conjunction with that announcement, the President also declared a national
18 emergency under the National Emergencies Act claiming that there is a “border security and
19 humanitarian crisis that threatens core national security interests and constitutes a national
20 emergency.” The Emergency Declaration claimed that the border is an entry point for “criminals,
21 gang members, and illicit narcotics.”⁵⁴ The Emergency Declaration continues: “The problem of
22 large-scale unlawful migration through the southern border is long-standing, and despite the
23 executive branch’s exercise of existing statutory authorities, the situation has worsened in certain
24 respects in recent years. In particular, recent years have seen sharp increases in the number of

25 ⁵² White House, *President Donald J. Trump’s Border Security Victory* (Feb. 15, 2019),
26 <https://tinyurl.com/y3empmay>.

27 ⁵³ *Id.*

28 ⁵⁴ Declaring a National Emergency Concerning the Southern Border of the United States,
84 Fed. Reg. 4949 (Feb. 15, 2019).

1 family units entering and seeking entry to the United States and an inability to provide detention
2 space for many of these aliens while their removal proceedings are pending.”⁵⁵ The Emergency
3 Declaration concludes that the difficulty in removing these family units justifies the declaration,
4 but it does not make any connection to how the entry of these family units into the United States
5 contributes to the flow of “criminals, gang members, and illicit narcotics” into the country.⁵⁶

6 245. The President invoked the National Emergencies Act and declared that the
7 “emergency requires use of the Armed Forces” and “that the construction authority provided in
8 section 2808 of title 10, United States Code, is invoked and made available, according to its
9 terms, to the Secretary of Defense, and at the discretion of the Secretary of Defense, to the
10 Secretaries of the military departments.”

11 246. The Emergency Declaration directs the Secretary of Defense or the Secretary of
12 relevant military departments to “order as many units or members of the Ready Reserve to active
13 duty as the Secretary concerned, in the Secretary’s discretion, determines to be appropriate to
14 assist and support the activities of the Secretary of Homeland Security at the southern border.”⁵⁷
15 The Emergency Declaration acknowledges that DOD had previously “provided support and
16 resources to the Department of Homeland Security at the southern border” pursuant to President
17 Trump’s April 4, 2018 memorandum.⁵⁸

18 247. The Emergency Declaration further directs the Secretaries of Defense, Interior,
19 and Homeland Security to “take all appropriate actions, consistent with applicable law, to use or
20 support the use of the authorities herein invoked.”⁵⁹

21 248. At a press conference announcing the Executive Actions, President Trump
22 acknowledged that Congress provided more than enough funding for homeland security, and that
23 the Administration has “so much money, we don’t know what to do with it.” In explaining his
24 rationale for the Executive Actions, the President candidly admitted that the emergency

25 ⁵⁵ *Id.*

26 ⁵⁶ *Id.*

27 ⁵⁷ *Id.* § 1.

28 ⁵⁸ *Id.*

⁵⁹ *Id.* § 2.

1 declaration reflected his personal preference to construct the wall more quickly, rather than an
2 actual urgent need for it to be built immediately: “I could do the wall over a longer period of time.
3 I didn’t need to do this. But I’d rather do it much faster.”⁶⁰

4 249. Following the announcement of the Executive Actions, Defendants announced
5 their plans in more specific detail. Based on information and belief, on February 15, 2019, the
6 Treasury notified Congress that it would be transferring \$242 million from the Treasury
7 Forfeiture Fund to DHS to support law enforcement border security efforts conducted by CBP to
8 be available for obligation as of March 2, 2019, with the remaining \$359 million to be transferred
9 and available for obligation at a later date.

10 250. On February 26, 2019, the White House released a “fact sheet” indicating that in
11 order to accommodate the Executive Action’s directive to use \$2.5 billion from DOD’s drug
12 interdiction account toward construction of a border wall, DOD “will augment existing
13 counterdrug funds” through the Department’s transfer authority provided in section 8005 of the
14 FY2019 Department of Defense Appropriations Act, P.L. No. 115-245.⁶¹ Based on information
15 and belief, DOD has informed Congress that it immediately plans to divert \$1 billion in
16 “underutilized” funds that were appropriated for military pay and pensions for the construction of
17 the border wall.⁶²

18 **IV. LEGAL BACKGROUND**

19 **A. The National Emergencies Act (50 U.S.C. §§ 1601-1651)**

20 251. The National Emergencies Act (“NEA”), Pub. L. 94-412, 90 Stat. 1255, codified at
21 50 U.S.C. sections 1601-1651, was enacted by Congress in 1976 to rein in, rather than expand,
22 the power of the president. The NEA was designed to “insure” that the president’s
23 “extraordinary” emergency powers would “be utilized only when emergencies actually exist.” S.
24 Rep. No. 94-1168, at 2 (1976). Senator Frank Church, who was instrumental in the development

25 ⁶⁰ White House, *Remarks by President Trump on the National Security and Humanitarian*
26 *Crisis on our Southern Border* (Feb. 15, 2019), <https://tinyurl.com/y3jenqeu>.

27 ⁶¹ White House, *The Funds Available to Address the National Emergency at Our Border*
(Feb. 26, 2019), <https://tinyurl.com/y3yu3pr8>.

28 ⁶² Andrew Taylor and Lisa Mascaro, *Pentagon May Tap Military Pay, Pensions for*
Border Wall, ABC News (Mar. 7, 2019), <https://tinyurl.com/y5pg7wtv>.

1 of the NEA, testified before the Senate Committee of Government Operations “that the President
2 should not be allowed to invoke emergency authorities or in any way utilize the provisions of this
3 Act for frivolous or partisan matters, nor for that matter in cases where important but not
4 ‘essential’ problems are at stake.” *Hearing on H.R. 3884 Before the S. Comm. of Governmental*
5 *Operations*, 94th Cong. 7 (1976) (statement of Sen. Frank Church). Senator Church continued
6 that “[t]he Committee intentionally chose language which would make clear that the authority of
7 the Act was to be reserved for matters that are ‘essential’ to the protection of the Constitution and
8 the people.” *Id.*

9 252. The NEA allows the president to utilize emergency powers, as authorized by
10 Congress in other federal statutes, when there is a national emergency, and one has been declared.
11 50 U.S.C. § 1621.

12 253. Under the NEA, the president must specify the statutory emergency authorities he
13 intends to invoke upon issuing a national emergency. He must also publish the proclamation of a
14 national emergency in the Federal Register and transmit it to Congress. 50 U.S.C. § 1631.

15 254. The NEA sets out a procedure whereby Congress may terminate the national
16 emergency if a resolution is passed by both houses of Congress and becomes law. 50 U.S.C. §
17 1622. This procedure requires that the joint resolution be signed into law by the President, or if
18 vetoed by the President, that Congress overrides the veto with a two-thirds vote in both chambers
19 of Congress.

20 255. On February 26, 2019, the House of Representatives passed H.J. Res. 46
21 terminating the Emergency Declaration by a vote of 245 to 182. The Senate has yet to act on the
22 resolution. President Trump has vowed to veto any resolution by Congress terminating the
23 Emergency Declaration.⁶³

24 **B. Section 2808’s Emergency Military Construction Authority (10 U.S.C.**
25 **§ 2808)**

26 256. The President seeks to reallocate “[u]p to \$3.6 billion . . . from Department of

27 ⁶³ Phil Helsel, *Trump Says He Will Veto Resolution Terminating National Emergency*,
28 NBC News (Feb. 28, 2019), <https://tinyurl.com/y2a53xrz>.

1 Defense military construction projects under the President’s declaration of a national
2 emergency.”⁶⁴

3 257. Section 2808 states that when the president declares a national emergency “that
4 requires use of the armed forces,” the Secretary of Defense may “undertake military construction
5 projects . . . not otherwise authorized by law that are necessary to support such use of the armed
6 forces.” 10 U.S.C. § 2808(a).

7 258. Section 2808 limits the funds available for emergency military construction to “the
8 total amount of funds that have been appropriated for military construction . . . that have not been
9 obligated.” *Id.*

10 259. “Military construction” under Section 2808 includes “any construction,
11 development, conversion, or extension of any kind carried out with respect to a military
12 installation,” and “military installation” includes a “base, camp, post, station, yard, center, or
13 other activity under the jurisdiction of the Secretary of a military department.” 10 U.S.C. § 2801.

14 **C. Section 284’s Authority to Support Counter-Drug Activities (10 U.S.C.
15 § 284) and Section 8005’s Transfer Authority**

16 260. The President seeks to use “[u]p to \$2.5 billion under the Department of Defense
17 funds transferred for Support for Counterdrug Activities.”⁶⁵ Defendants intend to transfer up to
18 \$2.5 billion from other DOD accounts into the Department’s account for counterdrug activities in
19 order to satisfy that directive.⁶⁶

20 261. Section 284 authorizes the Secretary of Defense to assist civilian law enforcement
21 with drug enforcement activities. 10 U.S.C. § 284. It states that the Secretary of Defense “may
22 provide support for the counterdrug activities or activities to counter transnational organized
23 crime” of any law enforcement agency. Such support may include “[c]onstruction of roads and
24 fences and installation of lighting to block drug smuggling corridors across international
25

26 ⁶⁴ *President Donald J. Trump’s Border Security Victory*, *supra* note 43 (citing 10 U.S.C. §
27 2808).

28 ⁶⁵ *Id.* (citing 10 U.S.C. § 284).

⁶⁶ *Funds Available to Address the National Emergency at Our Border*, *supra* note
61(citing section 8005 of the FY2019 Department of Defense Appropriations Act).

1 boundaries of the United States.” *Id.*

2 262. Use of Section 284 is not dependent on the president declaring a national
3 emergency.

4 263. Congress has appropriated funding for interdiction and counterdrug activities to
5 the DOD. For instance, in FY2019, Congress appropriated \$217,178,000 for National Guard
6 counterdrug programs subject to specific limitations on how the Administration may expend these
7 funds.⁶⁷ That funding is intended to support counterdrug operations at all levels of government,
8 including on a state-wide basis.⁶⁸ According to a U.S. Government Accountability Office
9 analysis, National Guard Counterdrug Program funding was planned for all fifty states plus
10 Washington, D.C., Puerto Rico, the U.S. Virgin Islands, and Guam.⁶⁹

11 264. Section 8005 of the FY2019 Department of Defense Appropriations Act, P.L. No.
12 115-245 provides that “[u]pon determination by the Secretary of Defense that such action is
13 necessary in the national interest, he may, with the approval of the Office of Management and
14 Budget, transfer not to exceed \$4,000,000,000 of working capital funds of the Department of
15 Defense or funds made available in this Act to the Department of Defense for military functions
16 (except military construction) between such appropriations or funds or any subdivision thereof, to
17 be merged with and to be available for the same purposes and for the same time period, as the
18 appropriation or fund to which transferred.”

19 265. The “funds made available” in the FY2019 Department of Defense Appropriations
20 Act includes those funds for the States’ national guards such as over \$8.6 billion appropriated for
21 Army National Guard personnel, almost \$3.7 billion appropriated for Air Force National Guard
22 personnel, over \$7.1 billion appropriated for Army National Guard operations and maintenance,
23 over \$6.4 billion appropriated for Air Force National Guard operations and maintenance, and \$1.3

24 ⁶⁷ Department of Defense and Labor, Health and Human Services, and Education
25 Appropriations Act, 2019 and Continuing Appropriations Act, 2019, Pub. L. No. 115-245 (Sept.
26 28, 2018).

26 ⁶⁸ Nat’l Guard, National Guard Counterdrug Program, <https://tinyurl.com/yx9whzd8> (last
27 visited Feb. 17, 2019).

27 ⁶⁹ Gov’t Accountability Off., *Drug Control, DOD Should Improve Its Oversight of the*
28 *National Guard Counterdrug Program*, GAO-19-27 (Jan. 2019), <https://tinyurl.com/y4e6ocra>.

1 billion for procurement items for the reserve components of the Armed Forces, including the
2 National Guard.⁷⁰

3 266. Section 8005’s transfer authority is subject to several conditions, including
4 “prompt” notification to Congress. In addition, the Section 8005 transfer authority “may not be
5 used unless for higher priority items, based on unforeseen military requirements, than those for
6 which originally appropriated and in no case where the item for which funds are requested has
7 been denied by Congress.”

8 267. Defendants have not explained how diversion of DOD funds toward construction
9 of a border wall would “block drug smuggling corridors” as contemplated by 10 U.S.C. section
10 284. Neither have Defendants explained how transferring funding for a border wall is for a
11 “higher priority item” nor an “unforeseen military requirement.” Defendants have not provided
12 an explanation, nor could they, as to how diverting funding toward construction of a border wall
13 would not be transferring funds for a project for which Congress has already denied funding.

14 **D. Authority to Transfer Funds from Treasury Forfeiture Fund (31 U.S.C. §**
15 **9705)**

16 268. The President seeks to use “about \$601 million” from the Department of the
17 Treasury’s Forfeiture Fund.⁷¹

18 269. Section 9705(g)(4)(B) provides that after reserves and required transfers, the
19 Treasury Forfeiture Fund’s “unobligated balances . . . shall be available to the Secretary . . . for
20 obligation or expenditure in connection with the law enforcement activities of any Federal
21 agency. . . .”

22 270. Defendants have not provided any explanation justifying the diversion of funding
23 from the Treasury Forfeiture Fund toward construction of the border wall. Specifically,
24 Defendants have not provided any explanation to warrant using Treasury Forfeiture Funds for the
25 construction of a border wall as opposed to reimbursing the Plaintiffs States’ outstanding claims
26 from the Treasury Forfeiture Fund.

27 _____
28 ⁷⁰ H.R. 6157, 115th Cong. § 4 (2019).

⁷¹ *Border Security Victory*, *supra* note 52.

1 **E. National Environmental Policy Act (“NEPA”)**

2 271. NEPA, 42 U.S.C. section 4321 et seq., is the “basic national charter for protection
3 of the environment.” 40 C.F.R. § 1500.1 (a). NEPA contains several action-forcing procedures,
4 most significantly the mandate to prepare an environmental impact statement (“EIS”) on major
5 federal actions “significantly affecting the quality of the human environment.” *Robertson v.*
6 *Methow Valley Citizen Council*, 490 U.S. 332, 348 (1989) (citing 42 U.S.C. § 4332 (2)(C)).

7 272. NEPA requires federal agencies to consider several factors relating to the
8 “intensity” of the project, including: the “[u]nique characteristics of the geographic area such as
9 proximity to . . . ecologically critical areas” (40 C.F.R. § 1508.27(3)); “[t]he degree to which the
10 action may adversely affect an endangered or threatened species or its habitat that has been
11 determined to be critical under the Endangered Species Act of 1973” (40 C.F.R. § 1508.27(9));
12 and “[w]hether the action threatens a violation of Federal, State, or local law or requirements
13 imposed for the protection of the environment.” 40 C.F.R. § 1508.27(10).

14 273. “NEPA requires that the evaluation of a project’s environmental consequences
15 take place at an early stage in the project’s planning process.” *State of California v. Block*, 690
16 F.2d 753, 761 (9th Cir. 1982) (citation omitted). A proposal subject to NEPA exists where an
17 agency has a goal and is actively preparing to make a decision on the alternatives in
18 accomplishing that goal, regardless of whether the agency declares that such a proposal exists:
19 “An agency shall commence preparation of an environmental impact statement as close as
20 possible to the time the agency is developing or is presented with a proposal.” 40 C.F.R. §
21 1502.5. A “[p]roposal exists at that stage in the development of an action when an agency subject
22 to the Act has a goal and is actively preparing to make a decision on one or more alternative
23 means of accomplishing that goal and the effects can be meaningfully evaluated.” 40 C.F.R. §
24 1508.23.

25 **V. THERE IS NO IMMIGRATION ENFORCEMENT “CRISIS” OR “INVASION” AT THE**
26 **SOUTHERN BORDER TO SUPPORT THE DECLARATION OF EMERGENCY**

27 **A. There Is No Evidence That a Massive Influx of Migrants Is Overwhelming**
28 **Government Resources at the Southern Border**

274. President Trump’s continued claim that an unprecedented flood of migrants is

1 causing an immigration enforcement crisis amounting to a “national emergency” is not supported
2 by the facts.⁷²

3 275. As CBP statistics show, apprehensions at the border in recent months—while they
4 show increases stemming from an increase in migrant families seeking asylum—are well within
5 the historic range.⁷³

6 276. In recent years, apprehensions at the southwest border have been near historic
7 lows, with fewer than 400,000 apprehensions in FY2018 compared to over 1.6 million in
8 FY2000.⁷⁴

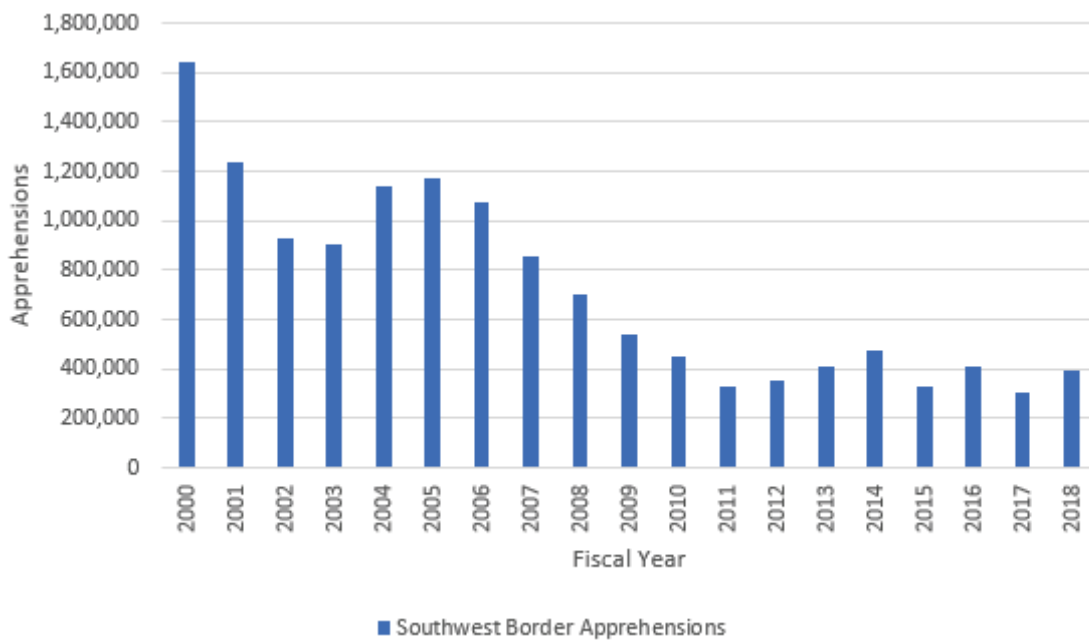
9 277. In FY2017, CBP made the fewest apprehensions since FY2000, and the number of
10 apprehensions in FY2018 was the fifth lowest since FY2000.⁷⁵

21 ⁷² See 165 Cong. Rec. S1412 (daily ed. Feb. 25, 2019) (joint declaration of 58 former
22 United States senior government national security, defense, and diplomatic officials, including
23 former Cabinet Secretaries Madeline Albright, Chuck Hegel, John Kerry, and Leon Panetta,
hereafter “Former Gov’t Officials Decl.”) (stating that “there is no evidence of a sudden or
emergency increase in the number of people seeking to cross the southern border”).

24 ⁷³ CBP, *Southwest Border Migration FY2019*, <https://tinyurl.com/CBP-app-2019> (last
visited Feb. 17, 2019).

25 ⁷⁴ CBP, *Nationwide Illegal Alien Apprehensions Fiscal Years 1925-2017*,
26 <https://tinyurl.com/y2kysbr8> (last visited Feb. 17, 2019) (also showing over 1 million
27 apprehensions in each of fiscal years 1954, 1983-87, 1990-99, 2001, 2004-06, as well as over
800,000 apprehensions in each of fiscal years 1953, 1977-79, 1981-82, 1988-89, 2002, 2003, and
2007).

28 ⁷⁵ *Id.* (also the source of data for the graph included herein).



278. During this same time span, there were dramatic increases in the number of Border Patrol agents utilized to patrol the southwest border between the ports of entry. From 2000 to 2017, CBP increased its Border Patrol agent staffing nationwide by 111 percent, from 9,212 to 19,437 agents. CBP increased the number of Border Patrol agents assigned to the southwest border sectors by nearly 94 percent, from 8,580 to 16,605 agents during the 2000-2017 time period.⁷⁶

279. The number of Border Patrol agents have significantly increased over the past two decades, while illegal border crossings have dropped, causing the average annual number of apprehensions made by each Border Patrol agent to drop by almost 91 percent, from 192 in FY2000 to only 18 in FY2017.⁷⁷

280. The Border Patrol's budget has also significantly increased during this period, with Congress' appropriations increasing from \$1.055 billion in FY2000 to \$3.805 billion in FY2017, an increase of over 260 percent.⁷⁸

⁷⁶ CBP, *Border Patrol Agent Nationwide Staffing by Fiscal Year*, <https://tinyurl.com/yyazdqm7> (last visited Feb. 17, 2019).

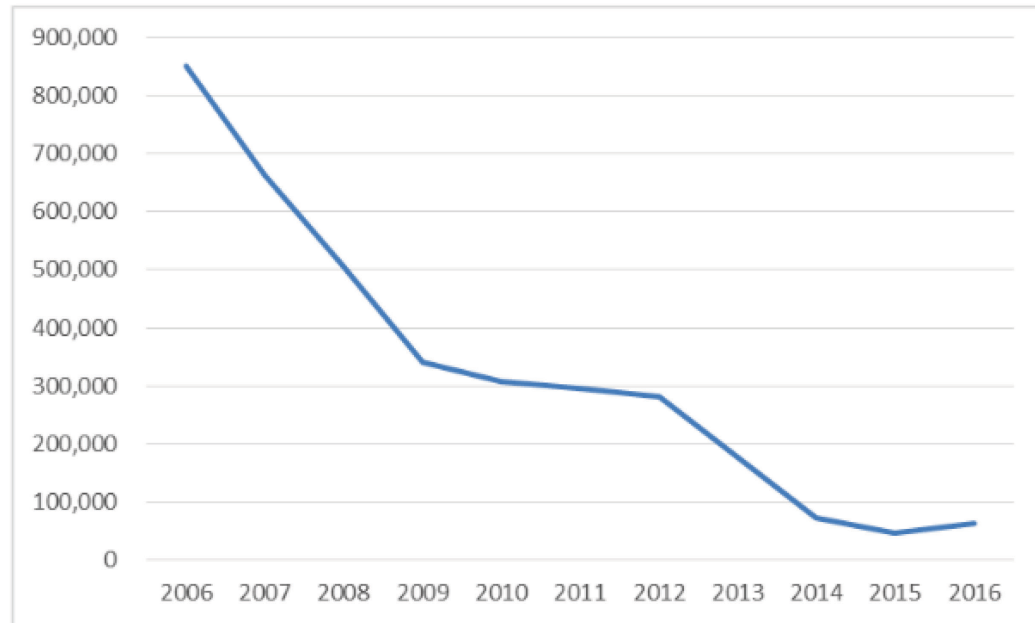
⁷⁷ *Id.*; CBP, *Total Illegal Alien Apprehensions by Fiscal Year*, <https://tinyurl.com/y73mzshs> (last visited Feb. 17, 2019).

⁷⁸ CBP, *Enacted Border Patrol Program Budget by Fiscal Year*,

281. In September 2017, DHS published a report in which it concluded that “the southwest land border is more difficult to illegally cross today than ever before.”⁷⁹

282. This difficulty is borne out in the precipitous drop in undetected unlawful entries, which, as a 2018 DHS study estimated, “fell from approximately 851,000 to nearly 62,000 [between FY2006 and 2016], a 93 percent decrease.”⁸⁰

Figure 2: Estimated Southwest Border Undetected Unlawful Entries, FY 2006 – FY 2016



283. That same DHS report contained data showing that probability of detection markedly increased during this time period, “from 70 percent in FY2006 (when an estimated 2.0 million unlawful border crossers were detected out of an estimated 2.9 million total unlawful border crossers) to 91 percent in FY2016 (611,000 detected out of 673,000 total estimated unlawful border crossers).”⁸¹

284. In general, the undocumented population in the United States has dropped

<https://tinyurl.com/yxw4bj4b> (last visited Mar. 12, 2019).

⁷⁹ DHS, Off. of Immigr. Stats., *Efforts by DHS to Estimate Southwest Border Security between Ports of Entry* (Sept. 2017), <https://tinyurl.com/y9gbn5js>.

⁸⁰ DHS, *Border Security Metrics Report* (May 1, 2018), <https://tinyurl.com/y2p96d2o> (2016 is the most recent year for which this data is available).

⁸¹ *Id.*

1 significantly in recent years, falling by about 1 million between 2010 and 2017.⁸²

2 285. The overall characteristics of individuals who are apprehended at the southwest
3 border have changed significantly, from predominantly adult male Mexican nationals entering the
4 United States alone, to increasing numbers of families from Central America.⁸³ Many of these
5 migrant families are requesting asylum upon entry into the United States.⁸⁴

6 286. The Director of National Intelligence's most recent "Worldwide Threat
7 Assessment" ("DNI Report") was produced on January 29, 2019. That report discusses several
8 topics germane to the Emergency Declaration, including migration, terrorism, and transnational
9 crime (including human and drug trafficking).⁸⁵

10 287. While the DNI Report notes that "high crime rates and weak job markets will spur
11 additional United States-bound migrants from the Northern Triangle—El Salvador, Guatemala,
12 and Honduras," the report contains no mention of a security threat at the southwest border.⁸⁶ The
13 report also discusses "transnational organized crime" as a driver of migration,⁸⁷ consistent with
14 research by federal officials indicating that most migrants from the Northern Triangle are "fleeing
15 violence at home" and seeking to claim asylum in the United States.⁸⁸

16 288. At the January 29, 2019, hearing of the Senate Intelligence Committee where the
17 report was presented, the heads of the Office of the Director of National Intelligence (DNI),
18 Federal Bureau of Investigation, and Central Intelligence Agency—all appointed by President

19 _____
20 ⁸² Robert Warren, *U.S. Undocumented Population Continued to Fall from 2016 to 2017, and Visa Overstays Significantly Exceeded Illegal Crossings for the Seventh Consecutive Year*,
21 Ctr. for Migration Studies (Jan. 16, 2019), <https://tinyurl.com/y7wa849r>; see also Former Gov't
22 Officials Decl., *supra* note 72, at S1412 ("The United States currently hosts what is estimated to
23 be the smallest number of undocumented immigrants since 2004").

24 ⁸³ Cong. Res. Serv., *The Trump Administration's "Zero Tolerance" Immigration*
25 *Enforcement Policy* (Jul. 20, 2018) <https://tinyurl.com/y6rxgipk>.

26 ⁸⁴ See, e.g., Nomaan Merchant, *Crush of Desperate Migrant Families Seek Asylum at*
27 *Border*, Associated Press (Jan. 23, 2019), <https://tinyurl.com/y4to9ykq>.

28 ⁸⁵ Daniel R. Coats, *Worldwide Threat Assessment*, Off. of the Dir. of Nat'l Intelligence
(Jan. 29, 2019), <https://tinyurl.com/y9r6kkhu>.

⁸⁶ *Id.* at 41.

⁸⁷ *Id.* at 19.

⁸⁸ Max Ehrenfreund, *The Huge Immigration Problem That Donald Trump's Wall Won't*
Solve, Wash. Post (Dec. 18, 2015), <https://tinyurl.com/yxgw1x2q> (citing research by Federal
Reserve Bank of Dallas economist).

1 Trump—testified about international threats to the United States. During that hearing, none of
2 these officials even mentioned issues relating to the southwest border; they also did not testify
3 that the situation at the United States-Mexico border constituted a threat to the United States’
4 national security.⁸⁹

5 **B. There Is No Evidence that Terrorists Are Infiltrating the United States via**
6 **the Southern Border**

7 289. The Trump Administration’s assertions that terrorism concerns justify its actions
8 here are without factual basis.

9 290. President Trump and other members of his Administration, including DHS
10 Secretary Nielsen, have repeatedly claimed that terrorists have attempted to infiltrate the United
11 States via the southern border and that the border wall is needed to stop this from happening.⁹⁰

12 291. However, the federal government’s own reports, as well as credible third-party
13 analysis, show that these claims are false.

14 292. In fact, while over 2,500 individuals on the Federal Bureau of Investigation’s
15 terrorist watchlist attempted to travel to the United States in FY2017, the vast majority—over
16 2,100—attempted to do so by air.⁹¹

17 293. More generally, a 2018 U.S. State Department report finds that there is “no

18 ⁸⁹ CSPAN, *Global Threats and National Security* (Jan. 29, 2019),
19 <https://tinyurl.com/ydyaugm5>; see also Former Gov’t Officials Decl., *supra* note 72, at S1413
20 (“In a briefing before the House Armed Services Committee the next day, Pentagon officials
acknowledged that the 2018 National Defense Strategy does not identify the southern border as a
security threat”).

21 ⁹⁰ See White House, *Remarks by Vice President Mike Pence at an America First Policies*
22 *Tax Reform Event* (Feb. 17, 2018), <https://tinyurl.com/y54tmrzo> (claiming that “seven individuals
a day who are either known or suspected terrorists” are apprehended at one Texas port of entry);
23 Donald J. Trump (@realDonaldTrump), Twitter (Oct. 22, 2018, 5:37 AM),
24 <https://tinyurl.com/mid-easterners-tweet> (asserting that “unknown Middle Easterners” are part of
the Caravan, and that he has “alerted Border Patrol and Military that this is a National Emergency
[sic.]”); see also Calvin Woodward, *AP FACT CHECK: Trump’s Mythical Terrorist Tide From*
25 *Mexico*, ABC News (Jan. 7, 2019), <https://tinyurl.com/yyhewhrl> (collecting other statements by
Administration officials asserting that large numbers of individuals with terrorist ties are
26 apprehended at the Southern Border).

27 ⁹¹ DHS and U.S. Dep’t of Justice, *Executive Order 13780: Protecting the Nation From*
Foreign Terrorist Entry Into the United States Initial Section 11 Report 9 (Jan. 2018),
28 <https://tinyurl.com/yy6bg66j>.

1 credible evidence indicating that international terrorist groups have established bases in Mexico,
2 worked with Mexican drug cartels, or sent operatives via Mexico into the United States.”⁹²

3 294. While noting that “[t]he U.S. southern border remains vulnerable to *potential*
4 terrorist transit,” the report concluded that “terrorist groups likely seek other means of trying to
5 enter the United States.”⁹³

6 295. A recent comprehensive study by the Cato Institute—using data going back to
7 1975—found that “there have been zero people murdered or injured in terror attacks committed
8 by illegal border crossers on U.S. soil.”⁹⁴

9 296. In fact, almost every individual convicted of even planning a terrorist attack on the
10 United States who entered the country illegally came over the Canadian border or jumped ship in
11 American ports.⁹⁵

12 297. Only three individuals convicted of a terrorist plot entered illegally through the
13 Mexican border, and they did so as children in the 1980s, decades before the planned attack was
14 foiled in 2007.⁹⁶

15 298. Further, the Cato Institute noted that “[n]ot a single terrorist in any visa category
16 came from Mexico or Central America during the 43-year period.”⁹⁷

17 299. The DNI Report contains a three-page discussion of terrorism. That discussion
18 does not mention any threat of terrorists infiltrating the United States through the southwest
19 border.⁹⁸ Indeed, terrorism is not discussed at all in the Western Hemisphere section of the

20
21 ⁹² U.S. Dep’t of State, Bureau of Counterterrorism, *Country Reports on Terrorism 2017*
205 (Sept. 2018), <https://tinyurl.com/y93n5fes>.

22 ⁹³ *Id.* (emphasis added).

23 ⁹⁴ David Bier & Alex Nowrasteh, *45,000 “Special Interest Aliens” Caught Since 2007,*
But No U.S. Terrorist Attacks from Illegal Border Crossers, Cato Inst. (Dec. 17, 2018),
24 <https://tinyurl.com/yddqwes3>.

25 ⁹⁵ *Id.*; see also Former Gov’t Officials Decl., *supra* note 72, at S1412 (“Between October
2017 and March 2018, forty-one foreign immigrants on the terrorist watchlist were intercepted at
the northern border. Only six such immigrants were intercepted at the southern border”).

26 ⁹⁶ *Id.*

27 ⁹⁷ Alex Nowrasteh, *Does the Migrant Caravan Pose a Serious Terrorism Risk?*, Cato Inst.
(Oct. 23, 2018), <https://tinyurl.com/yap9uc9s>.

28 ⁹⁸ *DNI Report*, *supra* note 85 at 10–13.

1 report.⁹⁹

2 300. At the January 29, 2019, Senate Intelligence Committee hearing about the report,
3 none of the national security officials testified to terrorists infiltrating the United States through
4 the southern border. The DNI's and Central Intelligence Agency Director's testimony focused on
5 threats in the Middle East, Africa, and the Philippines.¹⁰⁰

6 301. Thus, while combating terrorism is an important national priority, illegal crossings
7 at the southern border do not materially contribute to that problem and provide no factual
8 justification for declaring an emergency requiring the diversion of funds to build a wall.

9 **C. There Is No Evidence that a Border Wall Will Decrease Crime Rates**

10 302. Studies have consistently shown that the connection that President Trump attempts
11 to draw between unauthorized immigration and increased crime rates is false.

12 303. According to a 2018 Cato Institute study examining 2016 incarceration rates,
13 unauthorized immigrants were 47 percent less likely to be incarcerated for crimes than native-
14 born Americans.¹⁰¹

15 304. A 2018 Cato Institute report examining 2015 Texas crime statistics found that
16 undocumented immigrants had a criminal conviction rate 50 percent below that for native-born
17 Americans.¹⁰²

18 305. A 2018 study published in *Criminology* examining national crime rates from 1990
19 to 2014 found “that undocumented immigration does not increase violence” and in fact
20
21

22 ⁹⁹ *Id.* at 40–42.

23 ¹⁰⁰ Global Threats and National Security, *supra* note 89 (24:12–:21; 32:05–:50; 1:27:15–
:50; 1:28:40–:29:57).

24 ¹⁰¹ Michelangelo Landgrave & Alex Nowrasteh, *Incarcerated Immigrants in 2016*, Cato
25 Inst. Res. and Pol’y Br. No. 7 (Jun. 4, 2018), <https://tinyurl.com/y2jn4e3x>; *see also* Former Gov’t
26 Officials Decl., *supra* note 72, at S1412 (stating that “in Texas, undocumented immigrants were
found to have a first-time conviction rate 32 percent below that of native-born Americans; the
conviction rates of unauthorized immigrants for violent crimes such as homicide and sex offenses
were also below those of native-born Americans”).

27 ¹⁰² Alex Nowrasteh, *Criminal Immigrants in Texas*, Cato Inst. Res. and Pol’y Br. No. 4
28 (Feb. 26, 2018), <https://tinyurl.com/y62qjsa6>.

1 “[i]ncreases in the undocumented immigrant population within states are associated with
2 significant decreases in the prevalence of violence.”¹⁰³

3 306. A 2017 study in the *Journal of Ethnicity in Criminal Justice* examining
4 immigration and crime rates nationally over a 40-year period found that in the 10 cities where the
5 immigrant population increased the most, crime levels in 2016 decreased to lower levels of crime
6 than in 1980.¹⁰⁴ “The most striking finding from our research is that for murder, robbery,
7 burglary and larceny, as immigration increased, crime decreased, on average, in American
8 metropolitan areas.”¹⁰⁵ Large cities with substantial immigrant populations have *lower* crime
9 rates, on average, than those with minimal immigrant populations.¹⁰⁶

10 307. A 2010 study showed that native-born American men between ages 18 to 39 with
11 no high school diploma had triple the incarceration rate of immigrant men from Mexico, El
12 Salvador, and Guatemala with the same age and education profile.¹⁰⁷

13 308. The Administration’s repeated claims that building a border barrier in El Paso,
14 Texas reduced a previously high rate of violent crimes there are also false.¹⁰⁸

15 309. In fact, when the new border barrier was built in 2009, crime in El Paso had been
16 dramatically decreasing since the 1990s, just as the violent crime rate decreased substantially
17 nationwide from the 1990s through the present.¹⁰⁹ “From 2006 to 2011—two years before the

18 ¹⁰³ Michael T. Light & Ty Miller, *Does Undocumented Immigration Increase Violent*
19 *Crime?* Criminology (Mar. 25, 2018), <https://tinyurl.com/ycyzsf27>.

20 ¹⁰⁴ Robert Adelman et al., *Urban crime rates and the changing face of immigration:*
21 *Evidence across four decades*, J. of Ethnicity in Crim. Justice, Vol. 15 (2017),
<https://tinyurl.com/y6czenh7>; see also Anna Flag, *The Myth of the Criminal Immigrant*, N.Y.
22 Times (Mar. 30, 2018), <https://tinyurl.com/y9hcu6kp>.

23 ¹⁰⁵ Charis Kubrin et al., *Immigrants Do Not Increase Crime, Research Shows*, Scientific
24 American (Feb. 7, 2017), <https://tinyurl.com/h8xauk2>.

25 ¹⁰⁶ *Id.*

26 ¹⁰⁷ Walter Ewing, et al., *The Criminalization of Immigration in the United States*, Am.
27 Immigr. Council Rep. (Jul. 13, 2015), <https://tinyurl.com/jxcv9aq>.

28 ¹⁰⁸ See, e.g., White House, *President Donald J. Trump’s State of the Union Address* (Feb.
5, 2019), <https://tinyurl.com/y77nquv5> (“The border city of El Paso, Texas, used to have
extremely high rates of violent crime—one of the highest in the entire country, and considered
one of our nation’s most dangerous cities. Now, immediately upon its building, with a powerful
barrier in place, El Paso is one of the safest cities in our country.”).

¹⁰⁹ Federal Bureau of Investigation, Uniform Crime Reports, Crime in the United States,

1 fence was built to two years after—the number of violent crimes recorded in El Paso increased by
2 17 percent.”¹¹⁰

3 310. CBP data show that as the mix of apprehended migrants has shifted to an
4 increasing proportion of families as discussed above, the numbers of violent crimes committed by
5 this group has also decreased.¹¹¹

6 **D. There Is No Evidence that a Border Wall Will Impact the Smuggling of**
7 **Dangerous Drugs into the United States**

8 311. For years, the vast majority of the drugs smuggled into the country that the
9 President has singled out as dangerous (methamphetamine, heroin, cocaine, and fentanyl)¹¹² have
10 been smuggled through, not between, ports of entry.¹¹³

11 312. From 2012-2018, 86 percent of cocaine, 88 percent of heroin, and 84 percent of
12 methamphetamine came through ports of entry.¹¹⁴

13 313. From 2017-2018, 83 percent of fentanyl came through legal border ports of
14 entry.¹¹⁵

15
16 Table 1 (showing violent crime rate reduction from 567.6 violent crimes per 100,000 inhabitants
17 in 1998 to 382.9 per 100,000 inhabitants in 2017), <https://tinyurl.com/yyvc6636> (last visited Feb.
18 17, 2019).

19 ¹¹⁰ Madlin Mekelburg, *State of the Union: Facts Show Trump Wrong to Say El Paso*
20 *Dangerous City until Fence*, El Paso Times (Feb. 5, 2019), <https://tinyurl.com/y9ol96az> (citing
21 crime data from El Paso County Sheriff’s Office and FBI Uniform Crime Reports).

22 ¹¹¹ Alex Nowrasteh, *There Is No National Emergency on the Border, Mr. President*, Cato
23 Institute, <https://www.cato.org/blog/there-no-national-emergency-border-mr-president> (citing
24 CBP data).

25 ¹¹² *Trump Address on Crisis at Border*, *supra* note 33; see also White House, *President*
26 *Donald J. Trump Is Committed to Working with Congress to Solve Our Urgent Immigration*
27 *Crisis* (Feb. 5, 2019), <https://tinyurl.com/yyhzvrq9> (“Tens of thousands of Americans are killed
28 by tons of deadly, illicit drugs trafficked into our country by criminal aliens, gangs, and cartels
exploiting our porous border. The lethal drugs that flood across our border and into our
communities include meth, heroin, cocaine, and fentanyl.”).

¹¹³ CBP, *Enforcement Statistics FY2018*, <https://tinyurl.com/y9c4c6ft> (showing that
through August 2018, out of all the drugs seized by CBP in that fiscal year, 88 percent of cocaine,
90 percent of heroin, 87 percent of methamphetamine, and 80 percent of fentanyl were seized by
Field Operations at ports of entry).

¹¹⁴ *Id.*

¹¹⁵ *Id.*

1 314. For instance, CBP officers recently made what is being touted (including by
2 President Trump¹¹⁶) as the largest seizure of fentanyl in history. Some 254 pounds of the drug
3 and 395 pounds of methamphetamine were discovered hidden in a floor compartment of a truck
4 loaded with cucumbers as the truck tried to enter through the port of entry at Nogales, Arizona.¹¹⁷

5 315. The most recent Drug Enforcement Agency (DEA) National Drug Threat
6 Assessment affirms the CBP data showing that the bulk of dangerous illegal drugs flow through,
7 not between, ports of entry.¹¹⁸

8 316. For example, in that report, the DEA states that “[a] small percentage of all heroin
9 seized by CBP along the land border was between Ports of Entry (POEs).”¹¹⁹

10 317. As to fentanyl, the report states that “Mexican [Transnational Criminal
11 Organizations] most commonly smuggle the multi-kilogram loads of fentanyl concealed in
12 [privately owned vehicles] before trafficking the drugs through SWB POEs.”¹²⁰

13 318. Finally, the report notes that privately owned vehicles “remain the primary method
14 used to smuggle cocaine across the SWB. Traffickers hide cocaine amongst legitimate cargo of
15 commercial trucks or within secret compartments built within passenger vehicles.”¹²¹

16 319. The DNI Report discusses drug trafficking from Mexico; however, it contains no
17 mention of smuggling between ports of entry.¹²²

18 320. In fact, the DNI Report notes that as to fentanyl—one of the drugs that President
19 Trump has invoked in support of the border wall¹²³—“Chinese synthetic drug suppliers . . .
20 probably ship the majority of US fentanyl, when adjusted for purity.”¹²⁴

21 ¹¹⁶ Donald J. Trump (@realDonaldTrump), Twitter (Jan. 31, 2019, 4:14 PM),
22 <https://tinyurl.com/y4c4zxo3>.

23 ¹¹⁷ Pete Williams, *Feds Make Largest Fentanyl Bust in U.S. History*, NBC News (Jan. 31,
24 2019), <https://tinyurl.com/y9zgmv7p>.

25 ¹¹⁸ DEA, *2018 National Drug Threat Assessment* (Oct. 2018),
26 <https://tinyurl.com/yaqyh3ld>.

27 ¹¹⁹ *Id.*

28 ¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *DNI Report*, *supra* note 85.

¹²³ *Trump Address on Crisis at Border*, *supra* note 33.

¹²⁴ *DNI Report*, *supra* note 85 at 18; *see also* Former Gov’t Officials Decl., *supra* note 72,

1 **E. There Is No Factual Basis to Support the Statutory Criteria for Diverting**
2 **Funding**

3 321. Building a border wall does not “require[] use of the armed forces” under 10
4 U.S.C. section 2808.¹²⁵

5 322. Construction of border fencing has been carried out by civilian contractors in
6 recent years.

7 323. In fact, in 2007, the U.S. military informed DHS that “military personnel would no
8 longer be available to build fencing.”¹²⁶

9 324. This, along with the desire to not take CBP agents away from their other duties,
10 led CBP to decide to use “commercial labor for future infrastructure projects.”¹²⁷

11 325. This decision has been reflected in recent projects related to the border wall,
12 including contract awards in California¹²⁸ and Arizona¹²⁹ in Fall 2018.

13 326. The construction of a border wall also does not constitute a “military construction”
14 project, as defined in 10 U.S.C. section 2801. Since at least 2001, 10 U.S.C. section 2808 has
15 only been invoked to justify military construction directly linked to a military installation.¹³⁰

16 327. In fact, with one exception, it has only been invoked in relation to construction at
17

18 at S1412 (noting that border wall will not “stop drugs from entering via international mail (which
19 is how high-purity fentanyl, for example, is usually shipped from China directly to the United
20 States)”).¹²⁵

21 ¹²⁵ See also Former Gov’t Officials Decl., *supra* note 72, at S1412 (noting that “the
22 composition of southern border crossings has shifted such that families and unaccompanied
23 minors now account for the majority of immigrants seeking entry at the southern border; these
24 individuals do not present a threat that would need to be countered with military force”).

25 ¹²⁶ Gov’t Accountability Office, *GAO-09-244R Secure Border Initiative Fence*
26 *Construction Costs* 7 (Jan. 29, 2009), <https://tinyurl.com/y2kgefp5>.

27 ¹²⁷ *Id.*

28 ¹²⁸ CBP, *Border Wall Contract Awards in California* (Dec. 21, 2018),
 <https://tinyurl.com/y3px9ubj> (announcing \$287 million contract with SLSCO Ltd. to build border
 barriers).

¹²⁹ CBP, *Border Wall Contract Award in Arizona* (Nov. 15, 2018),
 <https://tinyurl.com/y2t5u6pw> (announcing \$172 million contract with Barnard Construction Co.
 to build border barriers).

¹³⁰ Michael J. Vassalotti & Brendan W. McGarry, *Military Construction Funding in the*
 Event of a National Emergency, Cong. Res. Serv. (Jan. 11, 2019), <https://tinyurl.com/y23t8xbc>.

1 military installations outside the United States.¹³¹

2 328. That single instance related to securing domestic sites at which weapons of mass
3 destruction were sited.¹³²

4 329. Furthermore, the diversion of funding and resources for the proposed border wall
5 does not satisfy the requirements of 10 U.S.C. section 284, the Counterdrugs Activities statute
6 because the proposed border wall does not “block drug smuggling corridors,” 10 U.S.C. §
7 284(b)(7), as contemplated by the statute. Defendants also do not satisfy the criteria under
8 section 8005 of the FY2019 Department of Defense Appropriations Act to transfer other
9 Department of Defense funds toward construction of the border wall because it is not a “higher
10 priority item,” is not a “unforeseen military requirement,” and *is* an item for which Congress has
11 denied funding.

12 330. The diversion of Treasury Forfeiture Funds for construction of a border wall fails
13 to satisfy the criteria of 31 U.S.C. section 9705 because infrastructure construction is not within
14 the scope of the activities for which Treasury Forfeiture Funds may be used under that statute.

15 **F. Plaintiff States and their Residents Are Harmed by the Executive Actions**

16 **1. Harm caused by diversion of funding and other resources**

17 331. Plaintiff States and their residents are harmed by the Executive Actions and
18 Defendants’ unlawful actions undertaken to construct the border wall. *See* Parties section *supra*.

19 332. California will be harmed by the diversion of funds it receives from the federal
20 government for drug interdiction program funding, which will impact public safety and the
21 welfare of its residents.

22 333. California is typically allocated tens of millions of dollars in drug interdiction
23 funds from the federal government annually (for example, over \$25 million in FY2018-19). If
24 California loses this funding, there will be negative public safety impacts arising from the
25 impairment of the State’s criminal and narcotics operations.

27 ¹³¹ *Id.*

28 ¹³² *Id.*

1 334. Diversion of DOD funding from California's National Guard will likewise cause
2 harm to the State. For FY2019-20, California expected to receive \$126.1 million in federal funds
3 that are at risk due to the Executive Actions.¹³³ Any diversion of military funding intended for
4 the California National Guard will also harm the State.

5 335. Diversion of funds from the Treasury's Forfeiture Fund will deprive the State of
6 California and its local law enforcement agencies of access to millions of dollars of funds that
7 would otherwise be available for law enforcement purposes, negatively impacting the public
8 safety and welfare of California's residents.

9 336. The law enforcement agencies within the Plaintiff States received over 73 percent
10 of the equitable shares paid to local and state agencies under the Treasury Forfeiture Fund's
11 equitable share program in FY2018. California law enforcement agencies, many of which have
12 participated in the equitable share program for over a decade, received \$53,304,000 in funding
13 from the Treasury Forfeiture Fund in FY2018, more than any state.¹³⁴ Based on information and
14 belief, California's state and local agencies, including the California Department of Justice,
15 California Highway Patrol, and California National Guard, have millions of dollars in outstanding
16 claims based on their previous participation in law enforcement activities.

17 337. California also will be harmed by diversion of funding for military construction.

18 338. More funds are spent on defense in California than in any other state, with \$48.8
19 billion in FY2017 alone.¹³⁵

20 339. California also leads the nation in defense contract spending, with \$35.2 billion
21 that same year.¹³⁶ Plaintiff States collectively account for \$142.3 billion in defense contract
22 spending, which represents 52 percent of all defense contract spending.

23 340. Three of the top ten defense contract spending locations in the nation are in

24 ¹³³ State of California, *2019-20 Governor's Budget, Statewide Financial Information* at 29
25 (Jan. 10, 2019) (estimating \$126.1 million in federal funding for the California Military
26 Department for FY2019-20), <https://tinyurl.com/y48pjdnl>.

26 ¹³⁴ *Forfeiture Fund Audit*, *supra* note 3, at 67.

27 ¹³⁵ DOD, Off. of Econ. Adjustment, *Defense Spending by State Fiscal Year 2017*,
<https://tinyurl.com/yxcqugzr>.

28 ¹³⁶ *Id.*

1 California (San Diego with \$9.2 billion, Los Angeles with \$5.3 billion, and Santa Clara County
2 with \$4.8 billion).¹³⁷

3 341. This defense spending—including construction—in California generates
4 significant economic activity, employment, and tax revenue.¹³⁸

5 342. In FY2016, this spending generated \$86.9 billion of direct economic activity in
6 California, \$17.4 billion of economic activity created through the supply chain, and \$52 billion of
7 “induced” economic activity created because of additional money in the economy.¹³⁹

8 343. This economic activity, in turn, generates employment for Californians. In
9 FY2016, approximately 358,000 jobs were directly attributable to employment by defense
10 agencies and their contractors, 84,000 were generated through the supply chain, and 324,000
11 resulted from economic activity induced by the additional money in the economy.¹⁴⁰

12 344. The economic activity generated by defense spending also resulted in significant
13 tax revenues for California at the state and local level, estimated at \$5.8 billion total annually,
14 including \$1.9 billion in income tax, \$1.7 billion in sales tax and \$1.3 billion in property tax.¹⁴¹

15 345. Certain regions of the state particularly rely on defense spending for employment,
16 including Lassen County (with 18% of jobs reliant on defense spending) and San Diego (16%).¹⁴²

17 346. In a briefing with reporters on February 15, 2019, White House officials (Acting
18 Chief of Staff John Michael Mulvaney, Defendant Nielsen, and Acting Director of the Office of
19 Management and Budget Russell Vought) discussed the Administration’s plans to carry out the
20 Emergency Declaration.¹⁴³ In response to a question regarding “which military construction
21 projects will see the money moved for the border wall,” one Administration official stated during

22 ¹³⁷ *Id.*

23 ¹³⁸ Devin Lavelle, *California Statewide National Security Economic Impacts*, Cal. Res.
24 Bureau (Aug. 2018), <https://tinyurl.com/yxqlw43b>.

24 ¹³⁹ *Id.*

25 ¹⁴⁰ *Id.*

25 ¹⁴¹ *Id.*

26 ¹⁴² *Id.*

27 ¹⁴³ White House, *Background Press Call on President Trump’s Remarks on the National*
28 *Security and Humanitarian Crisis on Our Southern Border* (Feb. 15, 2019). This document was
available on the White House website but then taken down that same day.

1 that briefing: “We would be looking at lower priority military construction projects. We would
2 be looking at ones that are to fix or repair a particular facility that might be able to wait a couple
3 of months into next year.”¹⁴⁴

4 347. A number of military construction projects that could fit this description, and for
5 which funds have been appropriated but are as yet unobligated, are planned in California.¹⁴⁵
6 These projects include repairs to existing military infrastructure. If Defendants determine that
7 these projects can wait, funding for them could be diverted to the border wall, and California
8 would be deprived of this federal funding and the resulting positive economic, employment, and
9 tax consequences.

10 348. If these types of projects are delayed due to the diversion of funding for border
11 wall construction, California stands to suffer economic harm.

12 349. Other Plaintiff States will suffer similar harms due to diversion of military
13 construction, drug interdiction, and drug forfeiture funding.

14 **2. Environmental harms to the States of California and New Mexico**

15 350. On December 12, 2018, DHS announced that if it received \$5 billion in additional
16 funding, it would use this funding to construct 330 miles of new barriers along the United States-
17 Mexico border in areas that the United States Border Patrol identified as “highest priority” in each
18 of the four border states. DHS specifically identified a five-mile barrier project in the CBP’s San
19 Diego Sector (California), a nine-mile project in the CBP’s El Centro Sector (California), and a
20 nine-mile project in the CBP’s El Paso Sector (New Mexico).¹⁴⁶

21 351. Following Defendant DHS’s December 12, 2018 announcement that it intended to
22 construct 330 miles of new barriers along the United States-Mexico border, DHS now intends to
23 construct hundreds more miles of new border barriers. During a March 6, 2019 hearing before
24 the House of Representatives’ Homeland Security Committee, Defendant Nielsen testified that

25
26 ¹⁴⁴ *Id.*

27 ¹⁴⁵ *E.g.*, DOD, *Construction Programs (C-1)*, Department of Defense Budget Fiscal Year
2019 (Feb. 2018), <https://tinyurl.com/vy85dch9>.

28 ¹⁴⁶ DHS, *Walls Work* (Dec. 12, 2018), <https://tinyurl.com/y7ca6byc>.

1 DHS now seeks to construct more than 700 miles of additional barriers along the southern
2 border.¹⁴⁷

3 352. CBP's San Diego Sector is located in San Diego County, California and
4 shares a 60-mile segment of the border with Mexico, 46 linear miles of which are already lined
5 with primary fencing.¹⁴⁸ The only portions of the border located within the San Diego Sector that
6 are not already lined with primary fencing are located in the southeastern portion of the county in
7 or near the Otay Mountain Wilderness Area.¹⁴⁹ Thus, the only segment of the border within the
8 San Diego Sector where DHS can construct new primary fencing, as it announced on December
9 12, 2018, are areas within or near the Otay Wilderness Area.

10 353. CBP's El Centro Sector is located within Imperial County, California, and shares a
11 70-mile segment of the border with Mexico, 59 linear miles of which are already lined by primary
12 fencing.¹⁵⁰ The only portions of the border located within the El Centro Sector that are not
13 already lined with primary fencing are located in the southwestern portion of Imperial County,
14 which is comprised of a mountainous landscape and the Jacumba Wilderness Area.¹⁵¹ Thus, the
15 only segment of the border within the El Centro Sector where DHS can construct new primary
16 fencing, as it announced on December 12, 2018, are areas within or near the Jacumba Wilderness
17 Area.

18 354. The Otay Mountain Wilderness and the Jacumba Wilderness areas are home to
19 more than 100 sensitive plant and animal species that are listed as "endangered," "threatened," or
20 "rare" under the federal Endangered Species Act of 1973, 16 U.S.C. § 1531 et seq., and/or the

21 ¹⁴⁷ CSPAN, *Immigration and Border Security* (Mar. 6, 2019),
22 <https://tinyurl.com/y5fqdmma>.

23 ¹⁴⁸ CBP, *San Diego Sector California* (Jan. 26, 2018), <https://tinyurl.com/y5zgvftf>; Gov't
24 Accountability Off., *GAO-17-331, Southwest Border Security: Additional Actions Needed to
25 Better Assess Fencing's Contributions to Operations and Provide Guidance for Identifying
26 Capability Gaps* 48, <https://www.gao.gov/products/GAO-17-331>.

27 ¹⁴⁹ CBP, *Border Fencing – California* (June 2011), <https://tinyurl.com/y24zbf4>; CBP,
28 *FY17 U.S. Border Patrol Apprehensions (Deportable) & Fencing* (Dec. 6, 2017),
<https://tinyurl.com/ydf146zk>.

¹⁵⁰ CBP, *El Centro Sector California* (Apr. 11, 2018), <https://tinyurl.com/y5kpbk2e>;
Southwest Border Security, *supra* note 148.

¹⁵¹ CBP, *Border Fencing 2011 & 2017*, *supra* note 149.

1 California Endangered Species Act, Cal. Fish & Game Code § 2050 et seq. These species include
2 the following federally and state endangered species: the Mexican flannel bush, Thornmint, the
3 Quino Checkerspot Butterfly, the Southwestern Willow Flycatcher, and the Peninsular Desert
4 Bighorn sheep.¹⁵² Some of the listed plant species, such as the Tecate Cypress and the Mexican
5 flannel bush, are so rare they can only be found in these wilderness areas.¹⁵³ The federally and
6 state-endangered Peninsular Desert Bighorn sheep has a range that includes mountainous terrain
7 in Mexico near the United States-Mexico border and extends north across the border through the
8 Jacumba Wilderness to California's Anza-Borrego State Park.¹⁵⁴

9 355. The construction of border barriers within or near the Jacumba Wilderness Area
10 and the Otay Mountain Wilderness Area will have significant adverse effects on environmental
11 resources, including direct and indirect impacts to endangered or threatened wildlife. These
12 injuries to California's public trust resources would not occur but for Defendants' unlawful and
13 unconstitutional diversion of funds.

14 356. The construction of a border wall in the El Paso Sector along New Mexico's
15 southern border will have significant adverse effects on the State's environmental resources,
16 including direct and indirect impacts to endangered or threatened wildlife.

17 357. If Defendants use the diverted funding announced in President Trump's February
18 15 Executive Actions to construct any of the border wall in New Mexico, it will impose
19 environmental harm to the State. The environmental damage caused by a border wall in New
20
21

22 ¹⁵² Cal. Dept. of Fish & Wildlife, *Threatened and Endangered Species*,
23 <https://tinyurl.com/7l65784> (last visited Feb. 17, 2019); Wilderness Connect, *Jacumba*
24 *Wilderness*, <https://tinyurl.com/y5yh23x5> (last visited Feb. 17, 2019); U.S. Bureau of Land
25 Management, *Jacumba Wilderness* <https://tinyurl.com/y43hv424> (last visited Feb. 17, 2019); U.S.
26 Bureau of Land Management, *Otay Mountain Wilderness* <https://tinyurl.com/y3zmvsh> (last
visited Feb. 17, 2019); Wilderness Connect, *Otay Mountain Wilderness*,
<https://tinyurl.com/y3ymkzn> (last visited Feb. 17, 2019).

¹⁵³ Wilderness Connect, *Otay Mountain*, *supra* note 152.

27 ¹⁵⁴ Cal. Dept. of Fish & Wildlife, *Peninsular Desert Bighorn Sheep*
28 <https://tinyurl.com/yyvu5kwa> (last visited Feb. 17, 2019).

1 Mexico would include the blocking of wildlife migration, flooding, and habitat loss.¹⁵⁵

2 358. The Chihuahuan desert bisected by the New Mexico-Mexico border is the most
3 biologically diverse desert in the Western Hemisphere.¹⁵⁶ Species common along the border are a
4 number of endangered, threatened, and candidate species including the beautiful shiner,
5 Chiricahua leopard frog, jaguar, lesser long-nosed bat, loach minnow, Mexican long-nosed bat,
6 Mexican spotted owl, Mexican wolf, narrow-headed gartersnake, New Mexican ridge-nosed rattle
7 snake, northern aplomado falcon, northern Mexican gartersnake, southwestern willow flycatcher,
8 spokedace, and yellow billed cuckoo.¹⁵⁷ A barrier built in the Chihuahuan desert is likely to
9 disrupt or destroy habitat of these migratory animals, nesting birds and reclusive reptiles.

10 359. In particular, New Mexico's border is also home to the endangered Mexican gray
11 wolf, the rarest subspecies of gray wolf in North America, which was nearly extirpated by the
12 1970s and only recently reintroduced.¹⁵⁸ A wall impossible to breach may make it impossible for
13 the wolf to disperse across the border to reestablish recently extirpated populations or bolster
14 small existing populations. On March 14, 2018, the New Mexico Department of Game and Fish
15 signed an agreement with the U.S. Department of Fish and Wildlife to increase cooperation in
16 reintroduction of this species to the wild, evidencing the State's commitment to preventing the
17 extinction of this species.

18 360. The segment of New Mexico's border with Mexico that does not already have
19 primary fencing is in the State's "bootheel" region.¹⁵⁹ If Defendants' diverted funding resulted in
20 the construction of a barrier in New Mexico's bootheel, it would cause environmental harm in

21 ¹⁵⁵ See Robert Peters et al., *Nature Divided, Scientists United: US-Mexico Border Wall*
22 *Threatens Biodiversity and Binational Conservation*, BioScience (Oct. 2018),
<https://tinyurl.com/y3t4ymfn>.

23 ¹⁵⁶ Nat'l Park Service, *Chihuahuan Desert Ecoregion* (Sept. 20, 2018),
<https://www.nps.gov/im/chdn/ecoregion.htm>.

24 ¹⁵⁷ U.S. Fish & Wildlife Serv., *Species By County Report*, <https://tinyurl.com/yxmwz9qm>
25 (Hidalgo County, NM); <https://tinyurl.com/y4ojwrtq> (Luna County, NM) (last visited Feb. 17,
2019).

26 ¹⁵⁸ U.S. Fish & Wildlife Serv., *Mexican Wolf*, <https://tinyurl.com/y2hf5ea2> (last visited
27 Feb. 17, 2019).

28 ¹⁵⁹ CBP, *Border Fencing - New Mexico/West Texas* (June 2011),
<https://tinyurl.com/y24zbf4>.

1 one of the State's most ecologically pristine and fragile regions. The bootheel is where temperate
2 and subtropical climates converge, making it another of the most biologically diverse regions in
3 the world, home to jaguars and wolves that coexist along the U.S.-Mexico border.¹⁶⁰ Recognizing
4 the ecological importance of this region, the U.S. Fish and Wildlife Service has designated large
5 segments of the bootheel's border with Mexico as critical habitat for the jaguar.¹⁶¹

6 361. Defendant DHS has not engaged in a public review of these adverse effects. By
7 failing to do so at the earliest possible stage of the project's planning process, DHS is violating
8 the requirements of NEPA. *Robertson v. Methow Valley Citizen Council*, 490 U.S. 332, 348-49
9 (1989); 40 C.F.R. §§ 1508.27(b)(9), (10). California and New Mexico have suffered, and will
10 continue to suffer, injuries to their procedural rights under NEPA and the APA, 5 U.S.C. section
11 551, and injuries to their concrete, quasi-sovereign interests relating to the preservation of wildlife
12 resources within their boundaries, including but not limited to wildlife on state properties.
13 *Massachusetts v. EPA*, 549 U.S. 497, 519-24 (2007); *Sierra Forest Legacy*, 646 F.3d at 1178.
14 These injuries to California's and New Mexico's procedural rights and quasi-sovereign interests
15 would not occur but for Defendants' unlawful and unconstitutional diversion of funds.

16 **DECLARATORY/INJUNCTIVE RELIEF**

17 362. Plaintiff States will suffer irreparable injury if Defendants take action to build the
18 border wall by diverting funds and resources in contravention of the United States Constitution
19 and several federal statutes, and Plaintiffs have no adequate remedy at law.

20 **FIRST CLAIM FOR RELIEF**

21 **VIOLATION OF CONSTITUTIONAL SEPARATION OF POWERS**

22 363. Plaintiff States incorporate the allegations of the preceding paragraphs by
23 reference.

24 364. Article I, Section 1 of the United States Constitution enumerates that "[a]ll
25 legislative Powers herein granted shall be vested in [the] Congress." Article I, Section 8 of the

26 ¹⁶⁰ Lauren Villagran, *Land That Time Forgot*, Albuquerque J. (Apr. 30, 2017),
27 <https://tinyurl.com/mxqht6r>.

28 ¹⁶¹ U.S. Fish & Wildlife Serv., *Jaguar (Panthera onca)*, <https://tinyurl.com/y6qpjdjl> (last
visited Feb. 17, 2019); 79 Fed. Reg. 12571 (Mar. 5, 2014).

1 United States Constitution vests exclusively in Congress the spending power to “provide for
2 the . . . General Welfare of the United States.”

3 365. Article I, Section 7, Clause 2 of the United States Constitution, known as the
4 Presentment Clause, requires that all bills passed by the House of Representatives and the Senate
5 be presented to the President for signature. The President then has the choice to sign or veto the
6 bill. Article II, Section 3 of the United States Constitution requires that the President “shall take
7 Care that the Laws be faithfully executed.”

8 366. The President acts at the lowest ebb of his power if he acts contrary to the
9 expressed or implied will of Congress. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579,
10 637 (1952) (Jackson, J., concurring). Moreover, there is no provision in the United States
11 Constitution that authorizes the President to enact, amend, or repeal statutes, including
12 appropriations already approved by Congress and signed into law by the President. *Clinton v.*
13 *City of New York*, 524 U.S. 417, 438 (1998).

14 367. Defendants have violated the United States Constitution’s separation of powers
15 doctrine by taking executive action to fund a border wall for which Congress has refused to
16 appropriate funding. The 2019 Appropriations Act is an explicit denial of the President’s
17 requested funding for a border wall. Defendants have further violated the separation of powers
18 doctrine—specifically the Presentment Clause—by unilaterally diverting funding that Congress
19 already appropriated for other purposes to fund a border wall for which Congress has provided no
20 appropriations.

21 368. For the reasons stated herein, Plaintiffs are entitled to a declaration that
22 Defendants’ diversion of funding and resources toward the construction of a border wall is
23 unconstitutional, and the Court should enjoin Defendants’ implementation of the President’s
24 Executive Actions.

25 **SECOND CLAIM FOR RELIEF**

26 **VIOLATION OF APPROPRIATIONS CLAUSE**

27 369. Plaintiff States incorporate the allegations of the preceding paragraphs by
28 reference.

370. Article I, Section 9, Clause 7, known as the Appropriations Clause, provides that “[n]o Money shall be drawn from the treasury, but in Consequence of Appropriations made by Law.” The Appropriations Clause is a “straightforward and explicit command” 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)).

371. Congress has not authorized or appropriated the funding that Defendants have diverted towards the construction of a border wall. Defendants have therefore violated the Appropriations Clause by funding construction of the border wall with funds that were not appropriated for that purpose.

372. For the reasons stated herein, Plaintiffs are entitled to a declaration that Defendants' diversion of funding and resources toward the construction of a border wall is unconstitutional, and the Court should enjoin Defendants' implementation of the President's Executive Actions.

THIRD CLAIM FOR RELIEF

ULTRA VIRES

373. Plaintiff States incorporate the allegations of the preceding paragraphs by reference.

374. Neither the President nor an agency can take any action that exceeds the scope of their constitutional and/or statutory authority.

375. The President has acted ultra vires in seeking to divert funding pursuant to the National Emergencies Act because no emergency exists to warrant the invocation of that statute.

376. In addition, Defendants have acted ultra vires in seeking to divert funding pursuant to 10 U.S.C. section 2808 for failure to meet the criteria required under that statute. The construction of the border wall: (a) is not a “military construction project”; (b) does not “require[] use of the armed forces”; and (c) is not “necessary to support such use of the armed forces.”

377. Defendants have acted ultra vires in seeking to divert funding and resources pursuant to 10 U.S.C. section 284 for failure to meet the criteria required under that statute. The

1 statute does not contemplate the construction of a border wall as proposed by the President.
2 Moreover, Defendants have acted ultra vires in seeking to transfer funding pursuant to section
3 8005 of the FY2019 Department of Defense Consolidated Appropriations Act to ultimately use
4 for the construction of a border wall because it is not being transferred for: (a) a “higher priority
5 item;” (b) “unforeseen military requirements;” or (c) an item for which Congress has not denied
6 funding.

7 378. Defendants have acted ultra vires in seeking to divert funding pursuant to 31
8 U.S.C. section 9705 for failure to meet the criteria required under that statute.

9 379. For the reasons stated herein, Plaintiffs are entitled to a declaration that
10 Defendants’ diversion of funding and resources toward the construction of a border wall is
11 unlawful, and the Court should enjoin Defendants’ implementation of the President’s Executive
12 Actions.

13 **FOURTH CLAIM FOR RELIEF**

14 **VIOLATION OF ADMINISTRATIVE PROCEDURE ACT** 15 **(Constitutional Violation and Excess of Statutory Authority under 10 U.S.C. section 284,** 16 **section 8005 of the FY2019 Department of Defense Appropriations Act, and 31 U.S.C.** **section 9705)**

17 380. Plaintiff States incorporate the allegations of the preceding paragraphs by
18 reference.

19 381. Defendants DOD and the Treasury are “agencies” under the APA, 5 U.S.C. section
20 551(1), and diversions of funding for construction of a border wall constitute “agency action”
21 under the APA, *id.* section 551(13).

22 382. The diversion of federal funds toward construction of a border wall constitutes an
23 “[a]gency action made reviewable by statute and final agency action for which there is no other
24 adequate remedy in a court.” *Id.* § 704.

25 383. The APA requires that a court “hold unlawful and set aside agency action,
26 findings, and conclusions found to be . . . contrary to constitutional right, power, privilege, or
27 immunity,” or “in excess of statutory jurisdiction, authority, or limitations, or short of statutory
28 right.” *Id.* § 706(2)(B)-(C).

384. Defendants DOD and the Treasury's diversion of funding and resources pursuant to 10 U.S.C. section 284, section 8005 of the FY 2019 Department of Defense Appropriations Act, and 31 U.S.C. section 9705 for construction of a border wall is unconstitutional because Defendants have: (a) overstepped their powers by exercising lawmaking authority that is solely reserved to Congress under Article I, Section I of the United States Constitution; (b) amended or cancelled appropriations that have already been approved by Congress; and (c) diverted funding and resources for the construction of a border wall that Congress did not appropriate for that purpose. Furthermore, these Defendants' diversion of federal funding and resources pursuant to those statutes for construction of a border wall is ultra vires in excess of their statutory authority.

385. For the reasons stated herein, because Defendants DOD and the Treasury acted unconstitutionally and in excess of their statutory authority in diverting federal funds and resources toward construction of a border wall pursuant to the statutes described above, these actions are unlawful and should be set aside under 5 U.S.C. section 706. Moreover, the Court should enjoin Defendants' implementation of the Executive Actions.

FIFTH CLAIM FOR RELIEF

VIOLATION OF ADMINISTRATIVE PROCEDURE ACT
(Arbitrary and Capricious actions under 10 U.S.C. section 284, section 8005 of the FY2019 Department of Defense Appropriations Act, and 31 U.S.C. section 9705)

386. Plaintiff States incorporate the allegations of the preceding paragraphs by reference.

387. Defendants DOD and the Treasury are “agencies” under the APA, 5 U.S.C. section 551(1), and their actions to divert funding for construction of a border wall constitute “agency action” under the APA, *id.* section 551(13).

388. The diversion of federal funds toward construction of a border wall constitutes an “[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court.” *Id.* § 704.

389. The APA requires that a court “hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or

1 otherwise not in accordance with law.” *Id.* § 706(2)(A).

2 390. Defendants DOD and the Treasury’s diversion of funding and resources pursuant
3 to 10 U.S.C. section 284, section 8005 of the FY2019 Department of Defense Appropriations Act,
4 and 31 U.S.C. section 9705 for construction of a border wall is arbitrary and capricious and an
5 abuse of discretion because Defendants have relied on factors that Congress did not intend, failed
6 to consider an important aspect of the problem the agency is addressing, and offered no
7 explanation for the decision to divert funding and resources toward construction of a border wall
8 that is consistent with the evidence that is before the agencies. *See Motor Vehicle Mfrs. Ass’n of*
9 *the U.S. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983).

10 391. For the reasons stated herein, because Defendants DOD and the Treasury acted in
11 an arbitrary and capricious manner in diverting federal funds and resources toward construction
12 of a border wall pursuant to the statutes described above, these actions are unlawful and should be
13 set aside under 5 U.S.C. section 706. Moreover, the Court should enjoin Defendants’
14 implementation of the Executive Actions.

15 **SIXTH CLAIM FOR RELIEF**

16 **VIOLATION OF NATIONAL ENVIRONMENTAL POLICY ACT**

17 **(For Plaintiff States California and New Mexico)**

18 392. Plaintiff States incorporate the allegations of the preceding paragraphs by
19 reference.

20 393. Defendant DHS is an “agency” under the APA, 5 U.S.C. section 552(1).

21 394. Defendant DHS has taken final agency action by proposing southern border wall
22 development projects in “high priority” areas and has identified specific projects along the border
23 in the El Centro, San Diego, and El Paso Sectors.¹⁶²

24 395. Defendants, through the Executive Actions, have taken steps to divert federal

25
26 ¹⁶² The proposed projects are not located within areas covered by any existing waiver
27 issued by DHS pursuant to section 102 of the Illegal Immigration Reform and Immigrant
28 Responsibility Act (8 U.S.C. § 1103 note). 84 Fed. Reg. 2897 (February 8, 2019); 83 Fed. Reg.
3012 (January 22, 2018); 82 Fed. Reg. 42829 (September 12, 2017); 82 Fed. Reg. 35984 (August
2, 2017).

1 funding and other resources for those southern border wall construction projects.

2 396. NEPA compels federal agencies such as Defendant DHS to evaluate and consider
3 the direct, indirect and cumulative effects that a proposed development project or program will
4 have on the environment by requiring the agency to prepare an EIS that analyzes a reasonable
5 range of alternatives and compares each alternative's environmental impacts. 40 C.F.R. §§
6 1502.16, 1508.7, 1508.8, 1508.27(b)(7). The EIS must also include an analysis of the affected
7 areas and resources and the environmental consequences of the proposed action and the
8 alternatives. 40 C.F.R. §§ 1502.10- 1502.19. The agency must commence preparation of the EIS
9 "as close as possible to the time that the agency is developing or is presented with a proposal" so
10 that the environmental effects of each alternative can be evaluated in a meaningful way. 40
11 C.F.R. § 1502.23.

12 397. Defendant DHS is in violation of NEPA and the APA because it failed to prepare
13 an EIS concerning border wall development projects that will have adverse effects on the
14 environment, including but not limited to direct, indirect and cumulative impacts on plant and
15 animal species that are listed as endangered or threatened under the Endangered Species Act
16 and/or California Endangered Species Act.

17 398. The imminent nature of this action is shown by the Trump Administration's
18 expression of its intent to move quickly with the construction of the border wall, DHS's
19 announcement designating priority areas for new border wall construction within the San Diego,
20 El Centro, and El Paso Sectors, and Defendant Nielsen's testimony regarding the intent to
21 construct even more fencing than previously designated.¹⁶³ In addition, during his speech
22 announcing the Emergency Declaration, President Trump spoke of his desire to build the wall
23 "much faster" than he could otherwise,¹⁶⁴ and recently claimed that "[m]any additional contracts
24 are close to being signed."¹⁶⁵

25
26 ¹⁶³ Rachael Bade et al., *'A Recipe for Disaster'? Trump's Border Emergency Drags the*
27 *GOP into a Risky Fight Ahead of 2020*, Wash. Post (Feb. 15, 2019), <https://tinyurl.com/y413lu99>.

¹⁶⁴ White House, *President Trump's Feb. 15, 2019, Remarks*, *supra* note 60.

28 ¹⁶⁵ Donald J. Trump (@realDonaldTrump), Twitter (Mar. 8, 2019, 4:24 AM),
<https://tinyurl.com/y3tsqmg1>.

399. The States of California and New Mexico have concrete and particularized interests in the protection of their own proprietary interests near the border as well as the protection of natural, historical, cultural, economic, and recreational resources within their jurisdictional boundaries. Defendants' failure to comply with NEPA and the APA injures and denies California's and New Mexico's procedural rights necessary to protect these interests.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff States respectfully request that this Court enter judgment in their favor, and grant the following relief:

1. Issue a judicial declaration that the Executive Actions' diversion of federal funds and resources toward construction of a border wall is unconstitutional and/or unlawful because it: (a) violates the separation of powers doctrine; (b) violates the Appropriations Clause; (c) exceeds congressional authority conferred to the Executive Branch and is ultra vires; and (d) violates the Administrative Procedure Act;

2. The States of California and New Mexico seek a judicial declaration that Defendants violated the National Environmental Policy Act and Administrative Procedure Act and further seek an order enjoining DHS, requiring it to comply with the National Environmental Policy Act and Administrative Procedure Act—including preparing an EIS—before taking any further action pursuant to the Executive Actions;

3. Permanently enjoin Defendants from constructing a border wall without an appropriation by Congress for that purpose;

4. Permanently enjoin Defendants from diverting federal funding and resources toward construction of a border wall; and

5. Grant such other relief as the Court may deem just and proper.

1 Dated: March 13, 2019

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