

1 Tony West
 2 Assistant Attorney General
 3 Dennis K. Burke
 4 United States Attorney
 5 Arthur R. Goldberg
 6 Assistant Director, Federal Programs Branch
 7 Varu Chilakamarri (NY Bar #4324299)
 8 Joshua Wilkenfeld (NY Bar #4440681)
 9 U.S. Department of Justice, Civil Division
 10 20 Massachusetts Avenue, N.W.
 11 Washington, DC 20530
 12 Tel. (202) 616-8489/Fax (202) 616-8470
 13 varudhini.chilakamarri@usdoj.gov
 14 *Attorneys for the United States*

11 **UNITED STATES DISTRICT COURT**
 12 **DISTRICT OF ARIZONA**

13 The United States of America,
 14 Plaintiff,
 15 v.
 16 The State of Arizona, et al.,
 17 Defendants.

18 The State of Arizona; and Janice K. Brewer,
 19 Governor of the State of Arizona, in her
 20 Official Capacity,

21 Counterclaimants,

22 v.

23 The United States of America; the United
 24 States Department of Homeland Security; the
 25 United States Department of Justice; and Janet
 26 Napolitano and Eric H. Holder, Jr., in their
 27 official capacities.

28 Counterdefendants.

No. 2:10-cv-1413-SRB

**COUNTERDEFENDANTS’
 MOTION TO DISMISS
 COUNTERCLAIMS AND
 MEMORANDUM OF LAW IN
 SUPPORT THEREOF**

ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

	Page
INTRODUCTION	1
BACKGROUND	2
LEGAL STANDARD	4
ARGUMENT	5
I. Arizona’s Constitutional Claims are Barred by the Collateral Estoppel and Political Question Doctrines, and they Fail to State a Cognizable Claim.....	5
A. Arizona’s Attempt to Re-Litigate Claims Under Article IV, the Tenth Amendment, and for Alleged Failure to Enforce Immigration Laws is Precluded by <i>Arizona v. United States</i>	5
B. Arizona’s Allegations Under Article IV of the Constitution (Count II) Raise a Nonjusticiable Political Question and Fail to State a Claim Upon Which Relief Can be Granted.	8
C. Arizona’s Tenth Amendment Allegations (Count V) Must be Dismissed For Failure to State a Claim Upon Which Relief Can be Granted.....	11
D. Arizona Lacks Standing to Raise Counts II, III, or V Against the Federal Government	14
II. Arizona’s Statutory Claims Must be Dismissed as Unreviewable	15
A. Count III Must be Dismissed Because the Federal Government’s Enforcement of Immigration Laws is Committed to Agency Discretion by Law	15
B. Count I Must be Dismissed Because The Manner in Which DHS Works to Achieve “Operational Control” of the U.S. Border is Committed to Agency Discretion by Law and is Therefore Unreviewable.....	18
C. Count IV Must be Dismissed Because Reimbursement Rates Under the SCAAP Program are Committed to the Attorney General’s Discretion by Law	25
CONCLUSION	32

1 Counterdefendants, through their undersigned counsel, hereby move to dismiss the
2 Counterclaims pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6).

3 INTRODUCTION

4
5 The United States filed suit to prevent the enforcement of a set of unprecedented
6 state immigration measures, enacted through Arizona Senate Bill 1070, which would
7 interfere and conflict with federal immigration laws and objectives. Now, through their
8 counterclaims, the State of Arizona and Governor Brewer (collectively “Arizona”) have
9 attempted to recast the justifications they advanced in defense of S.B. 1070 as claims
10 against the federal government – recycling a series of claims that Arizona brought against
11 the United States in 1994 that were rejected both by this Court and the Ninth Circuit.
12 Arizona contends that the Counterdefendants (“United States”) have violated Article IV
13 of the U.S. Constitution by failing to protect the State from an “invasion of illegal aliens.”
14 Arizona further alleges that the federal government’s immigration policies have indirectly
15 resulted in a variety of expenditures for Arizona, in violation of the Tenth Amendment.
16 In addition to raising these purported constitutional claims, which are virtually identical
17 to the claims that Arizona unsuccessfully raised in 1994, the State asserts that the federal
18 government, through the Department of Homeland Security (“DHS”) and Department of
19 Justice (“DOJ”), has failed to enforce immigration laws to the extent and in the manner
20 desired by Arizona, and that these federal agencies have violated statutory directives
21 related to the Secure Fence Act and the State Criminal Alien Assistance Program.
22

23 Through its counterclaims, Arizona repeatedly raises generalized allegations and
24 questions of a political nature, rather than a colorable constitutional or statutory claim.
25 This Court is not the proper forum in which to air such grievances. Arizona’s
26 constitutional claims represent an improper attempt to re-litigate legal issues which have
27 already been adjudicated by this Court, and which are plainly barred as non-justiciable or
28 non-cognizable. Arizona’s statutory claims fare no better, as they seek to compel federal

1 agencies to take actions relating to immigration enforcement and control that are
2 committed to these agencies' discretion and expertise. There is no legal basis for
3 requesting such extraordinary steps, nor are there any judicially manageable standards for
4 supervising these aspects of the federal government's system of immigration
5 enforcement. Accordingly, this Court should dismiss the counterclaims in their entirety.

6 **BACKGROUND**

7
8 The regulation and control of immigration and the nation's borders is a matter that
9 is constitutionally vested in the political branches of the federal government. *See* U.S.
10 Const., art. I § 8, cl. 3 & 4; *id.* art. II § 3. Congress has placed primary authority for the
11 enforcement of immigration laws in the Attorney General and the Secretary of Homeland
12 Security. *See, e.g.*, 8 U.S.C. 1103; 6 U.S.C. §§ 251–52, 271. The federal government
13 continues to expend significant resources to enforce the immigration laws to prevent the
14 illegal migration of aliens across this country's borders, and to remove aliens who have
15 unlawfully entered the United States or engaged in activity rendering them removable
16 from the United States. For example, in fiscal year 2010, the budget for DHS included
17 approximately \$11.4 billion for U.S. Customs and Border Protection (“CBP”) and
18 approximately \$5.7 billion for U.S. Immigration and Customs Enforcement (“ICE”). *See*
19 http://www.dhs.gov/xlibrary/assets/budget_bib_fy2011.pdf, page 17. In fiscal year 2009,
20 among its many other enforcement efforts, CBP processed over 360 million individuals at
21 ports of entry and found over 224,000 aliens to be inadmissible. *See id.* at 52. ICE
22 removed approximately 135,880 criminal aliens from the country in 2009, representing a
23 nearly 19% increase from 2008. *Id.* at 63. DHS removed 358,886 aliens under formal
24 removal orders in 2008, and 393,289 aliens under formal removal orders in 2009. U.S.
25 Dep't of Homeland Security, Office of Immigration Statistics, “Yearbook of Immigration
26 Statistics” at 95 (2009), *available at* [http://www.dhs.gov/xlibrary/assets/statistics/](http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2009/ois_yb_2009.pdf)
27 [yearbook/2009/ois_yb_2009.pdf](http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2009/ois_yb_2009.pdf). Since 2004, DHS has doubled the size of the Border
28

1 Patrol, and for the first time in history, CBP has deployed unmanned aircraft systems
2 over the entire southwest border. *See* February 15, 2011 Testimony of Michael Fisher,
3 Chief of U.S. Border Patrol, Before House Committee on Homeland Security,
4 Subcommittee on Border and Maritime Security, *available at*
5 http://homeland.house.gov/sites/homeland.house.gov/files/Testimony%20Fisher_0.pdf.

6 As part of many other ongoing measures to improve immigration enforcement,
7 Congress has enacted two additional provisions to improve border security and to further
8 respond to situations where aliens may elude the federal government’s enforcement
9 efforts and unlawfully enter the country.

10 In 2006, Congress passed the Secure Fence Act, which provided that the Secretary
11 of DHS shall take all actions she deems necessary and appropriate to “achieve and
12 maintain operational control” over the border. Pub. L. No. 109-367, § 2, 120 Stat. 2638
13 (2006), codified at 8 U.S.C. § 1701 note. The Secure Fence Act also amended Section
14 102 of the Illegal Immigration Reform and Immigrant Responsibility Act (“IIRIRA”),
15 Pub. L. No. 104-208, Div. C., § 102, which provides the Secretary with broad authority to
16 take “such actions as may be necessary” to install additional physical barriers and roads
17 near the border to deter illegal entry. *See* IIRIRA § 102(a) (as amended). As initially
18 enacted, the Secure Fence Act directed DHS to construct reinforced fencing and other
19 security features along five specific segments of the southern border, including a large
20 segment of the U.S. border in Arizona. *See* Pub. L. No. 109-367, § 3. However, in 2008,
21 Congress removed that requirement, and instead replaced it with a statutory framework
22 that identifies as a target the construction of 700 miles of reinforced fencing along the
23 southwest border, but which vests the Secretary with ultimate discretion to determine
24 both *where* and *what type* of infrastructure is appropriate to achieve and maintain
25 operational control of the southwest border. Consolidated Appropriations Act, 2008,
26 Pub. L. No. 110-161, Div. E, § 564 (amending IIRIRA § 102). As of February of this
27
28

1 year, DHS not only has completed approximately 649 miles of fencing along the
2 southwest border, but also continues to deploy additional border infrastructure and
3 technology. *See* March 9, 2011 Testimony of Janet Napolitano, Secretary of Homeland
4 Security, before Senate Committee on the Judiciary, *available at*
5 <http://judiciary.senate.gov/pdf/11-3-9%20Napolitano%20Testimony.pdf>; *see also supra*,
6 Fischer Testimony; Southwest Border Fence (Image of Construction Status), *available at*
7 [http://www.cbp.gov/linkhandler/cgov/newsroom/highlights/fence_map.ctt/
8 fence_map.pdf](http://www.cbp.gov/linkhandler/cgov/newsroom/highlights/fence_map.ctt/fence_map.pdf).

9
10 Through Section 241(i) of the Immigration and Nationality Act (“INA”), Congress
11 has also provided for a system – referred to as the State Criminal Alien Assistance
12 Program (“SCAAP”) – by which States may submit a written request for compensation
13 with respect to their incarceration of undocumented criminal aliens. *See* 8 U.S.C.
14 § 1231(i). Section 241 provides that, upon receipt of a State’s request for such assistance,
15 the “Attorney General shall, as determined by the Attorney General – (A) enter into a
16 contractual arrangement which provides for compensation to the State . . . or (B) take the
17 undocumented criminal alien into the custody of the Federal Government and incarcerate
18 the alien.” *Id.* § 1231(i)(1). Section 241 goes on to provide that “[c]ompensation under
19 paragraph (1)(A) shall be the average cost of incarceration of a prisoner in the relevant
20 State as determined by the Attorney General.” *Id.* § 1231(i)(2). In creating this program,
21 Congress also placed a statutory cap on the amount of money that could be appropriated
22 for the program every fiscal year, *id.* § 1231(i)(5); however, the amounts that Congress
23 has actually appropriated each year for these purposes have historically been less than the
24 maximum amount authorized by statute. *See infra* note 14.

25 **LEGAL STANDARD**

26 Federal Rule of Civil Procedure 12(b)(1) provides for dismissal of a pleading
27 where the claimant fails to meet its burden of establishing subject matter jurisdiction. *St.*
28

1 *Clair v. City of Chico*, 880 F.2d 199, 201 (9th Cir. 1989). In considering a motion under
2 Rule 12(b)(1), the court may consider the counterclaim as well as other evidence properly
3 before the court. *Colwell v. Dep’t of HHS*, 558 F.3d 1112, 1121 (9th Cir. 2009).

4 Under Rule 12(b)(6), a pleading may be dismissed when it fails to “state a claim
5 upon which relief can be granted.” Fed. R. Civ. P. 12(b)(6). “To survive a motion to
6 dismiss for failure to state a claim, a [counterclaimant] must state enough facts so that the
7 claim is plausible on its face.” *S.W. Windpower, Inc. v. Imperial Elec., Inc.*, 2011 WL
8 486089, at *1 (D. Ariz. Feb. 4, 2011). While the court should “treat all allegations of
9 material fact in the [counterclaim] as true,” “conclusory allegations of law and
10 unwarranted inferences are insufficient to defeat a motion to dismiss.” *Id.* The district
11 court has broad discretion to dismiss claims under Rule 12(b)(6) when they have no legal
12 merit. *Wood v. McEwen*, 644 F.2d 797, 800 (9th Cir. 1981). Dismissal under Rule
13 12(b)(6) is also appropriate where claims are barred by collateral estoppel. *See Fry v.*
14 *Northwestern Mut. Life Ins.*, 2010 WL 4581572, at *4 (D. Ariz. 2010).

16 ARGUMENT

17 **I. ARIZONA’S CONSTITUTIONAL CLAIMS ARE BARRED BY THE** 18 **COLLATERAL ESTOPPEL AND POLITICAL QUESTION DOCTRINES,** 19 **AND THEY FAIL TO STATE A COGNIZABLE CLAIM.**

20 **A. Arizona’s Attempt to Re-Litigate Claims Under Article IV, the Tenth** 21 **Amendment, and for Alleged Failure to Enforce Immigration Laws is** 22 **Precluded by *Arizona v. United States*.**

23 In Counts II, III, and V of its Counterclaim, Arizona advances the same claims
24 against the United States that were rejected by this Court in *Arizona v. United States*, No.
25 94-866 (D. Ariz. 1997) (“*Arizona I*”), where the State of Arizona alleged that the United
26 States had violated constitutional and statutory provisions relating to illegal immigration.
27 *See id., aff’d*, 104 F.3d 1095 (9th Cir. 1997) (for reasons set forth in *California v. United*
28

1 *States*, 104 F.3d 1086 (9th Cir. 1997), *cert. denied*, 522 U.S. 806 (1997)).¹ These claims
2 are therefore barred by the doctrine of collateral estoppel, which precludes “relitigation of
3 both issues of law and issues of fact if those issues were conclusively determined in a
4 prior action.” *United States v. Stauffer Chemical Co.*, 464 U.S. 165, 170-71 (1984);
5 *Segal v. Am. Tel. & Tel. Co.*, 606 F.2d 842, 845 (9th Cir. 1979) (defining issue preclusion
6 as foreclosing litigation of “issues of fact or law that were actually litigated and
7 necessarily decided by a valid and final judgment between the parties, whether on the
8 same or a different claim”). Undoubtedly, the collateral estoppel doctrine applies here
9 because the claims at issue in Counts II, III, and V were actually litigated and decided in
10 *Arizona I*.²

11
12 In Count II, Arizona claims that the United States has violated Article IV, Section
13 4 of the Constitution by failing to protect the State from an invasion of unlawfully present
14 aliens (Counterclaim ¶ 163). In its prior lawsuit, Arizona claimed that the United States
15 failed to “protect the State of Arizona from the massive influx of illegal aliens that has
16 occurred and is continuing to occur . . . and to guarantee the sovereignty of the state and a
17 republican form of government to the people of the State of Arizona.” *See Arizona I*,
18 Amended Complaint ¶ 34, Doc. 13³; *see also id.* ¶ 28 (stating that “[t]he massive and
19

20 ¹ The Ninth Circuit’s decision in *California v. United States* was incorporated into the
21 Ninth Circuit’s affirmance of the dismissal of *Arizona I*. Accordingly, this memorandum
22 refers to portions of *California* as having decided the appeal from *Arizona I*.

23 ² Similarly, Counts II, III, and V are barred by res judicata, because Arizona could have
24 raised these various claims in its prior dismissed action against the United States. *See*,
25 *e.g.*, *Stewart v. U.S. Bancorp*, 297 F.3d 953, 956 (9th Cir. 2002) (“Res judicata, or claim
26 preclusion, prohibits lawsuits on ‘any claims that were raised *or could have been raised*’
in a prior action.” (quoting *Owens v. Kaiser Found. Health Plan, Inc.*, 244 F.3d 708, 713
(9th Cir. 2001) (emphasis in *Stewart*)).

27 ³ Pursuant to L.R. Civ. 7.1(d)(4), copies of the Amended Complaint in *Arizona I* and this
28 Court’s decision in *Arizona I* will be included as attachments to the courtesy copy of the
instant motion delivered to the Court, as well as to counsel for all parties.

1 unlawful migration of foreign nationals constitutes an invasion of the State of Arizona . . .
2 pursuant to Article IV, Section 4”). In Count V, Arizona alleges that it has been forced
3 to expend state resources on incarceration and other expenses due to unlawfully present
4 aliens, in violation of the Tenth Amendment (Counterclaim ¶¶ 202-204). Similarly, in
5 *Arizona I*, the State alleged that “[a]s a result of federal immigration policy, the State of
6 Arizona has been required to expend its funds for the incarceration of those illegal aliens
7 who commit felonies against the people of the State of Arizona,” and that “[i]n essence,
8 the United States has ‘commandeered’ the Legislature of the State of Arizona” in
9 violation of the Tenth Amendment. *See Arizona I*, Amended Complaint ¶¶ 63, 30. So
10 too, in Count III, Arizona alleges that the federal government has adopted immigration
11 enforcement policies “that are so extreme that they amount to an abdication of DHS’ and
12 the DOJ’s statutory responsibilities,” (Counterclaim ¶¶ 180-182); and here again, in
13 *Arizona I*, the State asserted claims based on the “federal government’s manifestly
14 inadequate enforcement policy, its failure to observe its obligations under statutory and
15 constitutional law, and its reliance on policies that actually impede identification and
16 deportation of undocumented immigrants.” *See Arizona I*, Amended Complaint ¶¶ 3, 6,
17 31-32.
18

19 Each of these claims was dismissed by this Court under Rule 12(b)(6), and the
20 dismissal was affirmed by the Ninth Circuit. *See Arizona I*, April 18, 1995 Order, Doc.
21 28; *California*, 104 F.3d 1091-94. Arizona’s counterclaims are thus squarely foreclosed
22 by the collateral estoppel doctrine. In fact, Arizona even concedes that it has brought
23 these counterclaims in an effort to re-litigate issues that were definitively decided in the
24 earlier litigation: Arizona’s attorney-of-record in this action, Attorney General Thomas
25 Horne, has acknowledged that “[t]here are prior cases that went against [Arizona]” and
26 that the counterclaims were filed so as to “ask[] the 9th Circuit to take a second look.”
27 *See Jerry Markon*, “Arizona Files Countersuit Tied to Challenge of its Immigration Law,”
28 *The Washington Post*, February 14, 2011, available at

1 <http://www.washingtonpost.com/wp-dyn/content/article/2011/02/13/>
2 AR2011021303377.html. The underlying purpose of the collateral estoppel doctrine,
3 which is to promote adjudicative certainty, reliability, and finality, *see Allen v. McCurry*,
4 449 U.S. 90, 94 (1980), cannot be disregarded simply because a party wants the Court to
5 take a “second look.” For this reason alone, this Court should dismiss Counts II, III, and
6 V of the Counterclaim.

7
8 **B. Arizona’s Allegations Under Article IV of the Constitution (Count II)**
9 **Raise a Nonjusticiable Political Question and Fail to State a Claim**
10 **Upon Which Relief Can be Granted.**

11 Arizona alleges that the United States has violated Article IV of the U.S.
12 Constitution by failing to protect the State from an “invasion” of unlawfully present
13 aliens. *See, e.g.*, Counterclaim ¶¶ 162, 171. This Court lacks jurisdiction over this claim.
14 The Ninth Circuit has unequivocally held that federal courts lack jurisdiction over claims
15 brought under the “Invasion Clause” because such claims present a non-justiciable
16 political question:

17 [T]he issue of protection of the States from invasion implicates foreign
18 policy concerns which have been constitutionally committed to the political
19 branches. The Supreme Court has held that the political branches have
20 plenary powers over immigration. For this Court to determine that the
21 United States has been “invaded” when the political branches have made no
22 such determination would disregard the constitutional duties that are the
23 specific responsibility of other branches of government, and would result in
24 the Court making an ineffective non-judicial policy decision. Additionally,
25 even if the issue were properly within the Court’s constitutional
26 responsibility, there are no manageable standards to ascertain whether or
27 when an influx of illegal immigrants should be said to constitute an
28 invasion. The Court notes that the other Circuits that have addressed the
issues before us in similar suits against the United States have reached the
same conclusions that we do.

26 *California*, 104 F.3d at 1091 (internal citations omitted). The court’s opinion in
27 *California* reflects the clear and binding determination of the Ninth Circuit, which, along
28 with other Circuits, has dismissed Invasion Clause claims as non-justiciable political

1 questions. *See Barber v. Hawaii*, 42 F.3d 1185, 1199 (9th Cir. 1994) (rejecting Invasion
2 Clause claim); *see also Padavan v. United States*, 82 F.3d 23 (2d Cir. 1996) (same); *New*
3 *Jersey v. United States*, 91 F.3d 463 (3d Cir. 1996) (same); *Chiles v. United States*, 69
4 F.3d 1094 (11th Cir. 1995) (same).

5 In *California*, the Ninth Circuit joined the other Circuits cited above in holding
6 that an Invasion Clause claim represents a quintessential example of a question that is
7 non-justiciable due to a lack of judicially applicable standards and the serious separation
8 of powers concerns that would arise if the judiciary were to thrust itself into the matter.
9 *See* 104 F.3d at 1090-91 (citing *Baker v. Carr*, 369 U.S. 186, 217 (1962)). The Ninth
10 Circuit was correctly guided by *Baker v. Carr*, in which the Supreme Court established
11 six “formulations” that signal the presence of issues which are committed – on separation
12 of powers grounds – to the political branches and which therefore are unsuitable for
13 judicial review:
14

15 [1] a textually demonstrable constitutional commitment of the issue to a
16 coordinate political department; or [2] a lack of judicially discoverable and
17 manageable standards for resolving it; or [3] the impossibility of deciding
18 without an initial policy determination of a kind clearly for nonjudicial
19 discretion; or [4] the impossibility of a court’s undertaking independent
20 resolution without expressing lack of the respect due coordinate branches of
21 government; or [5] an unusual need for unquestioning adherence to a
22 political decision already made; or [6] the potentiality of embarrassment
23 from multifarious pronouncements by various departments on one question.

24 369 U.S. at 217. “Implicating any one of these factors renders a question ‘political’ and
25 thus nonjusticiable.” *United States v. Mandel*, 914 F.2d 1215, 1222 (9th Cir. 1990).

26 Arizona’s Invasion Clause claim implicates several of these formulations and thus,
27 as the Ninth Circuit held in *California*, is squarely barred by the political question
28 doctrine. The regulation of immigration and control over the borders are matters firmly
entrusted to the political branches, *see Mathews v. Diaz*, 426 U.S. 67, 81-86 (1976),
thereby implicating the first and fourth formulations discussed above. Similarly,

1 protection of the United States from “invasion” implicates matters of foreign policy and
2 defense which likewise are vested exclusively with the political branches. *See, e.g.,*
3 *Barclays Bank PLC v. Franchise Tax Bd. of Cal.*, 512 U.S. 298, 325-327 (1994); *Chicago*
4 *& Southern Air Lines, Inc. v. Waterman SS. Corp.*, 333 U.S. 103, 111 (1948).

5 Moreover, the second and third *Baker* formulations apply because the Constitution
6 does not provide any standards for adjudicating Arizona’s claim – *i.e.*, when a state has
7 been “invaded” and what judicial remedy might be appropriately ordered to cure an
8 “invasion.” Even if a peacetime influx of immigrants could be considered an “invasion,”
9 (which, as discussed *infra*, it cannot), the Constitution provides no standard that would
10 allow a federal court to determine either (i) when the influx should be deemed an
11 invasion or (ii) the adequacy of the federal government’s response to such an invasion.
12 Accordingly, just as the Ninth Circuit decided in *California*, the political question
13 doctrine precludes adjudication of Arizona’s claim. *California*, 104 F.3d at 1091; *see*
14 *also Colorado v. Gonzales*, 558 F. Supp. 2d 1158, 1162 (D. Colo. 2007).⁴
15
16

17
18 ⁴ Arizona’s Article IV claim also refers to the Constitution’s provision on protecting
19 states from “domestic violence.” *See* Counterclaim ¶ 163. As with the other provisions
20 of Article IV, Section 4, *see, e.g., O’Hair v. White*, 675 F.2d 680, 684 n.5 (5th Cir. 1982);
21 *see also California*, 104 F.3d at 1091, the “Domestic Violence” claim presents a non-
22 justiciable political question. The same considerations underlying the Ninth Circuit’s
23 political-question analysis for the Invasion Clause likewise require dismissal of claims
24 under the Domestic Violence Clause, which (among other failings) “lack[] judicially
25 discoverable and manageable standards.” *See supra* at 9-10; *Baker*, 369 U.S. at 217.
26 Even if such standards existed, they would not apply here: “when that Clause speaks of
27 ‘domestic Violence’ it means insurrection, riots, and other forms of civil disorder,”
28 *United States v. Smith*, 171 F.3d 617, 626 (8th Cir. 1999), of a type that has not even been
alleged in this case. Indeed, Arizona does not offer any allegations in support of its
“domestic violence” claim other than those same allegations offered in support of its
“invasion” claim. Accordingly, this claim should be dismissed both as repetitive of the
“invasion” claim and as lacking sufficient specificity. *See infra* at 16 (citing *Ashcroft v.*
Iqbal, 129 S.Ct. 1937 (2009)). Finally, as discussed above, this claim would be barred by
res judicata. *See supra* note 2.

1 In an effort to escape the unequivocal precedent rejecting Invasion Clause claims,
2 Arizona suggests that “the concept of ‘invasion’ has changed since the drafting of the
3 Constitution.” Counterclaim ¶ 167. But regardless of whether the term “invasion” could
4 properly be expanded to cover non-military intrusions, as Arizona now contends, this
5 Court is precluded from entertaining the broader question in the first instance – the Ninth
6 Circuit determined that the political question doctrine bars the judicial branch from
7 considering whether an invasion has actually occurred (regardless of what the abstract
8 definition of invasion might be). *See California*, 104 F.3d at 1091. In addition, even if
9 Article IV were subject to Arizona’s proposed dynamic construction, the Ninth Circuit
10 has also made clear its view that “invasion” as used in Article IV is meant to afford
11 protection to states “in situations wherein a state is exposed to armed hostility from
12 another political entity[;] from ‘foreign hostility’ and ‘ambitious or vindictive enterprises’
13 on the part of other states or foreign nations.” *Id.* at 1091 (quoting *The Federalist*, No.
14 43). Thus, even if Arizona’s Invasion Clause claims were otherwise justiciable, Arizona
15 has failed to state a cognizable claim for “invasion” under this Circuit’s precedent.⁵
16

17 **C. Arizona’s Tenth Amendment Allegations (Count V) Must be Dismissed**
18 **For Failure to State a Claim Upon Which Relief Can be Granted.**

19 Arizona’s Tenth Amendment claim likewise suffers the same deficiencies that it
20 did in *Arizona I*. Arizona claims that the federal government’s immigration policies have
21 indirectly resulted in a variety of expenditures for Arizona, in violation of the Tenth
22 Amendment. Counterclaim ¶¶ 202, 203. Specifically, Arizona alleges that federal
23 enforcement of the immigration laws “compel[s] Arizona to accommodate and provide
24 education, medical care, and other benefits to illegal aliens within its borders.”
25 Counterclaim ¶ 202. But these expenditures are not incurred as a result of any command
26 set forth in the federal government’s immigration policies. Rather, as the Ninth Circuit

27 ⁵ Moreover, Arizona’s contention that the concept of “invasion” has changed cannot
28 seriously be applied in light of the Ninth Circuit’s decision in *California* – it is difficult to
comprehend how this constitutional concept has materially changed since 1997.

1 explained in *California*, the Tenth Amendment is not implicated where alleged state costs
2 arise due to state activities and “independent constitutional obligation[s]” and where “no
3 federal mandate requires [Arizona] to pursue a . . . policy resulting in these costs.”

4 *California*, 104 F.3d at 1093.

5 Arizona alleged nearly identical injuries in 1994, claiming that the United States
6 violated the Tenth Amendment by enacting an immigration policy that resulted in a
7 variety of costs for the State, including those related to incarceration. *California*, 104
8 F.3d at 1092-93; see *Arizona I*, Amended Complaint ¶¶ 63-67. The Ninth Circuit
9 rejected Arizona’s Tenth Amendment claims (which were similar to those brought by
10 California), because the various cited costs were incurred as part of state, and not federal,
11 programs:

12
13 California also contends . . . that the United States has violated the Tenth
14 Amendment because federal immigration policy causes the State to incur
15 the costs of incarcerating those illegal aliens who commit crimes within the
16 State. California reasons that because the United States has failed to
17 effectively enforce its immigration policies, the Federal Government has
18 essentially “commandeered” the State’s legislative process by forcing
19 California to allocate money and human resources to both incarcerate
20 illegal alien felons and supervise their parole.

21 The Court concludes that California has failed to allege a Tenth
22 Amendment violation because no federal mandate requires California to
23 pursue a penal policy resulting in these costs.

24 *Id.* at 1092-93. The Ninth Circuit held that the same analysis applies for all other costs
25 that the State claimed were incurred as a result of federal immigration policy:

26 Finally, California argues that the Federal Government has violated the
27 Tenth Amendment because the State must allocate funds to pay for the
28 public education of alien children. We note that this argument is merely a
variation of California's claim that the Tenth Amendment is violated when
it expends funds to incarcerate illegal aliens. Again, California contends
that the costs of educating alien children stems from the Federal
Government’s ineffective policing of national borders. We find
California’s argument unpersuasive. Because the State’s obligation to

1 provide this education derives from an independent constitutional
2 obligation and not federal immigration policy, *see Plyler v. Doe*, 457 U.S.
3 202, 230 (1982), the Tenth Amendment is not implicated.

4 *Id.* at 1093. The Tenth Amendment analysis from *California* is binding as well as plainly
5 correct. The Tenth Amendment precludes the federal government from “simply
6 commandee[ring] the legislative processes of the States by directly compelling them to
7 enact and enforce a federal regulatory program.” *New York v. United States*, 505 U.S.
8 144, 161 (1992) (internal citation omitted); *Printz v. United States*, 521 U.S. 898, 935
9 (1997). No such commandeering can plausibly be claimed here. The federal
10 immigration policies cited by Arizona are administered by federal agencies; their
11 implementation does not direct Arizona to do anything. Arizona nonetheless maintains
12 that the Tenth Amendment is violated by the State’s expenditure of funds that, Arizona
13 claims, results from the unlawful presence of aliens which, in turn, allegedly results from
14 federal immigration policy. Counterclaim ¶ 202. But Arizona expenditures made
15 pursuant to a set of Arizona programs do not raise Tenth Amendment concerns, even if
16 those expenditures were allegedly affected by federal activity. Costs incurred as a result
17 of Arizona’s enforcement of its criminal laws against unlawfully present immigrants do
18 not raise Tenth Amendment concerns “because no federal mandate requires [Arizona] to
19 pursue a . . . policy resulting in these costs.” *California*, 104 F.3d at 1093; *see also*
20 *Arizona I*, April 18, 1995 Order at 9 (“The cost of incarcerating illegal aliens results not
21 from federal law but from Arizona’s own decision to prosecute illegal aliens for criminal
22 offenses defined by Arizona law. The Government did not command Arizona to enact
23 and enforce a criminal code.”). Accordingly, Arizona’s Tenth Amendment claim raises
24 the same deficient arguments as it did in *Arizona I*, necessitating dismissal under Rule
25 12(b)(6).⁶
26

27 ⁶ Arizona also puzzlingly suggests that the United States has violated the Tenth
28 Amendment by bringing suit challenging the constitutionality of S.B. 1070 (*i.e.*, the
original set of claims in this action) and preventing Arizona’s implementation of S.B.

1 **D. Arizona Lacks Standing to Raise Counts II, III, or V Against the**
2 **Federal Government.**

3 Even if Counts II, III and V of Arizona’s Counterclaim are otherwise justiciable,
4 the claims must nonetheless be dismissed if Arizona lacks standing to bring them – an
5 inquiry that requires Arizona to demonstrate that it has suffered a legal injury in fact, that
6 a causal connection to the purported illegal actions of the countereffendants exists, and
7 that the relief sought will likely redress the injury. *Lujan v. Defenders of Wildlife*, 504
8 U.S. 555, 560 (1992). Here, Arizona cannot show that the federal government has caused
9 the alleged injuries, *i.e.*, the costs associated with unlawfully present aliens entering and
10 residing in the State. To establish the causation element of standing, a claimant must
11 show that the alleged injury “fairly can be traced to the challenged action of the
12 defendant, and not injury that results from the independent action of some third party not
13 before the court.” *Simon v. E. Kentucky Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976).
14 Arizona’s claimed injuries have not been caused by the United States; rather, the causes
15 of migration into the United States, whether legal or illegal, are as many and varied as the
16 persons who come to this country. And for those immigrants who unlawfully enter or
17 reside here, that process includes the deliberate decision to evade federal law. While the
18 United States in no way condones the criminal conduct and the various costs associated
19 with those who unlawfully enter or remain in the country – and continues to expend a
20 great deal of resources to enforce the immigration laws and remove unlawfully present
21

22
23 1070. Counterclaim ¶¶ 199, 212. There simply is no basis to suggest that the Tenth
24 Amendment is implicated by the United States’ decision to bring a lawsuit to enforce the
25 Supremacy Clause of the Constitution. Arizona’s argument is self-contradictory, and is
26 simply another way of arguing that S.B. 1070 is not preempted. This Court has, of
27 course, already held that portions of the United States’ preemption claims were likely to
28 succeed on the merits (a decision recently affirmed by the Ninth Circuit), and has
otherwise refused to dismiss the United States’ lawsuit. Plainly, the Tenth Amendment is
not violated by the enforcement of the Supremacy Clause – enforcing the latter ensures
that the states have not exceeded the authority retained under the former.

1 aliens – the conduct of these individuals is attributable to them and not to the United
2 States.

3 **II. ARIZONA’S STATUTORY CLAIMS MUST BE DISMISSED AS**
4 **UNREVIEWABLE.**

5 In addition to its constitutional claims, Arizona alleges that DHS and DOJ have
6 failed to comply with various federal statutes relating to immigration enforcement and
7 border control, and requests the extraordinary relief of mandamus to force these agencies
8 to take certain actions. *See* Counterclaim, Counts I, III, and IV. These claims are
9 untenable.

10 Here, the Administrative Procedure Act (“APA”), 5 U.S.C. § 701 *et seq*, provides
11 the only potential basis for review of counterclaimants’ statutory claims. The APA
12 generally allows for judicial review of “final agency action for which there is no other
13 adequate remedy in a court,” 5 U.S.C. § 704, and permits a reviewing court to “compel
14 agency action unlawfully withheld or unreasonably delayed,” *id.* § 706(1). *See*
15 Counterclaim ¶ 18. However, review of agency inaction “can proceed only where a
16 [claimant] asserts that an agency failed to take a *discrete* agency action that it is *required*
17 *to take.*” *Norton v. Southern Utah Wilderness Alliance (“SUWA”)*, 542 U.S. 55, 64
18 (2004) (emphasis in original). Further, under the APA, judicial review is precluded over
19 matters which are “committed to agency discretion by law.” 5 U.S.C. § 701(a); *see*
20 *Heckler v. Chaney*, 470 U.S. 821, 828 (1985) (“The APA’s comprehensive provisions for
21 judicial review of ‘agency actions,’ are contained in 5 U.S.C. §§ 701-706 . . . [b]ut before
22 any review at all may be had, a party must first clear the hurdle of § 701(a).”). Under
23 these prerequisites, none of Arizona’s statutory claims withstands scrutiny.

24 **A. Count III Must be Dismissed Because the Federal Government’s**
25 **Enforcement of Immigration Laws is Committed to Agency Discretion**
26 **by Law.**

27 In Count III, Arizona makes vague and generalized claims as to the federal
28 government’s alleged failure to adequately enforce federal immigration statutes. *See*

1 Counterclaim ¶¶ 180-182. This Count should be dismissed outright because it does not
2 satisfy the bare minimal pleading requirements under Rule 8. In this Count, Arizona
3 simply alleges that the federal government has failed to “enforce certain provisions of the
4 federal immigration laws,” without citing to the federal statutes that have allegedly been
5 violated or explaining what these statutes specifically require of the federal government.
6 Arizona’s claim amounts to nothing more than an “unadorned, the-defendant-unlawfully-
7 harmed-me accusation,” *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009), which cannot
8 survive a motion to dismiss.⁷

9
10 Even if this claim met the pleading requirements, judicial review of this claim
11 would be precluded because, as the Ninth Circuit has explicitly held, immigration
12 enforcement decisions are wholly committed to agency discretion and are therefore
13 unreviewable. In *California*, the State “alleg[ed] that the Attorney General has failed to
14 adequately fulfill her obligation to enforce the country’s immigration laws.” 104 F.3d at
15 1094. The Ninth Circuit affirmed the dismissal of California’s claim, because the
16 Attorney General’s immigration enforcement decisions are committed to agency
17 prosecutorial discretion as a matter of law:

18 [T]he Court cannot, with propriety, address the issues raised. In *Heckler v.*
19 *Chaney*, 470 U.S. 821, 838 (1985) the Supreme Court held that “agency
20 refusals to institute investigative or enforcement proceedings” fall within
21 the “exception to reviewability provided by [5 U.S.C.] § 701(a)(2) for
22 action ‘committed to agency discretion.’” Each of the claims asserted by
23 California under these statutes implicates the institution of enforcement

23 ⁷ Among the general allegations made in Count III, Arizona claims that “ICE *may* choose
24 not to respond to inquiries from Arizona regarding individuals’ immigration status,”
25 Counterclaim ¶ 181 (emphasis added) and thus requests “an order requiring DHS to
26 respond to inquiries made by Arizona law enforcement personnel or agencies seeking to
27 verify or ascertain the citizenship or immigration status of any individual under the
28 jurisdiction of the law enforcement agency,” Counterclaim ¶ 184. Aside from its other
failings, Arizona lacks standing to pursue this claim. At no point has Arizona alleged
that DHS *has not* responded to Arizona’s inquiries, thus it has not been injured by the
administration of 8 U.S.C. § 1373.

1 actions of the variety contemplated in *Heckler*. As the Court noted in
2 *Heckler*, “an agency’s decision not to prosecute or enforce, whether
3 through civil or criminal process, is a decision generally committed to an
4 agency’s absolute discretion.” . . . 470 U.S. at 831. Accordingly, these
5 issues, having been committed to agency discretion, are not subject to
6 judicial review.

7 *Id.* *California* recognized that the Supreme Court’s decision in *Heckler* established a
8 clear rule that a federal agency’s decision not to take an enforcement action is committed
9 to agency discretion by law, 5 U.S.C. § 701(a)(2), and thus not subject to judicial review
10 under the APA. *Heckler*, which governs the instant counterclaim, involved a statute that
11 “state[d] baldly that any person who violates the Act’s substantive prohibitions ‘shall be
12 imprisoned . . . or fined.’” 470 U.S. at 835. Although this “bald” language was
13 unambiguous as to the need for a fine or imprisonment, the Supreme Court nevertheless
14 concluded that the Secretary of Health and Human Services had unreviewable discretion
15 to decline to take action with regard to any given violation. The Court noted that even
16 mandatory statutory language does not require an enforcement action and, just as
17 importantly, does not allow a court to review the prosecutor’s exercise of discretion. *Id.*

18 Although Arizona seeks judicial review of the federal government’s “refus[al] to
19 enforce certain provisions of the federal immigration laws” (Counterclaim ¶ 182),
20 *Heckler* and *California* make clear that Arizona cannot challenge the federal
21 government’s exercise of prosecutorial discretion in the enforcement of the federal
22 immigration laws. Accordingly, this claim must be dismissed.

23 Nor can Plaintiffs claim that the United States has “abdicat[ed its] statutory
24 responsibilities” under the immigration laws. Counterclaim ¶ 180. Although the Ninth
25 Circuit has recognized a limited exception to the general rule of nonreviewable
26 prosecutorial discretion in certain instances in which an agency “has consciously and
27 expressly adopted a general policy that is so extreme as to amount to an abdication of its
28 statutory responsibilities,” *Montana Air Chapter No. 29 v. FLRA*, 898 F.2d 753, 756 (9th
Cir. 1990) (internal citations omitted)), that exception is plainly inapplicable here. The

1 United States has, of course, adopted no policy abandoning its enforcement
2 responsibilities (nor has Arizona’s counterclaim specifically identified any policy of
3 abdication). Indeed, Arizona’s argument is defeated by its own allegations. Arizona
4 does not allege that the United States has failed to enforce immigration laws altogether,
5 but merely alleges that the United States has chosen to enforce the immigration laws in a
6 manner that Arizona believes is not what Congress intended. *See* Counterclaim at 32; *id.*
7 ¶ 181 (claiming that “enforcement of the federal immigration laws . . . ha[s] provided
8 greater protection to other states than to Arizona”). Even accepting Arizona’s own
9 allegations as true, then, the United States’ enforcement of the federal immigration laws
10 is a legitimate exercise of discretion to allocate law enforcement resources and determine
11 priorities. *See Heckler*, 470 U.S. at 831.

12
13 Arizona’s counterclaim thus suffers the same failings as the claim previously
14 brought by California: Arizona seeks judicial review of enforcement decisions that are
15 committed to agency discretion by law and are therefore unreviewable under the APA.⁸

16 **B. Count I Must be Dismissed Because The Manner in Which DHS**
17 **Works to Achieve “Operational Control” of the U.S. Border is**
18 **Committed to Agency Discretion by Law and is Therefore**
19 **Unreviewable.**

20 Even if Arizona had standing to assert a claim under IIRIRA § 102 (as amended
21 by the Secure Fence Act and Consolidated Appropriations Act, 2008),⁹ its claims

22 ⁸ Once again, Arizona suggests that the United States has violated federal law by bringing
23 suit to enjoin the implementation of S.B. 1070. *See* Counterclaim ¶ 181(b). As discussed
24 above, *see supra note 6*, there is no basis for claiming that federal law has been violated
25 by the filing of a lawsuit claiming a violation of the Supremacy Clause.

26 ⁹ Although it is Arizona’s burden to do so, Arizona has not identified either a basis for
27 standing or a right of action which would enable Arizona to bring this specific challenge
28 to the enforcement of IIRIRA § 102. *See generally Suter v. Artist M.*, 503 U.S. 347, 363
(1992) (plaintiff bears burden of demonstrating existence of private right of action); *San
Diego County Gun Rights Comm. v. Reno*, 98 F.3d 1121 (9th Cir. 1996) (“As the parties
invoking federal jurisdiction, plaintiffs bear the burden of establishing their standing to
sue.”).

1 improperly seek to compel agency action which is either not required or is committed to
2 the sole discretion and expertise of the agency.

3 *First*, the counterclaimants seek some sort of broad mandamus relief requiring the
4 Secretary of DHS to achieve and maintain “‘operational control’ of the Arizona-Mexico
5 border” in compliance Section 2 of with the Secure Fence Act. Counterclaim ¶ 157a,
6 158. However, the APA does not provide for review of DHS’s alleged failure to obtain
7 “operational control” of the border under Section 2 of the Secure Fence Act. Although
8 the APA allows reviewing courts to “compel agency action unlawfully withheld or
9 unreasonably delayed,” 5 U.S.C. § 706(1), the Supreme Court has unanimously held that
10 a plaintiff cannot maintain a claim under Section 706(1) absent a mandatory statutory
11 obligation that an agency take the specific, discrete action that the plaintiff wants it to
12 take. *SUWA*, 542 U.S. 64.

13 In *SUWA*, the plaintiffs claimed that a statute directing the Bureau of Land
14 Management to “continue to manage [wilderness areas] in a manner so as not to impair
15 the suitability of such areas for preservation as wilderness,” required the agency to ban
16 off-road vehicles in certain wilderness areas. *Id.* at 65. The Supreme Court dismissed the
17 plaintiffs’ “failure to act” claim, because the statute at issue simply directed the agency to
18 preserve the character of wilderness areas. *Id.* at 65-67. The Court explained that a
19 “failure to act” under the APA is “properly understood to be limited, as are the other
20 items in § 551(13), to a *discrete* action.” *Id.* at 62-63 (emphasis in original). Therefore,
21 “a claim under § 706(1) can proceed only where a plaintiff asserts that an agency failed to
22 take a *discrete* agency action that it is *required* to take.” *Id.* at 64; *Hells Canyon*
23 *Preservation Council v. U.S. Forest Serv.*, 593 F.3d 923, 932-33 (9th Cir. 2010)
24 (rejecting plaintiff’s effort to compel Forest Service to designate specific trail as a non-
25 motorized “wilderness area,” because the APA “does not give us license to ‘compel
26 agency action’ whenever the agency is withholding or delaying an action we think it
27 should take[;] [i]nstead, our ability to ‘compel agency action’ is carefully circumscribed
28 to situations where an agency has ignored a specific legislative command.”).

1 Just as the plaintiffs in *SUWA*, Arizona alleges here that DHS has failed to
2 comply with a broad statutory directive. Quoting the statute, Arizona contends that the
3 Secretary has not taken “all actions the Secretary determines necessary and appropriate to
4 achieve and maintain operational control over the entire international land and maritime
5 borders,” language which clearly contemplates broad Secretarial discretion and an
6 absence of specifically mandated “discrete” actions. *See* Secure Fence Act, Pub. L. No.
7 109-367, § 2 (2006), codified at 8 U.S.C. § 1701 note (defining “operational control” as
8 “the prevention of all unlawful entries into the United States, including entries by
9 terrorists, other unlawful aliens, instruments of terrorism, narcotics, and other
10 contraband”). Like the statute at issue in *SUWA*, which required the agency to manage
11 lands in a particular manner, the “operational control” directive contained in the Secure
12 Fence Act may be “mandatory as to the object to be achieved, but it leaves [DHS] a great
13 deal of discretion in deciding how to achieve it.” 542 U.S. at 66. Indeed, the Act
14 explicitly entrusts the Secretary to take actions that she “determines necessary and
15 appropriate” to achieve operational control over the border. The “operational control”
16 mandate is not a specific, discrete action of the sort that the courts have the ability to
17 compel under the APA. And it is telling that Arizona does not request a discrete action in
18 its “operational control” claim,¹⁰ and instead asks this Court to direct DHS to comply
19 with the “operational control” mandate; to order DHS to “deploy such temporary
20 measures as are necessary and appropriate to protect Arizona . . . until the Secretary has
21 achieved ‘operational control’ of the Arizona-Mexico border”; and to hold a hearing “to
22 address any other general or specific relief that may be necessary or appropriate under the
23 circumstances.” Counterclaim ¶¶ 158a-b. In so doing, Arizona requests a remedy that
24 the Supreme Court has expressly forbidden: a “wholesale improvement of [a] program
25 by court decree, rather than in the offices of the Department or the halls of Congress.”
26

27 ¹⁰ Arizona’s specific request concerning the construction of the 700 mile fence will be
28 addressed below, although it too is subject to the same flaws.

1 *SUWA*, 542 U.S. at 64, 66-67 (explaining that the APA does not contemplate relief that
2 would require the “supervising court, rather than the agency, to work out compliance
3 with the broad statutory mandate, injecting the judge into day-to-day agency
4 management”).¹¹

5 *Second*, Arizona seeks mandamus relief ordering the Secretary to complete “at
6 least 700 miles of fencing” along with additional infrastructure listed in the Consolidated
7 Appropriations Act amendments to IIRIRA § 102. Counterclaim ¶ 157b. This claim also
8 fails under the APA, because the actions at issue are committed to the agency’s discretion
9 under the applicable statutes, and are therefore not reviewable by this Court. *See* 5
10 U.S.C. § 701. An agency decision is deemed to be “committed to agency discretion” “if
11 no judicially manageable standards are available for judging how and when an agency
12 should exercise its discretion.” *Heckler*, 470 U.S. at 830; *Diaz-Covarrubias v. Mukasey*,

13 ¹¹ Although Arizona does not request any specific injunctive relief relating to
14 congressional reporting requirements, *see* Counterclaim ¶ 157, it alleges that DHS has not
15 complied with the Secure Fence Act’s requirement that DHS “submit to Congress a
16 report on the progress made toward achieving and maintaining operational control over
17 the [border],” apparently quarreling with the content of DHS’s reports and statements to
18 Congress, *see* Counterclaim ¶¶ 92-95. However, courts, including the Ninth Circuit, have
19 made clear that when Congress has requested an explanation of some matter from the
20 Executive Branch, the determination of whether Congress should be satisfied with the
21 proffered explanation should be left to Congress. A report to Congress is “not agency
22 action of the sort that is typically subject to judicial review. . . . Because it triggers no
23 legal consequences and determines no rights or obligations, no check on the substance of
24 the report is necessary. Having requested the report, Congress, not the judiciary, is in the
25 best position to decide whether it’s gotten what it wants.” *Guerrero v. Clinton*, 157 F.3d
26 1190, 1196 (9th Cir. 1998) (holding that Hawaii did not have standing and did not present
27 a reviewable claim, where it alleged that the Interior Department failed to meet
28 congressional reporting requirements concerning the impact of a federal-state compact,
even where the reports were to include the views of Hawaii); *see also Nat. Res. Def.
Council, Inc. v. Hodel*, 865 F.2d 288, 318-19 (D.C. Cir. 1988) (holding that a
congressional reporting provision “embodies a requirement that by its nature seems
singularly committed to congressional discretion in measuring the fidelity of the
Executive Branch actor”); *College Sports Council v. GAO*, 421 F. Supp. 2d 59, 67
(D.D.C. 2006) (similar). The absence of a meaningful standard, in combination with the
very nature of a congressional reporting requirement, demonstrates that it is for Congress
alone to decide whether it wants to receive more information from DHS.

1 551 F.3d 1114, 1118 (9th Cir. 2009). Thus, when a statute directs the Secretary to make
2 certain decisions but then offers no “relevant statutory reference point for the court” to
3 evaluate those decisions, “other than the decisionmaker’s own views of what is []
4 appropriate,” the decision is unreviewable under the APA. *Milk Train, Inc. v. Veneman*,
5 310 F.3d 747, 751 (D.C. Cir. 2003) (internal quotation marks omitted) (holding that the
6 Secretary of Agriculture’s determination of the manner in which to provide dairy
7 subsidies was committed to agency discretion where the statute provided that the funds
8 be disbursed “in a manner determined appropriate by the Secretary”).

9 Section 102 of the IIRIRA (as amended) vests in the Secretary complete discretion
10 for determining how to gain operational control of the border and where fencing and
11 additional measures should be utilized in that effort, directing the Secretary to construct
12 reinforced fencing along the southwest border “where fencing would be most practical
13 and effective,” IIRIRA § 102(b)(1)(A), specifying that:

14 [N]othing in this paragraph shall require the Secretary of [DHS] to install
15 fencing, physical barriers, roads, lighting, cameras, and sensors in a
16 particular location along an international border of the United States, *if the*
17 *Secretary determines that the use or placement of such resources is not the*
18 *most appropriate means to achieve and maintain operational control over*
the international border at such location.

19 IIRIRA § 102(b)(1)(D) (emphases added). Further, the Act prescribes no deadline for
20 completing the construction of 700 miles of fencing or installing additional physical
21 barriers, roads, lighting, cameras, and sensors along the southwest border, despite the fact
22 that the Act prescribed deadlines in other instances. *Compare* IIRIRA
23 § 102(b)(1)(B), *with id.* § 102(b)(1)(A). Thus, by its use of deferential language and
24 terms, IIRIRA § 102 (as amended) explicitly entrusts the Secretary with the ultimate
25 discretion to determine whether fencing or other measures should be installed in any
26 “particular location,” and whether “the use or placement of such resources” is the most
27 appropriate means of achieving operational control over the border. IIRIRA
28 § 102(b)(1)(D); *see Webster v. Doe*, 486 U.S. 592, 603-04 (1988) (holding that a

1 provision allowing termination of a CIA employee whenever the Director “shall deem
2 such termination *necessary or advisable in the interests of the United States*” precluded
3 judicial review of APA claim) (emphasis added); *Drake v. FAA*, 291 F.3d 59, 72 (D.C.
4 Cir. 2002) (noting that a statutory provision that allows the agency head to act when
5 “[she] ‘is *of the opinion* that the complaint does not state facts that warrant an
6 investigation,’” gives the agency “virtually unbridled discretion over such decisions”)
7 (emphasis added). Section 102 of IIRIRA does not provide any further guidance
8 regarding the manner of construction and placement of fencing and other measures. And
9 while much fence construction has already taken place along the border in Arizona, *see*
10 *supra* at 4, the language of the applicable statutes provides no meaningful standards by
11 which to review the Secretary’s decisions in this regard.¹²

12 In addition, even if IIRIRA § 102 were construed to provide Arizona with some
13 enforceable interest with respect to the construction of fencing, there remains no
14 meaningful standard by which this Court can review the agency’s allocation and
15 prioritization of resources concerning border control measures. DHS is an agency with
16 limited resources and enormous responsibility, which includes nothing short of ensuring
17 the security of the entire American public, including the citizens of Arizona. *See* 6
18 U.S.C. § 111. Through both the Secure Fence Act and IIRIRA § 102, DHS has been
19 tasked with *multiple* mandates and objectives, such as taking all actions deemed
20 necessary to achieve and maintain operational control over the border, which may include
21 using personnel and technology such as unmanned aerial vehicles, satellites, radar
22 coverage, and ground-base sensors to systematically survey the entire international land
23 and maritime border, *see* Pub. L. No. 109-367, § 2; constructing fencing along the
24

25 ¹² To the extent that Arizona is not seeking an order requiring the Secretary to construct
26 more fencing along Arizona’s border, its claim would be barred for lack of standing – the
27 requested relief would not redress the alleged injury, in that the construction of fencing
28 outside of Arizona would not affect injuries that Arizona claims are sustained due to
issues arising from DHS’s management of the “Arizona-Mexico border.” *See Lujan*, 504
U.S. at 560-61.

1 southwest border, *see* IIRIRA § 102(b); installing additional physical barriers, roads,
2 lighting, and cameras along the southwest border, *id.*; and conducting a study regarding
3 security measures on the northern border, *see* Pub. L. No. 109-367, § 4. Congress has not
4 earmarked particular funds for any one of these border related projects. Instead,
5 Congress has allocated a lump sum appropriation for “customs and border protection
6 fencing, infrastructure, and technology,” which includes the cost associated with all of
7 the mandates and objectives set forth in the applicable statutes. *See* Dep’t of Homeland
8 Sec. Appropriations Act, 2010, Pub. L. No. 111-83 (October 28, 2009) (2010
9 appropriations for border security fencing, infrastructure, and technology). As a result,
10 Arizona’s demand for the allocation of funds from within DHS’s lump sum border
11 control appropriations is a challenge to decisions that are committed to agency discretion
12 by law and therefore unreviewable. *See Lincoln v. Vigil*, 508 U.S. 182, 193 (1993).

13 The Secretary must determine how to allocate appropriated funds in order to
14 achieve the ultimate mandate of operational control over the border. And, as is
15 acknowledged in IIRIRA § 102 itself, multiple factors are involved in the construction of
16 fencing alone, including determining where fencing would be most practical and
17 effective; minimizing environmental, cultural, commercial, and community impact;
18 ensuring that the fencing has adequate safety features; as well as the costs and time
19 involved in acquiring the necessary property interests. *See* IIRIRA § 102(b) & (c).
20 Under such a scheme, the Secretary’s allocation of appropriated funds to either fencing or
21 some other specified border control measure clearly “requires a complicated balancing of
22 a number of factors which are peculiarly within its expertise” including “whether its
23 resources are best spent on one program or another,” and “whether it is likely to succeed
24 in fulfilling its statutory mandate.” *See Serrato v. Clark*, 486 F.3d 560, 567-70 (9th Cir.
25 2007) (quoting *Lincoln*, 508 U.S. at 193) (finding that termination of a Bureau of Prisons
26 program was unreviewable where decision involved agency’s allocation of lump sum
27 appropriation). Accordingly, the limited appropriations allocated for border control
28 measures and the inherent expertise necessary for prioritizing the allocations, precludes

1 the Court from second-guessing the Secretary’s determinations as to how, when, and
2 where fencing and other border-control measures will be undertaken. *See Lincoln*, 508
3 U.S. at 192 (“[T]he very point of a lump-sum appropriation is to give an agency the
4 capacity to adapt to changing circumstances and meet its statutory responsibilities in what
5 it sees as the most effective or desirable way.”); *Swift v. United States*, 318 F.3d 250, 253
6 (D.C. Cir. 2003) (stating that judicial review is unavailable because the statute “neither
7 sets substantive priorities nor circumscribes the government’s power to discriminate
8 among issues or cases it will pursue” (internal citations omitted)). Therefore, because
9 this Court is without manageable standards to compel the Secretary to take any specific
10 action relating to the completion of the 700 mile fence or installation of any additional
11 infrastructure along the Arizona border, this matter is committed to the agency’s
12 discretion and is therefore precluded from judicial review.¹³

13 **C. Count IV Must be Dismissed Because Reimbursement Rates Under the**
14 **SCAAP Program are Committed to the Attorney General’s Discretion**
15 **by Law.**

16 Count IV of the Counterclaim – which alleges that the United States has failed to
17 adequately reimburse Arizona for incarceration expenses under the SCAAP program –
18 similarly should be dismissed because Arizona has challenged a determination that is
19 committed to agency discretion by law.

20 The SCAAP program allows for the reimbursement of certain expenses related to
21 the incarceration of unlawfully present aliens. *See* 8 U.S.C. § 1231(i) (INA § 241(i)).
22 The program is subject to two funding limits: A set of maximum “authorized”
23 appropriation amounts listed in INA Section 241(i)(5) and a (historically smaller) set of

24 ¹³ As previously explained, DHS has already made substantial progress under IIRIRA
25 § 102 (as amended), *see supra* at 3-4. Under these circumstances, Arizona cannot state a
26 cognizable claim of “unreasonable delay.” *See, e.g., SUWA*, 542 U.S. at 64 & n.1
27 (holding that the APA “empowers a court only to compel an agency to perform a
28 ministerial or non-discretionary act”; “a delay cannot be unreasonable with respect to
action that is not required”).

1 actual appropriations.¹⁴ In every year of the SCAAP program’s existence, the Attorney
2 General has disbursed the entire amount of money allocated to the program to
3 jurisdictions requesting reimbursement for incarceration costs. *See* U.S. Dep’t of Justice,
4 Office of the Inspector General, Audit Division, “Cooperation of SCAAP Recipients in
5 the Removal of Criminal Aliens from the United States,” Audit Report 07-07 at iii, 2, 4
6 (January 2007), *available at* <http://www.justice.gov/oig/reports/OJP/a0707/final.pdf>.
7 Because state and local incarceration costs exceed the amount of funding actually
8 allocated by Congress to support the SCAAP program, the Attorney General has
9 provided states and localities with a *pro rata* share of their incarceration costs, which is
10 calculated based on those portions of state correctional officer salaries that are
11 attributable to incarceration of unlawfully present aliens. *Id.*; *see also* U.S. Dep’t of
12 Justice, Office of Justice Programs, Bureau of Justice Assistance, “State Criminal Alien
13 Assistance Program: FY 2006 Guidelines” at 12, *available at*
14 http://www.ojp.usdoj.gov/BJA/grant/2006_SCAAP_Guidelines.pdf (“The value of each
15 applicant’s correctional officer salary costs . . . are then totaled. . . . A percentage factor is
16 then used to reflect the relationship between the maximum reimbursable salary costs and
17 the program’s annual appropriation.”). Thus, because the SCAAP appropriation does not

19 ¹⁴ *Compare* 8 U.S.C. § 1231(i)(5)(A)-(C) (capping SCAAP appropriations at \$750
20 million for fiscal year 2006, \$850 million for fiscal year 2007, and \$950 million for fiscal
21 years 2008-2011), *with* Science, State, Justice, Commerce, And Related Agencies
22 Appropriations Act, 2006, Pub. L. No. 109-108, 119 Stat. 2290, 2230 (2005)
23 (appropriating \$405 million for SCAAP program for fiscal year 2006), Revised
24 Continuing Appropriations Resolution, 2007, Pub. L. No. 110-5, H.J. Res. 20 § 20901,
25 121 Stat. 8, 42 (2007) (appropriating approximately \$238 million for SCAAP program
26 for fiscal year 2007), Consolidated Appropriations Act, 2006, Pub. L. No. 110-161, 121
27 Stat. 1844, 1908 (2007) (appropriating approximately \$410 million for SCAAP program
28 for fiscal year 2008), Omnibus Appropriations Act, 2009, Pub. L. No. 111-8, 123 Stat.
524, 580 (2009) (appropriating \$400 million for SCAAP program for fiscal year 2009);
see also U.S. Dep’t of Justice, Office of the Inspector General, Audit Division,
“Cooperation of SCAAP Recipients in the Removal of Criminal Aliens from the United
States,” Audit Report 07-07 at iii (January 2007), *available at*
<http://www.justice.gov/oig/reports/OJP/a0707/final.pdf>.

1 actually allow for the reimbursement of 100% of state incarceration costs, the Attorney
2 General reimburses all states and localities for the same percentage of the eligible costs
3 they incurred for incarcerating unlawfully present aliens. *Id.*¹⁵

4 Here, although limited congressional appropriations necessarily result in all states
5 receiving SCAAP reimbursements of less than 100% of their incarceration costs, Arizona
6 claims that the Attorney General has violated the INA by failing to reimburse Arizona for
7 the entirety of its claimed costs. Counterclaim ¶¶ 190, 192. Arizona seeks to compel the
8 Attorney General to (i) to distribute funds beyond the SCAAP program’s specific
9 appropriation and out of appropriations made for other DOJ programs, and (ii) calculate
10 incarceration costs on some basis that disproportionately favors Arizona. Counterclaim ¶
11 192(e). This claim is unreviewable, because the INA specifically commits to the
12 Attorney General the discretion to determine how to reimburse states and how to
13 calculate the average incarceration costs to be reimbursed. These decisions are therefore
14 not subject to judicial review, and Arizona’s further suggestion that the Attorney General
15 distribute funds in excess of the congressional appropriation is simply untenable (if not
16 unlawful, *see* 31 U.S.C. § 1301(a)).

17
18 *First*, it is beyond this Court’s jurisdiction to, as Arizona suggests, compel the
19 Attorney General to use other monies generally appropriated to the DOJ to reimburse the
20 State. Indeed, similar challenges to the Attorney General’s methodology for reimbursing
21 states for the cost of incarcerating unlawfully present aliens have likewise been
22 dismissed. For example, both the Ninth and Third Circuits have rejected state demands
23 for the Attorney General to expend DOJ’s lump sum appropriation on incarceration costs,
24 because – in the absence of a specific Congressional appropriation in support of the
25 reimbursement program – reimbursement decisions are committed to agency discretion

26
27 ¹⁵ As a result, for example, if a given state was determined to have incurred 10% of the
28 total eligible incarceration costs borne by jurisdictions participating in the SCAAP
reimbursements.

1 by law. *See California*, 104 F.3d at 1093-94 (“[T]he Attorney General’s decision to
2 allocate monies generally appropriated to her in a lump-sum for the administration of
3 immigration laws for the specific purpose of reimbursing a State for the costs of
4 incarcerating illegal aliens . . . is ‘committed to agency discretion by law’ and is not
5 subject to judicial review under the Administrative Procedure Act.”); *New Jersey v.*
6 *United States*, 91 F.3d at 471. As these cases make clear, Arizona’s demand for funding
7 beyond the amount that Congress appropriated for the SCAAP program seeks to invade
8 the Attorney General’s discretion in a manner that is strictly foreclosed under the APA.¹⁶

9
10 Arizona appears to claim that the Attorney General violates SCAAP by refusing to
11 exceed the amount appropriated for the program. Counterclaim ¶¶ 190, 192, 106.
12 Arizona’s argument is plainly foreclosed by law. As with any federal program, the
13 United States can only provide reimbursement under the SCAAP program according to
14 the funding that has been actually allocated to the program. *See Anti-Deficiency Act*, 31
15 U.S.C. §§ 1341(a)(1)(A), 1532 (“An amount available under law may be withdrawn from
16 one appropriation account and credited to another or to a working fund only when
17 authorized by law.”); *Babbitt v. Oglala Sioux Tribal Pub. Safety Dep’t*, 194 F.3d 1374,
18 1378 (Fed. Cir. 1999) (“[I]n the face of congressional under-funding, an agency can only

19 ¹⁶ Nor can Arizona claim that the grants received fail to satisfy the statutory requirement
20 to enter into “contracts.” Counterclaim ¶ 190. The D.C. Circuit has made clear that the
21 process of applying for and accepting funding under SCAAP equates to a contractual
22 arrangement. *See California v. DOJ*, 114 F.3d 1222, 1226 (D.C. Cir. 1997)
23 (“California’s objection to the Attorney General’s use of the grant mechanism is also
24 without merit because the grant mechanism the Attorney General has established does
25 involve a ‘contractual arrangement,’ specifically a unilateral contract. Here the offer is
26 the Attorney General’s promise to distribute to each qualified State that applies a share of
27 the funds appropriated to implement [SCAAP]; the act requested in return is the
28 fulfillment of the requirements set forth in the application kit. When a State fulfills those
requirements and submits its application to the Attorney General, its performance will
constitute both consideration for the Attorney General’s promise and a manifestation of
its assent; a binding contract will have been created. Therefore, California has no cause to
complain about the procedure that the Attorney General has adopted.” (internal citation
omitted)).

1 spend as much money as has been appropriated for a particular program.”); *Highland*
2 *Falls-Fort Montgomery Cent. Sch. Dist. v. United States*, 48 F.3d 1166, 1171 (Fed. Cir.
3 1995) (holding that where Congress has not appropriated enough money for the
4 Department of Energy to fund a particular entitlement to the maximum extent authorized
5 by laws, it would be unlawful “for DOE to use money appropriated by Congress for
6 entitlements under other sections of the Act”). The Attorney General therefore cannot
7 distribute funds to Arizona under the SCAAP program where such funds have been
8 appropriated for other purposes. Arizona may, once again, take its complaint to the
9 political branches of the federal government, *see New Jersey*, 91 F.3d at 471 (“Congress
10 knows how to make an appropriation [for reimbursement of incarceration expenses] if it
11 wants to.”), but this Court is not the appropriate forum for such a challenge.

12
13 *Second*, by its plain terms, INA § 241 plainly entrusts the Attorney General with
14 the discretion to determine how to calculate the States’ average costs of incarceration for
15 reimbursement purposes. The INA provides that, upon a written request by a State, “the
16 Attorney General shall, as determined by the Attorney General . . . enter into a
17 contractual arrangement which provides for compensation to the State . . . with respect to
18 the incarceration of the undocumented criminal alien,” and the “compensation” “shall be
19 the average cost of incarceration of a prisoner in the relevant State *as determined by the*
20 *Attorney General.*” 8 U.S.C. § 1231(i) (emphasis added). Thus, the language of the
21 statute commits to the Attorney General the discretion to determine the “average cost of
22 incarceration” – especially where an exercise of such discretion is necessary due to the
23 limited funding appropriated for SCAAP reimbursements. *See, e.g., Claybrook v. Slater*,
24 111 F.3d 904, 908-09 (D.C. Cir. 1997) (decision of agency representative to adjourn a
25 meeting whenever “he determines it to be in the public interest” was committed to agency
26 discretion by law); *Veterans for Common Sense v. Peake*, 563 F. Supp. 2d 1049, 1055
27 (N.D. Cal. 2008) (“8 U.S.C. § 1710(a)(1) provides that the medical care veterans receive
28 is to be determined by the Secretary, and under the [APA] judicial review is prohibited

1 where actions are ‘committed to agency discretion by law.’”). And the statute provides
2 no manageable standards for the Court to review the Attorney General’s determination
3 regarding how to calculate the average cost of incarceration – the statute leaves the issue
4 of costs to the Attorney General and is otherwise silent. 8 U.S.C.A. § 1231(i)(2).
5 Accordingly, because this cost calculation is committed to the discretion of the Attorney
6 General, there can be no judicial review here. *See Heckler*, 470 U.S. at 830.

7
8 In addition, the Attorney General’s discretion in this regard is heightened because,
9 as Congress has not funded the SCAAP program to the maximum extent authorized, the
10 Attorney General must not only determine how to calculate the “average cost of
11 incarceration,” but must also decide how to allocate SCAAP funds among States in a
12 context where, due to the limited congressional appropriations, no possible formula will
13 result in every State receiving 100% reimbursement. In this situation, it is a fundamental
14 principle of administrative law that agencies have discretion to decide how to compensate
15 every eligible recipient by giving less. The federal courts have consistently recognized
16 that an agency’s decision as to how to allocate scarce funding resources is “committed to
17 agency discretion by law” and therefore unreviewable under the APA so long as the
18 allocated funding is spent on permissible statutory objectives. *See, e.g., Collins v. United*
19 *States*, 564 F.3d 833, 839 (7th Cir. 2009) (“The prioritization of demands for government
20 money is quintessentially a discretionary function.”); *St. Tammany Parish v. FEMA*, 556
21 F.3d 307, 325 (5th Cir. 2009) (“Eligibility determinations, the distribution of limited
22 funds, and other decisions regarding the funding of eligible projects are inherently
23 discretionary and the exact types of policy decisions that are best left to the agencies
24 without court interference.”); *Board of County Comm’rs v. Isaac*, 18 F.3d 1492, 1498
25 (10th Cir. 1994). Thus, this Court may not review the Attorney General’s discretionary
26 decision on how to distribute the limited SCAAP funding. *See Lincoln*, 508 U.S. at 193
27 (courts have “no leave to intrude” on the agency’s allocation of a lump-sum
28 appropriation, as long as the agency acts “to meet permissible statutory objectives”);

1 *International Union, United Autoworkers v. Donovan*, 746 F.2d 855, 861 (D.C. Cir.
2 1984) (“A lump-sum appropriation leaves it to the recipient agency (as a matter of law, at
3 least) to distribute the funds among some or all of the permissible objects as it sees fit.”);
4 *Kuhl v. Hampton*, 451 F.2d 340, 342 (8th Cir. 1971) (“The federal courts . . . were not
5 established to operate the administrative agencies of government.”).

6 In any event, the federal courts have recognized that an agency acts *within* its
7 discretion by distributing limited appropriated funds on a *pro rata* basis between
8 otherwise eligible recipients – just as the Attorney General has done here.¹⁷ *See, e.g.*,
9 *Ramah Navajo Sch. Bd. v. Babbitt*, 87 F.3d 1338, 1349 (D.C. Cir. 1996) (“Congress,
10 aware that it had appropriated an insufficient amount for full . . . funding, intended for the
11 agency to deal with the shortfall through a pro rata reduction.”).¹⁸

13 ¹⁷ “In considering the effect of appropriations language . . . the Supreme Court . . . [has]
14 recognized that the General Accounting Office’s [now the Government Accountability
15 Office (“GAO”)] publication, Principles of Federal Appropriations Law provides
16 significant guidance.” *Star-Glo Assocs. v. United States*, 414 F.3d 1349, 1354 (Fed. Cir.
17 2005). In turn, the GAO has explained that “There is no apparent reason why prorating
18 should not be one of the discretionary options available to the agency” for administering
19 a program where eligible claims exceed available appropriations. U.S. General
20 Accounting Office, Principles of Federal Appropriations Law, Vol. 1 at 3-52 (3d ed. Jan.
21 2004).

22 ¹⁸ Arizona also contends (Counterclaim ¶ 192(f)) that the Attorney General’s SCAAP
23 reimbursement decisions have not complied with the statutory provision asking “the
24 Attorney General [to] give priority to the Federal incarceration of undocumented criminal
25 aliens who have committed aggravated felonies.” 8 U.S.C. § 1231(i)(4)(A). Although
26 the INA generally calls upon the Attorney General to “priorit[ize]” the “federal
27 incarceration” of certain criminal aliens, this subsection has no bearing on how the
28 Attorney General should calculate the average costs of incarceration incurred by the
States. *Id.* Indeed, this Section provides that the Attorney General should prioritize
criminal aliens “[i]n carrying out paragraph (1)” of INA § 241(i), not in determining the
actual reimbursement costs as directed in paragraph (2) of the INA. *See id.* In addition,
Arizona’s extraordinary request that this Court should order the Attorney General to take
some greater number of aggravated felons into federal custody is plainly a remedy that is
not available through litigation. This request is beyond Arizona’s reach for the same
reasons that Arizona cannot use the judiciary to compel federal prosecutions or compel
the federal government to enforce immigration laws in the manner the State desires. *See*

1 **CONCLUSION**

2 For the foregoing reasons, the Court should grant the United States' Motion to
3 Dismiss the Counterclaims.

4
5 DATED: April 11, 2011

6 Respectfully submitted,

7 Tony West
8 Assistant Attorney General

9 Dennis K. Burke
10 United States Attorney

11 Arthur R. Goldberg
12 Assistant Branch Director

13 /s/ Varu Chilakamarri
14 Varu Chilakamarri (NY Bar #4324299)
15 Joshua Wilkenfeld (NY Bar #4440681)
16 U.S. Department of Justice, Civil Division,
17 Federal Programs Branch
18 20 Massachusetts Avenue, N.W.
19 Washington, D.C. 20530
20 Tel: (202) 616-8489/Fax (202) 616-8470
21 varudhini.chilakamarri@usdoj.gov

22 *Attorneys for the United States*

23
24
25 *supra*. Even if the “priorit[ization]” provision could be interpreted as an enforceable
26 mandate, the statute provides no meaningful standards as to how such “prioritization”
27 should be accomplished, and therefore is committed to agency discretion. *See, e.g.,*
28 *Legal Servs. of N. Cal. v. Arnett*, 114 F.3d 135, 140 (9th Cir. 1997) (holding that statute
requiring provision of legal services to senior citizens “to the maximum extent feasible”
left the court “ill-equipped” to determine how that could be accomplished).

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CERTIFICATE OF SERVICE

I hereby certify that on April 11, 2011, I electronically transmitted the attached document to the Clerk’s Office using the CM/ECF System for filing and transmittal of Notice of Electronic Filing to the CM/ECF registrants on record in this matter.

/s/ Varu Chilakamarri
Varu Chilakamarri