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12

13 IN THE UNITED STATES DISTRICT COURT
14 FOR THE NORTHERN DISTRICT OF CALIFORNIA
15 OAKLAND DIVISION
16

17 **STATE OF CALIFORNIA et al.;**

18 Plaintiffs,

19 v.

20 **DONALD J. TRUMP, in his official capacity**
21 **as President of the United States of America**
22 **et al.;**

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

**DECLARATION OF LEE I. SHERMAN
IN SUPPORT OF PLAINTIFF STATES'
ADMINISTRATIVE CONSENT
MOTION TO CONSIDER WHETHER
CASES SHOULD BE RELATED**

Judge: Honorable Haywood S. Gilliam,
Jr.
Trial Date: None Set
Action Filed: February 18, 2019

1 I, Lee I. Sherman, declare as follows:

2 1. I am an attorney licensed to practice law in the State of California and before this
3 Court. I am a Deputy Attorney General with the California Department of Justice, counsel for the
4 State of California, plaintiff in the action *State of California et al. v. Trump et al.* (*California v.*
5 *Trump I*), filed in this District on February 18, 2019, and *State of California et al. v. Trump et al.*
6 (*California v. Trump II*), filed in this District on March 3, 2020. I have personal knowledge of
7 the facts stated herein, and if called as a witness, I would testify competently thereto.

8 2. I file this Declaration in support of the Plaintiff States' Administrative Consent
9 Motion to Consider Whether Cases Should Be Related (the "Motion to Relate").

10 3. Attached hereto as **Exhibit A** is a true and correct copy of the First Amended
11 Complaint filed by Plaintiff States in *California v. Trump I*.

12 4. Attached hereto as **Exhibit B** is a true and correct copy of the Complaint filed by
13 Plaintiff States in *California v. Trump II*.

14 5. On February 26, 2020, I spoke by telephone with Andrew Warden, counsel for
15 Defendants in *California v. Trump I*, to ask him about Defendants' position on the Motion to
16 Relate. During that telephone conference, Mr. Warden said that Defendants agreed to relate the
17 cases as requested in Plaintiff States' Motion to Relate.

18 I declare under penalty of perjury under the laws of the United States that the foregoing is
19 true and correct and that this declaration was executed on March 3, 2020 at Los Angeles,
20 California.

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23 Lee I. Sherman
24 Deputy Attorney General
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EXHIBIT A

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

**STATE OF CALIFORNIA; STATE OF
COLORADO; STATE OF
CONNECTICUT; STATE OF
DELAWARE; STATE OF HAWAII;
STATE OF ILLINOIS; STATE OF
MAINE; STATE OF MARYLAND;
COMMONWEALTH OF
MASSACHUSETTS; ATTORNEY
GENERAL DANA NESSEL ON BEHALF
OF THE PEOPLE OF MICHIGAN;
STATE OF MINNESOTA; STATE OF
NEVADA; STATE OF NEW JERSEY;
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

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).

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 27
 28 ² Janice Cheryl Beaver, *U.S. International Borders: Brief Facts*, Cong. Res. Serv. (Nov. 9, 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.

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

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

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

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

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

PLAINTIFF STATE OF CONNECTICUT

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

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

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.

PLAINTIFF STATE OF HAWAII

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

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

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

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

54. Hawaii 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 funds.

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

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

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

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

6 59. Diversion of funding from military construction projects in Hawaii will harm the
7 State and its residents by injuring Hawaii’s economy. Defense spending, which includes military
8 construction projects, is the second-largest segment of Hawaii’s economy and, as of 2017,
9 represents 7.2 percent of the State’s Gross Domestic Product—the second highest percentage in
10 the nation. Hawaii has several major military installations, including Joint Base Pearl Harbor-
11 Hickam, Schofield Barracks, Fort Shafter, Marine Corps Base Hawaii (Kaneohe Bay), Camp
12 Smith, Tripler Army Medical Center, Wheeler Army Airfield, and the Pacific Missile Range
13 Facility at Barking Sands. On information and belief, Hawaii is subject to losing in excess of
14 \$311 million in military construction funds.

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

20 **PLAINTIFF STATE OF ILLINOIS**

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

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

24 63. J. B. Pritzker is the governor of Illinois, and under Illinois law has the “supreme
25 executive power” and the duty to ensure “the faithful execution of the laws.” Ill. Const., Art. V,
26 § 8.

27 64. On information and belief, Illinois is aggrieved by the actions of Defendants and
28 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.

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

PLAINTIFF COMMONWEALTH OF MASSACHUSETTS

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

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

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

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

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

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

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

PLAINTIFF STATE OF NEW JERSEY

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

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

131. 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. 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.

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.

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

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

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

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

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

⁷ Int'l Trade Admin., *New Mexico Exports, Jobs, & Foreign Investment* (Feb. 2018), <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 Threatens Biodiversity and Binational Conservation*, 68 *BioScience* 740, 743 (Oct. 2018), <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>.

160.060, ORS 180.210, and ORS 180.220.

148. On information and belief, Oregon 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 federal funds. The loss of funding to conduct drug interdiction and counter-narcotic activity, including funding that supports Oregon's work in this area with other States, would threaten the public safety of all Oregonians.

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

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

PLAINTIFF STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

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

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

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

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

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

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

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

¹² State of Rhode Island and Providence Plantations, *Fiscal Year 2019 Budget*, Vol. IV, 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>.

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/yycw5dk>.

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*

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

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

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

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

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

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

³⁷ *Id.*

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

³⁹ N.Y. Times, *Excerpt from Trump’s Interview with the New York Times* (Feb. 1, 2019), <https://tinyurl.com/y9gsosk4>; see also CBS, *Transcript: President Trump on “Face the Nation”* (Feb. 3, 2019), <https://tinyurl.com/y8l38g72> (President Trump describing emergency declaration 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

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

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

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

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

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

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

⁴² *Id.*

⁴³ Gov’t Accountability Office, *Additional Actions Needed to Better Assess Fencing’s Contributions to Operations and Provide Guidance for Identifying Capability Gaps*, GAO-17-331 (Feb. 16, 2017), at 7-10, <https://tinyurl.com/yaqbny6e>; Gov’t Accountability Office, *Secure 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

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

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

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

\$16.6 billion appropriation for border wall; no committee action); Fund and Complete the Border Wall Act, H.R. 6657, 115th Cong. (2018) (proposed authorization of funding for border wall; no committee action); American Border Act, H.R. 6415, 115th Cong. (2018) (proposed \$16.6 billion appropriation for border wall; no committee action); Border Security and Immigration Reform Act of 2018, H.R. 6136, 115th Cong. (2018) (proposed \$16.6 billion appropriation for border wall; voted down by House 301 to 121); Securing America’s Future Act of 2018, H.R. 4760, 115th Cong. (2018) (proposed construction of physical barrier, including border wall; voted down by House 231-193); Border Security and Deferred Action Recipient Relief Act, S. 2199, 115th Cong. (2017) (proposal to make available \$38.2 million for planning for border wall construction; 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>.

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

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

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

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

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

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

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

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

⁵⁰ White House, *Remarks by President Trump on the Humanitarian Crisis on our 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

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 26 ⁶⁰ White House, *Remarks by President Trump on the National Security and Humanitarian*
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).

boundaries of the United States.” *Id.*

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

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

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

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

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

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

⁶⁹ Gov’t Accountability Off., *Drug Control, DOD Should Improve Its Oversight of the 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.

E. National Environmental Policy Act (“NEPA”)

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

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

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

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

A. There Is No Evidence That a Massive Influx of Migrants Is Overwhelming 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

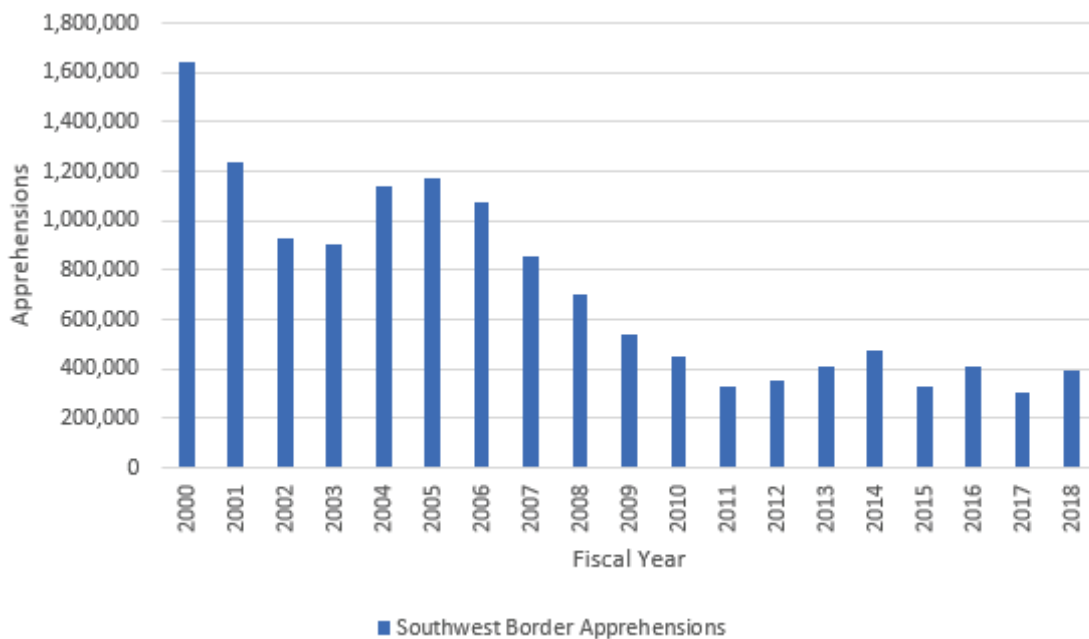
9 277. In FY2017, CBP made the fewest apprehensions since FY2000, and the number of
10 apprehensions in FY2018 was the fifth lowest since FY2000.⁷⁵

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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).

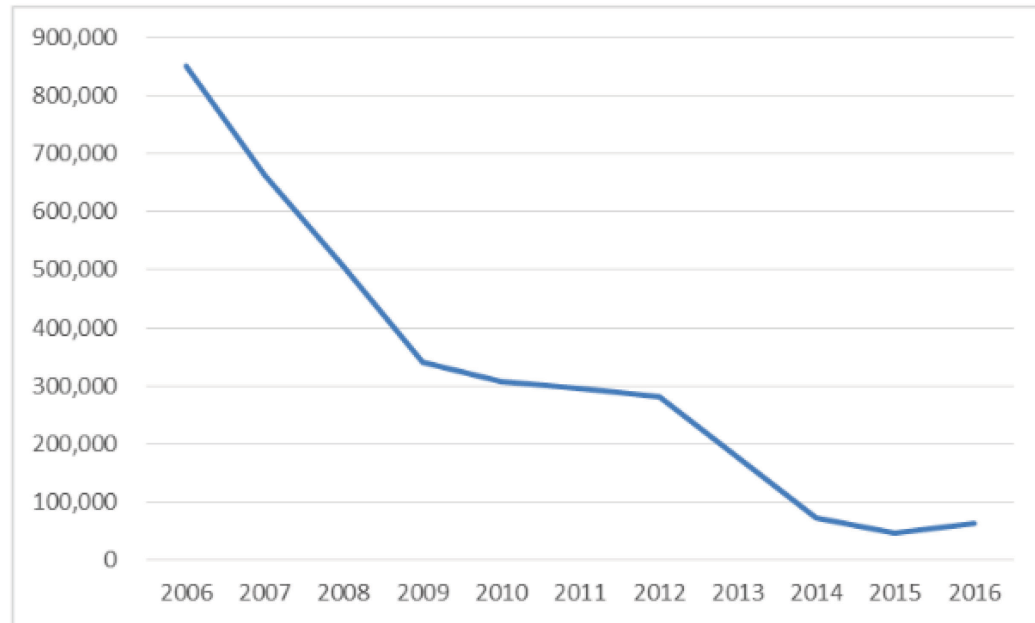
⁷⁷ *Id.*; CBP, *Total Illegal Alien Apprehensions by Fiscal Year*, <https://tinyurl.com/y73mzshs> (last visited Feb. 17, 2019).

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

⁷⁹ <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

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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).

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

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

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

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

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

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

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

⁸⁹ CSPAN, *Global Threats and National Security* (Jan. 29, 2019), <https://tinyurl.com/ydyaugm5>; see also Former Gov’t Officials Decl., *supra* note 72, at S1413 (“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”).

⁹⁰ See White House, *Remarks by Vice President Mike Pence at an America First Policies 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); Donald J. Trump (@realDonaldTrump), Twitter (Oct. 22, 2018, 5:37 AM), <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 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 apprehended at the Southern Border).

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), <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

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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
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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
Inst. Res. and Pol'y Br. No. 7 (Jun. 4, 2018), <https://tinyurl.com/y2jn4e3x>; *see also* Former Gov't
25 Officials Decl., *supra* note 72, at S1412 (stating that "in Texas, undocumented immigrants were
26 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,

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

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

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

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

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

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

Table 1 (showing violent crime rate reduction from 567.6 violent crimes per 100,000 inhabitants in 1998 to 382.9 per 100,000 inhabitants in 2017), <https://tinyurl.com/y9vc6636> (last visited Feb. 17, 2019).

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

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

¹¹² *Trump Address on Crisis at Border*, *supra* note 33; see also White House, *President Donald J. Trump Is Committed to Working with Congress to Solve Our Urgent Immigration Crisis* (Feb. 5, 2019), <https://tinyurl.com/y9hzvrq9> (“Tens of thousands of Americans are killed 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.*

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

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

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

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

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

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

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

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

¹¹⁷ Pete Williams, *Feds Make Largest Fentanyl Bust in U.S. History*, NBC News (Jan. 31, 2019), <https://tinyurl.com/y9zgnv7p>.

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

¹¹⁹ *Id.*

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,

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

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

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

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

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

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

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

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

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

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

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

¹²⁷ *Id.*

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.*

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

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

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

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

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

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

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

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

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

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

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

25 ¹⁴⁴ *Id.*

26 ¹⁴⁵ *E.g.*, DOD, *Construction Programs (C-1)*, Department of Defense Budget Fiscal Year
 27 2019 (Feb. 2018), <https://tinyurl.com/yy85dch9>.

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 spikedace, 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),
24 <https://www.nps.gov/im/chdn/ecoregion.htm>.

25 ¹⁵⁷ U.S. Fish & Wildlife Serv., *Species By County Report*, <https://tinyurl.com/yxmwz9qm>
(Hidalgo County, NM); <https://tinyurl.com/y4ojwrtq> (Luna County, NM) (last visited Feb. 17,
26 2019).

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

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

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

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

DECLARATORY/INJUNCTIVE RELIEF

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

FIRST CLAIM FOR RELIEF

VIOLATION OF CONSTITUTIONAL SEPARATION OF POWERS

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

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

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

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

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

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

379. 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 unlawful, and the Court should enjoin Defendants’ implementation of the President’s Executive Actions.

FOURTH CLAIM FOR RELIEF

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

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

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

382. 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.

383. The APA requires that a court “hold unlawful and set aside agency action, findings, and conclusions found to be . . . contrary to constitutional right, power, privilege, or immunity,” or “in excess of statutory jurisdiction, authority, or limitations, or short of statutory 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*
GOP into a Risky Fight Ahead of 2020, Wash. Post (Feb. 15, 2019), <https://tinyurl.com/y413lu99>.

27 ¹⁶⁴ 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>.

1 Dated: March 13, 2019

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

**STATE OF CALIFORNIA; STATE OF
COLORADO; STATE OF
CONNECTICUT; STATE OF HAWAII;
STATE OF ILLINOIS; STATE OF
MAINE; STATE OF MARYLAND;
COMMONWEALTH OF
MASSACHUSETTS; ATTORNEY
GENERAL DANA NESSEL ON BEHALF
OF THE PEOPLE OF MICHIGAN;
STATE OF MINNESOTA; STATE OF
NEVADA; STATE OF NEW JERSEY;
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. _____

**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; MARK T. ESPER**, in his official capacity as Secretary of Defense; **RYAN D. MCCARTHY**, in his official capacity as Secretary of the Army; **THOMAS B. MODLY**, in his official capacity as Acting Secretary of the Navy; **BARBARA M. BARRETT**, in her official capacity as Secretary of the Air Force; **U.S. DEPARTMENT OF THE INTERIOR; DAVID BERNHARDT**, in his official capacity as Secretary of the Interior; **U.S. DEPARTMENT OF HOMELAND SECURITY; CHAD F. WOLF**, in his official capacity as Acting Secretary of Homeland Security;

Defendants.

INTRODUCTION

1. The States of California, Colorado, Connecticut, 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, National Guard units, natural resources, and sovereign and economic interests from the harm caused by President Donald J. Trump’s flagrant disregard of fundamental separation of powers principles engrained in the United States Constitution. For the second consecutive year, the Trump Administration has acted contrary to the will of Congress by redirecting billions of dollars appropriated by Congress for Department of Defense (“DOD”) projects toward building a wall on the United States-Mexico border. This includes the diversion of funds for military projects in the Plaintiff States and vital equipment for the States’ respective National Guards. Defendants must be enjoined from carrying out President Trump’s unconstitutional and unlawful scheme.

2. For years, President Trump has 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, including during a record 35-day partial government shutdown over the border wall dispute in fiscal year (“FY”) 2019.¹ After the government reopened, Congress approved, and the President signed into law, a limited \$1.375 billion appropriation for fencing, but Congress made clear that funding could not be used to build President Trump’s proposed border wall. On February 15, 2019, the very same day President Trump signed the negotiated spending bill into law, he announced an executive action (“2019 Executive Action”) to redirect \$6.7 billion that Congress had appropriated for other purposes towards construction of the border wall, including through the declaration of a national emergency under the National Emergencies Act (“Emergency Declaration”).

¹ References to “border wall” in this 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 3. Despite this prior \$6.7 billion diversion, the Administration asked Congress to
2 appropriate billions of dollars more toward a border wall in FY 2020. Once again, Congress
3 declined to do so, only appropriating \$1.375 billion in funding for fencing on the border. After
4 signing this appropriation into law, on February 13, 2020, the Administration announced, using
5 statutory authority corresponding to that which it relied upon the previous fiscal year, that it
6 would redirect over \$3.8 billion in funds that Congress appropriated to the DOD for other
7 purposes toward construction of a border wall (“2020 Executive Action,” with the Emergency
8 Declaration, the “Executive Actions”). Reports also indicate that the Administration is planning
9 on diverting \$3.7 billion additional funds from military construction projects under 10 U.S.C.
10 § 2808 toward construction of a border wall in FY 2020.

11 4. Use of these additional federal funds for the construction of a border wall is
12 contrary to Congress’s intent and in violation of the U.S. Constitution, including separation of
13 powers principles, the Presentment Clause, and the Appropriations Clause. This use would divert
14 funding that has been appropriated to support the active military, the states’ National Guard units,
15 and other DOD projects in Plaintiff States, including, on information and belief, military
16 construction projects, for the non-appropriated purpose of constructing a border wall. Defendants
17 further do not satisfy the criteria in the statutes that they invoke to enable them to redirect funds
18 toward the construction of a border wall. In addition, DOD’s actions to divert funds from
19 appropriated DOD projects toward a border wall for which funding has not been appropriated by
20 Congress is arbitrary and capricious and exceeds DOD’s authority in violation of the
21 Administrative Procedure Act (“APA”).

22 5. The redirection of funds from authorized DOD projects located in Plaintiff States
23 will cause damage to their economies, harming their proprietary interests. Further, Defendants’
24 diversion of funds that Congress appropriated to allow the Plaintiff States’ National Guard units
25 to procure military equipment will also harm the States. And the diversion of any funding toward
26 construction of a wall along California’s and New Mexico’s southern borders will irreparably
27 harm the sovereign interests of those States due to the environmental damage to their natural
28 resources that construction will cause.

6. A court in this District determined that Defendants acted unlawfully by diverting billions of dollars in federal funds toward the construction of border barriers in FY 2019. There is no reason to find any differently for Defendants' FY 2020 diversion of federal funds. Defendants are relying on the same or equivalent statutory authority that they did last year, and Defendants continue to act in the face of clear congressional disapproval of the use of billions of dollars for a border wall. 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 the Executive Actions.

JURISDICTION AND VENUE

7. This Court has jurisdiction because this action arises under the Constitution and laws of the United States. Jurisdiction is proper under the judicial review provisions of the APA, 5 U.S.C. §§ 701-06. This Court also has jurisdiction under 28 U.S.C. §§ 1331 and 2201.

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

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

10. Assignment to the Oakland Division of this District is proper pursuant to Civil Local Rules 3-2(c)-(d) and 3-5(b) because Plaintiff State of California and Defendant United States both maintain offices in the District in Oakland.

PARTIES

PLAINTIFF STATE OF CALIFORNIA

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

12. Attorney General Xavier Becerra is the chief law officer of the State of California and head of the California Department of Justice, and has the authority to file civil actions to protect California's rights and interests, the environment, and the natural resources of this State. Cal. Const., art. V, § 13; Cal. Gov't Code §§ 12510-11, 12600-12; *see Pierce v. Superior Court*, 1 Cal. 2d 759, 761-62 (1934) (The Attorney General "has the power to file any civil action or proceeding directly involving the rights and interests of the state . . . and the protection of public rights and interests."). This challenge is brought pursuant to the Attorney General's independent constitutional, common law, and statutory authority.

13. Governor Gavin Newsom is the chief executive officer of the State of California. The Governor is responsible for overseeing the operations of the State and ensuring that its laws are faithfully executed. As the leader of the executive branch, the Governor is the chief of California's executive branch agencies, including those whose injuries are discussed in this Complaint. Cal. Const., art. V, § 1. Governor Newsom is the Commander-in-Chief of the California National Guard. Cal. Const., art. V, § 7; Cal. Mil. & Vet. Code §§ 550-67.

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

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

16. California 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 Defendants' reduction of federal defense spending in California due to diversion of funding to the border wall.

17. 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. California has an interest in preventing the diminution of specific tax revenues caused

1 by reduced procurement of military equipment and corresponding reduction in economic activity.
2 *Wyoming v. Oklahoma*, 502 U.S. 437, 448-50 (1992).

3 18. Defendants' diversion of funds from DOD projects, including, on information and
4 belief, the diversion of funds from the over \$4 billion of military construction projects anticipated
5 in California, will harm California's economy.

6 19. The diversion of DOD funding for projects supporting or used by California's
7 National Guard units harms the State. The California National Guard has over 13,000 soldiers,
8 almost 5,000 air members, employs more than 4,700 people on a full-time basis, and operates 126
9 facilities in the State. The California National Guard receives more than 77 percent of its funding
10 from the federal government. The purpose of the California National Guard includes providing
11 emergency public safety support to civil authorities as directed by the Governor.

12 20. On information and belief, California is injured by the loss of funds available for
13 equipment to its National Guard. DOD's reprogramming action diverts \$790 million from an
14 account used to provide equipment for the states' National Guard units and \$100 million from an
15 account for modernization of HMMWV vehicles ("Humvees") specifically for the states'
16 National Guard units. *California v. Trump*, No. 4:19-cv-00872-HSG (N.D. Cal., filed Feb. 18,
17 2019) (*California*), ECF No. 271-1, Ex. C at 2, 5. This diversion diminishes California's
18 opportunity to seek equipment that the California National Guard would use to provide public
19 safety support to civil authorities in times of emergency such as natural disasters, and to provide
20 mission-ready forces to the federal government.

21 21. California has an interest in its exercise of sovereign power over individuals and
22 entities within the State, including enforcement of its legal code. *Snapp*, 458 U.S. at 601; *Hawaii*
23 *v. Trump*, 859 F.3d 741, 765 (9th Cir. 2017), *rev'd on other grounds*, 138 S. Ct. 2392 (2018).
24 California also has a sovereign interest in the natural resources of this State—such as wildlife,
25 fish, and water—that are held in trust by the State for its residents and are protected by state and
26 federal laws. *Sierra Forest Legacy v. Sherman*, 646 F.3d 1161, 1178 (9th Cir. 2011).

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

23. Specifically, 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 from the construction and operation of the border wall.

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

PLAINTIFF STATE OF COLORADO

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

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

27. The State of Colorado will suffer injury because of the actions of Defendants and has standing to bring this action.

28. Colorado would be harmed by the loss of funding for military construction projects in the State. Colorado has many large military bases, including North American Aerospace Defense Command, Peterson Air Force Base, Schriever Air Force Base, Buckley Air Force Base, the Air Force Academy, and Fort Carson. Construction at these bases has significant economic impact on the surrounding communities and the State itself.

29. Colorado is harmed by the loss of defense spending in the State. Over 60,000 people work for the Department of Defense in Colorado and pay taxes in our State. Defense spending also goes to contracts with Colorado companies and companies that employ Coloradans, all of which have an impact in surrounding communities and the State. In addition, Colorado

1 receives a much higher proportion of defense spending than other states of similar population, so
2 reduction in defense spending disproportionately harms Colorado.

3 30. Colorado is further injured by the possible loss of equipment to its National Guard
4 units. Colorado's National Guard has over 5,500 members who collectively have an economic
5 impact of more than \$240 million. The loss of equipment to this National Guard will reduce its
6 effectiveness in meeting its mission of protecting life and property and preserving peace, order
7 and public safety. In the past, the Colorado National Guard has intervened in cases of blizzards,
8 floods, and fires in Colorado, preventing additional harm to Colorado's residents and economy in
9 times of crisis. Without the proper equipment, Colorado's National Guard cannot provide the
10 same level of protection to Colorado's residents and economy when its services are most needed.

11 **PLAINTIFF STATE OF CONNECTICUT**

12 31. The State of Connecticut, represented by and through its Attorney General, is a
13 sovereign state of the United States of America.

14 32. Attorney General William Tong is the chief legal officer of the State of
15 Connecticut and has the authority to file civil actions to protect Connecticut's rights and interests.
16 Conn. Const., art. IV, § 4; Conn. Gen. Stat. §§ 3-125. This challenge is brought pursuant to the
17 Attorney General's authority and responsibility to protect Connecticut's sovereign, quasi-
18 sovereign, and proprietary interests.

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

24 34. On information and belief, Connecticut is aggrieved by the actions of Defendants
25 and has standing to bring this action because of the injury caused by Defendants' unlawful and
26 unconstitutional diversion of funding from National Guard procurement accounts, military
27 hardware projects, and military construction projects in Connecticut toward the construction of a
28 border wall in Texas, Arizona, New Mexico, and California. Defendants' actions will hurt

1 Connecticut's economy, reduce state tax revenues, damage the State's critical security
2 infrastructure, impair National Guard readiness, and threaten the safety of Connecticut's National
3 Guard and of all Connecticut residents.

4 35. Defense spending in Connecticut is critical not just to national military readiness
5 but to Connecticut's economy. The Administration's planned funding diversions threaten to harm
6 the State's economy, employment, and tax revenues. As of 2017, annual defense spending
7 injected \$15 billion into Connecticut's economy, accounting for 5.6 percent of the State's per
8 capita GDP – a higher percentage than in all but two other states.²

9 36. DOD's reprogramming action diverts funding away from critical military projects
10 for which Connecticut-based companies produce key components. To cite just one prominent
11 instance: the reprogramming slashes both the Navy's JSF-STOVL and the Air Force's F-35
12 combat aircraft – variants on the world's most advanced Fifth Generation fighter jets – which are
13 powered by the F-135 engine manufactured by Connecticut defense contractor Pratt & Whitney.³
14 *California*, ECF No. 271-1, Ex. C at 2-3. Each highly-specialized jet engine costs almost \$20
15 million, which is injected directly into Connecticut's economy. The aircraft engine funding
16 supports not just Pratt's thousands of Connecticut-based employees but also the employees of the
17 92 Connecticut-based companies in Pratt's supply chain.⁴ Each of those employees, and the
18 company itself, pays state taxes, and Connecticut has a powerful interest in preventing the
19 diminution of specific tax revenues caused by reduced procurement of military equipment and
20 corresponding reduction in economic activity. *See Wyoming*, 502 U.S. at 448-50.

21 37. Connecticut is further injured by the threatened loss of equipment for its National
22 Guard in at least three ways that all implicate force readiness and the ability of the Connecticut
23
24

25 ² U.S. Dep't of Def., Off. of Econ. Adjustment, *Defense Spending by State: Fiscal Year*
26 *2017* 4 (Mar. 2019), <https://tinyurl.com/yxwo5k2m> (FY 2017 DOD Defense Spending by State)

³ Pratt & Whitney, *F135 Engine*, <https://www.pw.utc.com/products-and-services/products/military-engines/f135>.

27 ⁴ Conn. Bus. and Industry Ass'n, *What Keeps Pratt's Leduc Up at Night?* (May 1, 2019),
28 <https://www.cbia.com/news/economy/pratt-leduc-aerospace-workforce/>.

1 National Guard to protect the safety and health of Connecticut residents in the face of natural
2 disasters and other domestic emergencies.⁵

- 3 a. First: to be ready to serve, the Connecticut Army National Guard requires an
4 additional forty-seven Humvees. The Administration's attempt to slash \$100
5 million in Humvee modernization funds, *California*, ECF No. 271-1, Ex. C at
6 2, threatens Connecticut's ability to modernize and replace this critical missing
7 equipment.
- 8 b. Second: the reprogramming of funds for C-130J aircraft, *id.*, ECF No. 271-1,
9 Ex. C at 3, threatens significant harm to the readiness of Connecticut's Air
10 National Guard. The 103rd Aircraft Wing, based at Connecticut's Bradley Air
11 National Guard Base in East Granby, now operates legacy C-130H aircraft.
12 The 103rd Aircraft Wing has asked to convert to the C-130J and Connecticut
13 has executed over \$60 million in military construction funding over the last six
14 years to upgrade Bradley in expectation of making a C-130J conversion. The
15 value of that investment plummets if Connecticut is denied the opportunity to
16 upgrade.
- 17 c. Third: Connecticut's Army National Guard has requested \$8.79 million for FY
18 2020 in equipment from the National Guard and Reserve Equipment Account,
19 from which Defendants seek to divert funding. That equipment, which is essential
20 for force readiness, includes medium tactical vehicles (MTVs), light medium
21 tactical vehicles (LMTVs), and trailers that are needed for transporting troops and
22 materiel.

23 38. Military construction fund diversion also poses a significant economic threat to
24 Connecticut. On information and belief, in FY 2020, Connecticut stands to lose as much as \$72
25 million in military construction funding that would otherwise be injected into the State's
26 economy. Those funds are authorized for building a new pier at Connecticut's Submarine Base
27

28 ⁵ Letter from Francis J. Evon, Jr., Adjutant General of the Connecticut National Guard, to
Chris Murphy, U.S. Senator from Connecticut (Feb. 25, 2020) (on file with counsel).

1 New London, the Navy's primary East Coast submarine base. The funding would directly feed
 2 into Connecticut's economy, since many Connecticut-based contractors would work on the pier.
 3 But neglect of the pier and the base is a more existential threat to the region. In addition to its
 4 critical role in projecting United States naval power around the world, Submarine Base New
 5 London is a population and economic hub for eastern Connecticut, with housing and support
 6 facilities for more than 21,000 civilian workers, service members, and their families. In the
 7 absence of the military construction funding, the base will be forced to fall back on inadequate
 8 and structurally-deteriorated piers that do not meet current standards for the Los Angeles- and
 9 Virginia-class submarines that have made their homeport in New London. The deterioration of
 10 the base, and potential loss of opportunities to serve as a homeport for submarines, could mean
 11 loss of population and jobs across eastern Connecticut, a shrunken regional economy, and
 12 diminished state revenues.

13 **PLAINTIFF STATE OF HAWAII**

14 39. The State of Hawaii, represented by and through its Attorney General, is a
 15 sovereign state of the United States of America.

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

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

26 42. Hawaii has an interest in protecting its economy and the economic health and well-
 27 being of its residents.

28 43. Diversion of funding from DOD projects in Hawaii will harm the State and its

1 residents by injuring Hawaii's economy. Defense spending, which includes military construction
 2 projects, is the second-largest segment of Hawaii's economy and, as of 2017, represents 7.3
 3 percent of the State's Gross Domestic Product—the second highest percentage in the nation.⁶
 4 Hawaii has several major military installations, including Joint Base Pearl Harbor-Hickam,
 5 Schofield Barracks, Fort Shafter, Marine Corps Base Hawaii (Kaneohe Bay), Camp Smith,
 6 Tripler Army Medical Center, Wheeler Army Airfield, and the Pacific Missile Range Facility at
 7 Barking Sands.

8 44. Defense spending in Hawaii contributes to economic activity, employment, and
 9 increased tax revenues, all of which would be harmed if that funding is diverted, thereby injuring
 10 the State of Hawaii. As of 2017, annual defense spending injects \$6.5 billion into Hawaii's
 11 economy, is responsible for 64,366 jobs, and accounts for \$4.7 billion in total payroll (and the
 12 associated income tax revenue).⁷

13 45. On information and belief, hundreds of millions of dollars have been appropriated
 14 for military construction projects in Hawaii, and those funds are threatened by possible diversion.
 15 For FY 2020, Hawaii stands to lose as much as approximately \$316 million in military
 16 construction funding. Those funds are authorized for a command and control facility at Fort
 17 Shafter, bachelor enlisted quarters at Kaneohe Bay, magazine consolidation at the West Loch
 18 naval magazine, and a Special Operations Forces undersea operational training facility at Joint
 19 Base Pearl Harbor-Hickam.

20 PLAINTIFF STATE OF ILLINOIS

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

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

24 48. J. B. Pritzker is the governor of Illinois, and under Illinois law has the "supreme
 25 executive power" and the duty to ensure "the faithful execution of the laws." Ill. Const., Art. V, §
 26 8.

27 _____
 28 ⁶ *FY 2017 DOD Defense Spending by State*, *supra* note 2, at 4.

⁷ *Id.* at 39.

49. 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 diversion of federal funding from military construction projects in Illinois and equipment for the Illinois National Guard to the construction of a border wall on the nation's southern border.

50. As of 2017, Illinois was the location for nearly \$8 billion in federal defense spending.⁸ Diverting military construction funds could deprive Illinois of over \$110 million in already approved federal funding for military construction projects. Congress has already appropriated \$5 million for an automated record fire range that will serve the Army National Guard in Marseilles, Illinois, as well as \$9 million to construct a new fire crash/rescue station at the Greater Peoria Regional Airport. For FY 2020, Congress has appropriated \$100 million for a new joint operations and mission planning center at Scott Air Force Base in St. Clair County, Illinois. Scott AFB is home to the Eighteenth Air Force as well as the Air Force's Air Mobility Command and the United States Transportation Command.

51. Illinois is further injured by the prospect of losing needed equipment for its Air National Guard. In particular, the DOD's reprogramming action specifies that DOD will divert \$196 million intended for purchase of C-130J airlift aircraft. *California*, ECF No. 271-1, Ex. C at 3. A bipartisan coalition of U.S. representatives in Illinois had already requested new-generation C-130J aircraft to support the Illinois Air National Guard's 182nd Airlift Wing stationed in Peoria, Illinois—a unit that has not acquired new aircraft since 2005.⁹ The diversion of funds decreases the chances that the unit in Peoria will successfully obtain the planes needed to modernize its exceptionally busy fleet.¹⁰

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

⁸ *FY 2017 DOD Defense Spending by State*, *supra* note 2, at 42–43.

⁹ See Andy Kravetz, *Lawmakers Seek New Planes for 182nd Airlift Wing*, PEORIA J.-STAR (Dec. 15, 2019), <https://tinyurl.com/rybaxch>.

¹⁰ See Letter from Sen. Richard J. Durbin, Sen. Tammy Duckworth, & Rep. Cheri Bustos to Mark Esper, Sec. of Defense (Feb. 27, 2020), <https://tinyurl.com/tz4ezm5>.

PLAINTIFF STATE OF MAINE

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

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

55. The Governor of Maine, Janet T. Mills, is the chief executive officer of the State. The Governor is responsible for overseeing the operations of the State and ensuring that its laws are faithfully executed. As the leader of the executive branch, the Governor is the chief of Maine's executive branch agencies, including those whose injuries are discussed in this Complaint. Me. Const. art V, § 1. Governor Mills is the Commander-in-Chief of the Maine National Guard. 37-B M.R.S. §§ 103 et seq.

56. On information and belief, Maine 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 Defendants' reduction of federal defense spending in Maine due to diversion of funding to the border wall.

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

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

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

60. The diversion of funding from authorized DOD projects in Maine, including on information and belief, military construction projects, will harm Maine's economy. Maine is further injured by the possible loss of equipment to its National Guard units as a result of

1 Defendants' diversion of funds toward the border wall.

2 61. Maine has benefitted in the past from equipment purchased through funds made
3 available by Congress for use by state National Guards.

4 62. The diversion of said funds will harm Maine to the extent such diversion results in
5 elimination or reduction of the pool of federal funds available for the purchase of military
6 equipment in the future.

7 **PLAINTIFF STATE OF MARYLAND**

8 63. The State of Maryland is a sovereign state of the United States of America.
9 Maryland is represented by and through its chief legal officer, Attorney General Brian E. Frosh.
10 Under the Constitution of Maryland, and as directed by the Maryland General Assembly, the
11 Attorney General has the authority to file suit to challenge actions by the federal government that
12 threaten the public interest and welfare of Maryland residents. Md. Const. art. V, § 3(a)(2); 2017
13 Md. Laws, J. Res. 1.

14 64. On information and belief, Maryland is aggrieved by the actions of Defendants and
15 has standing to bring this action because of the injury due to the diversion of funding for military
16 construction projects and procurement of military equipment. Defendants' actions will hurt
17 Maryland's economy, reduce state tax revenues, and impair our National Guard units. Defense
18 spending in Maryland makes up a significant portion of the state economy. In 2017, defense
19 spending accounted for 5.3 percent of the State's GDP – the fifth highest percentage in the
20 country.¹¹

21 65. DOD's reprogramming action includes a substantial reduction in federal
22 procurement of F-35 and C-130J aircraft, which are produced by Lockheed Martin, a defense
23 contractor headquartered and located in Maryland. The F-35 program is Lockheed's largest,
24 accounting for 27 percent of its net sales in 2019 and expected to represent an even higher
25 percentage of sales in future years. Cuts to the F-35 program will significantly lessen the taxable
26 income of Lockheed Martin and negatively impact state revenues, as will the reprogramming of
27 funds for C-130J aircraft.

28 ¹¹ *DOD Defense Spending by State, supra* note 2, at 4.

66. Maryland's economy is also threatened by the potential diversion of military construction funds. On information and belief, in FY 2020, Maryland stands to lose as much as \$614 million in military construction funding that would otherwise flow into the state economy. At-risk projects include the Presidential Aircraft Recapitalization Complex at Joint Base Andrews, a new operations building at Fort Meade, an air traffic control tower in St. Inigoes, and a U.S. Army Medical Research facility at Fort Detrick.

67. Maryland is further injured by the potential loss of equipment to its National Guard units. The Maryland National Guard is composed of over 6,000 soldiers and airmen, operates over 70 facilities around the state, and has an annual fiscal impact of more than \$300 million. The Maryland National Guard serves a number of crucial roles, including as the first military responder to threats to the State, including natural disasters, and supporting the national defense, including through active service in overseas combat. The loss of funding for equipment would negatively affect the Guard's ability to provide these valuable services.

PLAINTIFF COMMONWEALTH OF MASSACHUSETTS

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

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

70. Massachusetts is aggrieved by the actions of Defendants and has standing to bring this action because of injury due to the potential loss of funds for DOD projects in Massachusetts, including, on information and belief, military construction projects, and equipment procurement for the Massachusetts National Guard, caused by Defendants' unlawful diversion of funding to pay for border wall construction.

71. Military construction project funds that have been appropriated by Congress and could be diverted include funds for projects for the State's Army, Army Reserve, Air Force, and Army National Guard units. For example, \$9.7 million in military construction funding has been

1 appropriated for a multi-purpose machine gun range for the Massachusetts National Guard in FY
2 2020.

3 72. Not only are these military construction projects important to national security,
4 military readiness, and the well-being of our service members, they are important generators of
5 economic activity for Massachusetts.

6 73. Massachusetts is further injured by the possible loss of equipment for its National
7 Guard units.

8 74. The Massachusetts National Guard consists of 6,225 Army Guard members and
9 2,127 Air Guard members, and maintains a presence in every region of Massachusetts, with 45
10 sites in 38 communities.

11 75. For the past 381 years, Massachusetts National Guard members have served in
12 every major armed conflict and have responded to numerous emergencies in Massachusetts and
13 elsewhere in the United States.

14 76. The Massachusetts National Guard has a number of pending requests for
15 equipment from DOD, including to fill shortages and upgrade older weapons, and to upgrade
16 digital battle command systems. The Massachusetts National Guard expects to make additional
17 equipment procurement requests in FY 2020, as it consistently makes requests to DOD to fill
18 equipment shortages throughout the year.

19 77. This equipment is important to the Massachusetts National Guard's preparedness
20 to meet and support national security directives and objectives, to respond to natural disasters and
21 other emergencies, and to support the safety and security of Massachusetts residents.

22 **PLAINTIFF ATTORNEY GENERAL DANA NESSEL ON BEHALF**
23 **OF THE PEOPLE OF MICHIGAN**

24 78. The People of Michigan are the sovereign of one of the states of the United States
25 and are represented by and through the Michigan Attorney General Dana Nessel.

26 79. Attorney General Dana Nessel is the chief legal officer of the State of Michigan
27 and her powers and duties include acting in federal court in matters of concern to the People of
28 Michigan, to protect Michigan residents. *Fieger v. Cox*, 734 N.W.2d 602, 604 (Mich. Ct. App.

2007); Mich. Comp. Laws §§ 14.28, 14.101. This action is brought to protect the interests of the People of Michigan.

80. Michigan is aggrieved by the actions of Defendants and has standing to bring this action because of the injury caused by the loss of defense spending in the State, including, on information and belief, the loss of funding for military construction projects, as a result of Defendants' unlawful diversion. As of 2017, annual defense spending injected \$3.8 billion into Michigan's economy, accounting for almost 1 percent of the State's per capita gross domestic product.¹²

81. Michigan is further injured by the possible diversion of defense funding for projects supporting the State's National Guard units. The Michigan National Guard has over 10,000 soldiers and airmen, employs over 700 state employees on a full-time basis through the Department of Military and Veterans Affairs, and operates over 40 facilities in the State. The Michigan Department of Military and Veterans Affairs receives a majority of its funding from the federal government. It prepares citizen soldiers and airmen to respond to, among other things, state emergencies, military support, and protection of local communities.

82. On information and belief, the loss of funding for equipment for Michigan's National Guard negatively impacts this vital service for the People of Michigan. This diversion diminishes Michigan's opportunity to seek equipment that the Michigan National Guard would use to provide public safety support to civil authorities in times of emergency such as natural disasters and to provide mission-ready forces to the federal government.

PLAINTIFF STATE OF MINNESOTA

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

84. Attorney General Keith Ellison is the chief legal officer of the State of Minnesota and has the authority to file civil actions to protect Minnesota's rights and interests. Minn. Const., art. V, § 1; Minn. Stat. §§ 8.01, 8.06 (2018). This action is brought pursuant to the Attorney General's authority and responsibility to protect Minnesota's sovereign, quasi-

¹² *FY 2017 DOD Defense Spending by State*, *supra* note 2, at 6.

1 sovereign, and proprietary interests.

2 85. Governor Tim Walz is the chief executive officer of the State of Minnesota. The
3 Governor is responsible for overseeing the operations of the State and ensuring that its laws are
4 faithfully executed. As the leader of the executive branch, the Governor is the commander-in-
5 chief of Minnesota's military and the chief of Minnesota's executive branch agencies. Minn.
6 Const., art. V, § 3; Minn. Stat. §§ 4.04, 190.02 (2018).

7 86. On information and belief, Minnesota is aggrieved by the actions of Defendants
8 and has standing to bring this action because of the injury caused by Defendants' unlawful and
9 unconstitutional diversion of funding from Minnesota toward the construction of a border wall in
10 Texas, Arizona, New Mexico, and California. Defendants' actions will hurt Minnesota's
11 economy, reduce state tax revenues, damage the State's critical security infrastructure, impair
12 National Guard readiness, and threaten the safety of Minnesota's National Guard units and of all
13 Minnesota residents.

14 87. Defense spending in Minnesota is critical not only for national military readiness
15 but also to Minnesota's economy. Defendants' planned funding diversions threaten to harm the
16 Minnesota's economy, employment, and tax revenues. In 2017, annual defense spending injected
17 \$4.6 billion into Minnesota's economy—accounting for 1.3 percent of the state's GDP—when
18 including payments to defense contractors.¹³

19 88. Minnesota is further injured by the potential loss of equipment to its National
20 Guard that implicates force readiness and the ability of the Minnesota National Guard to protect
21 the safety and health of Minnesota residents in the face of natural disasters and other domestic
22 emergencies. The Minnesota National Guard has over 13,000 soldiers and airmen, employs more
23 than 2,000 people on a full-time basis, and operates over 60 facilities in the State. The Minnesota
24 National Guard receives more than 96 percent of its funding from the federal government. The
25 Minnesota National Guard prepares citizen soldiers and airmen to respond to, among other things,
26 the Governor of Minnesota for state emergency response, military support, and protection of local
27 communities.

28 ¹³ *FY 2017 DOD Defense Spending by State*, *supra* note 2, at 6.

89. Any denial of replacement equipment as a result of the funding diversion for border wall construction will negatively affect the capabilities and readiness of the Minnesota National Guard. To keep the past-due equipment in service, the Minnesota National Guard will have to spend greater employee time and more money on repairs. The Minnesota National Guard, thus, will have to draw funding and work hours away from the Minnesota National Guard's core mission in order to prolong the useful life of equipment otherwise due for replacement.

90. In addition, Minnesota, its economy, and its residents will be harmed by any diversion of federal funding from necessary military construction projects in Minnesota to construct a wall along the United States-Mexico border. Such projects are competitively bid by private, independent contractors who pay wages to their laborers and purchase construction materials from commercial suppliers.

PLAINTIFF STATE OF NEVADA

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

92. 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.

93. 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. *Id.*, art. 5, § 5.

94. 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 Defendants' diversion of funding to a southern border wall. Defendants' unconstitutional actions undermine Nevada's sovereignty and harm the State through their effects on Nevada's residents and its economy.

95. Any diversion of military construction funding from Nevada will harm the State's

1 economy. Nevada is home to several military bases, including Nellis Air Force Base, Creech Air
 2 Force Base, Hawthorne Army Depot Base, and Naval Air Station Fallon. These military bases
 3 play a critical role in our nation's defense and the State's economy. The use of funding for a
 4 southern border wall rather than toward necessary military construction projects at these bases
 5 harms Nevada and its economy.

6 96. Nevada is harmed by the loss of other defense spending in the State. As of 2017,
 7 annual defense spending injects \$2.3 billion into Nevada's economy and is responsible for 21,175
 8 jobs.

9 97. The diversion of DOD funding for projects supporting or used by Nevada's
 10 National Guard units harms the State. The Nevada National Guard has over 3,000 soldiers, over
 11 1,000 air members, and operates 17 facilities in the State. The Nevada National Guard receives
 12 more than 79 percent of its funding from the federal government. The purpose of the Nevada
 13 National Guard includes providing emergency public safety support to civil authorities as directed
 14 by the Governor.

15 98. Nevada is further injured by the loss of equipment to its National Guard, as it
 16 impacts its ability to provide a domestic response for natural disasters within and outside of
 17 Nevada. Specifically, the Nevada National Guard has requested critical dual use items for its
 18 units throughout Nevada, including multiple trailers and a forklift to address critical shortages.
 19 On information and belief, DOD's reprogramming action threatens the availability of funds to
 20 meet the Nevada National Guard's need for equipment.

21 99. Upon information and belief, the Nevada National Guard is a possible finalist for
 22 one of the C-130J aircraft subject to DOD's reprogramming action. Monies for such aircraft,
 23 instead of being used for critical firefighting purposes for the benefit of Nevada, may instead be
 24 improperly redirected toward construction of the border wall.

25 **PLAINTIFF STATE OF NEW JERSEY**

26 100. The State of New Jersey is a sovereign state of the United States of America.

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

102. On information and belief, New Jersey is aggrieved by the actions of Defendants and has standing to bring this action because of the injury caused by the loss of defense spending, including for military construction projects, in the State as a result of Defendants' unlawful diversion. In FY 2019, Congress appropriated \$61 million for military construction projects in New Jersey, which, upon information and belief, are at risk to be diverted for border wall construction. These projects are critical to national security infrastructure. And the diversion of such funds to the construction of a border wall will hurt New Jersey's economy and affects business in the State.

103. New Jersey may be affected by the potential loss of equipment to its National Guard. The New Jersey National Guard has over 8,000 soldiers and employs 1,500 people on a full-time basis, and operates 365 facilities in the State. The New Jersey National Guard receives nearly 85 percent of its funding from the federal government. The New Jersey National Guard provides emergency public safety to civil authorities.

104. The New Jersey Armed Reserve National Guard, facilitated through the United States Property and Fiscal Office in New Jersey, has traditionally submitted requests for consideration for National Guard and Reserve Equipment Account funding, which DOD seeks to divert funding from in its reprogramming action. In FY 2019 and FY 2020, New Jersey initiated requests for such equipment through traditional channels. New Jersey has received a limited response to these requests.

105. 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

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

107. 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

1 when, in his judgment, the interest of the State requires such action. N.M. Stat. Ann. § 8-5-2(B).
 2 This challenge is brought pursuant to Attorney General Balderas's statutory and common law
 3 authority.

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

8 109. New Mexico shares over 179 miles of its southern border with Mexico. This close
 9 relationship gives New Mexico a special interest in the economic and public safety consequences
 10 of cross-border activity. Attorney General Balderas has worked with law enforcement
 11 counterparts in Mexico to facilitate international extraditions, implement technologies to combat
 12 human trafficking, and train prosecutors.¹⁴ Trade across New Mexico's southern border is a
 13 crucial component of the State's economy, with Mexico its largest export partner.¹⁵

14 110. New Mexico has an interest in its exercise of sovereign power over individuals and
 15 entities within the State, including enforcement of its legal code. *Snapp*, 458 U.S. at 601; *Hawaii*,
 16 859 F.3d at 765.

17 111. New Mexico is aggrieved by Defendants' actions and has standing to bring this
 18 action because of injury due to the possible loss of funds for DOD projects and equipment
 19 procurement for the New Mexico National Guard. Funds that could be diverted include, but may
 20 not be limited to \$7 million for a security gate and \$57.9 million for a helicopter simulator and
 21 replacement facility in New Mexico.

22 112. The loss of these funds would harm New Mexico's economy, employment and

23
 24 ¹⁴ Ryan Boetel, *Attorney General Announces Pilot Project for Mexico Extraditions*,
 25 Albuquerque J. (July 25, 2018), <https://tinyurl.com/y2zdbc8h>; PR Newswire, *TrustStamp and the*
 26 *Conference of Western Attorneys General Alliance Partnership Introduce Technology to Ease*
 27 *Data Sharing Among Law Enforcement* (Aug. 30, 2018), <https://tinyurl.com/y2seu64t>; Carol
 28 Clark, *AG Balderas Trains Mexican Prosecutors, Forensic Scientists, Investigators in Effort to*
Stop Crime From Crossing Border, Los Alamos Daily Post (Nov. 3, 2017),
<https://tinyurl.com/y3mcvrms>.

¹⁵ Int'l Trade Admin., *New Mexico Exports, Jobs, & Foreign Investment* (Feb. 2018),
<https://tinyurl.com/y25tsost>.

1 taxes. As of 2017, annual defense spending injected \$2.6 billion into New Mexico's economy,
 2 providing approximately \$1,250 per resident of the State, where 23,864 military personnel
 3 reside,¹⁶ constituting a significant portion of the State's current population of 2,096,829.

4 113. Defendants' use of the diverted funds to construct parts of their border wall in
 5 New Mexico will also harm New Mexico's sovereign interests by imposing environmental harm
 6 to the State. The environmental damage caused by a border wall in New Mexico would include
 7 the blocking of wildlife migration, flooding, and habitat loss.¹⁷

8 **PLAINTIFF STATE OF NEW YORK**

9 114. The State of New York, represented by and through its Attorney General, is a
 10 sovereign state of the United States of America. Attorney General Letitia James is New York
 11 State's chief law enforcement officer and is authorized to pursue this action pursuant to N.Y.
 12 Executive Law section 63.

13 115. Upon information and belief, Defendants' unlawful diversion of funding from
 14 DOD projects, including military construction projects, in New York to construction of a border
 15 wall will injure New York's economy and, by damaging the State's critical security
 16 infrastructure, threaten the safety of New York's National Guard and of all New York residents.

17 116. New York is further injured by the potential loss of equipment to its National
 18 Guard.

19 **PLAINTIFF STATE OF OREGON**

20 117. Plaintiff State of Oregon, acting through its Attorney General, Ellen Rosenblum, is
 21 a sovereign state of the United States of America.

22 118. Attorney General Rosenblum is the chief law officer of Oregon and is empowered
 23 to bring this action on behalf of the State of Oregon and the affected state agencies under ORS
 24 160.060, ORS 180.210, and ORS 180.220.

25 119. On information and belief, Oregon is aggrieved by the actions of Defendants and

26 ¹⁶ *FY 2017 DOD Defense Spending by State*, *supra* note 2, at 6.

27 ¹⁷ See Robert Peters et al., *Nature Divided, Scientists United: US-Mexico Border Wall*
 28 *Threatens Biodiversity and Binational Conservation*, 68 *BioScience* 740, 743 (Oct. 2018),
<https://tinyurl.com/y3t4ymfn>.

1 has standing to bring this action because of the injury caused by the threatened loss of defense
2 spending in Oregon as a result of Defendants' unlawful diversion.

3 120. On information and belief, Oregon is further injured by the threatened loss of
4 equipment for its National Guard in ways that implicate force readiness and the ability of the
5 Oregon National Guard to protect the safety and health of Oregon residents in the face of natural
6 disasters and other domestic emergencies. Oregon's Army National Guard has requested FY
7 2020 funding from the National Guard and Reserve Equipment Account, from which Defendants
8 seek to divert funding. That requested funding is for modernization and equipment that are
9 essential for force readiness.

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

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

13 122. Attorney General Peter F. Neronha is the chief law officer of the State of Rhode
14 Island and has the authority to file civil actions to protect Rhode Island's rights and the rights of
15 Rhode Island citizens. The Attorney General has the authority to file suit to take legal action
16 against the federal government for the protection of the public interest and welfare of Rhode
17 Island citizens as a matter of constitutional, statutory, and common law authority. R.I. Const. art.
18 IX, sec. 12; R.I. Gen. Laws §§ 42-9-1, et seq.; *see also State v. Lead Industries Ass'n*, 951 A.2d
19 428 (R.I. 2008).

20 123. The Governor of Rhode Island, Gina M. Raimondo, is the chief executive officer
21 of the State of Rhode Island. The Governor oversees the operations of the State and is in charge
22 of the State military, the Rhode Island National Guard, which is comprised of the Rhode Island
23 Army National Guard, Rhode Island Air National Guard, and the Historic Rhode Island Militia
24 (collectively, "RING").

25 124. Upon information and belief, Rhode Island is aggrieved by the actions of
26 Defendants and has standing to bring this action because of the injury caused by Defendants'
27 unlawful and unconstitutional diversion of funding from national guard procurement accounts,
28 military projects, and military construction projects in Rhode Island toward the construction of a

1 border wall in Texas, Arizona, New Mexico, and California. Defendants' actions will harm
2 Rhode Island's economy, reduce state tax revenues, damage Rhode Island's critical security
3 infrastructure, impair National Guard readiness, and threaten the safety of Rhode Island's
4 National Guard and of all Rhode Island residents.

5 125. RING is the oldest military branch in the United States and consists of over 3,300
6 members (2,178 in the Army National Guard, 1,136 in the Air National Guard) and is responsible
7 for responding to statewide civil emergencies declared by the Governor, as well as supporting the
8 defense of the nation and national security interests.

9 126. There exists between the State of Rhode Island and National Guard Bureau
10 ("NGB") a legal contract referred to as the Master Cooperative Agreement ("MCA"). The MCA
11 provides for Rhode Island support for the federal mission in the form of employment of state
12 personnel, the purchase of goods and services through state vendors, and provides a readied,
13 state-of-the-art trained military force. Rhode Island is obligated through the MCA to match the
14 federal funds with general revenues as a condition of the grant.

15 127. Overall, RING is financed with approximately 25 percent state capital funds and
16 75 percent federal funds, as well as direct federal funding for active duty guardsmen, services,
17 and construction costs. Military training is 100 percent federally financed.

18 128. Throughout Rhode Island, RING operates 14 armories, 4 aviation support
19 facilities, 2 training sites, and 6 logistical sites. The equipment housed and secured at these
20 facilities is valued in excess of \$500 million dollars. The estimated annual impact on the State
21 attributed to National Guard programs exceeds \$238 million dollars.¹⁸

22 129. Two of the RING aviation support facilities are located at Quonset Point in North
23 Kingston, Rhode Island, and consist of the Quonset Point Armory, operated by the Rhode Island
24 Army National Guard, and the Quonset Point Air Station, operated by the Rhode Island Air
25 National Guard ("Quonset Airbase").

26 130. The Quonset Airbase operates maintenance facilities for RING aircrafts, vehicles,
27

28 ¹⁸ State of Rhode Island and Providence Plantations, *Fiscal Year Budget*, Vol. IV, 103-111
(Jan. 2018), <http://tinyurl.com/y3nucc5s>.

1 and equipment, and serves as unit headquarters, meeting places, and equipment and personal
 2 effects storage areas for both Army Guard and Air Guard units. The Quonset Airbase is
 3 maintained with 75 percent federal funds and 25 percent state capital funds.

4 131. For FY 2020, the Governor recommended expenditures of \$28.7 million for
 5 various projects at the Quonset Airbase, to be funded 100 percent by the National Guard Bureau
 6 (“NGB”) federal funds. Several of these projects will provide benefits to Rhode Island for
 7 commercial aviation utilizing Quonset State Airport.¹⁹

8 132. Upon information and belief, Rhode Island is harmed by the loss of military
 9 construction spending in the State. In or about March 2019, the Office of the Under Secretary of
 10 Defense published an annual list of military construction projects (“C-1”) to the DOD oversight
 11 committees of Congress, coinciding with the transmittal of the President’s Budget. The C-1
 12 Military Construction list obligates \$11,600,000 in DOD funds to the Rhode Island National
 13 Guard for military construction and repair of a fuel storage complex at the Quonset Airbase.

14 133. Upon information and belief, Rhode Island is further injured by the loss of defense
 15 contractor spending in the State. Defense spending in Rhode Island is critical not just to national
 16 military readiness but to Rhode Island’s economy. The Trump Administration’s planned funding
 17 diversions threaten to harm the Rhode Island’s economy, employment, and tax revenues. As of
 18 FY 2018, annual defense spending injected \$1.5 billion into Rhode Island’s economy, accounting
 19 for 2.4 percent of Rhode Island’s total GDP—ranking Rhode Island among the top 25 states for
 20 defense spending as a share of GDP.²⁰

21 134. A significant number of defense contractors operate facilities in Rhode Island,
 22 including Raytheon, Systems Engineering Associate, BAE Systems, Northrop Grumman,
 23 McLaughlin Research Corp., Mikel Inc. L3 Technologies, Rite-Solutions, Hyman Brickle & Son

24
 25 ¹⁹ State of Rhode Island, *FY 2020 Capital Budget (FY 2020 – FY 2024 Capital*
 26 *Improvement Plan)*, 80-82 (Jan. 2019), available at <https://tinyurl.com/vwlluj4>. The enacted FY
 2020 State Budget allocated \$28,720,000 in NGB federal funds for construction projects at the
 Quonset Airbase. *Id.* at 122.

27 ²⁰ DOD, Off. of Econ. Adjustment, *Defense Spending by State Fiscal Year 2018*, 8,
 28 <https://tinyurl.com/rjltz3p> (last visited Feb. 27, 2020) (FY 2018 DOD Spending by State Report).

1 Inc., and Asgard Partners & Co. LLC. These defense contractors employ over 12,000 military
 2 and civilian employees in Rhode Island, and received over \$700 million in defense contract
 3 awards, and spent approximately \$800 million on payroll in FY 2018.

4 135. Upon information and belief, DOD's reprogramming action diverts funding away
 5 from critical military projects for which defense contractors in Rhode Island produce key
 6 components and provide research and development, supplies and equipment, and other services.

7 136. For example, the reprogramming slashes both the Navy's and Air Force's variants
 8 of the Lockheed Martin F-35 Lightning II, which utilize a Distributed Aperture System ("DAS")
 9 sensor,²¹ manufactured by Northrop Grumman and Raytheon. The reprogramming further slashes
 10 the Navy's and Air Force's variants of the Boeing P-8A Poseidon, which utilizes AN/APY-10
 11 radar, designed and manufactured by Raytheon,²² and the Boeing V-22 Osprey, which uses
 12 additional electronic equipment also designed and manufactured by Raytheon.²³

13 137. Defense funds used for research and development, production, and service of these
 14 highly specialized electronics are injected directly into Rhode Island's economy, and further
 15 support not only thousands of Rhode Island-based employees but also the companies and
 16 employees of all Rhode Island-based companies in Raytheon's supply chain. Each of those
 17 employees, and the company itself, pays state taxes, and Rhode Island has a powerful interest in
 18 preventing the diminution of specific tax revenues caused by reduced procurement of military
 19 equipment and the corresponding reduction in economic activity. *See Wyoming*, 502 U.S. at 448-
 20 450.

21 138. Upon information and belief, Rhode Island is further injured by the threatened loss
 22 of equipment and vehicle modernization programs for its National Guard.

23 139. To be ready to serve, RING requires the replacement of a number of Humvees.
 24 The Trump Administration's attempt to slash \$100 million in Humvee modernization funds

25 ²¹ The DAS sensor collects 360-degree high resolution images and transmits them in real-
 26 time directly to the pilot's helmet, and virtually allowing the pilot of the F-35 to virtually see
 through the bottom of the aircraft.

27 ²² Raytheon, *AN/APY-10 Maritime, Littoral and Overland Surveillance Radar*,
<https://www.raytheon.com/capabilities/products/apy10> (last accessed Feb. 29, 2020).

28 ²³ Raytheon, *V-22 Osprey Modernization and Sustainment*,
<https://www.raytheon.com/capabilities/products/v-22> (last accessed Feb. 29, 2020).

1 threatens RING's ability to modernize and replace this critical equipment. RING also utilizes
 2 funds from the National Guard and Reserve Equipment Account, from which Defendants seek to
 3 divert funding, to secure essential equipment necessary for rapid deployment and overall force
 4 readiness. The unavailability of these funds will prevent RING from securing essential
 5 equipment and adversely affect RING's readiness and ability to protect the safety and health of
 6 Rhode Island residents in the face of natural disasters and other domestic emergencies.

7 **PLAINTIFF STATE OF VERMONT**

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

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

13 142. Vermont is aggrieved by the actions of Defendants and has standing to bring this
 14 action because of the injury due to the potential loss of equipment to its National Guard units.

15 143. The Vermont National Guard, consisting of the Army National Guard and the Air
 16 National Guard, serves as a military force available to the governor in the event of state
 17 emergencies which exceed the capacity of the civil authorities. The Vermont National Guard's
 18 mission is to serve, protect, and defend the citizens of Vermont and the Nation. The National
 19 Guard consists of over 2,400 members and operates facilities throughout Vermont including 22
 20 armories, 1 Army Aviation Support Facility, 5 Field Maintenance Shops, the Ethan Allen Firing
 21 Range, Camp Johnson, and the Ethan Allen Air Force Base.

22 144. On information and belief, the diversion of funds for military equipment
 23 supporting or used by the Vermont National Guard would interfere with the Vermont National
 24 Guard's ability to provide these services for the State, thereby injuring the State and its residents.

25 **PLAINTIFF COMMONWEALTH OF VIRGINIA**

26 145. The Commonwealth of Virginia is a sovereign state of the United States of
 27 America.

28 146. The Commonwealth of Virginia brings this action by and through its Attorney

General, Mark R. Herring. The Attorney General has authority to represent the Commonwealth, its departments, and its agencies in “all civil litigation in which any of them are interested.” Va. Code Ann. § 2.2-507(A). In filing this action, the Attorney General seeks to protect the Commonwealth and its residents from harm caused by Defendants’ illegal conduct, prevent further harm, and seek redress for the injuries caused to Virginia and its residents by Defendants’ illegal diversion of federal funds to build the border wall.

147. The Governor of Virginia, Ralph S. Northam, is the chief executive officer of the Commonwealth of Virginia. The Governor oversees the operations of the Commonwealth and is the Commander-in-Chief of Virginia’s armed forces. See Va. Const. art. V, § 7; Va. Code Ann. § 44-8. The Adjutant General, Timothy P. Williams, oversees the militia of the Commonwealth of Virginia, including the Virginia National Guard, “subject to the orders of the Governor as Commander in Chief.” Va. Code Ann. § 44-13.

148. Defense spending in Virginia is critical not just to national military readiness but also to Virginia’s economy. The Administration’s planned funding diversions threaten to harm the Virginia’s economy, employment, and tax revenues. As of 2017, annual defense spending injected \$46.2 billion into Virginia’s economy, accounting for 8.9 percent of the Virginia’s per capita GDP – a higher percentage than any other state.²⁴

149. On information and belief, Virginia would be aggrieved by Defendants’ diversion of federal funding for DOD projects in the Commonwealth, including military construction projects. In FY 2020 alone, Congress has appropriated \$631.3 million in funds for military construction projects in Virginia. The loss of funding for even some of these projects would harm Virginia’s economy, employment, and tax revenues.

150. Virginia is further injured by the loss of equipment to its National Guard. The Virginia National Guard receives roughly 97 percent of its funding from the federal government. The Virginia National Guard has received equipment from the federal government that is housed and secured at Virginia National Guard’s facilities, and is valued in excess of \$1.8 billion. That equipment is used to further the Virginia National Guard’s efforts to assist civil authorities in

²⁴ *DOD Defense Spending by State*, *supra* note 2, at 4.

protecting life and property and to preserve peace, order, and public safety during emergencies.

151. There are roughly 8,705 guardsmen of the Virginia National Guard, across the Virginia Army National Guard, the Virginia Air National Guard, and the Virginia Defense Force. The Virginia National Guard also employs some 410 civilian personnel. The guardsmen and civilian personnel of the Virginia National Guard play a vital role in Virginia's economy, including by bringing in more than \$250 million in annual income into the Commonwealth.

152. On information and belief, the diversion of funds for military equipment supporting or used by the Virginia National Guard would interfere with the Virginia National Guard's ability to provide vital services for the Commonwealth, thereby injuring Virginia and its residents.

PLAINTIFF STATE OF WISCONSIN

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

154. Governor Tony Evers is the chief executive officer of the State of Wisconsin and has the duty to "take care that the laws be faithfully executed." Wis. Const. art. V, §§ 1, 4. The Governor is the commander-in-chief of the military and naval forces of the State, including the Wisconsin National Guard. Wis. Const. art. V, § 1. The Governor is the chief of Wisconsin's executive branch agencies, including agencies that will suffer injuries discussed in this complaint.

155. Attorney General Joshua L. Kaul is the chief legal officer of the State of Wisconsin and has the authority to file civil actions to protect Wisconsin's rights and interests. *See* Wis. Stat. § 165.25(1m). The Attorney General's powers and duties include appearing for and representing the State, on the Governor's request, "in any court or before any officer, any cause or matter, civil or criminal, in which the state or the people of this state may be interested." *Id.*

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

157. In filing this action, the Attorney General seeks to redress and prevent injuries to the State and its residents caused by Defendants' illegal diversion of federal funds to build the

1 border wall. These injuries include harms to Wisconsin's sovereign, quasi-sovereign, and
2 proprietary interests.

3 158. Wisconsin has an interest in protecting the State's economy and security, as well
4 as the health, safety, and welfare of its residents.

5 159. Wisconsin has an interest in protecting its tax revenues, including those resulting
6 from economic activity from military projects in Wisconsin.

7 160. Wisconsin is home to multiple military bases, which play a critical role in our
8 nation's defense and in Wisconsin's economy.

9 161. On information and belief, Defendants' diversion of funds for the border wall
10 threatens over \$97 million in military construction funding for projects currently planned in
11 Wisconsin.

12 162. Defendants' diversion of funds allocated to necessary maintenance and repairs at
13 these military bases would harm Wisconsin's economy and the economic welfare of Wisconsin
14 residents.

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

19 164. On information and belief, Defendants' latest diversion of funds for the border
20 wall will include \$790 million in funds currently designated for equipment for the states' National
21 Guards.

22 165. Defendants' diversion of funding for equipment supporting or used by the National
23 Guard would interfere with the Wisconsin National Guard's ability to provide necessary services
24 for Wisconsin, thereby injuring the State and its residents.

25 166. On information and belief, Defendants' diversion of funds includes the diversion
26 of \$101 million in funds for Heavy Expanded Mobile Tactical Trucks, *see California*, ECF No.
27 271-1, Ex. C at 2, that are exclusively manufactured by a Wisconsin-based company.
28

167. On information and belief, Defendants' diversion of funds for military equipment or services would result in the loss of revenue to Wisconsin-based companies and potentially the loss of hundreds of jobs due to the decreased production needs of those companies.

168. These decreased revenues and job losses resulting from Defendants' diversion would harm Wisconsin's economy and the economic welfare of Wisconsin residents.

DEFENDANTS

169. 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.

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

171. Defendant DOD is the federal agency to which Congress has appropriated the military construction and drug interdiction funding implicated by the President's Executive Actions. Defendant DOD is an executive department of the United States of America pursuant to 5 U.S.C. § 101, and a federal agency within the meaning of 28 U.S.C. § 2671. As such, it engages in agency action within the meaning of 5 U.S.C. § 702, and is named as a defendant in this action pursuant to 5 U.S.C. § 702.

172. Defendant Mark T. Esper, Secretary of Defense, oversees the DOD, and is responsible for the actions and decisions that are being challenged by Plaintiffs in this action. Defendant Esper is sued in his official capacity pursuant to 5 U.S.C. § 702.

173. Defendant Ryan D. McCarthy, Secretary of the Army, oversees the United States Army within DOD, and is responsible for the actions and decisions that are being challenged by Plaintiffs in this action. Defendant McCarthy is sued in his official capacity pursuant to 5 U.S.C. § 702.

174. Defendant Thomas B. Modly, Acting Secretary of the Navy, oversees the United States Navy within DOD, and is responsible for the actions and decisions that are being challenged by Plaintiffs in this action. Defendant Modly is sued in his official capacity pursuant to 5 U.S.C. § 702.

175. Defendant Barbara M. Barrett, Secretary of the Air Force, oversees the United States Air Force within DOD, and is responsible for the actions and decisions that are being challenged by Plaintiffs in this action. Defendant Barrett is sued in her official capacity pursuant to 5 U.S.C. § 702.

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

177. Defendant Chad F. Wolf, Acting Secretary of DHS, oversees DHS and is responsible for the actions and decisions that are being challenged by Plaintiffs in this action. Defendant Wolf is sued in his official capacity pursuant to 5 U.S.C. § 702.

178. Defendant Department of the Interior (“DOI”) is the federal agency responsible for managing federal lands. Defendant DOI is an executive department of the United States of America pursuant to 5 U.S.C. § 101, and a federal agency within the meaning of 28 U.S.C. § 2671. As such, it engages in agency action within the meaning of 5 U.S.C. § 702, and is named as a defendant in this action pursuant to 5 U.S.C. § 702.

179. Defendant David Bernhardt, Secretary of the Interior, oversees the Department of the Interior, and is responsible for the actions that are being challenged by Plaintiffs in this action. Defendant Bernhardt is sued in his official capacity pursuant to 5 U.S.C. § 702.

FACTUAL ALLEGATIONS

I. PRESIDENT TRUMP HAS LONG CLAIMED THAT A “CRISIS” AT THE BORDER REQUIRES BUILDING A BORDER WALL, BUT DID NOT DECLARE A NATIONAL EMERGENCY UNTIL CONGRESS DENIED HIM FUNDS TO BUILD IT

180. Dating back to at least August 2014, President Trump has advocated for a wall along the southern border.²⁵

²⁵ Donald J. Trump (@realDonaldTrump), Twitter (Aug. 5, 2014, 1:34 PM), <https://tinyurl.com/yydre3ep>.

181. In his speech announcing his candidacy for President in June 2015, President Trump claimed that a border wall is needed to stop a tide of illegal immigration, and that he would build it as President and have Mexico pay for the wall.²⁶ In the same speech, he also stated, “When Mexico sends its people, they’re not sending their best They’re bringing drugs. They’re bringing crime. They’re rapists.” This claim and his promise to build a wall and have Mexico pay for it became a consistent theme of his campaign.

182. President Trump repeatedly stated that the border wall he planned to build would help prevent terrorism, crime, and drug smuggling. For example, on October 4, 2014, President Trump tweeted, “The fight against ISIS starts at our border. ‘At least’ 10 ISIS have been caught crossing the Mexico border. Build a wall!”²⁷ More recently, on February 3, 2019, President Trump tweeted, “If there is no Wall, there is no Security. Human Trafficking, Drugs and Criminals of all dimensions - KEEP OUT!”²⁸

183. On August 27, 2016, President Trump tweeted that “[h]eroin overdoses are taking over our children and others in the MIDWEST. Coming in from our southern border. We need strong border & WALL!”²⁹

184. In a speech shortly before the 2016 presidential election, President Trump stated that “[o]n day one [of his Administration], we will begin working on an impenetrable, physical, tall, power [sic], beautiful southern border wall” to “help stop the crisis of illegal crossings” and “stop the drugs and the crime from pouring into our country.”³⁰

185. As president, President Trump has continued to repeatedly assert the need for a border wall and his intention to build it.

186. On February 28, 2017, President Trump delivered an address to a joint session of

²⁶ Time, *Here’s Donald Trump’s Presidential Announcement Speech* (June 16, 2015), <https://tinyurl.com/qzk4wrv>.

²⁷ Donald J. Trump (@realDonaldTrump), Twitter (Oct. 8 2014, 2:26 PM), <https://tinyurl.com/yxntlamo>.

²⁸ *Id.* (Feb. 3, 2019, 2:03 PM), <https://tinyurl.com/yywmw9yx>.

²⁹ *Id.* (Aug. 27, 2016, 7:17 AM), <https://tinyurl.com/y3f6bp9s>.

³⁰ N.Y. Times, *Transcript of Donald Trump’s Immigration Speech* (Sept. 1, 2016), <https://tinyurl.com/yalom4hl>.

1 Congress in which he stated that in order to “restore integrity and the rule of law at our
2 borders . . . we will soon begin the construction of a great, great wall along our southern
3 border.”³¹

4 187. In his 2018 State of the Union address, President Trump stated that “open borders
5 have allowed drugs and gangs to pour into our most vulnerable communities. . . . Most
6 tragically, they have caused the loss of many innocent lives[,]” and called for “building a wall on
7 the Southern border” as part of the President’s plan to “fully secure[] the border.”³²

8 188. On March 19, 2018, President Trump delivered a speech in which he claimed that
9 “[n]inety percent of the heroin in America comes from our southern border, where, eventually,
10 the Democrats will agree with us and we’ll build the wall to keep the damn drugs out.”³³

11 189. On January 8, 2019, President Trump delivered a speech decrying the southern
12 border as “a pipeline for vast quantities of illegal drugs, including meth, heroin, cocaine, and
13 fentanyl[,]” claiming that “thousands of Americans have been brutally killed by those who
14 illegally entered our country,” and discussing his “detailed proposal to secure the border and stop
15 the criminal gangs, drug smugglers, and human traffickers,” including his request for \$5.7 billion
16 for a border wall.³⁴

17 190. Additional statements by President Trump regarding the border wall include
18 tweets on December 19, 2018 (“Because of the tremendous dangers at the Border, including large
19 scale criminal and drug inflow, the United States Military will build the Wall!”),³⁵ December 31,
20 2018 (“I campaigned on Border Security, which you cannot have without a strong and powerful
21 Wall. Our Southern Border has long been an ‘Open Wound,’ where drugs, criminals (including
22

23 ³¹ White House, *Remarks by President Trump in Joint Address to Congress* (Feb. 28,
2017), <https://tinyurl.com/y4kvpj7n>.

24 ³² White House, *President Donald J. Trump’s State of the Union Address* (Jan. 30, 2018),
<https://tinyurl.com/ybtdy>.

25 ³³ White House, *Remarks by President Trump on Combatting the Opioid Crisis*, (Mar. 19,
2018), <https://tinyurl.com/ybsfq2t8>.

26 ³⁴ White House, *President Donald J. Trump’s Address to the Nation on the Crisis at the
Border* (Jan. 8, 2019), <https://tinyurl.com/y5uloxyg> (Trump Border Crisis Address).

27 ³⁵ Donald J. Trump (@realDonaldTrump), Twitter (Dec. 19, 2018, 5:43 AM),
28 <https://tinyurl.com/y95cnd8r>.

human traffickers) and illegals would pour into our Country. Dems should get back here an [sic] fix now!”),³⁶ January 27, 2019 (“BUILD A WALL & CRIME WILL FALL!”),³⁷ and June 2, 2019 (“The Wall is under construction and moving along quickly, despite all of the Radical Liberal Democrat lawsuits. What are they thinking as our Country is invaded by so many people (illegals) and things (Drugs) that we do not want. Make America Great Again!”).³⁸

191. Indeed, President Trump has made it clear that his plan to build the border wall would go forward regardless of the actual facts on the ground. During a speech to the National Rifle Association, President Trump stated in the context of statistics showing a decrease in unauthorized border crossings that “we will build the wall no matter how low this number gets or how this goes. Don’t even think about it. Don’t even think about it.”³⁹

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

193. President Trump acknowledged this when he stated that the “emergency” at the border “began a long time [ago],” citing 2014 as the beginning of the ostensible “crisis at the border.”⁴⁰

194. There is no evidence of change to the historic pattern of unauthorized immigrants committing crimes at substantially lower rates than native-born Americans.⁴¹

195. The federal government’s own data also show that the vast majority of the drugs smuggled into the country that the President has singled out as dangerous (methamphetamine,

³⁶ *Id.* (Dec. 31, 2018, 5:29 AM), <https://tinyurl.com/y6stmopr>.

³⁷ *Id.* (Jan. 27, 2019, 10:22 AM), <https://tinyurl.com/wpnjduw>.

³⁸ *Id.* (June 2, 2019, 4:53 AM), <https://tinyurl.com/vh8oqy3>.

³⁹ White House, *Remarks by President Trump at the National Rifle Association Leadership Forum* (Apr. 28, 2017), <https://tinyurl.com/y5dtnej>.

⁴⁰ White House, *Remarks by President Trump before Marine One Departure* (Jan. 10, 2019), <https://tinyurl.com/yycw5dk>.

⁴¹ 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 illegal immigrant conviction rate for homicide was 44 percent below that of native-born Americans in 2016 in Texas”) (emphasis in original).

1 heroin, cocaine, and fentanyl)⁴² continue to come through, not between, ports of entry.⁴³

2 196. There continues to be a lack of credible evidence that terrorists are using the
3 southern border as a means of entering the United States, as a State Department report produced
4 under the Trump Administration makes clear.⁴⁴

5 197. In his own public statements, President Trump has made clear that his Emergency
6 Declaration and Defendants' ensuing construction of a border wall were triggered by his inability
7 to secure funding for the border wall from Congress rather than any actual crisis at the border.

8 198. When asked by the media about his plans to declare a national emergency relating
9 to the border wall, President Trump stated his preference for "do[ing] the deal through Congress,"
10 but that if the deal did not "work out" he would "almost . . . definitely" declare a national
11 emergency.⁴⁵ Although he reiterated his unsupported claims about drugs, criminals, and gangs
12 "pouring" across the border between ports of entry and constituting a "crisis," President Trump
13 repeatedly cited the ongoing impasse with Congress as his rationale for the Emergency
14 Declaration.⁴⁶

15 199. Around the same time, when asked by the media what his threshold was for
16 declaring a national emergency, rather than cite any actual threshold relating to unauthorized
17 border crossings, President Trump responded, "[m]y threshold will be if I can't make a deal with
18 people that are unreasonable."⁴⁷

19 200. On February 1, 2019, President Trump made clear in an interview that he was
20 planning to wait until February 15, the deadline for a congressional conference committee to avert
21

22 ⁴² *Trump Border Crisis Address*, *supra* note 34.

23 ⁴³ CBP, *Enforcement Statistics FY 2019*, <https://tinyurl.com/w7fufkn> (last visited Feb. 27,
24 2020) (CBP Enforcement Statistics) (showing that for FY 2019, out of all the drugs seized by
25 CBP in that fiscal year, 88 percent of cocaine, 87 percent of heroin, 83 percent of
26 methamphetamine, and 92 percent of fentanyl were seized by Field Operations at ports of entry).

27 ⁴⁴ U.S. Dep't of State, Bureau of Counterterrorism, *Country Reports on Terrorism 2017*
28 205 (Sept. 2018), <https://tinyurl.com/y6klxpxy>.

⁴⁵ *Remarks by President Trump Before Marine One Departure*, *supra* note 40.

⁴⁶ *Id.*

⁴⁷ George Sargent, *Trump: I Have the 'Absolute Right' to Declare a National Emergency
if Democrats Defy Me*, *Wash. Post* (Jan 9, 2019), <https://tinyurl.com/y4vmtezb>.

another government shutdown, before issuing an emergency declaration.⁴⁸ President Trump claimed he was already building the border wall, and strongly implied that he needed neither additional funding nor an emergency declaration to build it.⁴⁹ During a press conference that same day, when asked whether he would consider other options besides the emergency declaration, President Trump stated that “we will be looking at a national emergency, because I don’t think anything is going to happen [in Congress]. I think the Democrats don’t want border security.”⁵⁰ President Trump also repeated his view that the wall was already being built “with funds that are on hand . . . we’re building a lot of wall right now, as we speak . . . [a]nd we’re getting ready to give out some very big contracts with money that we have on hand and money that comes in.”⁵¹

II. CONGRESS HAS APPROPRIATED LIMITED FUNDING TOWARD BORDER BARRIERS AND NO FUNDING TOWARD PRESIDENT TRUMP’S PROPOSED BORDER WALL

201. Congress has exercised its Article I powers by appropriating funds for the construction of border barriers and related infrastructure when Congress deemed it appropriate. During the period of 2005 through 2011, Congress appropriated funding for the construction of hundreds of miles of border barriers.⁵² According to Border Patrol, as of September 30, 2019,

⁴⁸ N.Y. Times, *Excerpt from Trump’s Interview with the New York Times* (Feb. 1, 2019), <https://tinyurl.com/y9gsosk4>; see also CBS, *Transcript: President Trump on “Face the Nation”* (Feb. 3, 2019), <https://tinyurl.com/y8l38g72> (President Trump describing emergency declaration as an “alternative” to the process that Congress was engaged in to avert another shutdown, which was to end on February 15).

⁴⁹ *Excerpt from Trump’s Interview with the New York Times*, *supra* note 48 (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 finished. Now whether or not I declare a national emergency, that you’ll see.”); see also Donald J. Trump (@realDonaldTrump), Twitter (Jan. 31, 2019, 9:43 AM), <https://tinyurl.com/y56tevok> (“Wall is being built!”).

⁵⁰ White House, *Remarks by President Trump in Meeting on Human Trafficking on the Southern Border* (Feb. 1, 2019), <https://tinyurl.com/y5ghp3eh>.

⁵¹ *Id.*

⁵² Gov’t Accountability Office, *Additional Actions Needed to Better Assess Fencing’s Contributions to Operations and Provide Guidance for Identifying Capability Gaps*, GAO-17-331 (Feb. 16, 2017), at 7-10, <https://tinyurl.com/yaqbny6e>; Gov’t Accountability Office, *Secure*

1 there was a total of 705 miles of primary, secondary, or tertiary fencing along 654 miles of the
2 southwest border.⁵³

3 202. In the 115th and 116th Congresses, between 2017 and 2019, Congress considered,
4 but repeatedly declined to adopt, legislation appropriating funding for President Trump's
5 proposed border wall.⁵⁴

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

16 *Border Initiative Fence Construction Costs*, GAO-09-244R (Jan. 29, 2009), at 4-11,
17 <https://tinyurl.com/y2kgefp5>.

18 ⁵³ U.S. Border Patrol, *Mileage of Pedestrian and Vehicle Fencing by State* (Sept. 30,
2019), <https://tinyurl.com/tkktspn>.

19 ⁵⁴ See, e.g., The WALL Act of 2019, S. 53, 116th Cong. (2019) (proposed \$25 billion
20 appropriation for border wall; no action taken); The WALL Act of 2018, S. 3713, 115th Cong.
21 (2018) (proposed \$25 billion appropriation for border wall; no committee action); 50 Votes for
22 the Wall Act, H.R. 7073, 115th Cong. (2018) (proposed \$25 billion appropriation for funding for
23 border wall; no committee action); Build the Wall, Enforce the Law Act of 2018, H.R. 7059,
24 115th Cong. (2018) (proposed \$16.6 billion appropriation for border wall; no committee action);
25 Fund and Complete the Border Wall Act, H.R. 6657, 115th Cong. (2018) (proposed authorization
26 of funding for border wall; no committee action); American Border Act, H.R. 6415, 115th Cong.
27 (2018) (proposed \$16.6 billion appropriation for border wall; no committee action); Border
28 Security and Immigration Reform Act of 2018, H.R. 6136, 115th Cong. (2018) (proposed \$16.6
billion appropriation for border wall; voted down by House 301 to 121); Securing America's
Future Act of 2018, H.R. 4760, 115th Cong. (2018) (proposed construction of physical barrier,
including border wall; voted down by House 231 to 193); Border Security and Deferred Action
Recipient Relief Act, S. 2199, 115th Cong. (2017) (proposal to make available \$38.2 million for
planning for border wall construction; 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).

1 for the border wall.⁵⁵

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

5 205. After the Senate passed the temporary funding bill, on December 20, 2018,
6 President Trump announced that “I’ve made my position very clear. Any measure that funds the
7 government must include border security,” which he clarified must include funding for a wall.⁵⁶

8 206. On December 20, 2018, the House of Representatives approved a short-term
9 funding bill appropriating \$5.7 billion for “U.S. Customs and Border Protection – Procurement,
10 Construction, and Improvements.” Department of Defense Appropriations Act of 2018, H.R.
11 695, 115th Cong. (2018). The Senate never passed the House-approved version of the legislation.

12 207. With no agreement between Congress and the President on funding, on December
13 22, 2018, the federal government partially shut down.

14 208. On January 3, 2019, Nancy Pelosi became Speaker of the House. The day before,
15 Speaker Pelosi reiterated in a televised interview that the House would be providing “[n]othing
16 for the wall.”⁵⁷ On January 3, the House of Representatives approved a short-term funding bill
17 without any funding for a border wall. Consolidated Appropriations Act of 2019, H.R. 21, 116th
18 Cong. (2019). The Senate never passed the House-approved version of the legislation.

19 209. The Office of Management and Budget formally requested \$5.7 billion from
20 Congress for the border wall on January 6, 2019.⁵⁸

21 210. On January 19, 2019, President Trump addressed the nation regarding the partial
22 government shutdown and laid out his immigration proposal. In connection with his continued

23
24 ⁵⁵ CSPAN, *President Trump Meeting with Democratic Leaders* (Dec. 11, 2018),
<https://tinyurl.com/ycalrz3x>.

25 ⁵⁶ CNN, *Trump: “I’ve Made My Position Very Clear” on Spending Bill* (Dec. 20, 2018),
<https://tinyurl.com/yy9cvzdd>.

26 ⁵⁷ Tal Axelrod, *Pelosi on Negotiations with Trump: “Nothing for the Wall,”* The Hill,
27 (Jan. 2, 2019), <https://tinyurl.com/y77o89hp>.

28 ⁵⁸ Letter from Russell T. Vought, Acting Director, Off. of Mgmt. and Budget, to Sen.
Richard Shelby (Jan. 6, 2019), <https://tinyurl.com/y224y59q>.

1 proposal for \$5.7 billion in funding for a wall, he said that “[a]s a candidate for president, I
2 promised I would fix this crisis, and I intend to keep that promise one way or the other.”⁵⁹

3 211. When he announced the congressional agreement that ended the government
4 shutdown on January 25, 2019, President Trump stated: “If we don’t get a fair deal from
5 Congress, the government will either shut down on February 15th, again, or I will use the powers
6 afforded to me under the laws and the Constitution of the United States to address this
7 emergency.”⁶⁰

8 212. After weeks of negotiation, on February 14, 2019, Congress passed the
9 Consolidated Appropriations Act, 2019, which provided just \$1.375 billion for border barrier
10 fencing. Pub. L. No. 116-6, 133 Stat. 13, § 230(a)(1) (“FY 2019 Consolidated Appropriations
11 Act”). The FY 2019 Consolidated Appropriations Act also imposed limitations on the type of
12 fencing for which these funds could be used, specifying that the funds “shall only be available for
13 operationally effective designs deployed as of the date of the Consolidated Appropriations Act,
14 2017 (Public Law 115-31), such as currently deployed steel bollard designs, that prioritize agent
15 safety.” *Id.* § 230(b). On February 15, 2019, President Trump signed the FY 2019 Consolidated
16 Appropriations Act into law.

17 213. As part of the President’s FY 2020 budget, the President “request[ed] \$5 billion to
18 construct approximately 200 miles of border wall along the U.S. Southwest border.”⁶¹

19 214. On December 19, 2019, Congress passed the Consolidated Appropriations Act,
20 2020, which provides just \$1.375 billion “for the construction of barrier system along the
21 southwest border.” Pub L. No. 116-93, 133 Stat. 2317, § 209(a)(1) (“FY 2020 Consolidated
22 Appropriations Act”). The FY 2020 Consolidated Appropriations Act also imposes limitations
23 on the type of fencing that may be used for construction that include those that Congress imposed
24 in the FY 2019 Consolidated Appropriations Act, *id.* § 209(b)(1)(A), and adds that “operationally

25 ⁵⁹ White House, *Remarks by President Trump on the Humanitarian Crisis on our*
26 *Southern Border and the Shutdown* (Jan. 19, 2019), <https://tinyurl.com/y7gdj6s8>.

27 ⁶⁰ White House, *Remarks by President Trump on the Government Shutdown* (Jan. 25,
2019), <https://tinyurl.com/y4mplplb>.

28 ⁶¹ White House, *A Budget for a Better America, Fiscal Year 2020, Budget of the U.S.*
Government 50 (Mar. 11, 2019), <https://tinyurl.com/y63rovly>.

effective adaptations of such designs that help mitigate community or environmental impacts of barrier system construction, including adaptations based on consultation with jurisdictions within which barrier system will be constructed” may also be used. *Id.* § 209(b)(1)(B). On December 20, 2019, President Trump signed the FY 2020 Consolidated Appropriations Act into law.

215. This \$1.375 billion appropriation is the only funding in the FY 2020 Consolidated Appropriations Act that Congress designated for the construction of a border barrier.

216. The FY 2019 and 2020 Consolidated Appropriations Acts also contain an appropriations rider limiting the transfer of federal funds appropriated by Congress for one purpose to augment a different program. That provision states:

None of the funds made available in this or any other appropriations Act may be used to increase, eliminate or reduce funding for a program, project, or activity as proposed in the President’s budget request for a fiscal year until such proposed change is subsequently enacted in an appropriation Act or unless such change is made pursuant to the reprogramming or transfer provisions of this or any other appropriations Act.

Pub. L. No. 116-6, 133 Stat. at 197, § 739; Pub. L. No. 116-93, 133 Stat. at 2494, § 739.

217. After signing the FY 2020 Consolidated Appropriations Act into law, the President has continued to seek money from Congress for a border wall. As part of the FY 2021 budget, the President has requested \$2 billion from Congress “to construct approximately 82 miles of additional border wall along the U.S. Southwest border.”⁶²

III. PRESIDENT TRUMP’S EXECUTIVE ACTIONS AND EMERGENCY DECLARATION

218. On the same day that the President signed the FY 2019 Consolidated Appropriations Act into law, the Trump Administration announced that the President was taking executive action to redirect funding beyond what was appropriated by Congress toward construction of a border wall. The Administration outlined specific plans for the diversion of an additional \$6.7 billion “that will be available to build the border wall once a national emergency is declared and additional funds have been reprogramed.”⁶³ In its announcement of the 2019

⁶² White House, *A Budget for America’s Future, Fiscal Year 2021, Budget of the U.S. Government (FY 21 Budget)* 56 (Feb. 10, 2020), <https://tinyurl.com/qnfcuu6>.

⁶³ White House, *President Donald J. Trump’s Border Security Victory* (Feb. 15, 2019), <https://tinyurl.com/y3empmay>.

1 Executive Action, the Administration identified the following funding for diversion to “be used
2 sequentially”:

- 3 • \$601 million from the Treasury Forfeiture Fund;
- 4 • Up to \$2.5 billion in DOD funds transferred for Support for Counterdrug Activities (10
5 U.S.C. § 284); and
- 6 • Up to \$3.6 billion reallocated from DOD military construction projects under the
7 President’s declaration of a national emergency (10 U.S.C. § 2808).⁶⁴

8 219. In conjunction with that announcement, the President also declared a national
9 emergency under the National Emergencies Act, claiming that there is a “border security and
10 humanitarian crisis that threatens core national security interests and constitutes a national
11 emergency.”⁶⁵ The Emergency Declaration claims that the border is an entry point for “criminals,
12 gang members, and illicit narcotics.”⁶⁶ The Emergency Declaration continues: “The problem of
13 large-scale unlawful migration through the southern border is long-standing, and despite the
14 executive branch’s exercise of existing statutory authorities, the situation has worsened in certain
15 respects in recent years.”⁶⁷ It asserts that “recent years have seen sharp increases in the number
16 of family units entering and seeking entry to the United States and an inability to provide
17 detention space for many of these aliens while their removal proceedings are pending.”⁶⁸ The
18 Emergency Declaration concludes that the difficulty in removing these family units justifies the
19 declaration, but it does not make any connection to how the entry of these family units into the
20 United States contributes to the flow of “criminals, gang members, and illicit narcotics” into the
21 country.⁶⁹

22 220. The President invoked the National Emergencies Act and declared that the
23 “emergency requires use of the Armed Forces” and “that the construction authority provided in

24 ⁶⁴ *Id.*

25 ⁶⁵ Declaring a National Emergency Concerning the Southern Border of the United States,
84 Fed. Reg. 4949 (Feb. 15, 2019).

26 ⁶⁶ *Id.*

27 ⁶⁷ *Id.*

28 ⁶⁸ *Id.*

⁶⁹ *Id.*

1 section 2808 of title 10, United States Code, is invoked and made available, according to its
 2 terms, to the Secretary of Defense, and at the discretion of the Secretary of Defense, to the
 3 Secretaries of the military departments.”⁷⁰

4 221. The Emergency Declaration directs the Secretary of Defense or the Secretaries of
 5 relevant military departments to “order as many units or members of the Ready Reserve to active
 6 duty as the Secretary concerned, in the Secretary’s discretion, determines to be appropriate to
 7 assist and support the activities of the Secretary of Homeland Security at the southern border.”⁷¹
 8 The Emergency Declaration acknowledges that DOD had previously “provided support and
 9 resources to the Department of Homeland Security at the southern border” pursuant to President
 10 Trump’s April 4, 2018 memorandum.⁷²

11 222. The Emergency Declaration further directs the Secretaries of Defense, Interior,
 12 and Homeland Security to “take all appropriate actions, consistent with applicable law, to use or
 13 support the use of the authorities herein invoked.”⁷³

14 223. At a press conference announcing the 2019 Executive Action, President Trump
 15 acknowledged that Congress provided more than enough funding for homeland security, and that
 16 the Administration has “so much money, we don’t know what to do with it.” In explaining his
 17 rationale for the 2019 Executive Action, the President candidly admitted that the Emergency
 18 Declaration reflected his personal preference to construct the wall more quickly, rather than an
 19 actual urgent need for it to be built immediately: “I could do the wall over a longer period of time.
 20 I didn’t need to do this. But I’d rather do it much faster.”⁷⁴

21 224. Defendants implemented the 2019 Executive Action through two sets of diversions
 22 relevant here. First, in March and May of 2019, DOD used its transfer authority provided in
 23 §§ 8005 and 9002 of the FY 2019 Department of Defense Appropriations Act, Pub. L. No. 115-
 24 245, 132 Stat. 2981, to divert \$2.5 billion appropriated for other purposes into DOD’s drug

25 ⁷⁰ *Id.*

26 ⁷¹ *Id.* § 1.

27 ⁷² *Id.*

⁷³ *Id.* § 2.

28 ⁷⁴ White House, *Remarks by President Trump on the National Security and Humanitarian
 Crisis on our Southern Border* (Feb. 15, 2019), <https://tinyurl.com/y3jenqeu>.

interdiction account for border wall construction, including in New Mexico and California, under 10 U.S.C. § 284. *California*, ECF Nos. 173-1 at 1-8, 34-37 & 173-3 at 1-20. Second, in September 2019, DOD announced that it was authorizing the diversion of \$3.6 billion originally intended for military construction projects toward border barrier projects, including in New Mexico and California, under 10 U.S.C. § 2808. *Id.*, ECF No. 206. Out of that amount, DOD diverted \$1.8 billion from 64 defunded domestic military construction projects, including 19 in the Plaintiff States. *Id.*, ECF No. 207-1.

225. On February 13, 2020, the President announced the continuation of the national emergency for one year.⁷⁵

226. Contemporaneous with that announcement, DOD used its transfer authority provided in §§ 8005 and 9002 of the FY 2020 Department of Defense Appropriations Act,⁷⁶ to divert \$3.831 billion appropriated for other purposes into DOD's drug interdiction account for border wall construction, again including projects in New Mexico and California, under 10 U.S.C. § 284. *California*, ECF No. 271 at 1-2. These funds were originally to be used for procurement of various military equipment for the Army, Navy, Air Force, and the National Guard and Reserves.

227. For example, Defendants' diversions include \$790 million from an account used to provide the states' National Guards with vital equipment. *Id.*, ECF No. 271-1, Ex. C at 5. Defendants' diversion also includes \$100 million from an account for modernization of Humvee vehicles for the states' National Guards. *Id.* at 2.

228. A report based on DOD internal planning figures show that the DOD is planning to divert an additional \$3.7 billion in military construction funding in FY 2020 in order to give the Trump Administration enough money to complete 885 miles of new fencing by the spring of 2022.⁷⁷

⁷⁵ Continuation of the National Emergency Concerning the Southern Border of the United States, 85 Fed. Reg. 8715 (Feb. 13, 2020).

⁷⁶ The Department of Defense Appropriations Act, 2020 is Division A of the FY 2020 Consolidated Appropriations Act, Pub. L. No. 116-93, referred to throughout the complaint.

⁷⁷ Nick Miroff, *Trump planning to divert additional \$7.2 billion in Pentagon funds for border wall*, Washington Post (Jan. 13, 2020), <https://tinyurl.com/vy5o5qz>.

229. The Administration estimates that with “[f]unding made available from 2017 to 2020,” \$10.5 billion of which was not appropriated by Congress for border barriers, “the Administration will build up to approximately 1,000 miles of border wall along the Southwest border,” and 400 miles will be built by the end of 2020.⁷⁸

IV. LEGAL BACKGROUND

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

230. The National Emergencies Act (“NEA”), Pub. L. 94-412, 90 Stat. 1255, codified at 50 U.S.C. §§ 1601-1651, was enacted by Congress in 1976 to rein in, rather than expand, the power of the president. The NEA was designed to “insure” that the President’s “extraordinary” emergency powers would “be utilized only when emergencies actually exist.” S. Rep. No. 94-1168, at 2 (1976). Senator Frank Church, who was instrumental in the development of the NEA, testified before the Senate Committee of Government Operations “that the President should not be allowed to invoke emergency authorities or in any way utilize the provisions of this Act for frivolous or partisan matters, nor for that matter in cases where important but not ‘essential’ problems are at stake.” Hearing on H.R. 3884 Before the S. Comm. of Governmental Operations, 94th Cong. 7 (1976) (statement of Sen. Frank Church). Senator Church continued that “[t]he Committee intentionally chose language which would make clear that the authority of the Act was to be reserved for matters that are ‘essential’ to the protection of the Constitution and the people.” *Id.*

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

232. Under the NEA, the President must specify the statutory emergency authorities he intends to invoke upon issuing a national emergency. He must also publish the proclamation of a national emergency in the Federal Register and transmit it to Congress. *Id.* § 1631.

233. The NEA sets out a procedure whereby Congress may terminate the national emergency if a resolution is passed by both houses of Congress and becomes law. *Id.* § 1622.

⁷⁸ FY 2021 Budget 6, 56, *supra* note 62.

1 This procedure requires that the joint resolution be signed into law by the President, or if vetoed
 2 by the President, that Congress overrides the veto with a two-thirds vote in both chambers of
 3 Congress. *Id.*

4 234. On February 26, 2019, the House of Representatives passed H.J. Res. 46
 5 terminating the Emergency Declaration by a vote of 245 to 182, which the Senate passed on
 6 March 14, 2019 by a vote of 59 to 41. The President vetoed the joint resolution, and the House
 7 did not reach the necessary two-thirds majority to override the veto.

8 235. On September 25, 2019, the Senate passed S.J. Res. 54 terminating the Emergency
 9 Declaration by a vote of 54 to 41, which the House passed on September 27, 2019 by a vote of
 10 236 to 174. The President again vetoed the joint resolution, and the Senate did not reach the
 11 necessary two-thirds majority to override the veto.

12 236. As discussed above, the Emergency Declaration remains in place at this time. *See*
 13 *supra*, para. 225.

14 **B. Section 2808’s Emergency Military Construction Authority (10 U.S.C.**
 15 **§ 2808)**

16 237. In FY 2019, DOD relied upon 10 U.S.C. § 2808 to reallocate \$3.6 billion from
 17 military construction projects toward a border wall. On information and belief, in FY 2020,
 18 Defendants will seek to use § 2808 to divert billions of additional funds toward a border wall.

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

23 239. Section 2808 limits the funds available for emergency military construction to “the
 24 total amount of funds that have been appropriated for military construction . . . that have not been
 25 obligated.” *Id.*

26 240. “Military construction” under Section 2808 includes “any construction,
 27 development, conversion, or extension of any kind carried out with respect to a military
 28 installation,” and “military installation” includes a “base, camp, post, station, yard, center, or

1 other activity under the jurisdiction of the Secretary of a military department. . . .” 10 U.S.C. §
2 2801.

3 **C. Section 284’s Authority to Support Counter-Drug Activities (10 U.S.C.**
4 **§ 284) and Transfer Authority under Sections 8005 and 9002**

5 241. In FY 2019, Defendants sought to divert \$2.5 billion from other DOD accounts
6 into the Department’s account for counterdrug activities for border wall construction. In FY 2020
7 Defendants have directed the transfer of over \$3.8 billion more in federal funds, using a
8 combination of three provisions of law, none of which is dependent on the President declaring a
9 national emergency.

10 242. First, 10 U.S.C. § 284 authorizes the Secretary of Defense to assist civilian law
11 enforcement with drug enforcement activities. It states that the Secretary of Defense “may
12 provide support for the counterdrug activities or activities to counter transnational organized
13 crime” of any law enforcement agency. 10 U.S.C. § 284. Such support may include
14 “[c]onstruction of roads and fences and installation of lighting to block drug smuggling corridors
15 across international boundaries of the United States.” *Id.*

16 243. Second, § 8005 of the FY 2019 Department of Defense Appropriations Act and the
17 FY 2020 Department of Defense Appropriations Act provide that “[u]pon determination by the
18 Secretary of Defense that such action is necessary in the national interest, he may, with the
19 approval of the Office of Management and Budget, transfer not to exceed \$4,000,000,000 of
20 working capital funds of the Department of Defense or funds made available in this Act to the
21 Department of Defense for military functions (except military construction) between such
22 appropriations or funds or any subdivision thereof, to be merged with and to be available for the
23 same purposes, and for the same time period, as the appropriation or fund to which transferred.”
24 133 Stat. at 2335, § 8005; 132 Stat. at 2999, § 8005.

25 244. Section 8005’s transfer authority is subject to several conditions, including
26 “prompt” notification to Congress. In addition, the § 8005 transfer authority “may not be used
27 unless for higher priority items, based on unforeseen military requirements, than those for which
28 originally appropriated and in no case where the item for which funds are requested has been

1 denied by Congress.” 133 Stat. at 2335, § 8005; 132 Stat. at 2999, § 8005.

2 245. Third, § 9002 of the FY 2019 and 2020 Department of Defense Appropriations
3 Acts also allows the transfer of funds between appropriations under certain circumstances, and “is
4 subject to the same terms and conditions as the authority provided in section 8005. . . .” 133 Stat.
5 at 2376, § 9002; 132 Stat. at 3042, § 9002.

6 246. Defendants have not sufficiently explained how the diversion of DOD funds
7 toward construction of a border wall would “block drug smuggling corridors” as contemplated by
8 10 U.S.C. § 284. Neither have Defendants sufficiently explained how transferring funding for a
9 border wall is for a “higher priority item.” Defendants also have not, and cannot, provide an
10 explanation sufficient to justify how diverting funds toward a border wall is for an “unforeseeable
11 military requirement,” and *not* for a project for which Congress has denied funding.

12 **D. National Environmental Policy Act (NEPA)**

13 247. NEPA, 42 U.S.C. § 4321 *et seq.*, is the “basic national charter for protection of the
14 environment.” 40 C.F.R. § 1500.1(a). NEPA contains several action-forcing procedures, most
15 significantly the mandate to prepare an environmental impact statement (EIS) on major federal
16 actions “significantly affecting the quality of the human environment.” *Robertson v. Methow*
17 *Valley Citizens Council*, 490 U.S. 332, 348-49 (1989) (citing 42 U.S.C. § 4332(2)(C)).

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

25 249. “NEPA requires that the evaluation of a project’s environmental consequences
26 take place at an early stage in the project’s planning process.” *State of Cal. v. Block*, 690 F.2d
27 753, 761 (9th Cir. 1982) (citation omitted). A proposal subject to NEPA exists where an agency
28 has a goal and is actively preparing to make a decision on the alternatives in accomplishing that

goal, regardless of whether the agency declares that such a proposal exists: “An agency shall commence preparation of an environmental impact statement as close as possible to the time the agency is developing or is presented with a proposal. . . .” 40 C.F.R. § 1502.5. A “[p]roposal exists at that stage in the development of an action when an agency subject to the Act has a goal and is actively preparing to make a decision on one or more alternative means of accomplishing that goal and the effects can be meaningfully evaluated.” *Id.* § 1508.23.

V. THE FY 2020 DIVERSIONS ARE UNLAWFUL BECAUSE DEFENDANTS DO NOT SATISFY THE STATUTORY CRITERIA

250. Defendants’ diversion of funding and resources for the proposed border wall does not satisfy the requirements of 10 U.S.C. § 284, the statutory provision authorizing support for counterdrug activities. Section 284 is limited to authorizing DOD to provide “support” for the “[c]onstruction of roads and fences and installation of lighting,” but that “support” does not authorize DOD to fully fund a construction project for DHS. 10 U.S.C. § 284(b)(7). Section 284’s structure further limits its scope, as it requires notice to Congress for “small scale construction” projects “not to exceed \$750,000 for any project.” *Id.* § 284(h), (i)(3).

251. Moreover, the proposed border wall does not “block drug smuggling corridors,” *id.* § 284(b)(7), as contemplated by the statute. For years, the vast majority of the drugs smuggled into the country that the President has singled out as dangerous (methamphetamine, heroin, cocaine, and fentanyl)⁷⁹ have been smuggled through, not between, ports of entry.⁸⁰

252. From 2014-2019, 87 percent of cocaine, 88 percent of heroin, and 82 percent of methamphetamine seized by U.S. Customs and Border Protection (“CBP”) came through ports of

⁷⁹ *Trump Address on Crisis at Border*, *supra* note 34; see also White House, *President Donald J. Trump Is Committed to Working with Congress to Solve Our Urgent Immigration Crisis* (Feb. 5, 2019), <https://tinyurl.com/yvhzvrq9> (“Tens of thousands of Americans are killed 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.”).

⁸⁰ *CBP Enforcement Statistics*, *supra* note 43 (showing that for FY 2019, out of all the drugs seized by CBP in that fiscal year, 88 percent of cocaine, 87 percent of heroin, 83 percent of methamphetamine, and 92 percent of fentanyl were seized by Field Operations at ports of entry).

1 entry.⁸¹

2 253. From 2016-2019, 89 percent of fentanyl seized by CBP came through ports of
3 entry.⁸²

4 254. A 2018 Drug Enforcement Agency (DEA) National Drug Threat Assessment
5 affirms the CBP data showing that the bulk of dangerous illegal drugs flow through, not between,
6 ports of entry.⁸³

7 255. For example, in that report, the DEA states that “[a] small percentage of all heroin
8 seized by CBP along the land border was between Ports of Entry (POEs).”⁸⁴

9 256. As to fentanyl, the report states that “Mexican [Transnational Criminal
10 Organizations] most commonly smuggle the multi-kilogram loads of fentanyl concealed in
11 [privately owned vehicles] before trafficking the drugs through SWB POEs.”⁸⁵

12 257. In a 2019 report, the DEA again acknowledges that “the most common method
13 employed [for drug smuggling] involves smuggling illicit drugs through U.S. POEs in passenger
14 vehicles with concealed compartments or commingled with legitimated goods on tractor-
15 trailers.”⁸⁶

16 258. A 2019 Report by the U.S. Intelligence Community discusses drug trafficking
17 from Mexico; however, it contains no mention of smuggling between ports of entry.⁸⁷ In fact,
18 this report notes that as to fentanyl—one of the drugs that President Trump has invoked in
19 support of the border wall⁸⁸—“Chinese synthetic drug suppliers . . . probably ship the majority of
20 US fentanyl, when adjusted for purity.”⁸⁹

21 ⁸¹ *Id.*

22 ⁸² *Id.*

23 ⁸³ DEA, *2018 National Drug Threat Assessment* (Oct. 2018),
<https://tinyurl.com/yaqyh3ld>.

24 ⁸⁴ *Id.*

25 ⁸⁵ *Id.*

26 ⁸⁶ DEA, *2019 National Drug Threat Assessment* (Dec. 2019),
<https://tinyurl.com/yx25vkmt>.

27 ⁸⁷ Daniel R. Coats, *Worldwide Threat Assessment*, Off. of the Dir. of Nat’l Intelligence
(Jan. 29, 2019), <https://tinyurl.com/y9r6kkhu>.

28 ⁸⁸ *Trump Address on Crisis at Border*, *supra* note 42.

⁸⁹ *Worldwide Threat Assessment*, *supra* note 87 at 18; *see also California*, Brief of Former

259. Defendants do not satisfy the criteria under §§ 8005 and 9002 of the FY 2020 Department of Defense Appropriations Act to transfer other DOD funds toward construction of the border wall because it is not a “higher priority item,” is not an “unforeseen military requirement,” and *is* an item for which Congress has denied funding.

260. Defendants also do not satisfy the criteria of 10 U.S.C. § 2808. The construction of a border wall also does not constitute a “military construction” project, as defined in 10 U.S.C. § 2801. From at least 2001 until Defendants’ 2019 diversion under § 2808, 10 U.S.C. § 2808 has only been invoked to justify military construction directly linked to a military installation.⁹⁰ In fact, with one exception, it has only been invoked in relation to construction at military installations outside the United States.⁹¹ That single instance related to securing domestic sites at which weapons of mass destruction were sited.⁹²

261. Building a border wall does not “require[] use of the armed forces” under 10 U.S.C. § 2808.⁹³ Construction of border fencing has been carried out by civilian contractors in recent years. In fact, in 2007, the U.S. military informed DHS that “military personnel would no longer be available to build fencing.”⁹⁴ This, along with the desire to not take CBP agents away from their other duties, led CBP to decide to use “commercial labor for future infrastructure projects.”⁹⁵ This decision has been reflected in recent projects related to the border wall,

U.S. Gov’t Officials as *Amici Curiae* in Supp. of Pls.’ Mot. for Prelim. Inj. 6, ECF No. 139 (“Former Gov’t Officials Amicus Brief”) (noting that border wall will not “stop drugs from entering via international mail (which is how high-purity fentanyl, for example, is usually shipped from China directly to the United States)”).

⁹⁰ 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>.

⁹¹ *Id.*

⁹² *Id.*

⁹³ See also Former Gov’t Officials Amicus Brief, *supra* note 89, at 8 (noting that “the composition of southern border crossings has shifted such that families and unaccompanied minors now account for the majority of immigrants seeking entry at the southern border; these individuals do not present a threat that would need to be countered with military force”).

⁹⁴ Gov’t Accountability Office, *GAO-09-244R Secure Border Initiative Fence Construction Costs* 7 (Jan. 29, 2009), <https://tinyurl.com/sjc5f8n>.

⁹⁵ *Id.*

1 including contract awards in California⁹⁶ and Arizona⁹⁷ in Fall 2018.

2 262. For the FY 2019 diversions, a federal court in the Northern District of California
 3 determined that the statutory provisions that Defendants invoke do not authorize the diversion of
 4 federal funds toward construction of a border wall. That court found that Defendants did not
 5 satisfy the criteria under §§ 8005 and 9002 because border wall construction is not an “unforeseen
 6 military requirement” and is an item for which Congress has denied funding. *California*, Order
 7 re: Pls.’ Partial Mot. for Summ. J. 3-5, ECF No. 185. Any contention that the need for the border
 8 wall is “unforeseeable” is even more absurd with respect to the FY 2020 diversion, since
 9 Defendants have attempted to use DOD resources toward the construction of the border wall
 10 since, at minimum, February 2019. And the court found that Defendants did not satisfy the
 11 criteria under 10 U.S.C. § 2808 because the border wall is neither a “military construction
 12 project” nor “necessary to support the use of the armed forces.” *California*, Order re: Pls.’ Partial
 13 Mot. for Summ. J. 22-33, ECF No. 257. This same reasoning applies just as forcefully for the FY
 14 2020 diversions at issue here.

15 **VI. PLAINTIFF STATES AND THEIR RESIDENTS ARE HARMED BY THE EXECUTIVE** 16 **ACTIONS**

17 **A. Harm caused by diversion of funding and other resources**

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

20 264. California will be harmed by Defendants’ diversion of funds that Congress
 21 appropriated for DOD projects in the State, including, on information and belief, military
 22 construction projects.

23 265. More funds are spent on defense in California than in any other state, with \$49.0

25 ⁹⁶ CBP, *Border Wall Contract Awards in California* (Dec. 21, 2018),
 26 <https://tinyurl.com/y3px9ubj> (announcing \$287 million contract with SLSCO Ltd. to build border
 barriers).

27 ⁹⁷ CBP, *Border Wall Contract Award in Arizona* (Nov. 15, 2018),
 28 <https://tinyurl.com/y2t5u6pw> (announcing \$324 million contract with Barnard Construction Co.
 to build border barriers).

1 billion in FY 2017 and \$57.7 billion in FY 2018.⁹⁸

2 266. California also leads the nation in defense contract spending, with \$35.2 billion in
3 FY 2017 and \$42.5 billion in FY 2018.⁹⁹ In FY 2017, Plaintiff States collectively accounted for
4 \$142.1 billion in defense contract spending, which represented over 52 percent of all defense
5 contract spending.¹⁰⁰ In FY 2018, Plaintiff States collectively accounted for \$176.2 billion in
6 defense contract spending, which represented over 49 percent of all defense contract spending.¹⁰¹

7 267. For both FY 2017 and FY 2018, two of the top ten defense contract spending
8 locations in the nation were in California (San Diego with \$9.2 and \$11.1 billion, and Los
9 Angeles with \$5.3 and \$9.5 billion, respectively).¹⁰²

10 268. This defense spending—including construction—in California generates
11 significant economic activity, employment, and tax revenue.¹⁰³

12 269. In FY 2016, defense spending generated \$86.9 billion of direct economic activity
13 in California, \$17.4 billion of economic activity created through the supply chain, and \$52 billion
14 of “induced” economic activity created because of additional money in the economy.¹⁰⁴ In FY
15 2018, this spending generated \$95.3 billion of direct economic activity in California, \$16.8 billion
16 of economic activity created through the supply chain, and \$55.2 billion of “induced” economic
17 activity created because of additional money in the economy.¹⁰⁵

18 270. This economic activity, in turn, generates employment for Californians. In FY
19

20 ⁹⁸ *FY 2017 DOD Defense Spending by State*, *supra* note 2, at 6; FY 2018 DOD Spending
by State Report, *supra* note 20, at 8

21 ⁹⁹ *FY 2017 DOD Spending by State Report*, *supra* note 2, at 6; 2018 *FY DOD Spending by*
State Report, *supra* note 20, at 8

22 ¹⁰⁰ *FY 2017 DOD Spending by State Report*, *supra* note 2, at 6.

23 ¹⁰¹ *FY 2018 DOD Spending by State Report*, *supra* note 20, at 8.

24 ¹⁰² *FY 2017 DOD Spending by State Report*, *supra* note 2, at 13; *FY 2018 Spending by*
State Report, *supra* note 20, at 17.

25 ¹⁰³ Devin Lavelle, *California Statewide National Security Economic Impacts*, Cal. Res.
Bureau, 5-9 (Aug. 2018), <https://tinyurl.com/yxqlw43b> (2018 California National Security
Spending Impacts Report); Devin Lavelle, *California Statewide & Regional National Security*
26 *Economic Impacts*, Cal. Res. Bureau, 4-7 (Dec. 2019), <https://tinyurl.com/tn9vamz> (2019
California National Security Spending Impacts Report).

27 ¹⁰⁴ *2018 California National Security Spending Impacts Report*, *supra* note 103, at 5-6.

28 ¹⁰⁵ *2019 California National Security Spending Impacts Report*, *supra* note 103, at 4.

2016, approximately 358,000 jobs were directly attributable to employment by defense agencies and their contractors, 84,000 were generated through the supply chain, and 324,000 resulted from economic activity induced by the additional money in the economy.¹⁰⁶ In FY 2018, approximately 393,000 jobs were directly attributable to employment by defense agencies and their contractors, 80,000 were generated through the supply chain, and 322,000 resulted from economic activity induced by the additional money in the economy.¹⁰⁷

271. In FY 2016, the economic activity generated by defense spending also resulted in significant tax revenues for California at the state and local level, estimated at \$5.8 billion total annually, including \$1.9 billion in income tax, \$1.7 billion in sales tax and \$1.3 billion in property tax.¹⁰⁸ In FY 2017, the economic activity generated by defense spending also resulted in significant tax revenues for California at the state and local level, estimated at \$7.2 billion total annually, including \$2.2 billion in income tax, \$1.8 billion in sales tax and \$1.7 billion in property tax.¹⁰⁹

272. A number of military construction projects for which funds have been appropriated but are as yet unobligated are planned in California, and are threatened by Defendants' planned diversions.¹¹⁰ On information and belief, Defendants' diversion of funds for the border wall threatens over \$4 billion in funding for military construction projects currently planned in California. *Id.* at 22, 43.

273. These projects include repairs to existing military infrastructure, as well as projects of massive economic significance, such as an over \$2.3 billion project at Naval Air Weapons Station China Lake. *Id.* at 102. Other projects meet the basic safety and welfare needs of service members, such as wastewater treatment, *id.* at 132, and child care, *id.* at 102.

¹⁰⁶ 2018 California National Security Spending Impacts Report, *supra* note 103, at 6.

¹⁰⁷ 2019 California National Security Spending Impacts Report, *supra* note 103, at 4.

¹⁰⁸ 2018 California National Security Spending Impacts Report, *supra* note 103, at 7.

¹⁰⁹ 2019 California National Security Spending Impacts Report, *supra* note 103, at 5.

¹¹⁰ E.g., DOD, Construction Programs (C-1), Department of Defense Budget Fiscal Year 2021 (Feb. 2020), <https://tinyurl.com/yx3fvmhl>.

¹¹¹ Adam Stone, *Added Help with Equipment*, National Guard Magazine (Apr. 24, 2018), <https://tinyurl.com/r5ye4cf> (quoting H. Rep. Comm. on Approps. report) (internal punctuation omitted).

274. If Defendants determine that these projects can wait, funding for them could be diverted to the border wall, and California would be deprived of the resulting positive economic, employment, and tax consequences.

275. On information and belief, California's National Guard also stands to suffer from the lost opportunity to procure vital military equipment from the National Guard and Reserve Equipment Account ("NGREA"). DOD's reprogramming action seeks to divert \$790 from NGREA toward the construction of a border wall. *California*, ECF No. 271-1, Ex. C. at 5.

276. NGREA has been a critical source of funding for National Guard units nationwide since 1981, when Congress first created the account due to the "tremendous shortage of equipment available to the Guard and Reserve."¹¹¹ Indeed, the most recent DOD report relating to NGREA shows that the Army National Guard had a \$14 billion equipment shortage, and the Air National Guard had an over \$5.3 billion shortage.¹¹²

277. The states' National Guard units fulfill dual purposes; not only are they part of the federal reserve force to support the active duty military, they serve as state assets to provide critical support to civil authorities, including in response to natural disasters such as wildfires, winter storms, floods, hurricanes, and tornadoes. For example, in FY 2018, the Army National Guard units provided engineer support to California for debris removal following wildfires.¹¹³ As DOD states, "[i]n order to be ready and available to respond to domestic emergencies, it is key the [Army National Guard units] receive the most modern and available equipment."¹¹⁴

278. California's Army and Air National Guards have historically submitted requests for tens of millions of dollars' worth of essential dual equipment from NGREA per year. The equipment that California receives from NGREA is dual-purpose, allowing California's National Guard to both provide public safety support to civil authorities in times of emergency such as natural disasters, and to provide mission-ready forces to the federal government.

¹¹¹ Adam Stone, *Added Help with Equipment*, National Guard Magazine (Apr. 24, 2018), <https://tinyurl.com/r5ye4cf> (quoting H. Rep. Comm. on Approps. report) (internal punctuation omitted).

¹¹² DOD, Off. of the Asst. Sec. for Defense for Readiness, *National Guard and Reserve Equipment Report for Fiscal Year 2020* (Mar. 2019) 1-18 to 1-19, <https://tinyurl.com/rk5wqdj>.

¹¹³ *Id.* at 2-26.

¹¹⁴ *Id.*

279. California's National Guard has received equipment from this account in the past for critical domestic uses, including equipping C-130 planes for use in fighting wildfires and sensors on Lakota helicopters for use in locating people lost in the wilderness.

280. For FY 2020, California requested approximately \$50 million worth of such dual-use equipment. For instance, the California Air National Guard has requested \$7 million for equipment to enhance airborne firefighting capabilities to better respond to and contain destructive wildfires in the State. Defendants' \$790 million diversion from NGREA diminishes the opportunity for California to obtain such equipment for its National Guard units to meet its vital public safety purposes.

281. Likewise, on information and belief, Defendants' diversions of \$100 million from an account for modernization of Humvees for the states' National Guards, *California*, ECF No. 271-1, Ex. C at 2, harms California. California's National Guard uses Humvees for both military and civil emergency purposes. As DOD itself states, "modernization of the HMMWV Cargo fleet . . . will enable the ARNG to sustain the [Humvee] fleet in the interim as a critical . . . transportation asset during domestic operations."¹¹⁵

282. As demonstrated above in paragraphs 25 through 179, other Plaintiff States will suffer similar harms due to Defendants' diversions.

B. Environmental harms to the States of California and New Mexico

283. As part of their February 13, 2020 announcement, DOD announced that diverted funds would be used in thirteen project areas, including six in California and New Mexico. *California*, ECF No. 271. In California, Defendants plan to use funds to build 3 miles of new primary pedestrian fencing and 14 miles of replacement pedestrian fencing in the San Diego Sector in the San Diego County and 10 miles of new pedestrian fencing in the El Centro Sector in Imperial County. *Id.* at 2. In New Mexico, Defendants plan to use funds toward construction in the El Paso Sector consisting of 2 miles of new pedestrian fencing in Luna County, 10 miles of replacement fencing in Luna and Dona Ana Counties, and 0.5 miles of new primary pedestrian fencing in Dona Ana County. *Id.* at 3. Defendants have identified precise coordinates for this

¹¹⁵ *Id.* at 2-14.

1 construction. *Id.*, ECF No. 271-1 at 8, 10, 11, 17-18.

2 284. CBP's San Diego Sector is located in San Diego County, California and
3 shares a 60-mile segment of the border with Mexico, at least 46 linear miles of which are already
4 lined with primary fencing.¹¹⁶ The only portions of the border located within the San Diego
5 Sector that are not already lined with primary fencing are located in the southeastern portion of
6 the county in or near the Otay Mountain Wilderness Area.¹¹⁷ Thus, the only segment of the
7 border within the San Diego Sector where DHS can construct new primary fencing are areas
8 within or near the Otay Wilderness Area.

9 285. CBP's El Centro Sector is located within Imperial County, California, and shares a
10 70-mile segment of the border with Mexico, at least 59 linear miles of which are already lined by
11 primary fencing.¹¹⁸ The only portions of the border located within the El Centro Sector that are
12 not already lined with primary fencing are located in the southwestern portion of Imperial
13 County, which is comprised of a mountainous landscape and the Jacumba Wilderness Area.¹¹⁹
14 Thus, the only segment of the border within the El Centro Sector where DHS can construct new
15 primary fencing are areas within or near the Jacumba Wilderness Area.

16 286. The Otay Mountain Wilderness and the Jacumba Wilderness areas are home to
17 more than 100 sensitive plant and animal species that are listed as "endangered," "threatened," or
18 "rare" under the federal Endangered Species Act of 1973, 16 U.S.C. §§ 1531-44, and/or the
19 California Endangered Species Act, Cal. Fish & Game Code §§ 2050-89.25. These species
20 include the following federally and state endangered species: the Mexican flannel bush,

21 ¹¹⁶ Gov't Accountability Off., *GAO-17-331, Southwest Border Security: Additional*
22 *Actions Needed to Better Assess Fencing's Contributions to Operations and Provide Guidance*
23 *for Identifying Capability Gaps* 48 (Feb. 2017), <https://tinyurl.com/yaqbny6e> (Southwest Border Security).

24 ¹¹⁷ CBP, *Border Fencing – California* (June 2011), <https://tinyurl.com/y24zbf4> (Border
25 Fencing 2011); Business Insider, *As the government shutdown over Trump's border wall rages, a*
26 *journey along the entire 1,933-mile US-Mexico border shows the monumental task of securing it*
27 (Jan. 12, 2019), <https://tinyurl.com/vfbykkg> (Business Insider Border Wall Map).

28 ¹¹⁸ CBP, *El Centro Sector California* (Apr. 11, 2018), <https://tinyurl.com/y5kpbk2e>;
Southwest Border Security, *supra* note 116.

¹¹⁹ CBP, *Border Fencing 2011*, *supra* note 117; *Business Insider Border Wall Map*, *supra*
note 117.

1 Thornmint, the Quino Checkerspot Butterfly, the Southwestern Willow Flycatcher bird, and the
 2 Peninsular Desert Bighorn sheep.¹²⁰ Some of the listed plant species, such as the Tecate Cypress
 3 and the Mexican flannel bush, are so rare they can only be found in these wilderness areas.¹²¹
 4 The federally and state-endangered Peninsular Desert Bighorn sheep has a range that includes
 5 mountainous terrain in Mexico near the United States-Mexico border and extends north across the
 6 border through the Jacumba Wilderness to California's Anza-Borrego State Park.¹²²

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

12 288. Defendants' use of diverted funds to construct a border wall in New Mexico will
 13 impose environmental harm to the State. The environmental damage caused by a border wall in
 14 New Mexico would include the blocking of wildlife migration, flooding, and habitat loss.¹²³

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

18 290. The Chihuahuan desert bisected by the New Mexico-Mexico border is the most

19 ¹²⁰ Cal. Dept. of Fish & Wildlife, *State and Federally Listed Endangered and Threatened*
 20 *Animals in California*, 2, 10, 13 (Aug. 7, 2019), <https://tinyurl.com/jkwndf3>; Cal. Dept. of Fish &
 21 *Wildlife, State and Federally Listed Endangered, Threatened, and Rare Plants of California*, 1, 7
 22 (Jan. 2, 2020), <https://tinyurl.com/rb592yn>; U.S. Bureau of Land Management, *Jacumba*
 23 *Wilderness*, <https://tinyurl.com/y43h424> (last visited Feb. 27, 2020) (showing location of
 24 Jacumba Wilderness on map); U.S. Bureau of Land Management, *Otay Mountain Wilderness*,
 25 <https://tinyurl.com/y3zamvsh> (last visited Feb. 27, 2020) (showing location of Otay Mountain
 26 Wilderness on map); Wilderness Connect, *Otay Mountain Wilderness*,
 27 <https://tinyurl.com/rm6cwvc> (last visited Feb. 27, 2020).

28 ¹²¹ *Otay Mountain*, *supra* note 120.

¹²² Cal. Dept. of Fish & Wildlife, *Peninsular Desert Bighorn Sheep*
<https://tinyurl.com/yyvu5kwa> (last visited Feb. 27, 2020).

¹²³ See Robert Peters et al., *Nature Divided, Scientists United: US-Mexico Border Wall Threatens Biodiversity and Binational Conservation*, BioScience, 740-42 (Oct. 2018),
<https://tinyurl.com/y3t4ymfn>.

1 biologically diverse desert in the Western Hemisphere.¹²⁴ The “bootheel” region of New Mexico
 2 includes the Peloncillo and Sierra San Luis Mountains and contains an extremely high diversity
 3 of plant and animal species, and also includes critical habitat for the endangered jaguar, as
 4 designated under the Endangered Species Act. Species common along the border are a number of
 5 endangered, threatened, and candidate species including the beautiful shiner, Chiricahua leopard
 6 frog, jaguar, lesser long-nosed bat, loach minnow, Mexican long-nosed bat, Mexican spotted owl,
 7 Mexican wolf, narrow-headed gartersnake, New Mexican ridge-nosed rattle snake, northern
 8 aplomado falcon, northern Mexican gartersnake, southwestern willow flycatcher, spikedace, and
 9 yellow billed cuckoo.¹²⁵ A barrier built in the Chihuahuan desert is likely to disrupt or destroy
 10 habitat of these migratory animals, nesting birds and reclusive reptiles.

11 291. In particular, New Mexico’s border is also home to the endangered Mexican wolf,
 12 the rarest subspecies of gray wolf in North America, which was nearly extirpated by the 1970s
 13 and only recently reintroduced.¹²⁶ An impenetrable wall may make it impossible for the wolf to
 14 disperse across the border to reestablish recently extirpated populations or bolster small existing
 15 populations. On March 14, 2018, the New Mexico Department of Game and Fish signed an
 16 agreement with the U.S. Department of Fish and Wildlife to increase cooperation in
 17 reintroduction of this species to the wild, evidencing the State’s commitment to preventing the
 18 extinction of this species.¹²⁷

19 292. The segment of New Mexico’s border with Mexico that does not already have
 20 substantial primary fencing is in the State’s “bootheel” region.¹²⁸ Defendants intend to use the
 21

22 ¹²⁴ Nat’l Park Service, *Chihuahuan Desert Ecoregion* (Sept. 20, 2018),
 23 <https://www.nps.gov/im/chdn/ecoregion.htm>.

24 ¹²⁵ U.S. Fish & Wildlife Serv., *Species by County Report*, <https://tinyurl.com/yxmwz9qm>
 (Hidalgo County, NM), <https://tinyurl.com/y4ojwrtq> (Luna County, NM) (last visited Feb. 27,
 2020).

25 ¹²⁶ U.S. Fish & Wildlife Serv., *Mexican Wolf*, <https://tinyurl.com/y2hf5ea2> (last updated
 Nov. 1, 2019).

26 ¹²⁷ U.S. Fish and Wildlife Serv., *Partners in Mexican Wolf Recovery Once Again, New*
 27 *Mexico Department of Game & Fish Official Signs on to Help Manage Mexican Wolves* (Nov. 13,
 2019), <https://tinyurl.com/wkop4kh>.

28 ¹²⁸ *Border Fencing 2011*, *supra* note 117, at 5.

diverted funding to construct barriers in New Mexico's bootheel, which will cause environmental harm in one of the State's most ecologically pristine and fragile regions. The bootheel is where temperate and subtropical climates converge, making it another of the most biologically diverse regions in the world, home to jaguars and wolves that coexist along the U.S.-Mexico border.¹²⁹ Recognizing the ecological importance of this region, the U.S. Fish and Wildlife Service has designated large segments of the bootheel's border with Mexico as critical habitat for the jaguar.¹³⁰

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

DECLARATORY AND INJUNCTIVE RELIEF

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

¹²⁹ USGS, *Jaguar Surveying and Monitoring in the United States (Ver. 1.1)*, 4 (Nov. 2016) <https://tinyurl.com/seeypbh>; New Mexico Game and Fish, *Wildlife Notes*, <https://tinyurl.com/zc8gzx3> (last visited Feb. 27, 2020); Kenneth Boykin, *Spatial Identification of Statewide Areas for Conservation Focus in New Mexico: Implications for State Conservation Efforts* (2011) <https://tinyurl.com/sk8wwuo> (last visited Feb. 27, 2020).

¹³⁰ U.S. Fish & Wildlife Serv., *Jaguar (Panthera onca)*, <https://tinyurl.com/y6qpjdjl>; 79 Fed. Reg. 12571 (Mar. 5, 2014).

FIRST CLAIM FOR RELIEF

VIOLATION OF CONSTITUTIONAL SEPARATION OF POWERS

(Including Presentment Clause)

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

296. Article I, Section 1 of the United States Constitution enumerates that “[a]ll legislative Powers herein granted shall be vested in [the] Congress.” Article I, Section 8, Clause 1 of the United States Constitution vests exclusively in Congress the spending power to “provide for the . . . general Welfare of the United States.”

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

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

299. Defendants have violated the United States Constitution’s separation of powers doctrine—including the Presentment Clause—by unilaterally taking executive action to fund a border wall for which Congress has refused to appropriate funding.

300. 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.

SECOND CLAIM FOR RELIEF

VIOLATION OF APPROPRIATIONS CLAUSE

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

302. 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)).

303. Section 1301 of title 31 of the United States Code, known as the “Purpose Statute,” provides that “[a]ppropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law.” 31 U.S.C. § 1301(a). This statutory provision “reinforce[s] Congress’s control over appropriated funds,” *Dep’t of the Navy v. FLRA*, 665 F.3d 1339, 1347 (D.C. Cir. 2012), and “codified what was already required under the Appropriations Clause of the Constitution,” Gov’t Accountability Off., Off. of the Gen’l Counsel, *Principles of Federal Appropriations Law* 3-10 (4th Ed. 2017).

304. For FY 2020, Congress did not authorize or appropriate 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.

305. Defendants have also violated the Appropriations Clause by seeking to use a general appropriation to circumvent the specific limitations that Congress imposed on border barrier funding in the FY 2020 Consolidated Appropriations Act. *See Nevada v. Dep’t of Energy*, 400 F.3d 9, 16 (D.C. Cir. 2005).

306. For the reasons stated herein, Plaintiffs are entitled to a declaration that Defendants’ diversion of funding and resources for FY 2020 toward the construction of a border wall is unconstitutional, and the Court should enjoin Defendants’ implementation of the

1 President's Executive Actions.

2 **THIRD CLAIM FOR RELIEF**

3 **ULTRA VIRES**

4 307. Plaintiff States incorporate the allegations of the preceding paragraphs by
5 reference.

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

8 309. Defendants have acted ultra vires in seeking to divert funds and resources under 10
9 U.S.C. § 284 because they fail to meet the criteria required under that statute. The statute does
10 not contemplate the construction of a multi-billion dollar border wall as proposed by the
11 President. *Cf.* 10 U.S.C. §§ 284(h), (i)(3) (requiring congressional notification of small-scale
12 projects). Further, the proposed border wall would not block “drug smuggling corridors” as
13 required under 10 U.S.C. § 284(b)(7).

14 310. Defendants have acted ultra vires in seeking to divert funds under §§ 8005 and
15 9002 of the FY 2020 Department of Defense Appropriations Act for the construction of a border
16 wall because the funds are not being transferred for: (a) a “higher priority item[];” (b) “unforeseen
17 military requirements;” or (c) an item for which Congress has not denied funding.

18 311. Defendants have acted ultra vires in seeking to divert funds under 10 U.S.C.
19 § 2808 for failure to meet the criteria required under that statute. The construction of the border
20 wall: (a) is not a “military construction project[];” (b) does not “require[] use of the armed
21 forces;” and (c) is not “necessary to support such use of the armed forces.”

22 312. Defendants have acted ultra vires by seeking to divert funds in violation of the
23 prohibition in § 739 of the FY 2020 Consolidated Appropriations Act, because the diversions
24 increase funding for the border wall proposed in the President's budget, other than through an
25 appropriation enacted in an appropriation act or validly through a reprogramming or transfer
26 provision in an appropriations act.

27 313. For the reasons stated herein, Plaintiffs are entitled to a declaration that
28 Defendants' diversion of funding and resources for FY 2020 toward the construction of a border

1 wall is unlawful, and the Court should enjoin Defendants' implementation of the President's
2 Executive Actions.

3 **FOURTH CLAIM FOR RELIEF**

4 **VIOLATION OF ADMINISTRATIVE PROCEDURE ACT** 5 **(Constitutional Violation and Excess of Statutory Authority)**

6 314. Plaintiff States incorporate the allegations of the preceding paragraphs by
7 reference.

8 315. Defendant DOD is an "agency" under the APA, 5 U.S.C. § 551(1), and diversions
9 of funding for construction of a border wall constitute "agency action" under the APA, *id.* §
10 551(13).

11 316. The diversion of federal funds toward construction of a border wall constitutes an
12 agency action which is reviewable under the APA. *Id.* § 704.

13 317. The APA requires that a court "hold unlawful and set aside agency action,
14 findings, and conclusions found to be . . . contrary to constitutional right, power, privilege, or
15 immunity," or "in excess of statutory jurisdiction, authority, or limitations, or short of statutory
16 right." *Id.* § 706(2)(B)-(C).

17 318. Defendant DOD's diversion of funds and resources under 10 U.S.C. § 284 and
18 §§ 8005 and 9002 of the FY 2020 Department of Defense Appropriations Act is unconstitutional
19 because Defendants have: (a) overstepped their powers by acting contrary to the implied and
20 express will of Congress; (b) modified appropriations that have already been approved by
21 Congress in repudiation of the clear policy judgments made by Congress; and (c) diverted funds
22 and resources for the construction of a border wall that Congress did not appropriate for that
23 purpose. Furthermore, DOD's diversion of federal funds and resources under those statutes for
24 construction of a border wall is ultra vires in excess of its statutory authority and in violation of
25 the prohibition contained in § 739 of the FY 2020 Consolidated Appropriations Act.

26 319. For the reasons stated herein, because Defendant DOD acted unconstitutionally
27 and in excess of its statutory authority in diverting federal funds and resources toward
28

1 construction of a border wall pursuant to the statutes described above, these actions are unlawful
 2 and should be set aside under 5 U.S.C. § 706. Moreover, the Court should enjoin Defendants’
 3 implementation of the Executive Actions.

4 **FIFTH CLAIM FOR RELIEF**

5 **VIOLATION OF ADMINISTRATIVE PROCEDURE ACT**
 6 **(Arbitrary and Capricious)**

7 320. Plaintiff States incorporate the allegations of the preceding paragraphs by
 8 reference.

9 321. Defendant DOD is an “agency” under the APA, 5 U.S.C. § 551(1), and its actions
 10 to divert funding for construction of a border wall constitute “agency action” under the APA, *id.*
 11 § 551(13).

12 322. The diversion of federal funds toward construction of a border wall constitutes an
 13 agency action which is reviewable under the APA. *Id.* § 704.

14 323. The APA requires that a court “hold unlawful and set aside agency action,
 15 findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or
 16 otherwise not in accordance with law.” *Id.* § 706(2)(A).

17 324. Defendant DOD’s diversion of funds and resources under 10 U.S.C. § 284 and
 18 §§ 8005 and 9002 of the FY 2020 Department of Defense Appropriations Act for construction of
 19 a border wall is arbitrary and capricious and an abuse of discretion because DOD has relied on
 20 factors that Congress did not intend it to consider, failed to consider an important aspect of the
 21 problem the agency is addressing, and failed to offer a satisfactory explanation for the decision to
 22 divert funding and resources toward construction of a border wall that is consistent with the
 23 evidence that is before the agencies. *See Motor Vehicle Mfrs. Ass’n of the U.S. v. State Farm*
 24 *Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983).

25 325. For example, Congress repeatedly denied the Administration’s requested funding
 26 for a border wall, implicitly rejecting the reasoning behind Defendants’ diversions and the factors
 27 they relied on to reach that decision.
 28

328. For the reasons stated herein, because Defendant DOD acted in an arbitrary and capricious manner 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. § 706. Moreover, the Court should enjoin Defendants' implementation of the Executive Actions.

(For Plaintiff States California and New Mexico)

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

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

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

2 333. 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. *Id.* §§ 1502.10-.19. The agency must commence preparation of the EIS "as close as
 9 possible to the time the agency is developing or is presented with a proposal" so that the
 10 environmental effects of each alternative can be evaluated in a meaningful way. *Id.* § 1502.5.

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

16 335. The imminent nature of this action is shown by the Trump Administration's
 17 expressed intent to use diverted funds to build "approximately 400 miles of new border wall" on
 18 the southern border by the end of 2020.¹³² Further, Defendants have announced their intent to
 19 modify existing contracts to begin construction on FY 2020 projects as early as March 15, 2020,
 20 and to initiate new contracts as early as April 7, 2020. *California*, ECF No. 271-2 ¶ 5.
 21 Defendants acknowledge that "ground-disturbing activities . . . may occur as early as the dates of
 22 the execution of the contract modification," or five days after the award of a new contract. *Id.*

23 336. The States of California and New Mexico have concrete and particularized
 24 sovereign interests in the protection of natural, historical, cultural, economic, and recreational
 25 resources within their jurisdictional boundaries. Defendants' failure to comply with NEPA and
 26 the APA injures and denies California's and New Mexico's procedural rights necessary to protect
 27 these interests.

28 ¹³² *FY 2021 Budget*, *supra* note 62, at 6.

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 Presentment Clause; (c) violates the Appropriations Clause; (d) exceeds congressional authority conferred to the Executive Branch and is ultra vires; and (e) violates the APA;

2. For the States of California and New Mexico, issue a judicial declaration that Defendants violated the NEPA and APA;

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;

5. For the States of California and New Mexico, permanently enjoin DHS, requiring it to comply with the NEPA and APA—including preparing an EIS—before taking any further action pursuant to the Executive Actions; and

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

1 Dated: March 3, 2020

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ATTESTATION OF SIGNATURES

I, Lee I. Sherman, hereby attest, pursuant to Local Civil Rule 5-1(i)(3) of the Northern District of California that concurrence in the filing of this document has been obtained from each signatory hereto.

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