

No. 19-16102, -16299, -16300, -16336

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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SIERRA CLUB, et al.,  
*Plaintiffs-Appellees,*

v.

DONALD J. TRUMP, in his official capacity as  
President of the United States, et al.,  
*Defendants-Appellants.*

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STATE OF CALIFORNIA, et al.,  
*Plaintiffs-Appellees–Cross-Appellants,*

v.

DONALD J. TRUMP, in his official capacity as  
President of the United States, et al.,  
*Defendants-Appellants–Cross-Appellees.*

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On Appeal from the United States District Court  
for the Northern District of California

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**BRIEF OF FORMER MEMBERS OF CONGRESS AS  
*AMICI CURIAE* IN SUPPORT OF PLAINTIFFS**

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## INTEREST OF *AMICI CURIAE*<sup>1</sup>

*Amici curiae* are a bipartisan group of more than 100 former Members of the House of Representatives, both Republicans and Democrats. *Amici* have served an aggregate of approximately 1,500 years in Congress, hail from 36 States, and include 21 former Members from the states of the Ninth Circuit. *Amici* disagree on many issues of policy and politics. Some *amici* believe that a wall along the Southern Border is in the national interest. Others do not. But all *amici* agree that the Executive Branch is undermining the separation of powers by proposing to spend tax dollars to build a border wall that Congress repeatedly and emphatically refused to fund.

*Amici*, as former members of Congress and as citizens of our Nation, have a strong interest in preventing Executive Branch overreach from degrading Congress's unique and important role in America's tripartite system of separated powers. All of the *amici* are

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<sup>1</sup> Pursuant to Federal Rule of Appellate Procedure 29(a)(4), undersigned counsel states that no party's counsel authored this brief in whole or in part. Nor did any party or party's counsel, or any other person other than *amici curiae*, contribute money that was intended to fund preparing or submitting this brief. All parties consented to the filing of this brief.

uniquely positioned to offer their perspective because they are former members of the Legislative Branch intimately familiar with the appropriations process. Each of them swore an oath to protect the Constitution; each has seen firsthand how the separation of powers safeguards the rights of the American people; and each firmly believes that defending Congress’s power of the purse is essential to preserving democracy’s promise that Americans’ hard-earned tax dollars will be spent in accordance with the will of the people.

A full listing of *amici* appears in the Appendix as Attachment A.

## **INTRODUCTION AND SUMMARY OF ARGUMENT**

As the district court and this Court properly recognized, this suit concerns the continued viability of the separation of powers—the foundation upon which “the whole American fabric has been erected,” *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803)—as a limit on Executive authority. The Executive Branch plans, and has already begun, to take billions of dollars that Congress appropriated for other pressing national needs and spend it instead on a wall along the United States-Mexico border. It has done this despite repeated votes in both Houses to refuse to fund construction of a border wall, and on the heels



of a multi-month government shutdown provoked, in part, by that very dispute. Now, more than four years after first arguing for a wall during the presidential campaign, the President has determined that the situation at the border constitutes a national emergency justifying these extraordinary steps. Why? Because, as President Trump boasted: “I want to do it faster. I could do the wall over a longer period of time. *I didn’t need to do this, but I’d rather do it much faster....* I just want to get it done faster, that’s all.” Peter Baker, *Trump Declares a National Emergency, and Provokes a Constitutional Clash*, N.Y. Times (Feb. 15, 2019), <https://tinyurl.com/y4ngfkyz>.

Rarely in our Nation’s history has the Executive Branch launched such an assault on Congress’s exclusive legislative powers. In the statement quoted above and many others like it, the President’s essential rationalization for unilateral Executive Branch action is that Congress has refused to authorize his requested appropriation. This subversion of Article I has caused, and continues to cause, grave harm to the House as an institution. The authority to decide whether and how to appropriate and spend tax dollars—the People’s money—is uniquely congressional. For the President to justify expenditures Congress

explicitly disapproved, by invoking an “unforeseen” emergency where none exists, usurps congressional power. The Framers regarded this power of the purse as the defining power of the Legislative Branch. They also saw it as a fundamental check on Executive overreaching. The judiciary is the only branch that can meaningfully enforce this check; this Court must reject the Executive Branch’s efforts to subvert the separation of powers and then render those violations unreviewable.

This Court should also reject the defendants’ effort to undo the injunction on equitable grounds. If this Court accepts the defendants’ characterization of the balance of harms here, it will license unilateral executive action virtually *any* time the Executive Branch tries and fails to convince Congress to adopt its proposed solution to an important public health or safety issue. That is not the law. If it were, it would make the separation of powers a dead letter.

The Court should affirm the district court’s injunction.

## **ARGUMENT**

### **I. THE DISTRICT COURT CORRECTLY HELD THAT THE TRANSFER OF FUNDS VIOLATES SECTION 8005**

The district court correctly enjoined the defendants from using Section 8005 to channel funds toward barrier construction, both because

the “need for which the funds were reprogrammed was not ‘unforeseen,’ and because it was an item for which funds were previously ‘denied by the Congress.’” *Sierra Club v. Trump*, 929 F.3d 670, 676 (9th Cir. 2019); *see also* No. 19-cv-00892, 2019 WL 2715422, at \*2 (N.D. Cal. June 28, 2019) (district court order).

The President asked Congress to authorize and appropriate \$5.7 billion to fulfill his campaign promise of a wall at the Southern Border, which he had assured the electorate that Mexico (and not the American taxpayer) would fund. White House, *Remarks by President Trump on the Humanitarian Crisis on our Southern Border and the Shutdown* (Jan. 19, 2019), <https://tinyurl.com/y7gdj6s8>. Congress debated the President’s proposal and, after weeks of negotiation, passed the 2019 Consolidated Appropriations Act allocating only \$1.375 billion—not for a wall, but rather for “construction of primary pedestrian fencing, including levee pedestrian fencing, in the Rio Grande Valley Sector” of the border. H.J. Res. 31 § 280(a)(1), 116th Cong. (2019). Congress went out of its way to differentiate this fencing from a border wall, limiting the designs to ones already deployed, which did not use solid material like concrete. *Id.* § 230(b).

The Congressional record conclusively establishes that Congress rejected the President's proposal.<sup>2</sup> When Congress appropriates a specific amount for a project, "that is all Congress intended" for that project "to get in [a fiscal year] from whatever source." *Nevada v. Dep't of Energy*, 400 F.3d 9, 16 (D.C. Cir. 2005); see also *United States v. MacCollom*, 426 U.S. 317, 321 (1976) ("Where Congress has addressed the subject as it has here, and authorized expenditures where a condition is met, the clear implication is that where the condition is not met, the expenditure is not authorized."). If that disapproval were not sufficiently clear, a majority of both houses of Congress on March 14, 2019, passed a joint resolution to terminate the President's emergency declaration. See H.J. Res. 46, 116th Cong. (2019). Congress's rejection alone forecloses the transfer of funds.

The reprogramming of funds violates Section 8005 for yet another reason. Beyond requiring that Congress not have disapproved the expenditure, Section 8005 also requires that the expenditure be "unforeseen." If the circumstances at the Southern Border are

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<sup>2</sup> Vice Chairman of the Senate Appropriations Committee Patrick Leahy: "The agreement does not fund President Trump's wasteful wall." 165 Cong. Rec. S1362 (daily ed. Feb 14, 2019).

“unforeseen,” then “[w]ords no longer have meaning.” *King v. Burwell*, 135 S. Ct. 2480, 2497 (2015) (Scalia, J., dissenting); *see also Roper v. Simmons*, 543 U.S. 551, 609 (2005) (Scalia, J., dissenting) (same).

Whatever the dimensions of the situation, whatever its importance, no one would mistake it for unanticipated. The President issued his Emergency Proclamation more than two years after he took office and six weeks after first publicly suggesting that he could “do” a national emergency to secure funding that Congress in the exercise of its appropriations powers had refused to grant. During that period, Congress considered at length a border wall that would extend across the entire Southern Border, repeatedly voted not to fund it, and instead passed legislation appropriating funds for limited repair and construction of fencing in particular locations along the border. That Congress had time to take action and specifically declined to do so precludes any characterization of the circumstances here as “unforeseen.” 929 F.3d at 690 (“The long history of the President’s efforts to build a border barrier and of Congress’s refusing to appropriate the funds he requested makes it implausible that this need was unforeseen.”).

A large group of highly respected, bipartisan former United States government officials, specializing in security matters, including former Secretaries of State and CIA Directors, have issued a fact-based declaration demonstrating that there is no emergency on our Southern Border. A copy of their declaration is set out in the Appendix as Attachment B.<sup>3</sup> These are the facts that Congress had before it when it rejected funding for the wall. Further, the alleged exigency is not amenable to a quick fix, as the eminent domain process necessary to acquire the land on which to build the wall will consume years. During those years, Congress will be available to consider the proposal. See Gerald S. Dickinson, Op-Ed., *The Biggest Problem for Trump's Border Wall Isn't Money. It's Getting the Land.*, Wash. Post (Mar. 3, 2017), <http://tinyurl.com/y42cttcp>.

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<sup>3</sup> As noted, not all *amici*, a large and diverse set of former House Members, agree with all of the assertions in Attachment B. However, all agree that Congress knew the arguments for and against the construction of the wall and consciously decided not to fund construction. The denial of funding was intentional, not the product of “inertia, indifference or quiescence.” *Youngstown, Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952).

## II. ALLOWING THE EXECUTIVE'S SPENDING HERE WOULD USURP CONGRESS'S EXCLUSIVE POWER OVER APPROPRIATIONS

Because Congress squarely denied the requested funds, the district court and this Court were exactly right that defendants' reading of Section 8005, if accepted, "would raise serious constitutional questions." 2019 WL 2715422, at \*2; *see also* 929 F.3d at 704. In particular, any statute that allowed the executive to freely channel funds in the face of congressional disapproval would violate Congress's exclusive power over appropriations.

The Appropriations Clause, Article I, section 9 of the Constitution, states that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." The words "No Money" and "in Consequence of Appropriations" are not ambiguous. This straightforward language "was intended as a restriction upon the disbursing authority of the Executive department." *Cincinnati Soap Co. v. United States*, 301 U.S. 308, 321 (1937).

The Appropriations Clause "assure[s] that public funds will be spent according to the letter of the difficult judgments reached by Congress as to the common good and not according to the individual

favor of Government agents.” *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 428 (1990). Vesting Congress with exclusive power to appropriate public funds was central to effectuating the Framers’ intent that political compromises between competing and otherwise antagonistic groups be thrashed out in the legislative process.

These structural elements of the Constitution, the Supreme Court has stated many times, are not simply matters of etiquette or architecture. They protect individual liberty—in this instance, by ensuring that only those representatives closest to the people can decide how to spend their money. *See Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 501 (2010). The Framers understood that, if not for the Appropriations Clause, “the executive would possess an unbounded power over the public purse of the nation; and might apply all its monied resources at his pleasure.” 3 Joseph Story, *Commentaries on the Constitution* § 1342.

The Supreme Court has strictly enforced the Appropriations Clause. Nearly 170 years ago, the Court ruled that, “No officer, however high, *not even the President* ... is empowered to pay debts of the United States generally, when presented to them ... [in] the want of any



appropriation by Congress to pay this claim.” *Reeside v. Walker*, 52 U.S. 272, 291 (1850) (emphasis added). The Court emphasized that under Article 1, Section 9 of the Constitution, “no money can be taken or drawn from the Treasury except under an appropriation by Congress.” *Id.* Indeed, the Court held, “[h]owever much money may be in the Treasury at any one time, not a dollar of it can be used in the payment of anything not thus previously sanctioned. Any other course would give to the fiscal officers a *most dangerous discretion.*” *Id.* (emphasis added); *see also Richmond*, 496 U.S. at 424 (“Our cases underscore the straightforward and explicit command of the Appropriations Clause. ‘It means simply that no money can be paid out of the Treasury unless it has been appropriated by an act of Congress.’” (quoting *Cincinnati Soap*, 301 U.S. at 321)). Permitting the Executive, “on its own, [to] carve out an area of nonappropriated funding would create an Executive prerogative that offends the Appropriations Clause and affects the constitutional balance of powers.” *Am. Fed’n of Gov’t Emps., AFL-CIO, Local 1647 v. FLRA*, 388 F.3d 405, 414 (3d Cir. 2004).

*Amici* know firsthand the serious responsibilities that come with the power of the purse. In particular, they understand the gravity of

denying an appropriation requested by the President. Withholding a requested appropriation renders the Executive Branch unable to complete projects for which it sought those funds. And while the President can veto appropriations bills and force Congress to return to the negotiating table, his power, by design, is only negative. The ultimate result of the negotiations still must be initiated and approved by Congress. Congress followed this procedure when it crafted the 2019 Appropriations Bill and presented it to the President. The Constitution gave the President two options: he could sign it or veto it.

The President, in effect, did both—he signed the bill and then reneged on the commitment his signature represented. By doing so, the President proposes to spend money in direct violation of the Appropriations Clause. The separation of powers is “violated when one branch assumes a function that more properly is entrusted to another.” *INS v. Chadha*, 462 U.S. 919, 963 (1983). Courts have not hesitated to block executives from exercising legislative powers. *See, e.g., Clinton v. City of New York*, 524 U.S. 417, 447 (1998) (Presentment Clause, Article I, § 7, forbade President from exercising “unilateral power to change the text of duly enacted statute”). The district court properly did

the same, recognizing that, if the statutes cited by the President were read to authorize the President to spend unappropriated funds, they would be unconstitutional.

What remains are the defendants' various assertions that, if accepted, would render the courts unable to remedy egregious violations of the separation of powers.

The defendants are flat wrong that the plaintiffs fall outside Section 8005's "zone of interests." The "zone of interests" test is a judicially fashioned "limitation on the cause of action for judicial review conferred by the Administrative Procedure Act (APA)." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 129 (2014). But the Supreme Court has made clear that it "appl[ies] the test in keeping with Congress's 'evident intent' when enacting the APA 'to make agency action presumptively reviewable.... *We do not require any indication of congressional purpose to benefit the would-be plaintiff.*" *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 225 (2012); accord *Lexmark*, 572 U.S. at 128–30 (a "lenient approach" to the zone of interests test "is an appropriate means of preserving the flexibility of the APA's omnibus judicial-review provision, which permits

suit for violations of numerous statutes of varying character that do not themselves include causes of action for judicial review”). As Justice Kavanaugh has explained, “the zone of interests test was understood to be part of a broader trend toward *expanding* the class of persons able to bring suits under the APA challenging agency actions.” *White Stallion Energy Ctr., LLC v. EPA*, 748 F.3d 1222, 1268 (D.C. Cir. 2014) (Kavanaugh, J., dissenting), *rev’d sub nom. Michigan v. EPA*, 135 S. Ct. 2699 (2015). It is mystifying that the defendants believe a statutory provision that expressly *limits* the locations where border fencing may be built is “so marginally related to or inconsistent with” concern for preventing the plaintiffs’ injuries in this case that prevention of those injuries does not even “arguably” fall within the provision’s scope.

But, in any event, the defendants’ “zone of interests” analysis is wrong twice-over because the plaintiffs are not asserting a violation of Section 8005; they are asserting a violation of *the Constitution*. As this Court has recognized, the plaintiffs are challenging the Executive Branch’s assault on the Appropriations Clause and the separation of powers, and the defendants have raised Section 8005 as a purported source of appropriated funds. 929 F.3d at 703. It is therefore irrelevant

whether the plaintiffs are within *Section 8005*'s zone of interest. Justice Jackson in *Youngstown, Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), for example, did not assess whether the challengers were within the zone of interests protected by the various statutes that the President invoked in attempting to defend his unilateral action. *Id.* at 646-47. It was enough that the plaintiffs were injured by the President's seizure of the steel mills—an action in excess of his executive powers. We know of no modern case in which a Plaintiff has been denied access to a federal court for falling outside of the “zone of interests” when the alleged unlawful agency action is a constitutional violation. *See, e.g., Bond v. United States*, 564 U.S. 211 (2011) (holding that individual criminal defendants have standing to challenge the constitutionality of federal criminal statutes for violating Tenth Amendment); *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010) (regulated party brought successful “Take Care” Clause challenge to constitutionality of limitations on removal of PCAOB Board members); *Clinton v. City of New York*, 524 U.S. 417 (1998) (City brought successful suit to strike down line-item veto); *United States v. Munoz-Flores*, 495 U.S. 385 (1990) (holding that individuals harmed by bills

passed in violation of the Origination Clause may sue to invalidate such laws as unconstitutional).

This Court should likewise reject the defendants’ overreading of *Dalton v. Specter*, 511 U.S. 462, 472–74 (1994), which, if accepted, would foreclose judicial enforcement of the separation of powers. *Dalton* stands for the limited, obvious principle that not “every action by the President, or by another executive official, in excess of his statutory authority is *ipso facto* in violation of the Constitution.” 511 U.S. at 472 (emphasis added). In particular, the Court in *Dalton* held that the statute at issue granted the President unreviewable discretion, and it declined to allow the plaintiff to end-run around the unenforceable statute by claiming that a violation of the statute “necessarily” violated the separation of powers doctrine. *Id.* at 473, 476.

Critically, the plaintiff in *Dalton*, unlike the plaintiffs here, did not allege that the President’s action violated a specific constitutional mandate—for example, that Congress and Congress alone appropriates money. Indeed, the Court expressly reaffirmed the vitality of constitutional claims that turn on issues of statutory interpretation. *Id.* at 473 n.5 (distinguishing cases enjoining executive actions as

unconstitutional under the non-delegation doctrine). A claim to halt the unconstitutional use of unappropriated funds is precisely such a claim.

And more fundamentally, though the defendants try to phrase their arguments as specific to these particular plaintiffs, the defendants in fact seek to shield egregious violations of the Appropriations Clause from *any* review. In a parallel challenge to the President's misappropriation of funds brought by El Paso County and an organization devoted to border issues, the Executive Branch has asserted that only Congress, and never the courts, can police transfers of funds pursuant to Section 8005. Cross-Mot. Summ. J. at 47, *El Paso Cty v. Trump*, No. 3:19-cv-66, ECF No. 95 (W.D. Tex.) ("Congress never contemplated third parties inserting themselves into the DoD funding process through litigation."). At the same time, the Executive Branch has taken the position that Congress cannot sue the President for violating the Appropriations Clause. *U.S. House of Representatives v. Mnuchin*, No. 1:19-CV-00969 (TNM), 2019 WL 2343015, at \*1 (D.D.C. June 3, 2019).

The sum of the defendants' sleight of hand is that no one can sue. So long as the Executive Branch invokes Section 8005, violations of the

Appropriations Clause are not reviewable. But the Legislative Branch's power of the purse is effective as a limitation on overreaching by the Executive only if that legislative power is enforceable through the courts. Policing the efforts of one branch to aggrandize its powers at the expense of other branches is one of the judiciary's critical functions. *See, e.g., NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014); *Mistretta v. United States*, 488 U.S. 361 (1989); *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833 (1986); *Bowsher v. Synar*, 478 U.S. 714 (1986).

Unless the courts remain available to stop violations of the Appropriations Clause, disputes over the lawfulness of Executive Branch violations would linger for years in the political process, where only blunt and imperfect tools are available to bring about compliance.

To be sure, courts cannot be the arbiter of every constitutional disagreement between the political branches. But for violations like this one, that go to the very heart of Congress's exclusive powers and undermine its most important check on the Executive Branch, judicial review is necessary to safeguard the separation of powers. Congress's power of the purse, like other aspects of the constitutionally enshrined separation of powers, was "not simply an abstract generalization in the



minds of the Framers,” but was expressly “woven into the document that they drafted in Philadelphia in the summer of 1787.” *Chadha*, 462 U.S. at 946 (quoting *Buckley v. Valeo*, 424 U.S. 1, 124 (1976)) (internal quotation marks omitted)).

Because the constitutional structure helps safeguard individual liberty, the Judiciary has long played a critical role in preserving the structural compromises and choices embedded in the constitutional text. As the Supreme Court has often explained, the “courts possess power to review either legislative or executive action that transgresses identifiable textual limits.” *Nixon v. United States*, 506 U.S. 224, 238 (1993); *Powell v. McCormack*, 395 U.S. 486, 506 (1969). The district court and this Court correctly concluded that the Executive Branch has usurped Congress’s exclusive power to appropriate money. The injunction should be affirmed on that basis.

### **III. THE EQUITIES SUPPORT THE DISTRICT COURT’S INJUNCTION**

The defendants assert that even if this Court finds their transfer of funds was lawless, this Court “as a remedial matter” should still vacate the district court’s injunction. Br. 52. But try as it may, the

defendants have identified no countervailing interest that outweighs the plaintiffs' substantial, irreparable harm.

In claiming that the balance of equities tips their way, the defendants point first to the flow of drugs into the country through the Southern border, and second to the harm that follows “*whenever a government cannot enforce its own laws.*” Br. 50 (emphasis added). If the second of these interests suffices to undo the injunction here, then government actors are entitled to reversal of *any* injunction halting enforcement of unconstitutional action. That, of course, is not the law. *See, e.g., Martin-Marietta Corp. v. Bendix Corp.*, 690 F.2d 558, 568 (6th Cir. 1982) (“[T]he public has no interest in the enforcement of laws in an unconstitutional manner.”).

Likewise, this Court has already properly rejected defendants' charge that the injunction will allow a “flow of deadly illegal drugs like heroin and fentanyl across the border,” Br. 24, finding it “supported by much less than meets the eye,” 929 F.3d at 705 (citing Drug Enforcement Administration data showing that majority of heroin and fentanyl smuggled into the country comes in through vehicles). And more fundamentally, accepting the defendants' argument would expand

the category of cognizable irreparable harms to include virtually *any* instance in which an Administration tried and failed to convince Congress to adopt its proposed solution to a public health or safety issue. Again, the problem of drug smuggling at the Southern border is not new. Quite the contrary, it is a longstanding, complex, and hotly debated public policy issue susceptible to many possible approaches. Here, the President sought an appropriation from Congress to fund one such approach—the construction of a border wall—but Congress was not convinced a wall was an effective solution and denied those funds. Nothing prevents the President from seeking another appropriation once he has built a case capable of persuading a majority of Congress, either in the form of an emergency appropriation before the end of the fiscal year or a regular appropriation for the new fiscal year.<sup>4</sup>

Nor can defendants establish irreparable harm based on their liabilities to contractors. Br. 52. It is well established that monetary losses alone do not support a finding of irreparable harm. *See Rent-A-Center, Inc. v. Canyon Television and Appliance Rental, Inc.*, 944 F.2d

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<sup>4</sup> The new fiscal year begins on October 1, 2019, just over one month from now.

597, 603 (9th Cir. 1991). That is particularly so when the President can seek an appropriation from Congress to move forward with construction while an injunction is in place.

Indeed, far from favoring the defendants, the equities here weigh heavily toward upholding the district court's injunction. The American public has few interests stronger than its liberty interest in ensuring that only those elected representatives closest to the people can decide how to spend their money. *See Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 501 (2010).

\* \* \*

Immigration policy poses significant challenges, but meeting them does not, and cannot, require sacrificing the backbone of our democracy: a commitment to the Constitution and the rule of law. The Executive Branch has flouted the Constitution's clear limits on Executive Power and usurped Congress's exclusive power to appropriate money. The Court should enjoin these unlawful actions and restore the checks and balances that govern the legislative and executive branches.

## CONCLUSION

For the foregoing reasons and the reasons set forth in the plaintiffs' briefs, the Court should affirm the district court's order granting a permanent injunction.

Dated: August 20, 2019

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**ATTACHMENT A—LIST OF AMICI CURIAE**

Gary Ackerman	Barney Frank	Walt Minnick
Tom Andrews	Martin Frost	Toby Moffett
James Bacchus	Richard Gephardt	Jim Moran
Brian Baird	Wayne Gilchrest	Connie Morella
Michael Barnes	Dan Glickman	Leon Panetta
John Barrow	Gene Green	Tom Perriello
Steve Bartlett	Janice Hahn	Earl Pomeroy
Berkley Bedell	Deborah Halvorson	Carol Shea Porter
Howard Berman	Lee Hamilton	Silvestre Reyes
Douglas Bereuter	Colleen Hanabusa	Don Riegler
Tim Bishop	Richard Hanna	Tim Roemer
David Bonior	Paul Hodes	Max Sandlin
Rick Boucher	Elizabeth Holtzman	Claudine Schneider
Charles Boustany	Bob Inglis	Patricia Schroeder
Barbara Boxer	Steve Israel	Allyson Schwartz
Bruce Braley	David Jolly	Joe Sestak
Jack Buechner	Steve Kagen	Chris Shays
Lois Capps	Mary Jo Kilroy	Gerry Sikorski
Robert Carr	Ron Klein	David Skaggs
Rod Chandler	Jim Kolbe	Peter Smith
William Cohen	Mike Kopetski	John Spratt
Jerry Costello	Dennis Kucinich	Alan Steelman
Mark Critz	Nick Lampson	Charlie Stenholm
Joe Crowley	Martin Lancaster	Bart Stupak
Jim Davis	Larry LaRocco	Betty Sutton
Lincoln Davis	Jim Leach	John Tanner
William Delahunt	John LeBoutillier	John Tierney
Chris Dodd	Mel Levine	Jim Turner
Byron Dorgan	Jim Marshall	Henry Waxman
Steve Driehaus	Carolyn McCarthy	Tim Wirth
Donna Edwards	Pete McCloskey	Lynn Woolsey
Mickey Edwards	James McDermott	David Wu
Bill Enyart	Matt McHugh	Albert Wynn
Elizabeth Esty	Tom McMillan	
Sam Farr	Brad Miller	
Vic Fazio	George Miller	

## ATTACHMENT B

### JOINT DECLARATION OF FORMER UNITED STATES GOVERNMENT OFFICIALS

We, the undersigned, declare as follows:

1. We are former officials in the U.S. government who have worked on national security and homeland security issues from the White House as well as agencies across the Executive Branch. We have served in senior leadership roles in administrations of both major political parties, and collectively we have devoted a great many decades to protecting the security interests of the United States. We have held the highest security clearances, and we have participated in the highest levels of policy deliberations on a broad range of issues. These include: immigration, border security, counterterrorism, military operations, and our nation's relationship with other countries, including those south of our border.

a. **Madeleine K. Albright** served as Secretary of State from 1997 to 2001. A refugee and naturalized American citizen, she served as U.S. Permanent Representative to the United Nations from 1993 to 1997. She has also been a member of the Central Intelligence Agency External Advisory Board since 2009 and of the Defense Policy Board since 2011, in which capacities she has received assessments of threats facing the United States.

b. **Jeremy B. Bash** served as Chief of Staff of the U.S. Department of Defense from 2011 to 2013, and as Chief of Staff of the Central Intelligence Agency from 2009 to 2011.

c. **John B. Bellinger III** served as the Legal Adviser to the U.S. Department of State from 2005 to 2009. He previously served as Senior Associate Counsel to the President and Legal Adviser to the National Security Council from 2001 to 2005.

d. **Daniel Benjamin** served as Ambassador-at-Large for Counterterrorism at the U.S. Department of State from 2009 to 2012.

e. **Antony Blinken** served as Deputy Secretary of State from 2015 to 2017. He previously served as Deputy National Security Advisor to the President from 2013 to 2015.

f. **John O. Brennan** served as Director of the Central Intelligence Agency from 2013 to 2017. He previously served as Deputy National Security Advisor for Homeland Security and Counterterrorism and Assistant to the President from 2009 to 2013.

g. **R. Nicholas Burns** served as Under Secretary of State for Political Affairs from 2005 to 2008. He previously served as U.S. Ambassador to NATO and as U.S. Ambassador to Greece.

- h. **William J. Burns** served as Deputy Secretary of State from 2011 to 2014. He previously served as Under Secretary of State for Political Affairs from 2008 to 2011, as U.S. Ambassador to Russia from 2005 to 2008, as Assistant Secretary of State for Near Eastern Affairs from 2001 to 2005, and as U.S. Ambassador to Jordan from 1998 to 2001.
- i. **Johnnie Carson** served as Assistant Secretary of State for African Affairs from 2009 to 2013. He previously served as the U.S. Ambassador to Kenya from 1999 to 2003, to Zimbabwe from 1995 to 1997, and to Uganda from 1991 to 1994.
- j. **James Clapper** served as U.S. Director of National Intelligence from 2010 to 2017.
- k. **David S. Cohen** served as Under Secretary of the Treasury for Terrorism and Financial Intelligence from 2011 to 2015 and as Deputy Director of the Central Intelligence Agency from 2015 to 2017.
- l. **Eliot A. Cohen** served as Counselor of the U.S. Department of State from 2007 to 2009.
- m. **Ryan Crocker** served as U.S. Ambassador to Afghanistan from 2011 to 2012, as U.S. Ambassador to Iraq from 2007 to 2009, as U.S. Ambassador to Pakistan from 2004 to 2007, as U.S. Ambassador to Syria from 1998 to 2001, as U.S. Ambassador to Kuwait from 1994 to 1997, and U.S. Ambassador to Lebanon from 1990 to 1993.
- n. **Thomas Donilon** served as National Security Advisor to the President from 2010 to 2013.
- o. **Jen Easterly** served as Special Assistant to the President and Senior Director for Counterterrorism from 2013 to 2016.
- p. **Nancy Ely-Raphel** served as Senior Adviser to the Secretary of State and Director of the Office to Monitor and Combat Trafficking in Persons from 2001 to 2003. She previously served as the U.S. Ambassador to Slovenia from 1998 to 2001.
- q. **Daniel P. Erikson** served as Special Advisor for Western Hemisphere Affairs to the Vice President from 2015 to 2017, and as Senior Advisor for Western Hemisphere Affairs at the U.S. Department of State from 2010 to 2015.
- r. **John D. Feeley** served as U.S. Ambassador to Panama from 2015 to 2018. He served as Principal Deputy Assistant Secretary for Western Hemisphere Affairs at the U.S. Department of State from 2012 to 2015.
- s. **Daniel F. Feldman** served as Special Representative for Afghanistan and Pakistan at the U.S. Department of State from 2014 to 2015.
- t. **Jonathan Finer** served as Chief of Staff to the Secretary of State from 2015 to 2017, and Director of the Policy Planning Staff at the U.S. Department of State from 2016 to 2017.



- u. **Jendayi Frazer** served as Assistant Secretary of State for African Affairs from 2005 to 2009. She served as U.S. Ambassador to South Africa from 2004 to 2005.
- v. **Suzy George** served as Executive Secretary and Chief of Staff of the National Security Council from 2014 to 2017.
- w. **Phil Gordon** served as Special Assistant to the President and White House Coordinator for the Middle East, North Africa and the Gulf from 2013 to 2015, and Assistant Secretary of State for European and Eurasian Affairs from 2009 to 2013.
- x. **Chuck Hagel** served as Secretary of Defense from 2013 to 2015, and previously served as Co-Chair of the President's Intelligence Advisory Board. From 1997 to 2009, he served as U.S. Senator for Nebraska, and as a senior member of the Senate Foreign Relations and Intelligence Committees.
- y. **Avril D. Haines** served as Deputy National Security Advisor to the President from 2015 to 2017. From 2013 to 2015, she served as Deputy Director of the Central Intelligence Agency.
- z. **Luke Hartig** served as Senior Director for Counterterrorism at the National Security Council from 2014 to 2016.
- aa. **Heather A. Higginbottom** served as Deputy Secretary of State for Management and Resources from 2013 to 2017.
- bb. **Roberta Jacobson** served as U.S. Ambassador to Mexico from 2016 to 2018. She previously served as Assistant Secretary of State for Western Hemisphere Affairs from 2011 to 2016.
- cc. **Gil Kerlikowske** served as Commissioner of Customs and Border Protection from 2014 to 2017. He previously served as Director of the Office of National Drug Control Policy from 2009 to 2014.
- dd. **John F. Kerry** served as Secretary of State from 2013 to 2017.
- ee. **Prem Kumar** served as Senior Director for the Middle East and North Africa at the National Security Council from 2013 to 2015.
- ff. **John E. McLaughlin** served as Deputy Director of the Central Intelligence Agency from 2000 to 2004 and as Acting Director in 2004. His duties included briefing President-elect Bill Clinton and President George W. Bush.
- gg. **Lisa O. Monaco** served as Assistant to the President for Homeland Security and Counterterrorism and Deputy National Security Advisor from 2013 to 2017. Previously, she served as Assistant Attorney General for National Security from 2011 to 2013.

hh. **Janet Napolitano** served as Secretary of Homeland Security from 2009 to 2013. She served as the Governor of Arizona from 2003 to 2009.

ii. **James D. Nealon** served as Assistant Secretary for International Engagement at the U.S. Department of Homeland Security from 2017 to 2018. He served as U.S. Ambassador to Honduras from 2014 to 2017.

jj. **James C. O'Brien** served as Special Presidential Envoy for Hostage Affairs from 2015 to 2017. He served in the U.S. Department of State from 1989 to 2001, including as Principal Deputy Director of Policy Planning and as Special Presidential Envoy for the Balkans.

kk. **Matthew G. Olsen** served as Director of the National Counterterrorism Center from 2011 to 2014.

ll. **Leon E. Panetta** served as Secretary of Defense from 2011 to 2013. From 2009 to 2011, he served as Director of the Central Intelligence Agency.

mm. **Anne W. Patterson** served as Assistant Secretary of State for Near Eastern Affairs from 2013 to 2017. Previously, she served as the U.S. Ambassador to Egypt from 2011 to 2013, to Pakistan from 2007 to 2010, to Colombia from 2000 to 2003, and to El Salvador from 1997 to 2000.

nn. **Thomas R. Pickering** served as Under Secretary of State for Political Affairs from 1997 to 2000. He served as U.S. Permanent Representative to the United Nations from 1989 to 1992.

oo. **Amy Pope** served as Deputy Homeland Security Advisor and Deputy Assistant to the President from 2015 to 2017.

pp. **Samantha J. Power** served as U.S. Permanent Representative to the United Nations from 2013 to 2017. From 2009 to 2013, she served as Senior Director for Multilateral and Human Rights at the National Security Council.

qq. **Jeffrey Prescott** served as Deputy National Security Advisor to the Vice President from 2013 to 2015, and as Special Assistant to the President and Senior Director for Iran, Iraq, Syria and the Gulf States from 2015 to 2017.

rr. **Nicholas Rasmussen** served as Director of the National Counterterrorism Center from 2014 to 2017.

ss. **Alan Charles Raul** served as Vice Chairman of the Privacy and Civil Liberties Oversight Board from 2006 to 2008. He previously served as General Counsel of the U.S. Department of Agriculture from 1989 to 1993, General Counsel of the Office of Management and Budget in the Executive Office of the President from 1988 to 1989, and Associate Counsel to the President from 1986 to 1989.

- tt. **Dan Restrepo** served as Special Assistant to the President and Senior Director for Western Hemisphere Affairs at the National Security Council from 2009 to 2012.
- uu. **Susan E. Rice** served as U.S. Permanent Representative to the United Nations from 2009 to 2013 and as National Security Advisor to the President from 2013 to 2017.
- vv. **Anne C. Richard** served as Assistant Secretary of State for Population, Refugees, and Migration from 2012 to 2017.
- ww. **Eric P. Schwartz** served as Assistant Secretary of State for Population, Refugees, and Migration from 2009 to 2011. From 1993 to 2001, he was responsible for refugee and humanitarian issues at the National Security Council, ultimately serving as Special Assistant to the President for National Security Affairs and Senior Director for Multilateral and Humanitarian Affairs.
- xx. **Andrew J. Shapiro** served as Assistant Secretary of State for Political-Military Affairs from 2009 to 2013.
- yy. **Wendy R. Sherman** served as Under Secretary of State for Political Affairs from 2011 to 2015.
- zz. **Vikram Singh** served as Deputy Special Representative for Afghanistan and Pakistan from 2010 to 2011 and as Deputy Assistant Secretary of Defense for Southeast Asia from 2012 to 2014.
- aaa. **Dana Shell Smith** served as U.S. Ambassador to Qatar from 2014 to 2017. Previously, she served as Principal Deputy Assistant Secretary of Public Affairs.
- bbb. **Jeffrey H. Smith** served as General Counsel of the Central Intelligence Agency from 1995 to 1996. He previously served as General Counsel of the Senate Armed Services Committee.
- ccc. **Jake Sullivan** served as National Security Advisor to the Vice President from 2013 to 2014. He previously served as Director of Policy Planning at the U.S. Department of State from 2011 to 2013.
- ddd. **Strobe Talbott** served as Deputy Secretary of State from 1994 to 2001.
- eee. **Linda Thomas-Greenfield** served as Assistant Secretary for the Bureau of African Affairs from 2013 to 2017. She previously served as U.S. Ambassador to Liberia and Deputy Assistant Secretary for the Bureau of Population, Refugees, and Migration from 2004 to 2006.
- fff. **Arturo A. Valenzuela** served as Assistant Secretary of State for Western Hemisphere Affairs from 2009 to 2011. He previously served as Special Assistant to the President and Senior Director for Inter-American Affairs at the National Security Council from 1999 to 2000, and as Deputy Assistant Secretary of State for Mexican Affairs from 1994 to 1996.

2. On February 15, 2019, the President declared a “national emergency” for the purpose of diverting appropriated funds from previously designated uses to build a wall along the southern border. We are aware of no emergency that remotely justifies such a step. The President’s actions are at odds with the overwhelming evidence in the public record, including the administration’s own data and estimates. We have lived and worked through national emergencies, and we support the President’s power to mobilize the Executive Branch to respond quickly in genuine national emergencies. But under no plausible assessment of the evidence is there a national emergency today that entitles the President to tap into funds appropriated for other purposes to build a wall at the southern border. To our knowledge, the President’s assertion of a national emergency here is unprecedented, in that he seeks to address a situation: (1) that has been enduring, rather than one that has arisen suddenly; (2) that in fact has improved over time rather than deteriorated; (3) by reprogramming billions of dollars in funds in the face of clear congressional intent to the contrary; and (4) with assertions that are rebutted not just by the public record, but by his agencies’ own official data, documents, and statements.

3. *Illegal border crossings are near forty-year lows.* At the outset, there is no evidence of a sudden or emergency increase in the number of people seeking to cross the southern border. According to the administration’s own data, the numbers of apprehensions and undetected illegal border crossings at the southern border are near forty-year lows.<sup>1</sup> Although there was a modest increase in apprehensions in 2018, that figure is in keeping with the number of apprehensions only two years earlier, and the overall trend indicates a dramatic decline over the last fifteen years in particular.<sup>2</sup> The administration also estimates that “undetected unlawful entries” at the southern border “fell from approximately 851,000 to nearly 62,000” between fiscal years 2006 to 2016, the most recent years for which data are available.<sup>3</sup> The United States currently hosts what is estimated to be the smallest number of undocumented immigrants since 2004.<sup>4</sup> And in fact, in recent years, the majority of currently undocumented immigrants entered the United States legally, but overstayed their visas,<sup>5</sup> a problem that will not be addressed by the declaration of an emergency along the southern border.

4. *There is no documented terrorist or national security emergency at the southern border.* There is no reason to believe that there is a terrorist or national security emergency at the southern border that could justify the President’s proclamation.

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<sup>1</sup> *Southwest Border Sectors: Total Illegal Alien Apprehensions by Fiscal Year*, U.S. CUSTOMS & BORDER PROTECTION, <https://www.cbp.gov/sites/default/files/assets/documents/2017-Dec/BP%20Southwest%20Border%20Sector%20Apps%20FY1960%20-%20FY2017.pdf> (last accessed Feb. 17, 2019); *Southwest Border Migration FY2019*, U.S. CUSTOMS & BORDER PROTECTION, <https://www.cbp.gov/newsroom/stats/sw-border-migration> (last accessed Feb. 17, 2019).

<sup>2</sup> *Southwest Border Migration FY2019*, *supra* note 1; *Southwest Border Migration FY2017*, U.S. CUSTOMS & BORDER PROTECTION, <https://www.cbp.gov/newsroom/stats/sw-border-migration-fy2017> (last accessed Feb. 17, 2019).

<sup>3</sup> U.S. DEP’T OF HOMELAND SECURITY, DEP’T OF HOMELAND SECURITY BORDER SECURITY METRICS REPORT 13 (May 1, 2018), [https://www.dhs.gov/sites/default/files/publications/BSMR\\_OIS\\_2016.pdf](https://www.dhs.gov/sites/default/files/publications/BSMR_OIS_2016.pdf).

<sup>4</sup> Jeffrey S. Passel & D’Vera Cohn, *U.S. Unauthorized Immigrant Total Dips to Lowest Level in a Decade*, PEW RES. CTR. (Nov. 27, 2018).

<sup>5</sup> Richard Gonzales, *For 7th Consecutive Year, Visa Overstays Exceeded Illegal Border Crossings*, NPR (Jan. 16, 2019, 7:02 PM) (noting “that from 2016-2017, people who overstayed their visas accounted for 62 percent of the newly undocumented, while 38 percent had crossed a border illegally”).

a. This administration's own most recent Country Report on Terrorism, released only five months ago, found that "there was no credible evidence indicating that international terrorist groups have established bases in Mexico, worked with Mexican drug cartels, or sent operatives via Mexico into the United States."<sup>6</sup> Since 1975, there has been only one reported incident in which immigrants who had crossed the southern border illegally attempted to commit a terrorist act. That incident occurred more than twelve years ago, and involved three brothers from Macedonia who had been brought into the United States as children more than twenty years earlier.<sup>7</sup>

b. Although the White House has claimed, as an argument favoring a wall at the southern border, that almost 4,000 known or suspected terrorists were intercepted at the southern border in a single year,<sup>8</sup> this assertion has since been widely and consistently repudiated, including by this administration's own Department of Homeland Security.<sup>9</sup> The overwhelming majority of individuals on terrorism watchlists who were intercepted by U.S. Customs and Border Patrol were attempting to travel to the United States by air;<sup>10</sup> of the individuals on the terrorist watchlist who were encountered while entering the United States during fiscal year 2017, only 13 percent traveled by land.<sup>11</sup> And for those who have attempted to enter by land, only a small fraction do so at the southern border. Between October 2017 and March 2018, forty-one foreign immigrants on the terrorist watchlist were intercepted at the northern border.<sup>12</sup> Only six such immigrants were intercepted at the southern border.<sup>13</sup>

5. *There is no emergency related to violent crime at the southern border.* Nor can the administration justify its actions on the grounds that the incidence of violent crime on the southern border constitutes a national emergency. Factual evidence consistently shows that unauthorized immigrants have no special proclivity to engage in criminal or violent behavior. According to a Cato Institute analysis of criminological data, undocumented immigrants are 44 percent *less likely* to be incarcerated

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<sup>6</sup> U.S. DEP'T OF STATE, COUNTRY REPORTS ON TERRORISM 2017, at 205 (Sept. 2018).

<sup>7</sup> See Alex Nowrasteh, *Trump's Wall Will Not Stop Terrorism*, CATO INST. (Dec. 18, 2018).

<sup>8</sup> See *Congressional Border Security Briefing: A Border Security and Humanitarian Crisis*, WHITE HOUSE (Jan. 4, 2019); Holly Rosenkrantz, *Sanders Repeats Claim on Terrorists at the Border Refuted by Administration's Own Data*, CBS NEWS (Jan. 7, 2019, 3:28 PM). Vice President Mike Pence made similar statements during his appearance on ABC the next week. See Betsy Klein, *Pence Misleadingly Cites Some Statistics to Push Trump Border Wall*, CNN (Jan. 8, 2019, 5:46 PM).

<sup>9</sup> See U.S. DEP'T OF HOMELAND SECURITY, MYTH/FACT: KNOWN AND SUSPECTED TERRORISTS/SPECIAL INTEREST ALIENS (Jan. 7, 2019); see also, e.g., Brett Samuels, *Conway: Sarah Sanders Made 'Unfortunate Misstatement' About Terror Suspects at Border*, HILL (Jan. 8, 2019, 10:30 AM).

<sup>10</sup> See U.S. DEP'T OF HOMELAND SECURITY, *supra* note 9.

<sup>11</sup> See Press Release, Dep't of Homeland Security, DOJ, DHS Report: Three Out of Four Individuals Convicted of International Terrorism and Terrorism-Related Offenses were Foreign-Born (Jan. 16, 2018).

<sup>12</sup> See Julia Ainsley, *Only Six Immigrants in Terrorism Database Stopped by CBP at Southern Border from October to March*, NBC NEWS (Jan. 7, 2019, 4:10 PM).

<sup>13</sup> See *id.*

nationwide than are native-born citizens.<sup>14</sup> And in Texas, undocumented immigrants were found to have a first-time conviction rate 32 percent below that of native-born Americans;<sup>15</sup> the conviction rates of unauthorized immigrants for violent crimes such as homicide and sex offenses were also below those of native-born Americans.<sup>16</sup> Meanwhile, overall rates of violent crime in the United States have declined significantly over the past 25 years, falling 49 percent from 1993 to 2017.<sup>17</sup> And violent crime rates in the country's 30 largest cities have decreased on average by 2.7 percent in 2018 alone, further undermining any suggestion that recent crime trends currently warrant the declaration of a national emergency.<sup>18</sup>

6. *There is no human or drug trafficking emergency that can be addressed by a wall at the southern border.* The administration has claimed that the presence of human and drug trafficking at the border justifies its emergency declaration. But there is no evidence of any such sudden crisis at the southern border that necessitates a reprogramming of appropriations to build a border wall.

a. The overwhelming majority of opioids that enter the United States across a land border are carried through legal ports of entry in personal or commercial vehicles, not smuggled through unauthorized border crossings.<sup>19</sup> A border wall would not stop these drugs from entering the United States. Nor would a wall stop drugs from entering via other routes, including smuggling tunnels, which circumvent such physical barriers as fences and walls,<sup>20</sup> and international mail (which is how high-purity fentanyl, for example, is usually shipped from China directly to the United States).<sup>21</sup>

b. Likewise, illegal crossings at the southern border are not the principal source of human trafficking victims. About two-thirds of human trafficking victims served by nonprofit organizations that receive funding from the relevant Department of Justice office are U.S. citizens, and even among non-citizens, most trafficking victims usually arrive in the country on valid visas.<sup>22</sup> None of these instances of trafficking could be addressed by a border wall. And the three states with the highest per capita trafficking reporting rates are not even located along the southern border.<sup>23</sup>

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<sup>14</sup> Michelangelo Landgrave & Alex Nowrasteh, *Criminal Immigrants: Their Numbers, Demographics, and Countries of Origin*, CATO INST. (Mar. 15, 2017).

<sup>15</sup> Alex Nowrasteh & Andrew Forrester, *Illegal Immigrant Conviction Rates Are Low, Even When Factoring in Recidivism*, CATO INST. (Jan. 7, 2019).

<sup>16</sup> Alex Nowrasteh, *Criminal Immigrants in Texas: Illegal Immigrant Conviction and Arrest Rates for Homicide, Sex Crimes, Larceny, and Other Crimes*, CATO INST. (Feb. 26, 2018).

<sup>17</sup> John Gramlich, *5 Facts About Crime in the U.S.*, PEW RES. CTR. (Jan. 3, 2019).

<sup>18</sup> Ames Grawert & Cameron Kimble, *Crime in 2018: Updated Analysis*, BRENNAN CTR. FOR JUST. (Dec. 18, 2018).

<sup>19</sup> *2018 National Drug Threat Assessment*, U.S. DEP'T OF JUST. DRUG ENFORCEMENT ADMIN. (2018). Ninety percent of heroin seizures at U.S. borders and more than 85 percent of cocaine and methamphetamine seizures occur at ports of entry, where drugs can be smuggled in personal vehicles or hidden among legal commercial goods in tractor trailers. Joe Ward & Anjali Singhvi, *Trump Claims There Is a Crisis at the Border. What's the Reality?*, N.Y. TIMES (Jan. 11, 2019).

<sup>20</sup> See Gustavo Solis, *Drug Smuggling, and the Endless Battle To Stop It*, USA TODAY (last visited Feb. 18, 2019).

<sup>21</sup> *2018 National Drug Threat Assessment*, *supra* note 19, at 33.

<sup>22</sup> Jenna Krajeski, *The Hypocrisy of Trump's Anti-Trafficking Argument for a Border Wall*, NEW YORKER (Feb. 5, 2019).

<sup>23</sup> Holly Yan, *The Deadly Toll of Human Smuggling and Trafficking in the U.S.*, CNN (July 28, 2017, 3:45 PM).

7. *This proclamation will only exacerbate the humanitarian concerns that do exist at the southern border.* There are real humanitarian concerns at the border, but they largely result from the current administration's own deliberate policies towards migrants. For example, the administration has used a "metering" policy to turn away families fleeing extreme violence and persecution in their home countries, forcing them to wait indefinitely at the border to present their asylum cases, and has adopted a number of other punitive steps to restrict those seeking asylum at the southern border. These actions have forced asylum-seekers to live on the streets or in makeshift shelters and tent cities with abysmal living conditions, and limited access to basic sanitation has caused outbreaks of disease and death. This state of affairs is a consequence of choices this administration has made, and erecting a wall will do nothing to ease the suffering of these people.

8. *Redirecting funds for the claimed "national emergency" will undermine U.S. national security and foreign policy interests.* In the face of a nonexistent threat, redirecting funds for the construction of a wall along the southern border will *undermine* national security by needlessly pulling resources from Department of Defense programs that are responsible for keeping our troops and our country safe and running effectively.

a. Repurposing funds from the defense construction budget will drain money from critical defense infrastructure projects, possibly including improvement of military hospitals, construction of roads, and renovation of on-base housing.<sup>24</sup> And the proclamation will likely continue to divert those armed forces already deployed at the southern border from their usual training activities or missions, affecting troop readiness.<sup>25</sup>

b. In addition, the administration's unilateral, provocative actions are heightening tensions with our neighbors to the south, at a moment when we need their help to address a range of Western Hemisphere concerns. These actions are placing friendly governments to the south under impossible pressures and driving partners away. They have especially strained our diplomatic relationship with Mexico, a relationship that is vital to regional efforts ranging from critical intelligence and law enforcement partnerships to cooperative efforts to address the growing tensions with Venezuela. Additionally, the proclamation could well lead to the degradation of the natural environment in a manner that could only contribute to long-term socioeconomic and security challenges.

c. Finally, by declaring a national emergency for domestic political reasons with no compelling reason or justification from his senior intelligence and law enforcement officials, the President has further eroded his credibility with foreign leaders, both friend and foe. Should a genuine foreign crisis erupt, this lack of credibility will materially weaken this administration's ability to marshal allies to support the United States, and will embolden adversaries to oppose us.

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<sup>24</sup> Claudia Grisales, *Trump Declares Emergency on Southern Border, Opens Battle Over Use of Military Funds To Build Wall*, STARS & STRIPES (Feb. 15, 2019).

<sup>25</sup> Leo Shane III, *Democrats Want To Know Why Active-Duty Troops Are Still on the Southern US Border*, MIL. TIMES (Jan. 29, 2019); Thomas Gibbons-Neff & Helene Cooper, *Impact of Border Deployments Is Felt by Troops at Home and Away*, N.Y. TIMES (Dec. 24, 2018); Ashley Roque, *Readiness Questions Abound, the Pentagon Prepares To Send Thousands of Additional Troops to Border*, JANE'S DEFENCE WKLY. (Jan. 29, 2019).

9. *The situation at the border does not require the use of the armed forces, and a wall is unnecessary to support the use of the armed forces.* We understand that the administration is also claiming that the situation at the southern border “requires use of the armed forces,” and that a wall is “necessary to support such use” of the armed forces. These claims are implausible.

a. Historically, our country has deployed National Guard troops at the border solely to assist the Border Patrol when there was an extremely high number of apprehensions, together with a particularly low number of Border Patrol agents. But currently, even with retention and recruitment challenges, the Border Patrol is at historically high staffing and funding levels, and apprehensions—measured in both absolute and per-agent terms—are near historic lows.<sup>26</sup>

b. Furthermore, 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.

c. Just last month, when asked what the military is doing at the border that couldn’t be done by the Department of Homeland Security if it had the funding for it, a top-level defense official responded, “[n]one of the capabilities that we are providing [at the southern border] are combat capabilities. It’s not a war zone along the border.”<sup>27</sup> Finally, it is implausible that hundreds of miles of wall across the southern border are somehow necessary to support the use of armed forces. We are aware of no military- or security-related rationale that could remotely justify such an endeavor.

10. *There is no basis for circumventing the appropriations process with a declaration of a national emergency at the southern border.* We do not deny that our nation faces real immigration and national security challenges. But as the foregoing demonstrates, these challenges demand a thoughtful, evidence-based strategy, not a manufactured crisis that rests on falsehoods and fearmongering. In a briefing before the Senate Intelligence Committee on January 29, 2019, less than one month before the Presidential Proclamation, the Directors of the CIA, DNI, FBI, and NSA testified about numerous serious current threats to U.S. national security, but none of the officials identified a security crisis at the U.S.-Mexico border. 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.<sup>28</sup> Leading legislators with access to classified information<sup>29</sup> and

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<sup>26</sup> Alex Nowrasteh, *Sending Troops to the Border Is Unnecessary and Dangerous*, CATO INST. (Apr. 4, 2018).

<sup>27</sup> Heather Timmons, *The US Border Situation Isn’t a National Emergency, Pentagon Officials Tell Congress*, QUARTZ (Jan. 29, 2019).

<sup>28</sup> *See id.*

<sup>29</sup> *See, e.g.*, Press Release, Sen. Lamar Alexander, Statement on National Emergency Announcement (Feb. 15, 2019); Press Release, Sen. Susan Collins, Statement on Reports President Trump Will Declare National Emergency To Fund More Border Walls (Feb. 14, 2019); Press Release, Sen. Mitt Romney, Statement on Spending, Border Security Deal (Feb. 14, 2019).



the President's own statements<sup>30</sup> have strongly suggested, if not confirmed, that there is no evidence supporting the administration's claims of an emergency. And it is reported that the President made the decision to circumvent the appropriations process and reprogram money without the Acting Secretary of Defense having even started to consider where the funds might come from,<sup>31</sup> suggesting an absence of consultation and internal deliberations that in our experience are necessary and expected before taking a decision of this magnitude.

11. For all of the foregoing reasons, in our professional opinion, there is no factual basis for the declaration of a national emergency for the purpose of circumventing the appropriations process and reprogramming billions of dollars in funding to construct a wall at the southern border, as directed by the Presidential Proclamation of February 15, 2019.

Respectfully submitted,

*Signed/*\*

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<sup>30</sup> *Remarks by President Trump on the National Security and Humanitarian Crisis on our Southern Border*, White House (Feb. 15, 2019) ("I didn't need to do this. But I'd rather do it much faster.").

<sup>31</sup> Noah Gray, *Acting U.S. Defense Secretary Will Review Programs To Cut for Wall Funding*, CNN (Feb. 17, 2019).

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## CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(B)(i) because it is 4,349 words, excluding the parts of the brief exempted by Rule 32(f). This brief complies with the typeface and the type-style requirements of Federal Rule of Appellate Procedure 32 because it has been prepared in a proportionally spaced typeface using Microsoft Word 14-point Century Schoolbook font.

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## CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on August 20, 2019 for filing and transmittal of a Notice of Electronic Filing to all CM/ECF registrants. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the Appellate CM/ECF system.

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