

1 MICHAEL RYAN WILLIAMS, ESQ.  
2 3636 North Central Avenue  
3 Phoenix, Arizona 85012  
4 State Bar No. 029703  
5 m.ryan.williams@gmail.com  
6 (602) 740-0321  
7 *Lead Counsel for Advocates for Victims of Illegal Alien Crime*

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10 **IN THE UNITED STATES DISTRICT COURT**  
11  
12 **FOR THE DISTRICT OF ARIZONA**  
13

14 Douglas A. Ducey, Governor of the State of  
15 Arizona,

16 Plaintiff,

17 v.

**Case No.: 2:22-cv-01814-PHX-DGC**

18 Randy Moore, Chief of the United States  
19 Forest Service, in his official capacity;  
20 Camille Calimlim Touton, Commissioner of  
21 the United States Bureau of Reclamation, in  
22 her official capacity; Thomas J. Vilsack,  
23 United States Secretary of Agriculture, in  
24 his official capacity; United States Forest  
25 Service; and United States Bureau of  
26 Reclamation,

27 Defendants.  
28

29  
30  
31 **MEMORANDUM OF LAW AS *AMICUS CURIAE* IN OPPOSITION**  
32 **TO FEDERAL DEFENDANTS' MOTION TO DISMISS**  
33 **FROM ADVOCATES FOR VICTIMS OF ILLEGAL ALIEN CRIME**  
34

1 Lorraine G. Woodwark  
2 By /s/ Lorraine G. Woodwark, Esq.  
3 Attorneys United for a Secure America  
4 25 Massachusetts Avenue NW, Ste 335  
5 Washington, D.C. 20001  
6 (202) 591-0962  
7 (202) 464-3590  
8 [LWoodwark@IRLI.org](mailto:LWoodwark@IRLI.org)

Michael Ryan Williams, Esq.  
By /s/ Michael Ryan Williams, Esq.  
Attorney at Law  
3636 North Central Avenue  
Phoenix, Arizona 85012  
(602) 740-0321  
[M.Ryan.Williams@gmail.com](mailto:M.Ryan.Williams@gmail.com)

9 Counsel for *Amicus Curiae*  
10 Advocates for Victims of Illegal Alien Crime  
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*Amicus Curiae* Advocates for Victims of Illegal Alien Crime is a non-profit corporation which has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

Advocates for Victims of Illegal Alien Crime, *Amicus Curiae*

Lorraine G. Woodwark, Esq., counsel for *Amicus Curiae*

/s/ Michael Ryan Williams  
M. Ryan Williams, Esq.  
*Counsel for Advocates for Victims of Illegal  
Alien Crime*

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AVIAC objects to Federal Defendants Motion to Dismiss on the grounds that the State of Arizona has a constitutional right to resist and challenge the federal government's actions on the U.S.-Mexico border, and that Arizona's actions are a proper exercise of its authority as a dual sovereign to protect its citizens from the harm that has been inflicted by illegal immigration. Given its interest in strong borders and the protection of national sovereignty, AVIAC has an interest in ensuring that the ongoing invasion of illegal immigrants ends and is concerned about further incursions on the sovereignty of American citizens by non-citizens.

<sup>2</sup> <https://www.aviac.us/> (viewed December 30, 2022).

## SUMMARY OF ARGUMENT

Every state shares dual sovereignty over its borders with the federal government, including the right to expel aliens in the event of an invasion. For decades, inconsistent or nonexistent federal immigration enforcement has led to increased illegal immigration, higher financial costs to the states and resulted in the spread of violent crime, human trafficking and drug use in our local communities.

The federal government has infringed upon Arizona's constitutional sovereignty with the unenforceable environmental regulations in dispute here. Arizona has a right and a duty to challenge unlawful federal actions. Governor Douglas A. Ducey (hereinafter, "Plaintiff or "Governor Ducey") declared an emergency so as to complete sections of the border barrier and reduce the number of unlawful entries into Arizona. Plaintiff acted to mitigate and the harm unregulated immigration creates for its citizens. It is fully within Arizona's constitutional right to act when the federal government refuses to enforce its immigration laws.

The selective enforcement of federal immigration and environmental laws threatens the principle of dual-sovereignty, as "...the federal government may not use its powers to legislate in certain areas to disrupt the actual operation of state and local government by, for example, regulating the use of state and local resources..." *City of N.Y. v. United States*, 179 F.3d 29, 34 (2d Cir. 1999) The action by United States Forest Service (hereinafter, "USFS") requiring that Arizona submit to a protracted permitting process to determine whether it may or may not build a border barrier is an abuse of power by the federal government. Therefore, Defendants' Motion to Dismiss should be denied.



## ARGUMENT

### I. THE PRINCIPLE OF DUAL SOVEREIGNTY PROVIDES THE AUTHORITY TO PREVENT AN ILLEGAL INVASION

The U. S. Constitution distributes the powers and responsibilities of government via dual sovereignty among and between the union of states “whose principal benefit may be ‘a check on abuses of government power.’”. *Gregory v. Ashcroft*, 501 U.S. 452, 458, 111 S. Ct. 2395, 115 L. Ed. 2d 410 (1991); *United States v. California*, 314 F. Supp. 3d 1077, 1086 (E.D. Cal. 2018). Our Framers understood that a monopoly of power held by only one body would inevitably lead to tyranny and that “[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.” The Federalist No. 47 (James Madison). This separation of powers is fundamental to our republican form of government and ensures there are checks and balances that enable the citizens to hold their government accountable.

Indeed, it is the federal government’s constitutional duty to ‘protect against invasion’. See U.S. Const. Art. IV, §4 (“The United States shall guarantee to every State in the Union, a Republican Form of Government, and shall protect each of them against Invasion...”). Yet, this duty to protect is not exclusive and does not prevent or preclude the several states from themselves taking appropriate actions when confronted with an invasion.<sup>3</sup> U.S. Const. Art. I, §10, clause 3 (“[n]o State shall, without the Consent of

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<sup>3</sup> Merriam Webster’s dictionary defines “invade” as “to enter for conquest or plunder, to encroach upon”. <https://www.merriam-webster.com/dictionary/invade> (last checked December 30, 2022)

1 Congress... engage in War, unless actually invaded, or in such imminent Danger as will  
2 not admit of delay. "). Such is the case here that led to Plaintiff's construction of sections  
3 of the border barrier. Thus, the Invasion Clause and State Self-Defense Clause provides  
4 dual protections against invasion broadly defined and encompasses defense against  
5 hostile non-state actors such as cartels and gangs operating at the border and entering into  
6 Arizona.

7  
8 While the federal government "has broad, undoubted [constitutional] power over  
9 the subject of immigration and the status of aliens," *Arizona v. United States*, 567 U.S.  
10 387, 364 (2012), the U.S. Supreme Court has never held "that every state enactment  
11 which in any way deals with aliens is a regulation of immigration and thus per se pre-  
12 empted by this constitutional power, whether latent or exercised." *De Canas v. Bica*, 424  
13 U.S. 351, 355, 96 S. Ct. 933, 47 L. Ed. 2d 43 (1976), *superseded by statute on other*  
14 *grounds*.

15  
16 Justice Scalia noted that this authority, secured via these two constitutional  
17 provisions, is specifically "designed to enable the States to prevent the intrusion of  
18 obnoxious aliens through other States." *Arizona v. United States*, 567 U.S. 387, 417  
19 (2012) (Scalia, J., dissenting) (citation and quotation marks omitted). "[T]he  
20 naturalization power given to Congress [therefore was] not to abrogate States' power to  
21 exclude aliens they did not want, but to vindicate it". *Id.* at 418.

22  
23 Finally, the actions Plaintiff has taken to create a barrier along the border with  
24 Mexico are consistent with the inherent sovereign "power to exclude," *id.* at 417, which  
25 has "long been recognized," *id.*, in international law: "The sovereign may forbid the  
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entrance of his territory either to foreigners in general, or in particular cases, or to certain persons... There is nothing in all this, that does not flow from the rights of domain and sovereignty...” *Id.* (quoting *The Law of Nations*, bk. II, ch. VII, §94, p. 309 (B. Kapossy & R. Whatmore eds. 2008); *See also id.* (citing I. R. Phillimore, *Commentaries upon International Law*, pt. III, ch. X, p. 233 (1854) (“It is a received maxim of International Law that, the Government of a State may prohibit the entrance of strangers into the country”))).

## **II. ARIZONA HAS A DUTY AND THE CONSTITUTIONAL RIGHT TO RESIST AND CHALLENGE UNLAWFUL FEDERAL ACTIONS**

Arizona has a duty to resist and challenge unlawful federal actions, especially when used as a cudgel to interfere with its’ sovereignty and “compromise the structural framework of dual sovereignty.” *Printz v. United States*, 521 U.S. 898, 918-923 (1997). (“[T]he power of the President would be subject to reduction, if Congress could act as effectively without the President as with him, by simply requiring state officers to execute its laws.”)

State sovereignty powers in this context extend “to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.” *Gregory*, 501 U.S. at 458 (quoting *Federalist No. 45*, pp. 292-93 (C. Rossieter ed. 1961)). The State of Arizona has an undisputed interest in the safety of its citizens, the protection of its laws, and the preservation of its environment.

1 First, the assertion that the federal government has a valid claim is false. Plaintiff's  
2 Complaint correctly notes that, "NEPA - A.R.S. § 26-303(D) and (E) are not subject to  
3 any such federal regulations (including the federal Administrative Procedures Act) for the  
4 land in question here because, among other reasons: (a) the land is not federal; and (b)  
5 even if it was, the State—and Governor Ducey by virtue of his emergency powers—has  
6 concurrent jurisdiction." See *Sierra Club v. E.P.A.*, 292 F.3d 895, 899–900 (D.C. Cir.  
7 2002) ("In many if not most cases the petitioner's standing to seek review of  
8 administrative action is self-evident"). Complaint at 3, *Ducey v. Moore et al*, 2:22-cv-  
9 1814 (D. Ariz. 2022). In 1907, President Roosevelt issued a Presidential Proclamation  
10 that established the reservation in order to keep all public lands along the border in  
11 California, Arizona, and New Mexico "*as a protection against the smuggling of goods*  
12 *between the United States and Mexico*".<sup>4</sup> (emphasis added).. The Federal Government's  
13 contention that the Roosevelt Reservation is exclusively in the realm of defendant's  
14 control is unconstitutional and exceeds the purpose of a Presidential Proclamation.

15 Second, selective and overzealous use of environmental regulations designed to  
16 undermine a state's sovereignty has routinely been held to be unlawful. "[T]he federal  
17 government may not use its powers to legislate in certain areas to disrupt the actual  
18 operation of state and local government..." *City of N.Y. v. United States*, 179 F.3d 29, 34  
19 (2d Cir. 1999). The action by USFS to demand Arizona go through a long permitting

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28 <sup>4</sup> Nuñez-Neto, Blas; Kim, Yule (2008-05-14). "[Border Security: Barriers Along the U.S. International Border](#)" (PDF).  
*Federation of American Scientists*. p. 24

1 process in order to determine whether the state may build a barrier is therefore an abuse  
2 of power by the federal government.

3         The irony of the USFS demanding a long application processes, through the guise  
4 of NEPA regulations, defeats its purpose. Illegal aliens continuously trample on the  
5 habitats of native plants and other endangered species. The environmental consequences  
6 of these actions are far more destructive than the construction of a border barrier.<sup>5</sup>

7  
8         Finally, the financial and human cost of the federal government's actions and  
9 inactions have drained the states financially and made life for Arizona's citizens far more  
10 dangerous. Fentanyl, for example, manufactured in both China and now Mexico, is  
11 routinely smuggled into the State of Arizona by the human trafficking and drug cartels.  
12 Former Director of ICE, Tom Homan, stated, "since [Biden] came into office over 13,000  
13 pounds of fentanyl have been seized at the southern border—enough to kill millions of  
14 Americans many times over." Tom Homan, *Biden's Open Borders Betrayal*, The Hill  
15 (Aug. 8, 2022, 11:00 AM)), [https://thehill.com/opinion/immigration/3592315-bidens-](https://thehill.com/opinion/immigration/3592315-bidens-open-borders-betrayal/)  
16 [open-borders-betrayal/](https://thehill.com/opinion/immigration/3592315-bidens-open-borders-betrayal/).

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18         As a result, the State of Arizona has borne the brunt of increased crime and  
19 skyrocketing financial and healthcare costs, as well as environmental damage. Arizona

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24         <sup>5</sup> In fact, a border wall will achieve many of NEPA's goals: "(a) The Congress, recognizing the  
25 profound impact of man's activity on the interrelations of all components of the natural environment,  
26 particularly the profound influences of population growth, high-density urbanization, industrial  
27 expansion, resource exploitation... and recognizing further the critical importance of restoring and  
28 maintaining environmental quality to the overall welfare and development of man, declares that it is the  
continuing policy of the Federal Government, in cooperation with State and local governments... to use  
all practicable means and measures... to foster and promote the general welfare... and fulfill the social,  
economic, and other requirements of present and future generations of Americans." 42 U.S.C. §4331(a)

1 has a duty to resist and challenge these unlawful government actions that result in untold  
2 harm to its citizens.

3 **III. THE FEDERAL GOVERNMENT’S ACTIONS HAVE INFLICTED**  
4 **HARM UPON ARIZONA AND ITS CITIZENS**

5 The unprecedented crisis at the State’s southern border, caused in large part by the  
6 federal government’s actions, has resulted in a massive influx of illegal aliens, drugs, and  
7 crime. In the federal government’s own words, “[t]he last decades have yielded a dramatic  
8 increase in encounters at the [southwest border]” in which “border encounters more than  
9 doubled between 2017 and 2019, and— following a steep drop in the first months of the  
10 COVID-19 pandemic—continued to increase at a similar pace in 2021 and 2022.”  
11 Implementation of a Parole Process for Venezuelans, 87 Fed. Reg. 63507, 63508 (October  
12 19, 2022). The influx of migrants “has been particularly acute in certain border sectors”  
13 in Texas and Arizona, “all of which are at risk of operating, or are currently operating,  
14 over capacity.” *Id.* at 63510.

15 In fact, the Department of Homeland Security (“DHS”) itself conceded that July  
16 2021 had the highest number of monthly encounters in decades and likely ever.<sup>6</sup> Since  
17 the start of 2022, the monthly number of illegal immigrants apprehended has been  
18 significantly higher and there are no signs of any slowdown. The most recent DHS data,  
19 from September 2022, illustrates the unprecedented nature of the crisis. *See*  
20 [www.DHS.gov/statistics](http://www.DHS.gov/statistics) (last checked December 30, 2022). These numbers do not  
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22 <sup>6</sup> [https://abcnews.go.com/Politics/cbp-encounters-highest-monthly-number-migrants-attempting-](https://abcnews.go.com/Politics/cbp-encounters-highest-monthly-number-migrants-attempting-cross/story?id=79240996)  
23 [cross/story?id=79240996](https://abcnews.go.com/Politics/cbp-encounters-highest-monthly-number-migrants-attempting-cross/story?id=79240996) (last checked December 30, 2022)

1 account for “got aways,” either. The *Washington Post* summarized the situation in noting  
2 that “[i]mmigration arrests along the U.S. southern border rose in May [2022] to the  
3 highest levels ever recorded [...] CBP made 239,416 arrests along the Mexico border last  
4 month [...] The agency is on pace to exceed 2 million detentions during fiscal 2022.”<sup>7</sup>

5  
6 Millions of illegal aliens have unlawfully entered because of the federal  
7 government’s actions, and inactions, that have harmed Arizona and its citizens.  
8

9  
10 For the forgoing reasons, the Motion to Dismiss should be denied.  
11

12 Respectfully submitted, this 30th day of December, 2022.  
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14  
15 /s/ Michael Ryan Williams  
16 MICHAEL RYAN WILLIAMS, ESQ.  
17 3636 North Central Avenue  
18 Phoenix, Arizona 85012  
19 State Bar No. 029703  
m.ryan.williams@gmail.com  
(602) 740-0321

20 LORRAINE G. WOODWARD, ESQ.  
21 Attorneys United for a Secure America (AUSA)  
22 25 Massachusetts Avenue NW, Ste 335  
23 Washington, D.C. 20001  
LWoodward@IRLI.org  
24 (202) 591-0962

25 *Counsel for Amicus Curiae*  
26 *Advocates for Victims of Illegal Alien Crime (AVIAC)*  
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28 <sup>7</sup> <https://www.washingtonpost.com/immigration/2022/06/16/united-states-border-immigration-arrests/> (last checked December 30, 2022)

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## CERTIFICATE OF COMPLIANCE

1. This brief has been prepared using 13-point, proportionally spaced type space in Microsoft Word pursuant to L.R.Civ. 7.

2. This brief complies with FED. R. APP. P. 29(a)(5) and 32(a)(7)(B) because it contains a total of 2,262 words, excluding material not counted under Rule 32(f).

Dated this 30th day of December, 2022.

/s/ Michael Ryan Williams  
MICHAEL RYAN WILLIAMS, ESQ.  
3636 North Central Avenue  
Phoenix, Arizona 85012  
State Bar No. 029703  
m.ryan.williams@gmail.com  
(602) 740-0321  
*Lead Counsel for Movant*



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**CERTIFICATE OF SERVICE**

I hereby certify that on this 30th day of December, 2022, I electronically filed the foregoing motion—together with the accompanying Corporate Disclosure Statement, Proposed Order, and Memorandum of Law—with the Clerk using the CM/ECF system, which I understand to have served the parties’ counsel who are registered in as CM/ECF users.

*/s/ Michael Ryan Williams*  
MICHAEL RYAN WILLIAMS, ESQ.  
3636 North Central Avenue  
Phoenix, Arizona 85012  
State Bar No. 029703  
m.ryan.williams@gmail.com  
(602) 740-0321

*Lead Counsel for Movant*

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