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**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA**

DOUGLAS A. DUCEY, GOVERNOR OF  
THE STATE OF ARIZONA,

Plaintiff,

vs.

RANDY MOORE, CHIEF OF THE  
UNITED STATES FOREST SERVICE, IN  
HIS OFFICIAL CAPACITY, ET AL,

Defendants.

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

**AMICUS CURIAE IN SUPPORT OF  
PLAINTIFF'S OPPOSITION  
TO DEFENDANTS' MOTION TO  
DISMISS**

**MEMORANDUM OF LAW AS *AMICUS CURIAE* IN SUPPORT OF  
PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS  
FROM ADVOCATES FOR VICTIMS OF ILLEGAL ALIEN CRIME**

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*A. Ducey v. Randy Moore, et al.*

Pursuant to the Federal Rule of Procedure, the undersigned counsel of record certifies that the parties' list of persons and entities having an interest in the outcome of this case is complete, to the best of the undersigned counsel's knowledge, with the following additions:

M. Ryan Williams, Esq., counsel for *Amicus Curiae*

These representations are made in order that the judge of this court may evaluate possible disqualification or recusal.

/s/ Michael Ryan Williams  
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1                   **IDENTITY, INTEREST AND AUTHORITY TO FILE<sup>1</sup>**

2                   *Amicus curiae* Advocates for Victims of Illegal Alien Crime (hereinafter,  
3 “AVIAC”) is a 26 U.S.C. § 501(c)(3) non-profit organization that was founded in 2017.  
4 AVIAC is led by individuals who have lost family members because of crimes committed  
5 by illegal aliens.<sup>2</sup> AVIAC’s mission includes being a source of support for such victims  
6 across the country and a resource for advancing policies that will enforce the nation’s  
7 immigration laws and prevent governmental incentives for illegal immigration.  
8

9                   AVIAC objects to the Federal Defendants’ Motion to Dismiss on the grounds that  
10 the State of Arizona has a constitutional right to resist and challenge the federal  
11 government’s actions on the U.S.-Mexico border. In contrast, Arizona’s actions are a  
12 proper exercise of its authority as a dual sovereign to protect its citizens from the harm  
13 that has been inflicted by illegal and mass migration. Given its interest in strong borders  
14 and the protection of national sovereignty, AVIAC has an interest in ensuring that the  
15 ongoing invasion of illegal aliens ends. It is also concerned about further incursions on  
16 the sovereignty of American citizens by non-citizens.  
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25                   <sup>1</sup> All parties have consented to the filing of this brief by *Amicus*. Pursuant to FED. R. APP. P.  
26 29(a)(4)(E), undersigned counsel certifies that: counsel for the *Amicus* authored this brief in whole; no counsel for  
a party authored this brief in any respect; and no person or entity—other than *Amicus*, its members, and its counsel—  
contributed monetarily to this brief’s preparation or submission.

27                   <sup>2</sup> <https://www.aviac.us/> (viewed December 7, 2022).  
28

## 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 declared an emergency to complete sections of the border barrier and reduce the number of unlawful entries into Arizona. Plaintiff lawfully acted to mitigate the harm that 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 ("USFS") requiring 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.

## ARGUMENTS

### **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” . . . is 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); *see also 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.” 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



1 invasion.<sup>3</sup> U.S. Const. Art. I, §10, cl. 3 (“No State shall, without the Consent of Congress...  
2 engage in War, *unless actually invaded, or in such imminent Danger as will not admit of*  
3 *delay.*”)(Emphasis added). Just such a circumstance here led to Plaintiff’s construction of  
4 sections of the border barrier. Thus, the Invasion Clause and State Self-Defense Clause  
5 provide dual protections against invasion broadly defined and encompass defense against  
6 hostile non-state actors such as cartels and gangs operating at the border and entering into  
7 Arizona.  
8

9  
10 While the federal government “has broad, undoubted [constitutional] power over  
11 the subject of immigration and the status of aliens,” *Arizona v. United States*, 567 U.S.  
12 387, 364 (2012),, the U.S. Supreme Court has never held “that every state enactment  
13 which in any way deals with aliens is a regulation of immigration and thus per se pre-  
14 empted by this constitutional power, whether latent or exercised.” *De Canas v. Bica*, 424  
15 U.S. 351, 355, 96 S. Ct. 933, 47 L. Ed. 2d 43 (1976), *superseded by statute on other*  
16 *grounds.*  
17

18  
19 Justice Scalia noted that this authority, secured via these two constitutional  
20 provisions, is specifically “designed to enable the States to prevent the intrusion of  
21 obnoxious aliens through other States.” *Arizona v. United States*, 567 U.S. 387, 417  
22 (2012) (Scalia, J., dissenting) (citation and quotation marks omitted). “[T]he  
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27 <sup>3</sup> Merriam Webster’s dictionary defines “invade” as “to enter for conquest or plunder, to encroach upon”.  
28 <https://www.merriam-webster.com/dictionary/invade> (last checked December 9, 2022)

1 naturalization power given to Congress [therefore was] not to abrogate States' power to  
2 exclude aliens they did not want, but to vindicate it". *Id.* at 418.

3  
4 Finally, the actions Plaintiff has taken to create a barrier along the border with  
5 Mexico are consistent with the inherent sovereign "power to exclude," *id.* at 417, which  
6 has "long been recognized," *id.*, in international law: "The sovereign may forbid the  
7 entrance of his territory either to foreigners in general, or in particular cases, or to certain  
8 persons... There is nothing in all this, that does not flow from the rights of domain and  
9 sovereignty..." *Id.* (quoting *The Law of Nations*, bk. II, ch. VII, §94, p. 309 (B. Kapossy  
10 & R. Whatmore eds. 2008); *See also id.* (citing I. R. Phillimore, *Commentaries upon*  
11 *International Law*, pt. III, ch. X, p. 233 (1854) ("It is a received maxim of International  
12 Law that, the Government of a State may prohibit the entrance of strangers into the  
13 country"))).

## 14 **II. ARIZONA HAS A DUTY AND THE CONSTITUTIONAL RIGHT TO** 15 **RESIST AND CHALLENGE UNLAWFUL FEDERAL ACTIONS**

16  
17 Arizona has a duty to resist and challenge unlawful federal actions, especially  
18 when used as a cudgel to interfere with its' sovereignty and "compromise the structural  
19 framework of dual sovereignty." *Printz v. United States*, 521 U.S. 898, 918-923 (1997).  
20 ("[T]he power of the President would be subject to reduction, if Congress could act as  
21 effectively without the President as with him, by simply requiring state officers to execute  
22 its laws.")

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24 State sovereignty powers in this context extend "to all the objects which, in the  
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1 ordinary course of affairs, concern the lives, liberties, and properties of the people, and  
2 the internal order, improvement, and prosperity of the State.” *Gregory*, 501 U.S. at 458  
3 (quoting Federalist No. 45, pp. 292-93 (C. Rossiter ed. 1961)). The State of Arizona has  
4 an undisputed interest in the safety of its citizens, the protection of its laws, and the  
5 preservation of its environment.  
6

7 First, the assertion that the federal government has a valid claim is false. Plaintiff’s  
8 Complaint correctly notes that, “NEPA - A.R.S. § 26-303(D) and (E) are not subject to  
9 any such federal regulations (including the federal Administrative Procedures Act) for the  
10 land in question here because, among other reasons: (a) the land is not federal; and (b)  
11 even if it was, the State—and Governor Ducey by virtue of his emergency powers—has  
12 concurrent jurisdiction.” *See Sierra Club v. E.P.A.*, 292 F.3d 895, 899–900 (D.C. Cir.  
13 2002) (“In many if not most cases the petitioner’s standing to seek review of  
14 administrative action is self-evident”). Complaint at 3, *Ducey v. Moore et al*, 2:22-cv-  
15 1814 (D. Ariz. 2022). In 1907, President Roosevelt issued a Presidential Proclamation  
16 that established the reservation in order to keep all public lands along the border in  
17 California, Arizona, and New Mexico “as a protection against the smuggling of goods  
18 between the United States and Mexico”.<sup>4</sup> (emphasis added).. The Federal Government’s  
19 contention that the Roosevelt Reservation is exclusively in the realm of defendant’s  
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27 <sup>4</sup> Nuñez-Neto, Blas; Kim, Yule (2008-05-14). "Border Security: Barriers Along the U.S. International Border" (PDF).  
28 Federation of American Scientists. p. 24

1 control is unconstitutional and exceeds the purpose of a Presidential Proclamation.

2       Second, selective and overzealous use of environmental regulations designed to  
3  
4 undermine a state's sovereignty has routinely been held to be unlawful. "[T]he federal  
5 government may not use its powers to legislate in certain areas to disrupt the actual  
6 operation of state and local government..." *City of N.Y. v. United States*, 179 F.3d 29, 34  
7 (2d Cir. 1999). The action by USFS to demand Arizona go through a long permitting  
8 process in order to determine whether the state may build a barrier is therefore an abuse  
9 of power by the federal government.  
10

11       The irony of the USFS demanding a long application processes, through the guise  
12 of NEPA regulations, defeats its purpose. Illegal aliens continuously trample on the  
13 habitats of native plants and other endangered species. The environmental consequences  
14 of these actions are far more destructive than the construction of a border barrier.<sup>5</sup>  
15

16       Finally, the financial and human cost of the federal government's actions and  
17 inactions have drained the states financially and made life for Arizona's citizens far more  
18 dangerous. Fentanyl, for example, manufactured in both China and now Mexico, is  
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23       <sup>5</sup> In fact, a border wall will achieve many of NEPA's goals: "(a) The Congress, recognizing the profound  
24 impact of man's activity on the interrelations of all components of the natural environment, particularly the profound  
25 influences of population growth, high-density urbanization, industrial expansion, resource exploitation... and  
26 recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare  
27 and development of man, declares that it is the continuing policy of the Federal Government, in cooperation with  
28 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 routinely smuggled into the State of Arizona by the human trafficking and drug cartels.  
2 Former Director of ICE, Tom Homan, stated, “since [Biden] came into office over 13,000  
3 pounds of fentanyl have been seized at the southern border—enough to kill millions of  
4 Americans many times over.” Tom Homan, *Biden’s Open Borders Betrayal*, The Hill  
5 (Aug. 8, 2022, 11:00 AM)), [https://thehill.com/opinion/immigration/3592315-bidens-](https://thehill.com/opinion/immigration/3592315-bidens-open-borders-betrayal/)  
6 [open-borders-betrayal/](https://thehill.com/opinion/immigration/3592315-bidens-open-borders-betrayal/).  
7  
8

9 As a result, the State of Arizona has borne the brunt of increased crime and  
10 skyrocketing financial and healthcare costs, as well as environmental damage. Arizona  
11 has a duty to resist and challenge these unlawful government actions that result in untold  
12 harm to its citizens.  
13

### 14 **III. THE FEDERAL GOVERNMENT’S ACTIONS HAVE INFLECTED HARM** 15 **UPON ARIZONA AND ITS CITIZENS**

16 The unprecedented crisis at the State’s southern border, caused in large part by the  
17 federal government’s actions, has resulted in a massive influx of illegal aliens, drugs, and  
18 crime. In the federal government’s own words, “[t]he last decades have yielded a dramatic  
19 increase in encounters at the [southwest border]” in which “border encounters more than  
20 doubled between 2017 and 2019, and— following a steep drop in the first months of the  
21 COVID-19 pandemic—continued to increase at a similar pace in 2021 and 2022.”  
22 Implementation of a Parole Process for Venezuelans, 87 Fed. Reg. 63507, 63508 (October  
23 19, 2022). The influx of migrants “has been particularly acute in certain border sectors”  
24 in Texas and Arizona, “all of which are at risk of operating, or are currently operating,  
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1 over capacity.” *Id.* at 63510.

2 In fact, the Department of Homeland Security (“DHS”) itself conceded that July  
3 2021 had the highest number of monthly encounters in decades and likely ever.<sup>6</sup> Since  
4 the start of 2022, the monthly number of illegal immigrants apprehended has been  
5 significantly higher and there are no signs of any slowdown. The most recent DHS data,  
6 from September 2022, illustrates the unprecedented nature of the crisis. *See*  
7 [www.DHS.gov/statistics](https://www.dhs.gov/statistics) (last checked December 29, 2022). These numbers do not  
8 account for “got aways,” either. The *Washington Post* summarized the situation in noting  
9 that “[i]mmigration arrests along the U.S. southern border rose in May [2022] to the  
10 highest levels ever recorded [...] CBP made 239,416 arrests along the Mexico border last  
11 month [...] The agency is on pace to exceed 2 million detentions during fiscal 2022.”<sup>7</sup>  
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15 Millions of illegal aliens have unlawfully entered because of the federal  
16 government’s actions, and inactions, that have harmed Arizona and its citizens.  
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18 For the forgoing reasons, the Motion to Dismiss should be denied.  
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26 <sup>6</sup> <https://abcnews.go.com/Politics/cbp-encounters-highest-monthly-number-migrants-attempting-cross/story?id=79240996>

27 <sup>7</sup> <https://www.washingtonpost.com/immigration/2022/06/16/united-states-border-immigration-arrests/>  
28

1 Respectfully submitted, this 30th day of December, 2022.

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1 **CERTIFICATE OF COMPLIANCE**

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4 1. This brief has been prepared using 13-point, proportionately spaced, serif typeface, in

5 Microsoft Word per LRCiv.7.

6 2. This brief complies with FED. R. APP. P. 29(a)(5) and 32(a)(7)(B) because it contains a

7 total of 2,005 words, excluding material not counted under Rule 32(f).

8

9 Dated: December 30, 2022

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12 s/<>

13 Ryan M. Williams,

14 *Counsel for Amicus Curiae Advocates for*

15 *Victims of Illegal Alien Crime*

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