

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*

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

10 Douglas A. Ducey, Governor of the State of
11 Arizona,

12 Plaintiff,

13 v.

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

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

23 Defendants.

24
25 **MEMORANDUM OF LAW AS *AMICUS CURIAE* IN OPPOSITION**
26 **TO FEDERAL DEFENDANTS' MOTION TO DISMISS**
27 **FROM ADVOCATES FOR VICTIMS OF ILLEGAL ALIEN CRIME**
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Lorraine G. Woodwark
By /s/ Lorraine G. Woodwark, Esq.
Attorneys United for a Secure America
25 Massachusetts Avenue NW, Ste 335
Washington, D.C. 20001
(202) 591-0962
(202) 464-3590
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

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

1 **CERTIFICATE OF INTERESTED PERSONS**

2 The case number for this *amicus curiae* brief is No. **2:22-cv-01814-PHX-DGC**,
3 *Douglas A. Ducey v. Randy Moore, et al.*

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

7 Pursuant to the Federal Rule of Procedure, the undersigned counsel of record
8 certifies that the parties’ list of persons and entities having an interest in the outcome of
9 this case is complete, to the best of the undersigned counsel’s knowledge, with the
10 following additions:
11

12 following additions:
13
14 Advocates for Victims of Illegal Alien Crime, *Amicus Curiae*

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

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

17 These representations are made in order that the judge of this court may evaluate possible
18 disqualification or recusal.
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23 Dated: December 30, 2022

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

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1 **IDENTITY, INTEREST AND AUTHORITY TO FILE¹**

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 undocumented immigrants.² AVIAC’s mission includes being a source of support for
6 such victims across the country and a resource for policies that will enforce the nation’s
7 immigration laws and prevent governmental incentives for illegal immigration.
8
9

10 AVIAC objects to Federal Defendants Motion to Dismiss on the grounds that the
11 State of Arizona has a constitutional right to resist and challenge the federal government’s
12 actions on the U.S.-Mexico border, and that Arizona’s actions are a proper exercise of its
13 authority as a dual sovereign to protect it citizens from the harm that has been inflicted
14 by illegal immigration. Given its interest in strong borders and the protection of national
15 sovereignty, AVIAC has an interest in ensuring that the ongoing invasion of illegal
16 immigrants ends and is concerned about further incursions on the sovereignty of
17 American citizens by non-citizens.
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25 ¹ Only Plaintiff has consented to the filing of this brief by *Amicus*. Federal defendants did not provide a position on
26 AVIAC’s motion to leave as of December 30, 2022. Intervenor Defendant Center for Biological Diversity has taken
27 no position on AVIAC’s motion for leave. Pursuant to FED. R. APP. P. 29(a)(4)(E), undersigned counsel certifies
28 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.

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

SUMMARY OF ARGUMENT

1
2 Every state shares dual sovereignty over its borders with the federal government,
3 including the right to expel aliens in the event of an invasion. For decades, inconsistent
4 or nonexistent federal immigration enforcement has led to increased illegal immigration,
5 higher financial costs to the states and resulted in the spread of violent crime, human
6 trafficking and drug use in our local communities.
7

8 The federal government has infringed upon Arizona’s constitutional sovereignty
9 with the unenforceable environmental regulations in dispute here. Arizona has a right and
10 a duty to challenge unlawful federal actions. Governor Douglas A. Ducey (hereinafter,
11 “Plaintiff or “Governor Ducey”) declared an emergency so as to complete sections of the
12 border barrier and reduce the number of unlawful entries into Arizona. Plaintiff acted to
13 mitigate and the harm unregulated immigration creates for its citizens. It is fully within
14 Arizona’s constitutional right to act when the federal government refuses to enforce its
15 immigration laws.
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19 The selective enforcement of federal immigration and environmental laws
20 threatens the principle of dual-sovereignty, as “...the federal government may not use its
21 powers to legislate in certain areas to disrupt the actual operation of state and local
22 government by, for example, regulating the use of state and local resources...” *City of*
23 *N.Y. v. United States*, 179 F.3d 29, 34 (2d Cir. 1999) The action by United States Forest
24 Service (hereinafter, “USFS”) requiring that Arizona submit to a protracted permitting
25 process to determine whether it may or may not build a border barrier is an abuse of power
26 by the federal government. Therefore, Defendants’ Motion to Dismiss should be denied.
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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.³ U.S. Const. Art. I, §10, clause 3 (“[n]o State shall, without the Consent of

³ 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*.
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17 Justice Scalia noted that this authority, secured via these two constitutional
18 provisions, is specifically “designed to enable the States to prevent the intrusion of
19 obnoxious aliens through other States.” *Arizona v. United States*, 567 U.S. 387, 417
20 (2012) (Scalia, J., dissenting) (citation and quotation marks omitted). “[T]he
21 naturalization power given to Congress [therefore was] not to abrogate States’ power to
22 exclude aliens they did not want, but to vindicate it”. *Id.* at 418.
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25 Finally, the actions Plaintiff has taken to create a barrier along the border with
26 Mexico are consistent with the inherent sovereign “power to exclude,” *id.* at 417, which
27 has “long been recognized,” *id.*, in international law: “The sovereign may forbid the
28

1 entrance of his territory either to foreigners in general, or in particular cases, or to certain
2 persons... There is nothing in all this, that does not flow from the rights of domain and
3 sovereignty...” *Id.* (quoting *The Law of Nations*, bk. II, ch. VII, §94, p. 309 (B. Kapossy
4 & R. Whatmore eds. 2008); *See also id.* (citing I. R. Phillimore, *Commentaries upon*
5 *International Law*, pt. III, ch. X, p. 233 (1854) (“It is a received maxim of International
6 Law that, the Government of a State may prohibit the entrance of strangers into the
7 country”)).

9
10 **II. ARIZONA HAS A DUTY AND THE CONSTITUTIONAL RIGHT TO**
11 **RESIST AND CHALLENGE UNLAWFUL FEDERAL ACTIONS**

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

18
19 State sovereignty powers in this context extend “to all the objects which, in the
20 ordinary course of affairs, concern the lives, liberties, and properties of the people, and
21 the internal order, improvement, and prosperity of the State.” *Gregory*, 501 U.S. at 458
22 (quoting *Federalist No. 45*, pp. 292-93 (C. Rossieter ed. 1961)). The State of Arizona has
23 an undisputed interest in the safety of its citizens, the protection of its laws, and the
24 preservation of its environment.
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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*".⁴ (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.
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19 Second, selective and overzealous use of environmental regulations designed to
20 undermine a state's sovereignty has routinely been held to be unlawful. "[T]he federal
21 government may not use its powers to legislate in certain areas to disrupt the actual
22 operation of state and local government..." *City of N.Y. v. United States*, 179 F.3d 29, 34
23 (2d Cir. 1999). The action by USFS to demand Arizona go through a long permitting
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28 ⁴ *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.⁵

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-
16 open-borders-betrayal/](https://thehill.com/opinion/immigration/3592315-bidens-open-borders-betrayal/).

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

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24 ⁵ 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.
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18 In fact, the Department of Homeland Security (“DHS”) itself conceded that July
19 2021 had the highest number of monthly encounters in decades and likely ever.⁶ Since
20 the start of 2022, the monthly number of illegal immigrants apprehended has been
21 significantly higher and there are no signs of any slowdown. The most recent DHS data,
22 from September 2022, illustrates the unprecedented nature of the crisis. *See*
23 www.DHS.gov/statistics (last checked December 30, 2022). These numbers do not
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27 ⁶ [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)
28 [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.”⁷

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.

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

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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
20 m.ryan.williams@gmail.com
21 (602) 740-0321

22 LORRAINE G. WOODWARK, ESQ.
23 Attorneys United for a Secure America (AUSA)
24 25 Massachusetts Avenue NW, Ste 335
25 Washington, D.C. 20001
26 LWoodwark@IRLI.org
27 (202) 591-0962

28 *Counsel for Amicus Curiae*
Advocates for Victims of Illegal Alien Crime (AVIAC)

⁷ <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

CERTIFICATE OF SERVICE

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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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