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9 **UNITED STATES DISTRICT COURT**  
10 **NORTHERN DISTRICT OF CALIFORNIA**  
11 **OAKLAND DIVISION**

12 SIERRA CLUB and SOUTHERN BORDER  
13 COMMUNITIES COALITION,

14 *Plaintiffs,*

15 vs.

16 DONALD J. TRUMP, President of the  
United States, in his official capacity, *et al.*,

17 *Defendants.*

Case no. 4:19-cv-00892-HSG

S.J. Hearing Date: November 20, 2019  
Time: 10:00 A.M.

**BRIEF OF THE BRENNAN CENTER  
FOR JUSTICE AND THE CATO  
INSTITUTE AS AMICI CURIAE IN  
SUPPORT OF PLAINTIFFS' MOTION  
FOR PARTIAL SUMMARY JUDGMENT**

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

4 *Amicus curiae* the Brennan Center for Justice at New York University School of Law  
 5 (“the Brennan Center”) is a not-for-profit, non-partisan think tank and public interest law  
 6 institute that seeks to improve systems of democracy and justice. The Brennan Center’s interest  
 7 in this case stems from an extensive research project it recently conducted on statutory  
 8 emergency powers and the National Emergencies Act (NEA). Based on this research, the  
 9 Brennan Center believes that Proclamation 9844—the President’s emergency declaration  
 10 regarding the southern border—is contrary to the original purpose of the NEA, represents a sharp  
 11 departure from past practice, and, absent judicial intervention, would open the door to  
 12 presidential misuse of dozens of highly potent emergency powers.

13 *Amicus curiae* The Cato Institute (“Cato”) is a nonpartisan public policy research  
 14 foundation that advances individual liberty, free markets, and limited government. Cato’s Robert  
 15 A. Levy Center for Constitutional Studies helps restore the principles of constitutionalism that  
 16 are the foundation of liberty. Toward those ends, Cato conducts conferences and publishes  
 17 books, studies, and the annual *Cato Supreme Court Review*. Cato shares the Brennan Center’s  
 18 interest here. Allowing the president to declare an emergency under the circumstances presented  
 19 in this case would fundamentally upset the Constitution’s balance of power between the  
 20 executive and the legislature.

21 **INTRODUCTION AND SUMMARY OF ARGUMENT**

22 Congress enacted the National Emergencies Act of 1976 (NEA) to rein in presidential use  
 23 of statutory emergency powers. Although Congress purposely omitted a definition of “national  
 24 emergency,” the legislative history makes clear that Congress did not intend for the law to  
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26 <sup>1</sup> No counsel for a party authored this brief in whole or in part, and no person other than  
 27 *amici* and their counsel made a monetary contribution to its preparation or submission. This brief  
 28 has been prepared by a center affiliated with New York University School of Law, but does not  
 purport to present the school’s institutional views, if any.



1 provide an affirmative grant of limitless discretion, and that it expected the limits contained  
2 within specific emergency powers to be scrupulously observed and enforced. Moreover, the  
3 NEA was carefully designed to ensure that presidential actions in this area would remain  
4 subordinate to Congress’s authority. An emergency declaration that attempts to harness an ill-  
5 fitting statutory power for the purpose of flouting Congress’s will on a question of policy, such  
6 as President Trump’s Proclamation 9844, makes a mockery of Congress’s intent in passing the  
7 law.

8 Proclamation 9844 also represents a sharp departure from past practice in implementing  
9 the NEA. Outside of emergency declarations invoking the International Emergency Economic  
10 Powers Act (IEEPA), which must be viewed separately in light of IEEPA’s legislative history  
11 and subsequent congressional actions, presidents have declared national emergencies only a  
12 handful of times in the past 40 years. All of these declarations responded to events that were  
13 sudden and unexpected—thus meeting one of the basic criteria for an “emergency,” under the  
14 term’s plain meaning—and none sought to implement measures for which Congress had  
15 withheld funding. By contrast, official statistics show that there has been no sudden, unexpected  
16 change in immigration patterns at the southern border. More important, the president has openly  
17 acknowledged that his purpose in issuing the declaration was to sidestep Congress, which had  
18 repeatedly refused to provide the funding he requested for a border wall. No president before  
19 now has sought to use emergency powers to circumvent Congress’s explicit will and power of  
20 the purse. Nor has any president been so transparent that he was using emergency powers simply  
21 because he saw them as an expedient way to achieve a policy goal.

22 Allowing the emergency declaration to stand in this case could have far-reaching effects  
23 outside the four corners of this case. It would give a green light to this president and future ones  
24 to use emergency powers as a means of resolving policy disputes with Congress. The Brennan  
25 Center has catalogued 123 such powers, many of which are far more sweeping and susceptible to  
26 abuse than the one President Trump has invoked here. This Court should therefore intervene to  
27 stop this abuse of emergency power and to prevent similar abuses from becoming the norm.

## 28 ARGUMENT

1 **I. Proclamation 9844 Is Contrary to the Congressional Intent Behind the NEA**

2 Plaintiffs argue compellingly that the Defendants cannot meet the criteria contained in 10  
 3 U.S.C. § 2808, the emergency power invoked by Proclamation 9844, for the diversion of military  
 4 construction funds. Pls.’ Notice of Mot. and Mot. for Part. Summ. J. 8-13, ECF No. 210.  
 5 Defendants have argued that the president has total and unreviewable discretion, under both the  
 6 NEA and 10 U.S.C. § 2808, to determine whether an emergency exists that meets the statutory  
 7 criteria. Defs.’ Opp’n to Pls.’ Mot. Prelim. Inj. 22, ECF No. 64. The legislative history of the  
 8 NEA strongly suggests otherwise. It makes clear that the law was enacted to circumscribe the  
 9 president’s use of statutory emergency powers, and it underscores the importance of strictly  
 10 construing those powers’ limits.

11 To understand the purpose of the NEA, it is necessary to briefly summarize the history of  
 12 statutory emergency powers in the United States. Unlike most other countries’ constitutions,<sup>2</sup> the  
 13 U.S. Constitution does not provide the president with any explicit emergency powers. *See*  
 14 *generally* U.S. Const. art. II.<sup>3</sup> Accordingly, from the time of the country’s founding, presidents  
 15 have relied on Congress to provide them with enhanced authorities in emergency situations.  
 16 Throughout the eighteenth and early nineteenth centuries, Congress periodically enacted laws  
 17 giving presidents standby authorities that they could use in their discretion during military,  
 18 economic, or labor crises. *See* Elaine Halchin, Cong. Research Serv., 98-505, *National*  
 19 *Emergency Powers* 1 (2019), <https://tinyurl.com/y3mvekk3>.

20 Beginning in World War I, a new procedure for invoking statutory emergency powers<sup>4</sup>  
 21 evolved. Presidents would declare a national emergency, and this declaration would give them  
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23 <sup>2</sup> A review of current constitutions reveals that at least 178 countries’ constitutions have  
 24 provisions for emergency rule. *See* Constitutions Containing Emergency Provisions, *Constitute*,  
<https://tinyurl.com/y6op33d7> (last visited Apr. 25, 2019).

25 <sup>3</sup> Those powers that could be considered “emergency powers” are given to Congress  
 26 under Article I, such as the power to suspend *habeas corpus*, *see* U.S. Const. art. 1, § 9, cl. 2, and  
 27 to call forth “the Militia” to “suppress Insurrections and repel Invasions.” U.S. Const. art. 1, § 8,  
 28 cl. 15.

<sup>4</sup> Starting with the Civil War, claims of “inherent” emergency powers under Article II of  
 the Constitution became more common, and served as the basis for several extraordinary  
 exercises of emergency power in the twentieth century—including President Franklin Delano

1 access to statutory authorities that would otherwise lie dormant. *See Halchin, supra*, at 1. This  
2 system continues to this day. Before the enactment of the NEA, however, there was no  
3 overarching statute regulating it. *See id.* There was little transparency or congressional oversight  
4 with respect to the presidents' use of emergency powers, and nothing to prevent states of  
5 emergency from lingering indefinitely.

6 In the 1970s, several scandals involving executive branch overreach—including  
7 Watergate, the bombing of Cambodia, and domestic spying by the CIA—prompted Congress to  
8 investigate the exercise of executive power in national security matters, and to enact several laws  
9 aimed at reasserting Congress's role as a coequal branch of government and a check on  
10 executive authority. *See generally* Thomas E. Cronin, *A Resurgent Congress and the Imperial*  
11 *Presidency*, 95 Pol. Sci. Q. 209 (1980). It was in this context that a special Senate committee,  
12 which eventually came to be named the Special Committee on National Emergencies and  
13 Delegated Emergency Powers, was formed to examine presidential use of emergency powers.  
14 *See* S. Res. 242, 93<sup>rd</sup> Cong. (1974); Halchin, *supra*, at 7-8.

15 The immediate impetus for the committee's formation was Republican Senator Charles  
16 Mathias's discovery that an emergency declaration issued in 1950, at the start of the Korean  
17 War, was still in place and was being used to prosecute the war in Vietnam. *See Halchin, supra*,  
18 at 17. On closer examination, the committee learned that four clearly outdated states of  
19 emergency—issued in 1933, 1950, 1970, and 1971—were still in effect. *See id.* at 7. As Senator  
20 Church stated: "few, if any, foresaw that [these] temporary states of emergency . . . would

21  
22 Roosevelt's internment of Japanese Americans during World War II, *see Korematsu v. United*  
23 *States*, 323 U.S. 214 (1944), President Harry Truman's seizure of steel mills during the Korean  
24 War, *see Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), and President George  
25 W. Bush's programs of warrantless wiretapping, *see* Alberto R. Gonzalez, Attorney General,  
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28 Memorandum from Jay Bybee, Assistant Attorney General, Office of Legal Counsel, to Alberto  
R. Gonzalez, Counsel to the President, Re: Standards of Conduct for Interrogation under 18  
U.S.C. §§ 2340-2340A (Aug. 1, 2002), <https://tinyurl.com/y39bhwbw>, after the attacks of 9/11.  
Yet even as claims of inherent emergency authority gained traction, legislative grants of  
emergency power continued to multiply. *See* Saikrishna Prakash, *The Imbecilic Executive*, 99  
Va. L. Rev. 1391, 1367-68, 1425 (2013).

1 become what are now regarded collectively as virtual permanent states of emergency.” 120  
2 Cong. Rec. S. 15784-86 (daily ed. Aug. 22, 1974) (statement of Sen. Church), *reprinted in S.*  
3 *Comm. on Government Operations and the Spec. Comm. on National Emergencies and*  
4 *Delegated Emergency Powers, The National Emergencies Act (Public Law 94-412), Source*  
5 *Book: Legislative History, Text, and Other Documents*, at 73 (1976) [hereinafter *Spec. Comm. on*  
6 *National Emergencies Source Book*]. One House Report examining the issue observed:

7 [T]here has been an emergency in one form or another for the last 43 years. ...  
8 The history of continued and almost routine utilization of such emergency  
9 authorities for years after the original crisis has passed ... serves only to  
10 emphasize the fact that there is an urgent need to provide adequate laws to meet  
our present day needs. Legislation intended for use in crisis situations is by its  
nature not well suited to normal, day-to-day government operations.

11 121 Cong. Rec. H.R. H8325-H8341 (daily ed. Sept. 4, 1972) (statement of Rep. Rodino),  
12 *reprinted in Spec. Comm. on National Emergencies Source Book, supra*, at 244.

13 Even more alarming to the committee were the nature and scope of the powers a  
14 president could exercise upon issuing an emergency declaration. The committee counted more  
15 than 470 statutory provisions that delegated extraordinary authority to the executive branch in  
16 times of national emergency. These included provisions allowing a president “to seize property  
17 and commodities, organize and control the means of production, call to active duty 2.5 million  
18 reservists, assign military forces abroad, seize and control all means of transportation and  
19 communication, restrict travel, and institute martial law, and, in many other ways, manage every  
20 aspect of the lives of all American citizens.” S. Rep. No. 93-1170 (1974), *reprinted in Spec.*  
21 *Comm. on National Emergencies Source Book, supra*, at 20.

22 The committee’s work culminated in the introduction and passage of the National  
23 Emergencies Act of 1976, which took effect in 1978. *See National Emergencies Act, Pub. L. No.*  
24 *94-412, 90 Stat. 1255 (1976)*. The purpose of the law, evident in every facet of the legislative  
25 history, was to place limits on presidential use of emergency powers. As summarized by the  
26 committee in urging passage of the Act:

27 While much work remains, none of it is more important than passage of the  
28 National Emergencies Act. Right now, hundreds of emergency statutes confer

1 enough authority on the President to rule the country without reference to normal  
2 constitutional process. Revelations of how power has been abused by high  
3 government officials must give rise to concern about the potential exercise,  
4 unchecked by the Congress or the American people, of this extraordinary power.  
5 The National Emergencies Act would end this threat and insure that the powers  
6 now in the hands of the Executive will be utilized only in time of genuine  
7 emergency and then only under safeguards providing for Congressional review.

8 *Spec. Comm. on National Emergencies Source Book, supra*, at 50. The law employed various  
9 mechanisms to this end.<sup>5</sup> There were several provisions intended to increase transparency and  
10 facilitate congressional oversight with respect to the presidents' use of emergency powers. These  
11 included requirements for the president to transmit declarations of national emergency to  
12 Congress and publish them in the Federal Register, *see* National Emergencies Act, Pub. L. No.  
13 94-412, § 201, 90 Stat. 1255 (codified at 50 U.S.C. § 1621); to specify in the declaration the  
14 specific powers he intended to invoke, and to issue updates via published executive order where  
15 necessary, *see* 50 U.S.C. § 1631; to transmit to Congress any orders, rules, or regulations issued  
16 pursuant to an emergency declaration, *see* 50 U.S.C. § 1621; and to report to Congress every six  
17 months on expenditures incurred by the government attributable to the exercise of emergency  
18 powers, *see* 50 U.S.C. § 1641(c).

19 The NEA also included provisions designed to prevent states of emergency from  
20 becoming permanent, and to give Congress a stronger and more active role in deciding whether  
21 states of emergency should continue. In particular, the law provided that states of emergency  
22 would terminate after a year unless renewed by the president, *see* 50 U.S.C. § 1622(d); it *allowed*  
23 Congress to terminate states of emergency at any time through a concurrent resolution  
24 (commonly referred to as a "legislative veto" because it would take effect without the president's  
25 signature), *see* National Emergencies Act, Pub. L. No. 94-412, § 202, 90 Stat. 1255 (codified as  
26 amended at 50 U.S.C. § 1622); and it *required* both houses of Congress to meet every six months  
27 while an emergency declaration was in effect to "consider a vote" on whether to end the  
28 emergency, *see* 50 U.S.C. § 1622(b).

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<sup>5</sup> In addition to regulating future emergency declarations, the NEA returned emergency powers then active to dormancy after two years. *See Halchin, supra*, at 11.

1 As enacted, the law did not include a definition of “national emergency.” Critically,  
2 however, this omission was not intended as a grant of unlimited discretion. Under an earlier draft  
3 of the legislation, the president was authorized to declare a national emergency “[i]n the event  
4 the President finds that a proclamation of a national emergency is essential to the preservation,  
5 protection and defense of the Constitution or to the common defense, safety, or well-being of the  
6 territory or people of the United States.” S. 977, 94th Cong. § 201 (a) (1975). One committee  
7 report noted that this definition was “deliberately cast in broad terms that makes it clear that a  
8 proclamation of a state of national emergency requires a grave national crisis.” *Spec. Comm. on*  
9 *National Emergencies Source Book, supra*, at 96.

10 The Senate Committee on Government Operations removed this language, not because it  
11 was too limiting, but because the committee believed it to be too broad. As stated in the  
12 committee’s report:

13 [F]ollowing consultations with several constitutional law experts, the committee  
14 concluded that section 201(a) is overly broad, and might be construed to delegate  
15 additional authority to the President with respect to declarations of national  
16 emergency. In the judgment of the committee, the language of this provision was  
17 unclear and ambiguous and might have been construed to confer upon the  
18 President statutory authority to declare national emergencies, other than that  
19 which he now has through various statutory delegations.

20 The Committee amendment clarifies and narrows this language. The Committee  
21 decided that the definition of when a President is authorized to declare a national  
22 emergency should be left to the various statutes which give him extraordinary  
23 powers. The National Emergencies Act is not intended to enlarge or add to  
24 Executive power. Rather the statute is an effort by the Congress to establish clear  
25 procedures and safeguards for the exercise by the President of emergency powers  
26 conferred upon him by other statutes.

27 S. Rep. No. 94-1168, at 3 (1976), *reprinted in Spec. Comm. on National Emergencies Source*  
28 *Book, supra*, at 292. The committee’s solution ultimately proved to be flawed, as the majority of  
the statutes in place today that confer power on the president during “national emergencies” do  
not include definitions of the term or criteria that must be met beyond the issuance of the  
declaration. *See A Guide to Emergency Powers and Their Use*, Brennan Ctr. (Jan. 23, 2019),  
<https://tinyurl.com/y78jkjvp>. It is nonetheless significant that Congress believed that even a

1 definition limiting national emergencies to grave national crises would be “overly broad.” The  
2 notion that Congress intended the NEA as an affirmative delegation of unlimited discretion to the  
3 president—one that would allow the president to circumvent the will of Congress on specific  
4 policy proposals—is contradicted by this and every other aspect of the legislative history.

5 Moreover, where statutes granting emergency powers *do* include criteria beyond the mere  
6 declaration of an emergency, this legislative history underscores the importance of strictly  
7 interpreting and enforcing those limitations. In the current case, President Trump has invoked a  
8 statutory provision that provides authorization and funding for military construction projects  
9 only during emergencies that “require the use of the armed forces,” 10 U.S.C. § 2808(a), and  
10 only if the projects “are necessary to support such use of the armed forces,” *id.*, and meet the  
11 statutory definition of “military construction,” 10 U.S.C. § 2801(a). In passing the NEA,  
12 Congress clearly intended for criteria like these to provide meaningful and enforceable checks on  
13 the president’s authority to issue emergency declarations.

## 14 **II. Proclamation 9844 Is Unprecedented in the History of National Emergencies Act** 15 **Implementation**

16 In practice, the NEA has not proven to be the strong check Congress intended.  
17 Nonetheless, outside the unique context of emergency declarations invoking the International  
18 Emergency Economic Powers Act (IEEPA), past presidential use of emergency powers has been  
19 relatively restrained. A review of the law’s exercise from 1978 to the present shows that  
20 Proclamation 9844 is unprecedented, both in the absence of any arguable emergency and in the  
21 declaration’s underlying purpose: to sidestep a Congress that would not bend to the president’s  
22 will.

23 The NEA’s effectiveness was undermined by the Supreme Court’s 1983 ruling that  
24 concurrent resolutions are unconstitutional. *See I.N.S. v. Chadha*, 462 U.S. 919, 954-55 (1983).  
25 Congress responded to the decision by substituting a joint resolution as the mechanism for  
26 terminating emergencies. *See* 50 U.S.C. § 1622(a)(1). Like any other legislation, a joint  
27 resolution must be signed into law by the president, and if the president vetoes the resolution,  
28

1 Congress can override the veto only with a two-thirds vote by both houses. This change greatly  
2 diluted the role of Congress as envisioned in the original Act.<sup>6</sup>

3 In addition, Congress has essentially ignored the NEA's requirement to meet every six  
4 months while an emergency is in place and consider a vote on whether to end the emergency.  
5 States of emergency have existed throughout the 40-plus years the law has been in effect, *see*  
6 *Declared National Emergencies Under the National Emergencies Act*, Brennan Ctr. (Feb. 4,  
7 2019), <https://tinyurl.com/yy3betsb>, which means Congress should have met approximately 80  
8 times to review them. There is no indication, however, that Congress has ever previously done  
9 so.<sup>7</sup> Before this emergency declaration, only one resolution to end a state of emergency had ever  
10 been introduced, and the emergency declaration at issue was revoked before Congress could vote  
11 on it. *See* Tamara Keith, *If Trump Declares an Emergency to Build the Wall, Congress Can*  
12 *Block Him*, N.P.R. (Feb. 11, 2019), <https://tinyurl.com/y4vobv6m>.

13 The NEA has thus proven weaker in implementation than in concept. Nonetheless, it has  
14 never previously been treated as a license for presidents to invoke emergency powers literally at  
15 will—or to do so against the express wishes of Congress. Indeed, presidents have shown  
16 considerable restraint in their exercise of statutory emergency powers. According to the Brennan  
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18 <sup>6</sup> The effect of this change is starkly illustrated by the current controversy. A joint  
19 resolution to terminate Proclamation 9844 passed the House by a vote of 245 to 182 on February  
20 26, *see* 165 Cong. Rec. H.R. H2105 (daily ed. Feb. 26, 2019), and passed the Senate by a vote of  
21 59 to 41 on March 14, *see* 165 Cong. Rec. S1856 (daily ed. Mar. 14, 2019). Under the original  
22 NEA procedure, that would have been sufficient to terminate the emergency. However, under the  
23 revised legislation it went to the President's desk, and he vetoed it. *See* Donald J. Trump, *Veto*  
24 *Message to the House of Representatives for H.J. Res. 46*, White House (Mar. 15, 2019),  
25 <https://tinyurl.com/y6mlsn76>. When it returned to the House for a veto override vote, it failed to  
26 muster the necessary two-thirds majority. *See* 165 Cong. Rec. H2814 (daily ed. Mar. 26, 2019).  
27 A second resolution to terminate Proclamation 9844—this one starting in the Senate—again  
28 recently passed both chambers of Congress with bipartisan majorities, only to be vetoed. Emily  
Cochrane, *Trump Again Vetoes Measure to End National Emergency*, N.Y. Times, (Oct. 15,  
2019), <https://tinyurl.com/y3zypkq8>. A Senate attempt to override the veto on October 17, 2019  
failed.

<sup>7</sup> On one occasion in 1980, the Chair of the House Foreign Affairs Committee sent a  
letter to the Speaker of the House expressing approval over the continuation of an existing state  
of emergency. *See* Patrick A. Thronson, *Toward Comprehensive Reform of America's*  
*Emergency Law Regime*, 46:2 U. Mich. J.L. Reform, 737, 752, 752 n. 108 (2012). This,  
apparently, is the closest Congress has come before now to considering a vote.



1 Center’s research, nearly 70% of the authorities available to the president when he declares a  
2 national emergency remain unused more than 40 years after the NEA took effect. *See A Guide to*  
3 *Emergency Powers, supra*; Elizabeth Goitein, *Trump’s Hidden Powers*, Brennan Ctr. (Dec. 5,  
4 2018), <https://tinyurl.com/y5484ngl>. Although presidents have declared national emergencies 60  
5 times during that period, 54 of those have been invoked for the sole or primary purpose of  
6 imposing foreign economic sanctions under IEEPA and related legislation. *See Declared*  
7 *National Emergencies Under the National Emergencies Act, supra*. These cases constitute a  
8 category unto themselves and must be addressed separately.

9 Congress enacted IEEPA in 1977 to limit the powers conferred by the 1917 Trading With  
10 the Enemy Act (TWEA). It was Congress’s sense that the TWEA, which gave presidents broad  
11 authority to “investigate, regulate ... prevent or prohibit ... transactions” in times of war or  
12 declared emergency, Trading With the Enemy Act, Pub. L. No.65-91, ch. 106 § 5(b)(1), 40 Stat.  
13 415 (1917) (codified as amended at 50 U.S.C. § 4305(b)(1)), had been improperly used to  
14 regulate domestic economic activity during peacetime. IEEPA thus limited the use of TWEA to  
15 wartime and created a new framework for peacetime emergencies. *See* Laura K. Donohue,  
16 *Constitutional and Legal Challenges to the Anti-Terrorist Financing Regime*, 43 Wake Forest L.  
17 Rev. 643, 647-48 (2008). Under that framework, presidents could declare a national emergency  
18 based on an “unusual and extraordinary threat” to the U.S. national security, foreign policy, or  
19 economy “which has its source in whole or substantial part outside the United States.”

20 International Emergency Economic Powers Act, Pub. L. No. 95-223, tit. II, § 202, 91 Stat. 1626  
21 (1977) codified at 50 U.S.C. §1701 (b). The president could then authorize a range of economic  
22 actions to address this foreign threat.

23 Despite being tied to the mechanism of national emergency declarations, and despite the  
24 requirement of an “unusual and extraordinary threat,” IEEPA has been used almost from the  
25 outset as a basic tool of foreign policy. Presidents issue declarations under IEEPA in situations  
26 where imposing sanctions on foreign actors would advance U.S. interests, regardless of whether  
27 the threat to those interests is truly “unusual and extraordinary.” *See* Harold Hongju Koh, *The*  
28 *National Security Constitution: Sharing Power After the Iran-Contra Affair* 47 (Yale U. Press

1 1990).<sup>8</sup> IEEPA declarations create sanctions regimes that often become—and are intended to  
2 become—semi-permanent in nature. IEEPA thus underlies current U.S. economic policies  
3 toward governments or factions in Iran, Sudan, the Balkans, Zimbabwe, Iraq, Syria, Belarus, the  
4 Democratic Republic of the Congo, the Central African Republic, Burundi, Lebanon, North  
5 Korea, Venezuela, Somalia, Libya, Yemen, and Ukraine. *See Declared National Emergencies,*  
6 *supra.*

7 While the routinization of IEEPA use might seem incompatible with the congressional  
8 intent underlying the NEA, Congress has for decades acquiesced in the use of IEEPA as a  
9 substitute for ordinary sanctions legislation. Indeed, there is some evidence that Congress, in  
10 passing IEEPA, expected that it would be used to fill gaps in non-emergency legislative regimes.  
11 Presidents had previously invoked a provision of the TWEA to impose controls over certain  
12 types of exports when export-control legislation—the Export Administration Act—had lapsed.  
13 Congress imported the relevant language from the TWEA into IEEPA, and the legislative history  
14 shows that Congress anticipated it could be used in the same way if the Export Administration  
15 Act were to lapse again in the future. *See* Joel B. Harris and Jeffrey P. Bialos, *The Strange New*  
16 *World of United States Export Controls Under the International Emergency Powers Act*, 18  
17 *Vand. J. Transnat'l L.* 78, 78 n. 16 (1985). That, indeed, is what happened in 1983. *See* Exec.  
18 Order No. 12444, 48 Fed. Reg. 48215 (Oct. 14, 1983). Both the NEA and IEEPA have  
19 subsequently been amended without Congress acting to modify this aspect of presidents' use of  
20 IEEPA. *See, e.g.*, Pub. L. No. 99-93, § 801, 99 Stat. 407, 448 (1985); Omnibus Trade and  
21 Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107, 1371 (1988); Department of  
22

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23 <sup>8</sup> The White House itself has acknowledged this dynamic. After President Obama  
24 declared a national emergency to impose sanctions on Venezuela in 2015, the White House  
25 hastened to reassure the public that there was, in fact, no threat to U.S. national security, despite  
26 the executive order's words to the contrary. “[T]he United States does not believe that Venezuela  
27 poses some threat to our national security,” said Deputy National Security Adviser Ben Rhodes.  
28 “We, frankly, just have a framework for how we formalize these executive orders.” Gregory  
Korte, *White House: States of emergency are just formalities*, USA Today (April 9, 2015),  
<https://tinyurl.com/y4crdfmk>. State Department spokesperson Jen Psaki echoed his remarks:  
“This is how we describe the process of naming sanctions, and there are 20 to 30 other sanctions  
programs we have.” *Id.*

1 Defense Appropriations Act, Pub. L. No. 102-396, 106 Stat. 1876 (1992); USA PATRIOT Act of  
 2 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001); International Emergency Economic Powers  
 3 Enhancement Act, Pub. L. No. 110-96, 121 Stat. 1011 (2007).

4 If IEEPA declarations are set aside, the picture looks very different. Declarations of  
 5 national emergency not relying on IEEPA have been few and far between. A complete list of  
 6 such declarations prior to Proclamation 9844 includes:

- 7 • Executive Order 12722 (1990) – issued in response to the Iraqi invasion of Kuwait.  
 8 Although the emergency was initially declared for the purpose of imposing sanctions  
 9 under IEEPA, President George H.W. Bush subsequently relied on it to bolster military  
 10 strength and to engage in military construction during the Gulf War. *See* Exec. Order.  
 11 12722, 55 Fed. Reg. 31803 (Aug. 3, 1990); *A Guide to Emergency Powers, supra*.
- 12 • Proclamation 6491 (1992)<sup>9</sup> – issued in response to Hurricanes Andrew and Iniki. The  
 13 declaration was used to suspend minimum wage requirements with respect to  
 14 reconstruction efforts in areas devastated by the hurricanes. *See* Proc. No. 6491, 57 Fed.  
 15 Reg. 47553 (Oct. 14, 1992); *A Guide to Emergency Powers, supra*.
- 16 • Proclamation 6867 (1996) – issued in response to deadly Cuban attacks on U.S. civilian  
 17 aircraft. The declaration was used to impose a naval blockade on Cuba. *See* Proc. No.  
 18 6867, 61 Fed. Reg. 8843 (Mar. 1, 1996); *A Guide to Emergency Powers, supra*.
- 19 • Proclamation 7463 (2001) – issued in response to the attacks of 9/11. The declaration was  
 20 used primarily to make changes in the size and composition of the military forces,  
 21 including calling reservists to active duty and implementing stop-loss policies. *See* Proc.  
 22 No. 7463, 66 Fed. Reg. 48199 (Sept. 14, 2001); *A Guide to Emergency Powers, supra*.
- 23 • Proclamation 7924 (2006) – issued in response to Hurricane Katrina. The declaration was  
 24 used to suspend minimum wage requirements with respect to reconstruction efforts in

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25 <sup>9</sup> Although the proclamation stated that the hurricanes constituted a “national emergency”  
 26 and invoked emergency powers, it did not formally declare an emergency under the National  
 27 Emergencies Act. Accordingly, this proclamation is not included in the list of national  
 28 emergency declarations compiled and published by the Brennan Center. *See Declared National  
 Emergencies, supra*. It is referenced in this brief to present a complete picture of how powers  
 available during national emergencies have been used.

1 areas devastated by the hurricane. *See* Proc. No. 7924, 70 Fed. Reg. 54225 (Sept. 8,  
2 2005); *A Guide to Emergency Powers, supra*.

- 3 • Proclamation 8443 (2009) – issued in response to the swine flu epidemic. The declaration  
4 was used to waive certain legal requirements in order to facilitate the provision of public  
5 health services. *See* Proc. No. 8443, 74 Fed. Reg. 55439 (Oct. 23, 2009); *A Guide to*  
6 *Emergency Powers, supra*.

7 Each of these proclamations responded to events or circumstances that would qualify as  
8 an “emergency” under the plain meaning of that word; *i.e.*, there was a sudden, unexpected turn  
9 of events that at least arguably required immediate action. *See, e.g., Emergency Definition,*  
10 *Merriam-Webster Online Dictionary*, <https://tinyurl.com/yxw5fncq> (last visited Apr. 25, 2019)  
11 (defining “emergency” as “an unforeseen combination of circumstances or the resulting state that  
12 calls for immediate action”); *Emergency Definition, English Oxford Living Dictionaries,*  
13 <https://tinyurl.com/y5g2pwq7> (last visited Apr. 25, 2019) (defining “emergency” as “[a] serious,  
14 unexpected, and often dangerous situation requiring immediate action”). Moreover, with the  
15 exception of Iraq’s invasion of Kuwait, which prompted an emergency declaration for the initial  
16 purpose of imposing sanctions under IEEPA, these occurrences directly and significantly  
17 affected Americans’ health or safety. Perhaps most significantly, in none of these cases did  
18 presidents invoke emergency powers to take action after Congress had explicitly considered and  
19 rejected legislation to authorize such action.

20 Proclamation 9844 is thus unprecedented in two respects. First, the problem it seeks to  
21 address cannot reasonably be described as an “emergency.” At the time President Trump issued  
22 the declaration, there had been no sudden, unexpected change in illegal immigration at the  
23 southern border. According to official government data, illegal border crossings in 2017 reached  
24 their lowest point in 46 years; they remained close to that historic low, and well within the  
25 fluctuation range for the past several years, in 2018. *See* Lori Robertson, *Illegal Immigration*  
26 *Statistics*, FactCheck.Org, (Jan. 9, 2019), <https://tinyurl.com/ybn5mr7s>; John Burnett, *Arrests for*  
27 *Illegal Border Crossings Hit 46-Year Low*, NPR (Dec. 5, 2017, 11:10 AM),  
28 <https://tinyurl.com/y84xapfl>. Nor had there been any significant, unexpected changes in patterns

1 of crime or drug smuggling.<sup>10</sup> Indeed, the only change in circumstances the president was able to  
 2 identify in his proclamation is an increase in families seeking asylum at the border. *See* Proc. No.  
 3 9844, 84 Fed. Reg. 4949 (Feb. 15, 2019). This change, however, is not evidence of “unlawful  
 4 migration”—the crisis identified in the proclamation—as these families are seeking admission to  
 5 the United States through lawful means.

6 Moreover, it is clear from President Trump’s own words and conduct that he did not  
 7 believe the situation at the southern border required “immediate action.” For the first two years  
 8 of his administration, he accepted Congress’s decision not to provide \$5.7 billion in border wall  
 9 funding with little pushback. He first hinted that he might declare a national emergency in early  
 10 January 2019, *see* Jane C. Timm, *Fact check: What’s a ‘national emergency’ and can Trump*  
 11 *declare one to get his wall?*, NBC News (Jan. 4, 2019), <https://tinyurl.com/ycxmurfj>, yet he  
 12 waited a full six weeks before declaring it. When he announced the declaration, he explicitly  
 13 stated that quick action was not a necessity in this case, just a personal preference: “I could do  
 14 the wall over a longer period of time. I didn’t need to do this. But I’d rather do it much faster.”  
 15 *Remarks by President Trump on the National Security and Humanitarian Crisis on our Southern*  
 16 *Border*, White House (Feb. 15, 2019), <https://tinyurl.com/y3jenqeu>. Even after the president  
 17 declared the emergency, his administration waited almost seven months before identifying  
 18 sources of 10 U.S.C. § 2808 funds it intended to use.<sup>11</sup>

19 \_\_\_\_\_  
 20 <sup>10</sup> Statistically, immigrants—both documented and undocumented—remain less likely to  
 21 commit crimes, including violent crimes, than U.S. citizens. *See, e.g.*, Alex Nowrasteh, *The*  
 22 *Murder of Mollie Tibbetts and Illegal Immigrant Crime: The Facts*, Cato Institute (Aug. 22  
 23 2018), <https://tinyurl.com/y5boc9me> (observing that “[t]he illegal immigrant conviction rate for  
 24 homicide was 44 percent *below* that of native-born Americans in 2016 in Texas”) (emphasis in  
 25 original). Similarly, official reports indicate that the drugs President Trump has identified as  
 26 posing a threat to the U.S.—methamphetamine, heroin, cocaine, and fentanyl—continue to be  
 27 smuggled primarily through ports of entry, as they have in the past. *See CBP Enforcement*  
 28 *Statistics FY2018*, U.S. Customs and Border Protection, <https://tinyurl.com/y9c4c6ft> (showing  
 that, between October 2017 and August 2018, federal agents seized 88 percent of cocaine, 90  
 percent of heroin, 87 percent of methamphetamine, and 80 percent of fentanyl at ports of entry).

<sup>11</sup> President Trump declared the national emergency through Proclamation 9844 on  
 February 15, 2019, but the Department of Defense did not identify how it intended to use the 10  
 U.S.C. §2808 funds, nor what projects it would draw those funds from, until September 5, 2019.  
 Defs.’ Suppl. to Notice of Decis. by the Dep’t of Def. to Auth. Border Barrier Projects Pursuant  
 to 10 U.S.C. § 2808, ECF No. 202.

1           Second, no previous president has invoked emergency powers to take an action for which  
2 Congress had explicitly withheld its consent.<sup>12</sup> Here, President Trump for two years sought  
3 funding from Congress to build a wall along the southern border, and Congress consistently  
4 refused to provide it. Indeed, Congress voted repeatedly not to give the president the authority  
5 and funds that he requested.<sup>13</sup>

6           The President has been quite forthright that his purpose in declaring an emergency was to  
7 get around Congress. In the weeks leading up to the declaration, he repeatedly stated that he  
8 would give Congress time to change its mind about funding the wall, and that he would declare  
9 an emergency only if Congress refused to give him what he wanted. On January 10, President  
10 Trump stated his preference for “do[ing] the deal through Congress,” but he added that if the  
11 deal did not “work out,” he would “almost ... definitely” declare a national emergency. *Remarks*  
12 *by President Trump Before Marine One Departure*, White House (Jan. 10, 2019),  
13 <https://tinyurl.com/yycw5dk>. Asked about his threshold for declaring an emergency, President  
14 Trump responded, “My threshold will be if I can’t make a deal with people that are  
15 unreasonable.” George Sargent, *Trump: I have the ‘Absolute Right’ to Declare a National*  
16 *Emergency if Democrats Defy Me*, Wash. Post (Jan. 9, 2019), <https://tinyurl.com/y5f5eqwg>. On  
17 February 1, Trump reiterated that he was planning to wait until February 15, the date on which a  
18 temporary appropriations measure would lapse, before issuing an emergency declaration. *See*  
19 *Excerpts from Trump’s Interview with the New York Times*, N.Y. Times, (Feb. 1, 2019),  
20 <https://tinyurl.com/y9gsosk4>; see also *Transcript: President Trump on “Face the Nation,”* CBS

21           <sup>12</sup> The closest comparison is President Ronald Reagan’s emergency declaration in 1983,  
22 which he used to continue certain export controls under IEEPA after a statute authorizing such  
23 controls had lapsed. *See* Exec. Order No. 12444, 48 Fed. Reg. 48215 (Oct. 14, 1983). As noted  
24 above, however, the legislative history of IEEPA indicates Congress’s awareness that presidents  
25 would be able to use IEEPA for that very purpose. *See supra* pp. 10-11. Importantly, that was not  
26 a case in which Congress voted to deny the president authority or funding for the very action he  
27 then attempted to take.

28           <sup>13</sup> Over the course of nearly a year of negotiations, Congress repeatedly declined to  
allocate \$5.7 billion for the border wall, and never passed a bill allocating more than \$1.6 billion  
for fencing. *See, e.g.*, Department of Defense Appropriations Act, 2018, H.R. 695, 115th Cong.  
(2017) (failed in conference after an amendment adding \$5.7 billion in border wall funding  
passed the House); End the Shutdown and Secure the Border Act, S.Amdt. 5 to Supplemental  
Appropriations Act, 2019, H.R. 268, 115th Cong. (2019).

1 News, (Feb. 3, 2019), <https://tinyurl.com/y8l38g72>. He predicted that “we will be looking at a  
2 national emergency, because I don’t think anything is going to happen [in Congress]. I think the  
3 Democrats don’t want border security.” *Remarks by President Trump in Meeting on Human*  
4 *Trafficking on the Southern Border*, White House (Feb. 1, 2019), <https://tinyurl.com/y5ghp3eh>.

5 This clear intent to circumvent Congress differentiates Proclamation 9844 from any  
6 declaration that precedes it. Using emergency powers for this purpose is thus contrary, not only  
7 to Congress’s intent in enacting the NEA, but also to 40 years of post-enactment practice.

### 8 **III. Upholding Proclamation 9844 Would Create a Dangerous Precedent**

9 If allowed to stand, President Trump’s emergency declaration would create an  
10 extraordinarily dangerous precedent. In the future, presidents would know that they could invoke  
11 emergency powers to address even chronic or routine problems, and that they could use those  
12 powers to take actions for which Congress has expressly withheld consent. In other words, where  
13 emergency powers exist that could resolve a policy dispute with Congress, there would be  
14 nothing to stop a president from deploying them, and it would require a veto-proof majority of  
15 Congress to put an end to the contested policy. This would fundamentally upset the balance of  
16 power between the president and Congress. It would also undermine one of the basic principles  
17 of democracy: that the policies pursued by our government are those approved by a majority of  
18 Congress, not those that Congress cannot muster a supermajority to reject.

19 Moreover, the next time a president decides to declare an emergency for political reasons,  
20 he or she could invoke powers far more potent than the one that President Trump has invoked  
21 here. The Brennan Center has catalogued 123 statutory provisions that become available to  
22 presidents when they declare a national emergency. Ninety-six of these require nothing more  
23 than the president’s signature. Twelve contain a *de minimis* restriction, such as a requirement that  
24 an agency head certify the necessity of the measure (something the president could simply order  
25 the agency head to do). Only fifteen of these powers contain a more substantive restriction, such  
26 as a requirement that the emergency have certain specified effects. *See Goitein, Trump’s Hidden*  
27 *Powers, supra; A Guide to Emergency Powers, supra.*

1 While some of these powers are narrowly crafted, others are sweeping, and their  
2 invocation as a means of short-circuiting Congress could have profound consequences. Simply  
3 by signing a declaration of national emergency, for instance, the president can take over or shut  
4 down radio stations. *See* 47 U.S.C. § 606(c). If he goes further and declares a mere “threat” of  
5 war, he can take over or shut down facilities for wire communication, *see* 47 U.S.C. § 606(d)—  
6 including, according to some policymakers’ interpretation, facilities for Internet traffic inside the  
7 U.S. *See* David W. Opperbeck, *Does the Communications Act of 1934 Contain a Hidden Internet*  
8 *Kill Switch?*, 65 Fed. Comm. L.J. 1, 3-6 (2013). This power was last exercised during World  
9 War II, when electronic communications were still at a primitive stage. *See* Elizabeth Goitein,  
10 *The Alarming Scope of the President’s Emergency Powers*, Atlantic, Jan./Feb. 2019, at 39, 42. It  
11 would be infinitely more potent if deployed today—perhaps to implement cybersecurity or  
12 electronic surveillance policies that Congress refuses to endorse.

13 Another emergency power allows the president to detail any member of the U.S. armed  
14 forces to “any . . . country that he considers it advisable to assist in the interest of national  
15 defense.” 10 U.S.C. § 712(a)(3). This power has not been exercised during the 40 years the NEA  
16 has been in effect. Yet this has also been a period of congressional acquiescence in executive  
17 branch deployments of the military. *See* Louis Fisher, *Congressional Abdication: War and*  
18 *Spending Powers*, 43 St. Louis U. L.J. 931, 967-80 (1999). There are some indications that  
19 Congress is beginning to reassert itself in this area. *See* Karoun Demirjian, *With vote to end U.S.*  
20 *involvement in Yemen’s war, House sets up Trump’s second veto*, Wash. Post, Apr. 4, 2019,  
21 <https://tinyurl.com/y4fhw9aq>. If that continues—and if courts have given their blessing to  
22 presidential use of emergency powers to resolve policy disagreements with Congress—the power  
23 to detail members of the U.S. armed forces during national emergencies could give presidents a  
24 convenient workaround.

25 IEEPA is particularly worrisome. To date, it has been used primarily to advance U.S.  
26 foreign policy by imposing sanctions on foreign entities, including government officials, political  
27 factions, terrorist groups, and suspected drug traffickers. *See Declared National Emergencies*,  
28 *supra*. This usage has been relatively uncontroversial; indeed, as noted above, Congress has for



1 decades allowed such sanctions to stand even in the absence of true emergencies. However, the  
2 text of the law does not limit the president to foreign targets. While IEEPA declarations must cite  
3 a threat that emanates in substantial part from overseas, the actions that the president can take in  
4 response may target U.S. citizens and residents—as occurred after 9/11, when the administration  
5 of President George W. Bush used IEEPA to effectively shut down several U.S.-based Muslim  
6 charities, asserting that their donations benefited terrorists overseas. *See* Lawyer’s Comm. for  
7 Civil Rights of the S.F. Bay Area, *The OFAC List: Due Process Challenges in Designation and*  
8 *Delisting* 3, 20-21 (July 2014), <https://tinyurl.com/yxwzbsz6>. In theory, then, presidents could  
9 use IEEPA to impose crippling financial punishment on U.S. persons and organizations based on  
10 a unilateral executive branch determination that their actions undermine U.S. foreign policy.<sup>14</sup>  
11 Congress might not acquiesce in the widespread domestic use of IEEPA—but if the NEA is  
12 available to circumvent Congress, then the opposition of a majority of Congress would make  
13 little difference.

14 The list goes on. There are statutory provisions that authorize the president, during a  
15 national emergency, to prohibit or limit the export of any agricultural commodity, *see* 7 U.S.C. §  
16 5712(c); to suspend statutory wage requirements for public contracts, *see* 40 U.S.C. § 3147; to  
17 “coordinate” domestic transportation, *see* 49 U.S.C. § 114(g) (a provision that arguably would  
18 allow the Secretary of Transportation to limit the use of trucks or automobiles for purposes of  
19 restricting emissions, *see* Dan Farber, *Using Emergency Powers to Fight Climate Change*, *Legal*  
20 *Planet* (Jan. 14, 2019), <https://tinyurl.com/y2qgnplw>); and to sell off aliens’ property without  
21 waiting for a court judgment, *see* 50 U.S.C. § 4309. If courts uphold President Trump’s actions  
22 in this case, such formidable powers could henceforth become available—to President Trump or  
23 to a future president—based simply on the president’s unilateral claim that he needs them, and  
24 against the wishes of a majority of Congress.

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26 <sup>14</sup> Courts might hold that the Constitution limits the government’s ability to take this  
27 approach. After 9/11, two lower courts held that aspects of the government’s use of IEEPA  
28 against U.S.-based Muslim charities violated the Constitution. *See Al Haramain Islamic*  
*Foundation, Inc. v. U.S. Dept. of the Treasury*, 686 F.3d 965 (9th Cir. 2012); *Kindhearts for*  
*Charitable Humanitarian Dev. v. Geithner*, 647 F.Supp.2d 857 (N.D. Ohio 2009).

1 Few presidents would be able to resist such an open invitation to unchecked power. At a  
2 minimum, we could expect government by presidential emergency order to become far more  
3 common than it has been in the past. It would become a tool for presidents of both parties to  
4 advance long-term policy goals in the face of congressional resistance. This would be  
5 inconsistent with Congress's intent when it passed the NEA, with the constitutional separation of  
6 powers, and with basic democratic principles.

7 **CONCLUSION**

8 For the foregoing reasons, we urge this court to grant the Plaintiffs' motion for partial  
9 summary judgment and enjoin the operation of Proclamation 9844.

10  
11 Respectfully submitted,

12 /s/ Elizabeth Goitein

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