



STATE OF ARIZONA

OFFICE OF THE ATTORNEY GENERAL

<p>ATTORNEY GENERAL OPINION</p> <p>By</p> <p>MARK BRNOVICH ATTORNEY GENERAL</p> <p>February 7, 2022</p>	<p>No. I22-001 (R21-015)</p> <p>Re: The Federal Government's Duty To Protect the States And The States' Sovereign Power Of Self Defense When Invaded</p>
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To: Jake Hoffman, Representative
Arizona House of Representatives

Questions Presented

The request seeks a formal legal opinion on whether “the federal government has failed—intentionally or unintentionally—to uphold its obligations to protect our state from invasion under Article IV, Section 4 of the U.S. Constitution.” To fully and properly answer this question from the perspective of the State of Arizona, this Opinion will address the below issues.

1. What constitutes “actually invaded” for purposes of Article I, Section 10 (“State Self-Defense Clause”) and “invasion” for purposes of Article IV, Section 4 (“Invasion Clause”) of the U.S. Constitution? Do States retain constitutional power to defend themselves when “actually invaded” by hostile non-state actors such as armed cartels and gangs, or only by foreign powers?
2. Can the current situation at Arizona’s border with Mexico—where the federal government has lost or severely degraded its operational control of the border and in which cartels and gangs are smuggling unauthorized aliens and large quantities of drugs

outside of authorized ports of entry and also engaging in acts of violence in pursuit of their objectives—satisfy the definitions of “actually invaded” and “invasion”?

Summary Answers

1. The issues addressed in this Opinion relate to border security. The State Self-Defense Clause in Article I, Section 10 provides that a State may defend itself when it has been “actually invaded, or in such imminent Danger as will not admit of delay,” and the State does not need the consent of Congress to do so. The Invasion Clause in Article IV, Section 4 provides that “[t]he United States ... shall protect each [state in this union] against invasion.” These clauses provide dual protection against invasion broadly defined. This includes defending against actions by “foreign hostility [and] ambitious or vindictive enterprises of [a state’s] more powerful neighbors.” This encompasses defense against hostile non-state actors such as cartels and gangs operating at the border and entering into Arizona’s territory. James Madison specifically cited Virginia using its militia to stop smugglers as an example of a valid exercise of the invasion power, and there is every basis to conclude this sovereign power was retained as reflected in the State Self-Defense Clause. The Import-Export Clause in Article I, Section 10 also recognizes that States retain sovereign authority to execute inspection laws, which requires operational control of the border to channel entry of goods to authorized ports of entry. This is an aspect of the historical police power that is expressly preserved for the States. In sum, both the power of self-defense against being “actually invaded” and the power to “execut[e] [their] inspection laws” are sovereign powers that were retained by the States under the U.S. Constitution to permit States to control on-the-ground conditions at their borders that are essential to public safety and security in a State.

2. The on-the-ground violence and lawlessness at Arizona’s border caused by cartels and gangs is extensive, well-documented, and persistent. It can satisfy the definition of “actually invaded” and “invasion” under the U.S. Constitution. Two conclusions flow from this. First, the federal government has a duty to protect Arizona under the Invasion Clause.¹ Second, Arizona retains the independent authority under the State Self-Defense Clause to defend itself when actually invaded. This power is exercised under the Governor’s authority as Commander-in-Chief. *See* Ariz. Const. art. V, § 3. Further—while it is not necessary for the exercise of the State’s retained sovereign powers—state sovereignty to defend the integrity of the State from on-the-ground lawlessness at or near its border is bolstered by the unprecedented actions of the current presidential administration to destroy operational control of the border, including the illegal rescission of the Migrant Protection Protocols (“MPP”),² illegal issuance of “interim guidance” (carried forward in “permanent guidance”) that prevents the U.S. Immigration and Customs Enforcement (“ICE”) and United States Customs and Border Protection (“CBP”) from executing federal laws,³ halting construction of the border wall,⁴ and closing highway inspection checkpoints.⁵ There is nothing in federal constitutional or statutory law authorizing the federal executive to thwart States from ensuring on-the-ground safety and an orderly border within the

¹ While this duty exists, it has been held not enforceable in court due to the “political question” doctrine.

² *See Texas v. Biden*, No. 21-10806, -- F.4th --, 2021 WL 5882670, at *2 (5th Cir. Dec. 13, 2021), as revised (Dec. 21, 2021) (“[T]he Termination Decision was arbitrary and capricious under the APA. ... The Termination Decision is independently unlawful because it violates 8 U.S.C. § 1225.”), petition for certiorari filed No. 21-954 (Dec. 29, 2021).

³ *See Texas v. United States*, No. 6:21-CV-00016, 2021 WL 3683913, at *42 (S.D. Tex. Aug. 19, 2021) (“The policy contained in the Memoranda effectively dispenses with these mandates by conferring discretion to the Government to independently decide who will be detained and when—if ever—detention of those individuals might occur. This guidance therefore is wholly contrary to Sections 1226(c) and 1231(a)(2). Thus, the States have demonstrated a substantial likelihood of success on Counts I & II.”), appeal pending No. 21-40618 (5th Cir.). Multiple states are also challenging the unlawful paroling of aliens. *See, e.g., Brnovich v. Biden*, No. 2:21-cv-01568 (D. Ariz.).

⁴ Arizona is challenging this action. *See Arizona v. Mayorkas*, No. 2:21-cv-00617 (D. Ariz.).

⁵ *See* Adam Shaw & Peter Hasson, *CBP shuts down highway checkpoints as overwhelmed agency struggles to handle border surge*, Fox News (March 9, 2021), <https://www.foxnews.com/politics/cbp-shuts-checkpoints-agency-border-surge>

State's own territory. Nor is there any conflict with this and the orderly conduct of immigration policy by the federal executive. No State should be put in the position that Arizona and other border states have been put in through the federal government's recent actions. The federal government is failing to fulfill its duty under Article IV, Section 4 of the Constitution to defend the States from invasion. The State Self-Defense Clause exists precisely for situations such as the present, to ensure that States are not left helpless.

Analysis

I. The Terms “Invasion” And “Actually Invaded” In The Invasion and State Self-Defense Clauses Are Broad And Apply To Invasion By Hostile Non-State Actors Such As Cartels and Gangs

A. The “Invasion Clause” and the “State Self-Defense Clause” Must Be Understood As Providing Dual Protection In The Context of The States’ Reserved Powers

“When the original States declared their independence, they claimed the powers inherent in sovereignty—in the words of the Declaration of Independence, the authority ‘to do all ... Acts and Things which Independent States may of right do.’” *Murphy v. Nat’l Collegiate Athletic Ass’n*, 138 S. Ct. 1461, 1475 (2018) (quoting Declaration of Independence ¶ 32 (U.S. 1776)). “The Constitution limited but did not abolish the sovereign powers of the States, which retained ‘a residuary and inviolable sovereignty.’” *Id.* (quoting *The Federalist* No. 39, at 245 (James Madison) (C. Rossiter ed. 1961)). “[B]oth the National and State Governments have elements of sovereignty the other is bound to respect.” *Arizona v. United States*, 567 U.S. 387, 398 (2012). Finally, the U.S. “Constitution ... shall be the supreme law of the land....” U.S. Const. art. VI, paragraph 2.

The “Invasion Clause” of the U.S Constitution requires that the United States “shall protect each [State] against Invasion.” U.S. Const. art. IV, § 4. In the 1990s, states and counties, including Arizona, sued the federal government under the Invasion Clause. They argued that out-

of-control levels of illegal immigration constituted an “invasion” by an influx of unauthorized immigrants that triggered the federal government’s duty to protect the states. Courts rejected these claims, holding that addressing them would require making “non-judicial policy decision[s].” *E.g.*, *California v. United States*, 104 F.3d 1086, 1090-91 (9th Cir. 1997); *see also Padavan v. United States*, 82 F.3d 23, 28 (2d Cir. 1996) (“[T]he plaintiffs’ Invasion Clause claim is nonjusticiable. The protection of the states from ‘invasion’ involves matters of foreign policy and defense, which are issues that the courts have been reluctant to consider.”).⁶ However, these decisions did not address the current situation of escalating violence and smuggling by transnational cartels and gangs.

Nonetheless, the Constitution itself establishes that States *do* have the power to protect themselves from invasion: “No State shall, without the Consent of Congress, ... engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.” U.S. Const. art. I, § 10, cl. 3 (the “State Self-Defense Clause”). The State Self-Defense Clause of the Constitution establishes that States in our federal system retain the sovereign power to “engage in War” when “actually invaded,” and States do not require the “Consent of Congress” to do so. The Second Circuit summarized the meaning of the State Self-Defense Clause in the following way: “although a state is prohibited from waging war, it may do even that if it is ‘actually invaded’ or facing ‘imminent Danger’ not admitting delay.” *Melendez v. City of New York*, 16 F.4th 992, 1018 (2d Cir. 2021). As Justice Scalia explained, the State Self-Defense Clause “leaves intact [States’] inherent power to protect their territory.” *Arizona*, 567 U.S. at 419 (Scalia, J., concurring). The Second Circuit in *Melendez* cited Justice Gorsuch’s dissent in *Sveen*

⁶ Because the courts held that the question itself is non-justiciable, their statements about what constitutes an invasion are dicta, and they also never reached the issue of organized cartel activities or the State Self-Defense Clause. In addition, the holdings regarding the Invasion Clause are distinguishable from the Take Care Clause in Article II, Section 3. Nothing in this Opinion suggests the President’s abdication of his duty under the Take Care Clause is non-justiciable.

as also recognizing the principle that the limitations in the State Self-Defense Clause are not absolute but rather permit action when “actually invaded.” *Melendez*, 16 F.4th at 1018 n.42 (citing *Sveen v. Melin*, 138 S. Ct. 1815, 1826–27 (2018) (Gorsuch, J., dissenting)). Moreover, “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” U.S. Const. amd. X; *see also New York v. United States*, 505 U.S. 144, 157 (1992) (“[T]he Tenth Amendment confirms that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States.”); *see also Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 536 (2012) (“State sovereignty is not just an end in itself: Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power....The independent power of the States also serves as a check on the power of the Federal Government: By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power.” (cleaned up)).

B. “Actually Invaded” Under The State Self-Defense Clause Includes Action By Hostile Non-State Actors, And The Cartels’ Activities Satisfy This Requirement

As discussed above, the U.S. Constitution established a dual protection against invasion through both the Invasion Clause and the State Self-Defense Clause. There are no grounds to conclude that this protection applies only to hostilities by foreign states and not to those by non-state actors such as cartels and gangs. Potentially contrary statements in court decisions were dicta and focused on “invasion” by unauthorized aliens themselves.⁷ They thus provide no analysis of the meaning of the word “invasion” in the context of non-state hostile actors, such as

⁷ Defensive measures against invasion by transnational cartels and gangs could well include action to prevent entry into the State’s territory except through authorized ports of entry. This also implicates the State’s powers under the Import-Export Clause. *See* note 18, *infra*. Additional analysis of that issue is beyond the scope of this opinion.

organized cartels and gangs. They also failed to address more broadly the meaning of “invasion” in the context of security concerns at a State’s border.

The text of the State Self-Defense Clause does not contain any limitation that restricts it to actions by foreign nations as opposed to hostile non-state actors. Beginning with the plain language, the critical phrase is “actually invaded, or in such imminent Danger as will not admit of delay.” U.S. Const. art. I, § 10. “Ordinarily courts do not construe words used in the Constitution so as to give them a meaning more narrow than one which they had in the common parlance of the times in which the Constitution was written.” *United States v. S.-E. Underwriters Ass’n*, 322 U.S. 533, 539 (1944), *superseded by statute on other grounds*. Moreover, as Chief Justice Marshall famously stated, “we must never forget that it is a *constitution* we are expounding.” *McCulloch v. Maryland*, 17 U.S. 316, 407 (1819).

Webster’s 1806 dictionary—the first American English dictionary—defines “invade” broadly, as meaning “to enter or seize in hostile manner.”⁸ Webster’s 1828 dictionary also defines “invade” broadly, to include not just the entrance of a foreign army into a country, but also “1. ... to enter as an enemy, with a view to conquest or plunder; to attack”; “2. To attack; to assail; to assault”; “3. To attack; to infringe; to encroach on; to violate.”⁹ The cartel and gang violence described below falls within these broad definitions of “invade,” since cartel and gang members are entering Arizona in a hostile manner that attacks, encroaches on, and violates Arizona. *See* Part II, *infra*.

The history of the adoption of the Constitution also powerfully shows that the Founders understood the States were giving up certain sovereign powers to the national government, but retaining core self-defense powers against both domestic and foreign threats to their actual

⁸ Noah Webster, A COMPENDIOUS DICTIONARY OF THE ENGLISH LANGUAGE 164 (1806).

⁹ 1 Noah Webster, AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 113 (1828).

security within their territories. The history of the ratification shows that the framers understood that self-defense power to be broad, and essentially congruent with the federal power to protect states from invasion, when it comes to actions within a State's own territory. It would be nonsensical to conclude that either power is artificially limited to invasion by foreign states as opposed to hostile non-state actors, as it would render the State defenseless in the absence of federal support. *See Houston v. Moore*, 18 U.S. 1, 16-17 (1820) (State governments' power over the militia and its use "existed prior to the formation of the constitution, and having not been prohibited by that instrument, it remains with the States...").

In Federalist No. 43, James Madison explained with respect to the Invasion Clause that "[a] protection against invasion is due from every society to the parts composing it. The latitude of the expression used here seems to secure each state, not only against foreign hostility, but against **ambitious or vindictive enterprises** of its more powerful neighbors."¹⁰ There is no indication in this two-part definition of an intent by the framers to limit the protection to only state, as opposed to non-state, actors. As discussed above, the Invasion Clause by its plain language applies to "Invasion" and "domestic Violence." Those two categories must be understood to cover the full subject of areas where a State might need external protection, and since actions by foreign non-state actors are not "domestic Violence," they must qualify as "Invasion." Federalist 43 makes clear that the federal assistance to the state is in addition to the state's own ability to defend itself, and "[i]f the interposition of the general government should not be needed, the provision for such an event will be a harmless superfluity only in the Constitution." In Federalist No. 44, Madison quoted the State Self-Defense Clause, and stated, "[t]he remaining particulars of this clause fall within reasonings which are either so obvious, or have been so fully developed, that they may be passed over without remark."

¹⁰ The Federalist 43 (James Madison) (emphasis added).

Moreover, *every* time it uses the phrase, the Constitution contrasts “invasion” with “insurrections,” “rebellion,” and “domestic violence,” showing that the difference is not state versus non-state actors but rather foreign versus domestic hostilities. In Article I, Section 8, Clause 15, Congress is given the power “[t]o provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions.” Article I, Section 9 provides that “[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.” In Article IV, Section 4, the clause immediately following the Invasion Clause provides “[t]he United States ... shall protect each [State in this Union] ... on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic violence.” In other words, the framers were concerned about the federal government using the pretext of domestic violence to send the militia of other states into a state and thus created additional protections for the states. They were not concerned about artificially limiting the type of foreign hostile actors for which protection against “invasion” would apply (or artificially limiting the States within each State’s own territory on that basis).

At the Virginia Ratifying Convention, Madison stated that under the Constitution, States still retained the right to defend themselves in the face of invasion: “[States] are to be protected from invasion ... from foreign powers; and, on application by the legislature or executive, as the case may be, the militia of the other states are to be called to suppress domestic insurrections. Does this bar the states from calling forth their own militia? No; but it gives them a supplementary security to suppress insurrections and domestic violence.”¹¹ He further explained

¹¹ James Madison, Debate From Virginia Ratifying Convention (June 16, 1788)

that the State Self-Defense Clause means that States “are restrained from making war, unless invaded, or in imminent danger. *When in such danger, they are not restrained.*”¹²

Madison also made clear at the Virginia Ratifying Convention that the protection against “invasion” applies to hostile non-state actors. Madison specifically brought up “suppress[ing] smugglers” as an example of a justified use of the state’s militia, and he cited with approval an actual prior case of Virginia calling out its militia to do just that: “There were a number of smugglers, who were too formidable for the civil power to overcome. The military quelled the sailors, who otherwise would have perpetrated their intentions.”¹³

It is clear from the above ratification sources that the purposes of the Invasion and State Self-Defense Clauses were both to protect against invasion and to provide *additional* security to the States in the form of assistance of the militias of other States—not to limit the power of a State to defend itself against invasion by hostile non-state, as opposed to state, actors. In fact, where a major concern in creating a national government was to speak with one voice in foreign affairs, State action against the agents of a foreign government would implicate that concern far more than State action against non-state actors such as criminal gangs and cartels operating illegally within a State’s own territory. But it is undisputed that the Constitution was express in reserving the potentially more intrusive power (action against hostile state actors) to the States, and there is no basis to conclude it silently removed a less intrusive power (action against hostile non-state actors). Indeed, Madison addressed the lack of conflict between a state’s power to defend itself and the national government’s war power: States “are restrained from making war, unless invaded, or in imminent danger.—When in such danger, they are not restrained. I can perceive no competition in these clauses. They cannot be said to be repugnant to a concurrence

¹² *Id.* (emphasis added).

¹³ *Id.*

of the power.”¹⁴

In sum, the specific example of Virginia taking action against smugglers, and the lack of any indication that the purpose of the State Self-Defense Clause was to artificially limit a state’s ability to defend itself against hostile non-state actors, is powerful evidence that States retained this sovereign power under the U.S. Constitution.

Applying that to the issue in this opinion, there can be little doubt that the activities of 21st century drug cartels and gangs are just as violent, militant, and invasive than those of 18th century Virginia smugglers, if not more so. And thus the State Self-Defense Clause reserves to States the sovereign right to use force to defend themselves against the activities of transnational cartels and gangs operating in the State’s territory at its border.¹⁵

C. The Powers Herein Are Distinct From—And Support—The Commerce, Naturalization, And Immigration Powers Exercised By The Federal Government

The issue of “invasion” under Article IV, Section 4 of the U.S. Constitution has previously been analyzed and litigated related to immigration law and interior enforcement. *See, e.g., Arizona*, 567 U.S. 387; *California*, 104 F.3d 1086. But the issues expressed in this opinion relate to a different power—the power of defense against cross-border invasion under Article I, Section 10 of the U.S. Constitution. As repeatedly noted, the issue in this Opinion is about border security. This is a sovereign power that the States retained under the text of the Constitution. And this sovereign power can be exercised in a manner separate from immigration law by regaining

¹⁴ *Id.*

¹⁵ The dicta in the Ninth Circuit case discusses “armed hostility from another political entity.” *California*, 104 F.3d at 1091 & n.6. The dicta from the Second Circuit similarly states the clause applies to “another political entity, such as another state or foreign country that is intending to overthrow the state’s government.” *Padavan*, 82 F.3d at 28. There is nothing in the phrase “political entity” to conclude that these courts were intending to exclude hostile non-state actors such as cartels and gangs from the definition of “political entity,” as opposed to just unauthorized immigrants, which was the topic in both cases. The events of September 11, 2001, which came after these decisions, also reshaped our understanding of the threats posed by non-state actors.

operational control of the border and ensuring that persons and goods entering the United States go through authorized ports of entry—to ensure that persons and goods entering the State of Arizona are not being illegally smuggled.

As a former Acting ICE Director said in discussing “gotaways” in terms of security, “[t]his isn’t just about illegal immigration. ... this is about public safety, because the Border Patrol has arrested over 12,000 ... convicted criminals. So how many of the ... almost 500,000 ‘gotaways’ based on camera traffic, based on sensor traffic, based on drone traffic that the Border Patrol couldn’t respond to ... were criminals or gang members? Also, Border Patrol has already arrested 16 people on the FBI screening database. How many of that 500,000 are known or suspected terrorists? We don’t know. I’m afraid someday we’re going to find out. So this isn’t just an illegal immigration problem. It’s a public health crisis because of COVID. It’s a public safety crisis. And there’s a national security crisis of huge proportions.”¹⁶

State powers may be properly exercised to require persons and goods entering the state do so through authorized ports of entry or by surrendering themselves to federal officials without infringing on the separate federal powers over immigration, naturalization, and international commerce. In fact, channeling such entries to authorized ports of entry and interdicting criminal gangs and cartels only strengthens federal power by preventing “gotaways” that by their very nature are not an exercise of federal enforcement but a circumvention of it.¹⁷ This conclusion is also supported by the fact that the States retain sovereign power to execute inspection laws under the Import-Export Clause in Article I, Section 10.¹⁸ These actions by the State—to require entry

¹⁶ See Jan 8, 2022, Fox News Interview at 3:29, <https://video.foxnews.com/v/6290660245001#sp=show-clips>

¹⁷ The federal government has established ten (10) authorized ports of entry in Arizona, including several at the Arizona-Mexico border. See <https://www.cbp.gov/contact/ports/az>

¹⁸ The Second Circuit recently recognized this as a retained sovereign power that was qualified but not eliminated by the adoption of the Constitution. See *Melendez*, 16 F.4th at 1018 (“[A]lthough a state

at an authorized port of entry—would thus be clearly distinguishable from prior cases about immigration enforcement that were litigated.

II. The Current Situation At Arizona’s Border With Mexico And Smuggling Activities By Cartels And Gangs Satisfies The Constitutional Definition Of An Invasion

A. Facts Relating To Cartels And Gangs Engaging In Smuggling Activities And Violence At Arizona’s Border With Mexico

Arizona is facing an unprecedented crisis at its 370-mile border with Mexico. Acting as if they are above the law, Mexican and Central American cartels are engaging in brazen attacks on Arizona, trafficking in drugs and human beings. President Biden himself has affirmed that “drug cartels and human traffickers” are “actual threats” to our country.¹⁹ Unfortunately, the federal government has failed to protect Arizona from this threat. However, the State through its Governor as Commander-in-Chief can exercise its own power of self-defense.²⁰

1. Cartels Are Smuggling Record Amounts of Illegal Drugs Into Arizona

According to the U.S. State Department, “the volume of dangerous drugs entering the United States from Mexico and violent crime within Mexico fueled by transnational criminal

generally may not impose import or export duties, it may do so when “absolutely necessary for executing its inspection Laws.”). And the Second Circuit cited the same observation by Justice Gorsuch. *Id.* at 1018 n.4 (citing *Sveen*, 138 S. Ct. at 1826–27 (2018) (Gorsuch, J., dissenting)).

That power is implicated here. To carry out *any* inspection laws, States must be able to take action to ensure operational control of the border and to ensure that persons and goods enter at authorized ports of entry. *See, e.g., Dep’t of Revenue v. James B. Beam Distilling Co.*, 377 U.S. 341, 345-46 (1964) (“It is clear that the gravamen of the offense in *Gordon [v. Texas]*, 355 U.S. 369 (1958) (per curiam) was the failure to obtain, or even apply for, a permit as required by state law. Such permits, in addition to other functions, *serve to channelize the traffic in liquor* and thus to prevent diversion of that traffic into unauthorized channels.” (emphasis added)); *see generally McCulloch v. Maryland*, 17 U.S. 316, 417 (1819) (discussing that from the express power of establishing a post office, there is the implied power “to punish those who steal letters from the post-office, or rob the mail”).

Arizona law prohibits possession of narcotic drugs such as fentanyl, so channeling entry of goods through authorized ports of entry is clearly implicated here. *See, e.g., A.R.S. § 13-3408*. A full discussion of this issue, however, is beyond the scope of this opinion.

¹⁹ Proclamation No. 14010, 86 Fed. Reg. 8,267, 8,267 (Feb. 2, 2021).

²⁰ Finding an “invasion” present may not necessarily require the Governor to declare a state of war emergency, which is a distinct issue under state law. *See A.R.S. § 26-301(16)*. That issue is beyond the scope of this Opinion.

organization (TCOs) remain alarmingly and unacceptably high.”²¹ Cartels bring deadly illegal drugs into the United States by trafficking them into Arizona and other southern border states. According to the State Department, “Mexican drug cartels are consolidating their involvement in fentanyl production and trafficking.”²² Today, “[m]ost fentanyl available in the United States” has been “trafficked from Mexico across the U.S. Southwest border,” and each year’s fentanyl seizure rates are higher than the previous.²³ Similarly, “[m]ost of the methamphetamine available in the United States ... is produced in Mexico, and trafficking across the U.S. southern border has increased dramatically in recent years.”²⁴ Moreover, “Mexico is a significant source and transit country for heroin, marijuana, methamphetamine, and illicit synthetic opioids destined for the United States. Over 90 percent of the heroin seized and sampled in the United States comes from Mexico. Mexico is also a main transit country for cocaine from South America.”²⁵

On June 10, 2021, FBI Director Christopher Wray testified before the House Judiciary Committee that “the drug issues related to the border are extremely significant ... fentanyl coming into this country from ... the southwest border is something that I think can be fairly described as an epidemic.”²⁶ The Congressional Research Service recently concluded that “Mexico’s cartels remain the primary source of heroin and fentanyl trafficking into the United States.”²⁷ Deaths from drug overdoses are going up at a frightening rate, and most of that

²¹ U.S. Department of State, “International Narcotics Control Strategy Report: Volume I, Drug and Chemical Control,” Mar. 2021, p. 183, <https://www.state.gov/wp-content/uploads/2021/02/International-Narcotics-Control-Strategy-Report-Volume-I-FINAL-1.pdf>

²² *Id.* at 79.

²³ *Id.*

²⁴ *Id.* at 82.

²⁵ *Id.* at 180.

²⁶ HOUSE JUDICIARY COMMITTEE, *FBI Director Wray Testifies on Oversight of the Bureau*, C-SPAN (June 10, 2021), <https://www.c-span.org/video/?512336-1/fbi-director-wray-testifies-oversight-bureau>

²⁷ JUNE S. BEITTEL AND LIANA W. ROSEN, CONG. RESEARCH SERV., IN11535, MEXICAN DRUG TRAFFICKING AND CARTEL OPERATIONS AMID COVID-19 (Apr. 2, 2021), <https://crsreports.congress.gov/product/pdf/IN/IN11535>

increase is driven by fentanyl and other opioids.²⁸ Fentanyl and related drugs killed 64,178 Americans from May 2020 to April 2021, more than doubling the number of deaths from the prior 12 months.²⁹ For adults between the ages of 18 and 45, fentanyl overdose is the leading cause of death, killing more adults in this age group than car crashes, gun violence, or COVID-19.³⁰

Arizona law prohibits possession of narcotic drugs such as fentanyl. *See, e.g.*, A.R.S. § 13-3408. And illicit fentanyl is illegal throughout the United States. *See* DEA, *Facts About Fentanyl* (“Illicit fentanyl, primarily manufactured in foreign clandestine labs and smuggled into the United States through Mexico, is being distributed across the country and sold on the illegal drug market. Fentanyl is being mixed in with other illicit drugs to increase the potency of the drug, sold as powders and nasal sprays, and increasingly pressed into pills made to look like legitimate prescription opioids. Because there is no official oversight or quality control, these counterfeit pills often contain lethal doses of fentanyl, with none of the promised drug. There is significant risk that illegal drugs have been intentionally contaminated with fentanyl. Because of its potency and low cost, drug dealers have been mixing fentanyl with other drugs including heroin, methamphetamine, and cocaine, increasing the likelihood of a fatal interaction.”).³¹

Ninth Circuit Judge N.R. Smith recognized when addressing litigation over the construction of the border wall: “Nor even does anyone seriously dispute the DoD’s determination that drug trafficking along our southern border (including in the project areas at

²⁸ CDC, *Fentanyl* (Feb. 16, 2021), <https://www.cdc.gov/opioids/basics/fentanyl.html>; NATIONAL CENTER FOR HEALTH STATISTICS, CENTERS FOR DISEASE CONTROL AND PREVENTION, *Vital Statistics Rapid Release* (2021), <https://www.cdc.gov/nchs/nvss/vsrr/drug-overdose-data.htm>

²⁹ Audrey Conklin, *Fentanyl overdoses become No. 1 cause of death among US adults, ages 18-45: ‘A national emergency’*, Fox News, (Dec. 16, 2021), <https://www.foxnews.com/us/fentanyl-overdoses-leading-cause-death-adults>

³⁰ *Id.*

³¹ Available at <https://www.dea.gov/resources/facts-about-fentanyl>

issue here [which includes Arizona]) threatens the safety and security of our nation and its citizens.” *Sierra Club v. Trump*, 929 F.3d 670, 719 (9th Cir. 2019) (N.R. Smith, J., dissenting)). Judge Smith’s dissent further described this as a “significant national security interest.” *Id.* The U.S. Supreme Court ultimately issued a stay permitting construction to proceed, *Trump v. Sierra Club*, 140 S. Ct. 1 (2019), and denied a motion to dissolve the stay, *Trump v. Sierra Club*, 140 S. Ct. 2620 (2020). Judge Smith’s observation that “drug trafficking along our southern border ... threatens the safety and security of our nation and its citizens” remains true today. But the Biden administration halted construction of this critical tool that protects against cartel violence spilling across Arizona’s border.

2. Cartel Involvement In Human Smuggling And Sex Trafficking

On June 10, 2021, FBI Director Wray testified that “[t]here’s no question that the cartel activity on the other side of the border is spilling over in all sorts of ways” and that, in particular, cartel involvement in human smuggling and sex trafficking at the border is a “significant security concern.” Wray also admitted that “violent crime,” “drug trafficking,” and “human trafficking” are border security issues “of great concern.”³²

Human trafficking is a lucrative racket, which brought in more than \$14 million a day for cartels and gangs in February 2021.³³ Because illegal border crossings have increased substantially since February 2021, it is almost certain that cartel and gang revenue from human smuggling has increased substantially as well. Annually, the cartels and gangs get billions of

³² HOUSE JUDICIARY COMMITTEE, *FBI Director Wray Testifies on Oversight of the Bureau*, C-SPAN (June 10, 2021), <https://www.c-span.org/video/?512336-1/fbi-director-wray-testifies-oversight-bureau>

³³ William La Jeunesse, *US-Mexico border traffickers earned as much as \$14M a day last month: sources*, Fox News, (Mar. 22, 2021), <https://www.foxnews.com/politics/us-mexico-border-traffickers-million-february>

dollars a year from human trafficking.³⁴ It is thus no wonder that criminal organizations would be willing to engage in violent cross-border attacks to protect their profits.

3. Violence At The Border

The cartels' smuggling and violence disproportionately affect Arizona. For example, unauthorized aliens have engaged in a number of violent attacks in Cochise County, which shares an 83-mile border with Mexico. In June 2019, a shootout just across the border from Douglas, Arizona between different factions of the Sinaloa drug cartel resulted in ten deaths.³⁵ The shootout happened close to the Douglas port of entry, and following the shootout four cartel members—apparently on the losing side of the fight—presented themselves at the port of entry to request asylum in the United States.³⁶ Local Arizona residents routinely cross into Mexico at that port of entry, and thus this shootout placed Arizonans' lives at risk. In a separate incident, a drug smuggler nearly killed a National Park employee in Chiricahua National Park.³⁷ The perpetrator was an unauthorized alien and a two-time deported felon. He was found guilty of attempted first degree murder, armed robbery, aggravated assault, kidnapping, and theft of means

³⁴ *Id.* The U.S Department of Homeland Security recently admitted in a sworn declaration that it is “encountering record numbers” unauthorized aliens at the border, which “ha[s] strained DHS operations and caused border facilities to be filled beyond their normal operating capacity.” Declaration of David Shahoulian (DHS Assistant Secretary for Border and Immigration Policy) at 1-2, *Huisha-Huisha v. Mayorkas*, No. 21-cv-100 (D.D.C. August 2, 2021). DHS’s own statistics reveal the unprecedented surge of unlawful migration and the collapse of DHS’s control of the border. Monthly border encounters with unauthorized aliens are the highest they have been in decades. *Id.* at 7 (“[T]he highest monthly encounter number since Fiscal Year 2000.”) For example, the number of encounters in July 2021 was more than five times the July 2020 and July 2018 numbers, and roughly 2.5 times July 2019. The cartels and gangs that smuggle unauthorized aliens across the border are primary players in this surge.

³⁵ Lupita Murillo, *Sinaloa cartel shootout in Agua Prieta leaves nearly a dozen people dead*, News 4 Tucson, (Jun. 11, 2019), https://www.kvoa.com/news/crime/sinaloa-cartel-shootout-in-agua-prieta-leaves-nearly-a-dozen-people-dead/article_9a7b8037-e690-5398-ad99-e9e7392e4c3e.html

³⁶ *Id.*

³⁷ Ainslee S. Wittig, *Jury finds Gaxiola guilty in Chiricahua assault*, Arizona Range News, (Mar. 22, 2017), https://www.myheraldreview.com/news/willcox/jury-finds-gaxiola-guilty-in-chiricahua-assault/article_d71732f5-814c-552c-a6ae-895f6ed5f847.html

of transportation.³⁸ In 2021, the Cochise County Sheriff's Office encountered 43,229 unauthorized aliens and 51 drug smugglers. Over that same time, the Sheriff's Office seized 808 pounds of illegal marijuana.

Similar events are also becoming common in other parts of the state and in other border states. On February 2, 2022, "Border Patrol agents patrolling the Rio Grande Valley Sector [in Texas] were fired upon from across the Mexican border" according to "multiple law enforcement sources."³⁹ Individuals believed to be cartel drug smugglers are regularly caught on camera crossing the border, dressed in camouflage and carrying weapons to protect their drug loads.⁴⁰ Border area ranchers have experienced this violence firsthand, including one who was killed the day after he reported a drug load to authorities and another on whose land a U.S. Border Patrol agent was shot in 2018.⁴¹ Cartel scouts appear to even brazenly "occupy strategically-selected hilltops for dozens of miles inside Arizona," establishing a presence on American territory to help smugglers avoid authorities.⁴² Even the drugs themselves are becoming more dangerous, as smugglers are trading large bags of marijuana for smaller packs of more potent "cocaine, fentanyl, heroin, [and] meth."⁴³ In December 2021, police in Scottsdale, Arizona seized 1.7

³⁸ National Park Service, *Gaxiola sentenced to 76 years*, Apr. 18, 2017, <https://www.nps.gov/chir/learn/news/gaxiola-sentenced-to-76-years.htm>

³⁹ Bill Melugin & Adam Shaw, *Border Patrol agents fired upon from Mexico, return fire: sources*, Fox News (Feb. 3, 2022), <https://www.foxnews.com/us/border-patrol-agents-fired-upon-from-mexico-return-fire>

⁴⁰ Brian Brennan, 'People don't need to die': Border rancher deals with constant flow of migrants, drug packers, KGUN 9 (May 20, 2019), <https://www.kgun9.com/border-watch/people-dont-need-to-die-border-rancher-deals-with-constant-flow-of-migrants-drug-packers>

⁴¹ *Id.*; Steve Jess, *Border Patrol: Agent Wounded in Shooting Near Arivaca*, Arizona Public Media (June 12, 2018), <https://news.azpm.org/p/news-topical-border/2018/6/12/131311-border-patrol-agent-wounded-in-shooting-near-arivaca/>

⁴² U.S. House of Representatives, Committee on Homeland Security, *Testimony of Jim Chilton on "Examining the Effect of Border Wall on Private and Tribal Landowners"*, (February 27, 2020), <https://homeland.house.gov/imo/media/doc/Testimony%20-%20Chilton1.pdf>

⁴³ Natasha Yee, *As marijuana profits fade, cartels increasingly smuggle fentanyl across the border*, (October 18, 2021), <https://gilaherald.com/as-marijuana-profits-fade-cartels-increasingly-smuggle-fentanyl-across-the-border/>

million fentanyl pills that were worth \$9 million; they also seized ten kilograms of powdered fentanyl and one pound of methamphetamine.⁴⁴ The seized drugs were from the Sinaloa Cartel.⁴⁵ According to the DEA, “[t]he Sinaloa Cartel primarily uses trafficking routes that go through Arizona,”⁴⁶ and the Phoenix area is a major cartel drug trans-shipment hub.⁴⁷

State Troopers in Yuma County now must conduct drug busts at the border on a daily basis.⁴⁸ In spite of their heroic efforts, law enforcement does not have the manpower to fully thwart the onslaught of cartel activity, as shown by the record increases in the amount of drugs now smuggled across the border. And the federal government’s decisions resulting in loss of operational control of the border has been a major contributing factor.⁴⁹ Over the course of just one week in late December 2021, Arizona State Troopers seized over 664 pounds of methamphetamine and 37 pounds of fentanyl, with a street value of more than \$5.1 million. The Arizona Department of Public Safety reports that “the cartels are in a constant state of war with each other” and persons involved in cartel activities are more commonly armed than before.⁵⁰ On December 1, 2021, after a car chase, Yuma Sector CBP agents stopped and detained an alien who was smuggling methamphetamine, cocaine, fentanyl, heroin, and more than \$10,000 in cash.⁵¹

⁴⁴ Steven Hernandez, *Scottsdale police, DEA seize record 1.7 million fentanyl pills in Arizona*, Arizona Republic, (Dec. 16, 2021), <https://www.azcentral.com/story/news/local/phoenix-breaking/2021/12/16/authorities-arizona-seize-9-million-fentanyl-pills-narcotics/8929613002/>

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ Alex Gallagher, *Record fentanyl seizure by Scottsdale cops, DEA*, Scottsdale Progress, (Dec. 19, 2021), https://www.scottsdale.org/news/record-fentanyl-seizure-by-scottsdale-cops-dea/article_fbf7c02e-6074-11ec-91ab-b35932ed58da.html

⁴⁸ Matt Leach, *Arizona border cop says Mexican cartels war not something easy to win*, Fox News, Jan. 6, 2022, <https://www.foxnews.com/us/arizona-border-cop-says-mexican-cartels-war>

⁴⁹ See pages 3-4, *supra*.

⁵⁰ *Id.*

⁵¹ CBP, *Suspicious Driver Who Fled from Agents Had Drugs and \$10K*, (Dec. 1, 2021), <https://www.cbp.gov/newsroom/local-media-release/suspicious-driver-who-fled-agents-had-drugs-and-10k>

CBP encounters with unauthorized aliens in the Yuma sector have been 2,400% higher so far in Fiscal Year 2022 than in Fiscal Year 2021.⁵² Most of these aliens pay smuggling fees to the cartels and gangs, thus increasing cartel profits and feeding further violence. Furthermore, cartels use human smuggling as a cover to distract authorities from their drug trafficking activities.⁵³

In a growing trend nicknamed “cartel uber,” drivers wait close to the border to pick up unauthorized aliens and smuggle them further into the United States. Alien smugglers, who are usually affiliated with the cartels, typically pay these drivers \$1,000 for each alien that is smuggled. Tragically, in October 2021, a local Cochise County resident was killed when her car was hit by a car driven by a 16-year-old who ran a red light at a speed of 105 miles per hour. The 16-year-old was smuggling four unauthorized aliens in his car.⁵⁴

CBP routinely apprehends unauthorized aliens trying to illegally reenter the United States who have known gang and cartel connections, or who have prior felony and drug convictions that strongly suggest cartel or gang connections. For example, the official Twitter account for the CBP Chief Patrol Agent for the Yuma Sector lists the following notable border apprehensions of criminal aliens just for the month of December 2021:

- Rosario Lugo-Parra, “multiple felony convictions for drug possession, assault and robbery”⁵⁵
- Joel Campos-Velis, “a suspected MS-13 gang member with an assault conviction”⁵⁶

⁵² *Id.*

⁵³ Russ Read, *US general: Cartels are using migrants to distract from drug smuggling at the border*, Washington Examiner, (Jul. 22, 2019), <https://www.washingtonexaminer.com/policy/defense-national-security/us-general-cartels-are-using-migrants-to-distract-from-drug-smuggling-at-the-border>.

⁵⁴ Charlotte Cuthbertson, *Human Smuggling Is Booming in Arizona, With Deadly Consequences*, Epoch Times, (Jan. 4, 2022), https://www.theepochtimes.com/cartel-uber-how-human-smuggling-is-devastating-lives-in-arizona_4192542.html

⁵⁵ <https://twitter.com/USBPChiefYUM/status/1473487668168192000>

- Gabriel Hernandez-Perez, “convicted of attempted aggravated sexual battery”⁵⁷
- Jose Jesus Villanueva-Canchola, “convicted of conspiracy to distribute a controlled substance”⁵⁸
- Armando Veliz-Samayoa and Isaac Humberto Cuen-Logo, convicted of “a drive-by shooting, theft, transporting and selling narcotics, and bank robbery”⁵⁹
- Jose Reynaldo Argueta-Ventura, “convicted of voluntary manslaughter”⁶⁰
- Elvis Guzman-Rodriguez, “two felony convictions for robbery and assault on a fellow inmate”⁶¹
- Guadalupe Salamanca-Sedano, “convicted ... in 2000 and 2010 for possession of narcotics”⁶²
- CBP “attempted a vehicle stop ..., but the driver fled and a pursuit involving multiple agencies ensued. The driver was stopped in San Luis, AZ, and had meth, fentanyl, cocaine, heroin and \$10K”⁶³

Cartel violence affects Arizonans abroad as well. For example, On November 14, 2019, cartel gunmen in the state of Sonora, Mexico (just south of Arizona) attacked a group of American citizens traveling in their vehicles. The gunmen murdered three women and six children and injured six others. Several of the victims were flown to Arizona for emergency medical treatment, and the families of many of the victims are former or current Arizona

⁵⁶ <https://twitter.com/USBPChiefYUM/status/1471120221268185090>

⁵⁷ <https://twitter.com/USBPChiefYUM/status/1471120221268185090>

⁵⁸ <https://twitter.com/USBPChiefYUM/status/1468596679356006406>

⁵⁹ <https://twitter.com/USBPChiefYUM/status/1466849092185690113>

⁶⁰ <https://twitter.com/USBPChiefYUM/status/1466848448833994754>

⁶¹ <https://twitter.com/USBPChiefYUM/status/1466521070920298497>

⁶² <https://twitter.com/USBPChiefYUM/status/1466520814623199235>

⁶³ <https://twitter.com/USBPChiefYUM/status/1466418419595624459>

residents.⁶⁴ On October 6, 2020, cartel gunmen armed with machine guns hijacked the vehicle of an Arizona family traveling in the area of the beach resort town of Rocky Point in the Mexican state of Sonora. The criminals stranded the family on the side of the road in an isolated area, without any of their belongings.⁶⁵ Although this did not occur in Arizona, it shows the threats of violence that the cartels pose.

The threat is not just limited to the onslaught from cartels. Potential terrorists also use the southern border to enter the United States. In April 2021, CBP released a press release after agents caught several men who were on terrorism watch lists.⁶⁶ After the press release started to circulate widely, CBP deleted it from its website.⁶⁷

The head of CBP warned in August 2021 that the border “is a national security crisis” and that there are “massive amounts of smuggling going across the southwest border — to include [known or suspected terrorists] at a level we have never seen before.”⁶⁸

⁶⁴ Gianluca Mezzofiore, et. al., *Woman whose sister-in-law was killed in massacre near the US-Mexico border says cartels have targeted them before*, CNN (Nov. 5, 2019), <https://www.cnn.com/2019/11/05/americas/mormons-attacked-us-mexico-border/index.html>; Anthony Harrup and Juan Montes, *Nine U.S. Citizens Killed in Ambush in Mexico*, WALL STREET JOURNAL, <https://www.wsj.com/articles/relatives-say-at-least-5-u-s-citizens-were-killed-in-north-mexico-shooting-11572949398>

⁶⁵ Jennifer Martinez, *Arizona family speaks out after scary robbery during Mexico trip*, FOX 10 PHOENIX (Oct. 7, 2020), <https://www.fox10phoenix.com/news/arizona-family-speaks-out-after-scary-robbery-during-mexico-trip>; Josh Sanders, *Mesa family ambushed, held at gunpoint while on vacation in Mexico*, 12 NEWS (Oct. 7, 2020), <https://www.12news.com/article/news/ mesa-family-ambushed-and-held-at-gunpoint-while-on-vacation-in-mexico/75-74e1f0cc-7676-4419-aceb-f3c341533d11>

⁶⁶ CBP, *Two Yemeni Men Arrested by Border Patrol Identified on the FBI's Terrorism Watch List*, (Apr. 5, 2021), <https://web.archive.org/web/20210405171308/https://www.cbp.gov/newsroom/local-media-release/two-yemeni-men-arrested-border-patrol-identified-fbi-s-terrorism-0>

⁶⁷ Gabrielle Fonrouge, *CBP deletes release about migrants on terrorism watch list over 'national security' concerns*, NY Post (Apr. 6, 2021), <https://nypost.com/2021/04/06/cbp-deletes-release-about-migrants-on-terrorism-watch-list/>

⁶⁸ Anna Giaritelli, *Suspected terrorists crossing border 'at a level we have never seen before,' outgoing Border Patrol chief says*, Washington Examiner (Aug. 16, 2021), <https://www.washingtonexaminer.com/news/border-patrol-chief-suspected-terrorists-coming-across-southern-border>

B. These Facts Satisfy The Definition Of “Invasion” Empowering The Governor To Exercise His Authority As Commander-In-Chief

As explained above, at the time of the Founding, the State Self-Defense Clause was understood to include a State’s right to use force to defend itself against “foreign hostility [and] ambitious or vindictive enterprises of [a state’s] more powerful neighbors.” *See* Part I(B), *supra*. This phrase includes for-profit activities that involve violence, and the cartel and gang activities described above involve inflicting brutal violence in the pursuit of profit and would thus qualify. This interpretation is supported by James Madison’s specific example of a state militia acting to suppress smugglers. The principal activity of transnational cartels and gangs at the border is to smuggle people and drugs for profit. Indeed, using the state militia to suppress smugglers was Madison’s paradigmatic example of a justified and Constitutional use of the state militia.

Furthermore, the commonly understood meaning at the time of the word “invade” covers the activities of the transnational cartels and gangs at the border—they enter Arizona “in [a] hostile manner”⁶⁹; they “enter as an enemy, with a view to ... plunder”; they “attack,” “assail,” and “assault”; and they “infringe,” “encroach on,” and “violate” Arizona.⁷⁰

The militia of the State of Arizona is established by Article 16 of the Arizona Constitution and is officially designated “The National Guard of Arizona.” Under A.R.S. § 26-174, the Governor also has authority to establish an Arizona State Guard. Under Article 5, Section 3 of the Arizona Constitution, the Governor is the “commander-in-chief of the military forces of the state, except when such forces shall be called into the service of the United States.”

Thus, while this Opinion has concluded that transnational cartel and gang activity in Arizona would meet the legal standard to justify exercise of the State’s power under the State Self-Defense Clause, only the Governor of the State of Arizona has the power to make a final

⁶⁹ Noah Webster, A COMPENDIOUS DICTIONARY OF THE ENGLISH LANGUAGE 164 (1806).

⁷⁰ 1 Noah Webster, AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 113 (1828).

determination that such exercise is justified. Similarly, only the Governor has the authority to establish the exact parameters for the exercise of the defensive use of force. While authorized by the U.S. and Arizona Constitutions, any such use of defensive force to protect the State against actual invasion must also be consistent with applicable federal law and treaties and particular attention must be paid to the State's relationship with Native American tribes with reservations at the Arizona-Mexico border. The applicability of such other sources of law and comity for the tribes' sovereignty is beyond the scope of this opinion. Finally, nothing in this opinion should be read as authorizing any use of force by anyone other than in the chain of command under the Governor; this opinion is strictly limited to the sovereign right of the State of Arizona under the State Self-Defense Clause of the U.S. Constitution and the Governor's constitutional powers as Commander-in-Chief for this purpose.

Conclusion

The issues in this Opinion relate to border security. The federal government's failure to secure the border and protect Arizona from invasion is dangerous and unprecedented. Thankfully, the Founders foresaw that States might need to protect themselves from invasion and made clear in the Constitution that States retain the sovereign power to defend themselves within their own territory. As discussed above, "actually invaded" and "invasion" in the State Self-Defense and Invasion Clauses is not limited to hostile foreign states but includes hostile non-state actors. The violence and lawlessness at the border caused by transnational cartels and gangs satisfies the definition of an "invasion" under the U.S. Constitution, and Arizona therefore has the power to defend itself from this invasion under the Governor's authority as Commander-in-

Chief. An actual invasion permits the State to engage in defensive actions within its own territory at or near its border.

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