

The Honorable Barbara J. Rothstein

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6
7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 STATE OF WASHINGTON,

11 Plaintiff,

12 v.

13 DONALD J. TRUMP, in his official capacity
14 as President of the United States of America, *et*
15 *al.*,

16 Defendants.

No. 2:19-01502-BJR

BRIEF OF THE BRENNAN
CENTER FOR JUSTICE AS *AMICUS*
CURIAE IN SUPPORT OF
PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT

NOTE ON MOTION CALENDAR:
DECEMBER 16, 2019

1 **TABLE OF CONTENTS**

2 INTEREST OF *AMICUS CURIAE*..... 1

3 INTRODUCTION AND SUMMARY OF ARGUMENT 1

4 ARGUMENT 2

5 I. Proclamation 9844 Is Contrary to the Congressional Intent Behind the

6 NEA 2

7 II. Proclamation 9844 Is Unprecedented in the History of NEA

8 Implementation 7

9 III. Upholding Proclamation 9844 Would Create a Dangerous Precedent 13

10 CONCLUSION..... 15

1 **INTEREST OF AMICUS CURIAE** ¹

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

10 **INTRODUCTION AND SUMMARY OF ARGUMENT**

11 Congress enacted the National Emergencies Act of 1976 (NEA) to rein in presidential use
12 of statutory emergency powers. Although Congress purposely omitted a definition of “national
13 emergency,” the legislative history makes clear that Congress did not intend for the law to
14 provide an affirmative grant of limitless discretion. Moreover, the law was carefully designed to
15 ensure that presidential actions in this area would remain subordinate to Congress’s authority. A
16 declaration issued for the purpose of flouting Congress’s will on a question of policy, such as
17 President Trump’s Proclamation 9844, makes a mockery of Congress’s intent in passing the law.

18 Proclamation 9844 also represents a sharp departure from past practice in implementing
19 the NEA. Outside of emergency declarations invoking the International Emergency Economic
20 Powers Act (IEEPA), which must be viewed separately in light of IEEPA’s legislative history
21 and subsequent congressional actions, presidents have declared national emergencies only a
22 handful of times in the past 40 years. All of these declarations responded to events that were
23 sudden and unexpected—thus meeting one of the basic criteria for an “emergency,” under the
24 term’s plain meaning—and none sought to implement measures for which Congress had

25 _____
26 ¹ No counsel for a party authored this brief in whole or in part, and no person other than *amicus* and their
27 counsel made a monetary contribution to its preparation or submission. This brief 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 Throughout the eighteenth and early nineteenth centuries, Congress periodically enacted laws
2 giving presidents standby authorities that they could use in their discretion during military,
3 economic, or labor crises. *See* Elaine Halchin, Cong. Research Serv., 98-505, *National*
4 *Emergency Powers* 1 (2019), <https://tinyurl.com/y3mvekk3>.

5 Beginning in World War I, a new procedure for invoking statutory emergency powers
6 evolved. Presidents would declare a national emergency, and this declaration would give them
7 access to statutory authorities that would otherwise lie dormant. *See* Halchin, *supra*, at 1. This
8 system continues to this day. Before the enactment of the NEA, however, there was no
9 overarching statute regulating it. *See id.* There was little transparency or congressional oversight
10 with respect to the presidents' use of emergency powers, and nothing to prevent states of
11 emergency from lingering indefinitely.

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

21 On review, the committee was surprised to learn that four clearly outdated states of
22 emergency—issued in 1933, 1950, 1970, and 1971—were still in effect. *See id.* at 7. As Senator
23 Church stated: “few, if any, foresaw that [these] temporary states of emergency . . . would
24 become what are now regarded collectively as virtual permanent states of emergency.” 120
25 Cong. Rec. S. 15784-86 (daily ed. Aug. 22, 1974) (statement of Sen. Church), *reprinted in* S.
26 Comm. on Government Operations and the Spec. Comm. on National Emergencies and
27 Delegated Emergency Powers, *The National Emergencies Act (Public Law 94-412)*, *Source*

1 *Book: Legislative History, Text, and Other Documents*, at 73 (1976) [hereinafter *Spec. Comm. on*
2 *National Emergencies Source Book*]. One House Report examining the issue observed:

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

9 121 Cong. Rec. H.R. H8325-H8341 (daily ed. Sept. 4, 1972) (statement of Rep. Rodino),
10 *reprinted in Spec. Comm. on National Emergencies Source Book, supra*, at 244.

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

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

25 While much work remains, none of it is more important than passage of the
26 National Emergencies Act. Right now, hundreds of emergency statutes confer
27 enough authority on the President to rule the country without reference to normal
constitutional process. Revelations of how power has been abused by high
government officials must give rise to concern about the potential exercise,
unchecked by the Congress or the American people, of this extraordinary power.
The National Emergencies Act would end this threat and insure that the powers
now in the hands of the Executive will be utilized only in time of genuine
emergency and then only under safeguards providing for Congressional review.

1 *Spec. Comm. on National Emergencies Source Book, supra*, at 50. The law employed various
2 mechanisms to this end. There were several provisions intended to increase transparency and
3 facilitate congressional oversight with respect to the presidents’ use of emergency powers. These
4 included requirements for the president to transmit declarations of national emergency to
5 Congress and publish them in the Federal Register, National Emergencies Act, Pub. L. No. 94-
6 412, § 201, 90 Stat. 1255 (codified at 50 U.S.C. § 1621); to specify in the declaration the specific
7 powers he intended to invoke, and to issue updates via published executive order where
8 necessary, 50 U.S.C. § 1631; to transmit to Congress any orders, rules, or regulations issued
9 pursuant to an emergency declaration, 50 U.S.C. § 1621; and to report to Congress every six
10 months on expenditures incurred by the government attributable to the exercise of emergency
11 powers, 50 U.S.C. § 1641(c).

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

22 As enacted, the law did not include a definition of “national emergency.” Critically,
23 however, this omission was not intended as a grant of unlimited discretion. Under an earlier draft
24 of the legislation, the president was authorized to declare a national emergency “[i]n the event
25 the President finds that a proclamation of a national emergency is essential to the preservation,
26 protection and defense of the Constitution or to the common defense, safety, or well-being of the
27 territory or people of the United States.” S. 977, 94th Cong. § 201 (a) (1975). One committee

1 report noted that this definition was “deliberately cast in broad terms that makes it clear that a
2 proclamation of a state of national emergency requires a grave national crisis.” *Spec. Comm. on*
3 *National Emergencies Source Book, supra*, at 96.

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

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

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

21 S. Rep. No. 94-1168, at 3 (1976), *reprinted in Spec. Comm. on National Emergencies Source*
22 *Book, supra*, at 292. The committee’s solution proved to be flawed, as the majority of the statutes
23 in place today that confer power on the president during “national emergencies” do not include
24 definitions of the term or criteria that must be met beyond the issuance of the declaration. *See A*
25 *Guide to Emergency Powers and Their Use*, Brennan Ctr. (Jan. 23, 2019),
26 <https://tinyurl.com/y78jkjyp>. It is nonetheless significant that Congress believed that even a
27 definition limiting national emergencies to grave national crises would be “overly broad.” The
28 notion that Congress intended the NEA as an affirmative delegation of unlimited discretion to the
29 president—one that would allow the president to circumvent the will of Congress on specific
30 policy proposals—is contradicted by this and every other aspect of the legislative history.

31 Moreover, where statutes granting emergency powers *do* include criteria beyond the mere
32 declaration of an emergency, this legislative history underscores the importance of strictly
33 interpreting and enforcing those limitations. In the current case, President Trump has invoked a

1 statutory provision that provides authorization and funding for military construction projects
2 only during emergencies that “require the use of the armed forces,” 10 U.S.C. § 2808(a), and
3 only if the projects “are necessary to support such use of the armed forces,” *id.*, and meet the
4 statutory definition of “military construction,” 10 U.S.C. § 2801(a). In passing the NEA,
5 Congress clearly intended for criteria like these to provide meaningful and enforceable checks on
6 the president’s authority to issue emergency declarations.

7 **II. Proclamation 9844 Is Unprecedented in the History of NEA Implementation**

8 In practice, the NEA has not been the strong check Congress intended. Nonetheless,
9 outside the unique context of emergency declarations invoking the International Emergency
10 Economic Powers Act (IEEPA), past presidential use of emergency powers has been relatively
11 restrained. A review of the law’s exercise from 1978 to the present shows that Proclamation
12 9844 is unprecedented, both in the absence of any arguable emergency and in the declaration’s
13 underlying purpose: to sidestep a Congress that would not bend to the president’s will.

14 The NEA’s effectiveness was undermined by the Supreme Court’s 1983 ruling that
15 concurrent resolutions are unconstitutional. *See I.N.S. v. Chadha*, 462 U.S. 919, 954-55 (1983).
16 Congress responded to the decision by substituting a joint resolution as the mechanism for
17 terminating emergencies. *See* 50 U.S.C. § 1622(a)(1). Like any other legislation, a joint
18 resolution must be signed into law by the president, and if the president vetoes the resolution,
19 Congress can override the veto only with a two-thirds vote by both houses. This change greatly
20 diluted the role of Congress as envisioned in the original Act.³

21 In addition, Congress has until now ignored the NEA’s requirement to meet every six
22 months while an emergency is in place and consider a vote on whether to end the emergency.
23 States of emergency have existed throughout the 40-plus years the law has been in effect, *see*

24 ³ The effect of this change is starkly illustrated by the current controversy. A majority of both houses of
25 Congress have voted (twice) to terminate Proclamation 9844. Under the original NEA procedure, that would have
26 been sufficient to end the emergency. However, pursuant to the revised legislation, the resolution went to the
27 president’s desk, and he vetoed it. Congress was unable to override the veto. *See* Melanie Zanona, *House Fails to*
Override Trump Veto on Border Emergency, Politico (March 26, 2019), <https://tinyurl.com/y4rssy3m>; Jordain
Carney, *Senate Fails to Override Trump Veto Over Emergency Declaration*, The Hill (Oct. 17, 2019),
<https://tinyurl.com/yydluzjv>.

1 *Declared National Emergencies Under the National Emergencies Act*, Brennan Ctr. (Oct. 18,
2 2019), <https://tinyurl.com/y56yzohe>, which means Congress should have met approximately 80
3 times to review them. There is no indication, however, that Congress has ever previously done
4 so.⁴ Before this emergency declaration, only one resolution to end a state of emergency had ever
5 been introduced, and the emergency declaration at issue was revoked before Congress could vote
6 on it. Tamara Keith, *If Trump Declares an Emergency to Build the Wall, Congress Can Block*
7 *Him*, N.P.R. (Feb. 11, 2019), <https://tinyurl.com/y4vobv6m>.

8 The NEA has thus proven weaker in implementation than in concept. Nonetheless, it has
9 never previously been treated as a license for presidents to invoke emergency powers literally at
10 will—or to do so against the express wishes of Congress. Indeed, presidents have shown
11 considerable restraint in their exercise of statutory emergency powers. According to the Brennan
12 Center’s research, nearly 70% of the authorities available to the president when he declares a
13 national emergency remain unused more than 40 years after the NEA took effect. *See* Elizabeth
14 Goitein, *Trump’s Hidden Powers*, Brennan Ctr. (Dec. 5, 2018), <https://tinyurl.com/y5484ngl>; *see*
15 *also A Guide to Emergency Powers, supra*. Although presidents have declared national
16 emergencies 63 times during that period, 57 of those have been invoked for the sole or primary
17 purpose of imposing foreign economic sanctions under IEEPA and related legislation. *See*
18 *Declared National Emergencies Under the National Emergencies Act, supra*. These cases
19 constitute a category unto themselves and must be addressed separately.

20 Congress enacted IEEPA in 1977 to limit the powers conferred by the 1917 Trading With
21 the Enemy Act (TWEA). It was Congress’s sense that the TWEA had been improperly used to
22 regulate domestic economic activity during peacetime. IEEPA thus limited the use of TWEA to
23 wartime and created a new framework for peacetime emergencies. *See* Laura K. Donohue,
24 *Constitutional and Legal Challenges to the Anti-Terrorist Financing Regime*, 43 Wake Forest L.
25

26 ⁴ On one occasion in 1980, the Chair of the House Foreign Affairs Committee sent a letter to the Speaker of
27 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 Rev. 643, 647-48 (2008). Under that framework, presidents could declare a national emergency
2 based on an “unusual and extraordinary threat” to the U.S. national security, foreign policy, or
3 economy “which has its source in whole or substantial part outside the United States.”
4 International Emergency Economic Powers Act, Pub. L. No. 95-223, tit. II, § 202, 91 Stat. 1626
5 (1977) codified at 50 U.S.C. §1701 (b). The president could then authorize a range of economic
6 actions to address this foreign threat.

7 Despite employing the mechanism of national emergency declarations, and despite the
8 requirement of an “unusual and extraordinary threat,” IEEPA has been used almost from the
9 outset as a basic tool of foreign policy. Presidents impose economic sanctions under IEEPA to
10 advance U.S. foreign policy interests, regardless of whether the threat to those interests is truly
11 “unusual and extraordinary.” *See* Harold Hongju Koh, *The National Security Constitution:
12 Sharing Power After the Iran-Contra Affair* 47 (Yale U. Press 1990).⁵ Those sanctions regimes
13 often become—and are intended to become—semi-permanent in nature. IEEPA thus underlies
14 current U.S. economic policies toward governments or factions in Iran, Sudan, the Balkans,
15 Zimbabwe, Iraq, Syria, Belarus, the Democratic Republic of the Congo, the Central African
16 Republic, Burundi, Lebanon, North Korea, Venezuela, Somalia, Libya, Yemen, and Ukraine. *See*
17 *Declared National Emergencies, supra*.

18 While treating IEEPA as a general delegation of foreign sanctions authority might seem
19 incompatible with the congressional intent underlying the NEA, Congress has for decades
20 acquiesced in this use. Indeed, there is some evidence that Congress, in passing IEEPA, expected
21 that it would be used to fill gaps in non-emergency legislative regimes. Presidents had previously
22 invoked a provision of the TWEA to impose controls over certain types of exports when export-
23 control legislation—the Export Administration Act—had lapsed. Congress imported the relevant

24 ⁵ The White House itself has acknowledged this dynamic. After President Obama declared a national
25 emergency to impose sanctions on Venezuela in 2015, the White House hastened to reassure the public that there
26 was, in fact, no threat to U.S. national security, despite the executive order’s words to the contrary. “[T]he United
27 States does not believe that Venezuela poses some threat to our national security,” said Deputy National Security
Adviser Ben Rhodes. “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..>

1 language from the TWEA into IEEPA, and the legislative history shows that Congress
2 anticipated it could be used in the same way if the Export Administration Act were to lapse again
3 in the future. *See* Joel B. Harris and Jeffrey P. Bialos, *The Strange New World of United States*
4 *Export Controls Under the International Emergency Powers Act*, 18 Vand. J. Transnat'l L. 78,
5 78 n. 16 (1985). That, indeed, is what happened in 1983. *See* Exec. Order No. 12444, 48 Fed.
6 Reg. 48215 (Oct. 14, 1983). Both the NEA and IEEPA have subsequently been amended without
7 Congress acting to modify this aspect of presidents' use of IEEPA.

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

- 11 • Executive Order 12722 (1990) – issued in response to the Iraqi invasion of Kuwait.
12 Although the emergency was initially declared for the purpose of imposing sanctions
13 under IEEPA, President George H.W. Bush subsequently relied on it to bolster military
14 strength and to engage in military construction during the Gulf War. *See* Exec. Order.
15 12722, 55 Fed. Reg. 31803 (Aug. 3, 1990); *A Guide to Emergency Powers, supra*.
- 16 • Proclamation 6491 (1992)⁶ – issued in response to Hurricanes Andrew and Iniki. The
17 declaration was used to suspend minimum wage requirements with respect to
18 reconstruction efforts in areas devastated by the hurricanes. *See* Proc. No. 6491, 57 Fed.
19 Reg. 47553 (Oct. 14, 1992); *A Guide to Emergency Powers, supra*.
- 20 • Proclamation 6867 (1996) – issued in response to deadly Cuban attacks on U.S. civilian
21 aircraft. The declaration was used to impose a naval blockade on Cuba. *See* Proc. No.
22 6867, 61 Fed. Reg. 8843 (Mar. 1, 1996); *A Guide to Emergency Powers, supra*.
- 23 • Proclamation 7463 (2001) – issued in response to the attacks of 9/11. The declaration was
24 used primarily to make changes in the size and composition of the military forces,

25 ⁶ Although the proclamation stated that the hurricanes constituted a “national emergency” and invoked
26 emergency powers, it did not formally declare an emergency under the National Emergencies Act. Accordingly, this
27 proclamation is not included in the list of national 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 including calling reservists to active duty and implementing stop-loss policies. *See* Proc.
2 No. 7463, 66 Fed. Reg. 48199 (Sept. 14, 2001); *A Guide to Emergency Powers, supra*.

- 3 • Proclamation 7924 (2006) – issued in response to Hurricane Katrina. The declaration was
4 used to suspend minimum wage requirements with respect to reconstruction efforts in
5 areas devastated by the hurricane. *See* Proc. No. 7924, 70 Fed. Reg. 54225 (Sept. 8,
6 2005); *A Guide to Emergency Powers, supra*.
- 7 • Proclamation 8443 (2009) – issued in response to the swine flu epidemic. The declaration
8 was used to waive certain legal requirements in order to facilitate the provision of public
9 health services. *See* Proc. No. 8443, 74 Fed. Reg. 55439 (Oct. 23, 2009); *A Guide to*
10 *Emergency Powers, supra*.

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

24 Proclamation 9844 is thus unprecedented in two respects. First, the problem it seeks to
25 address cannot reasonably be described as an “emergency.” At the time President Trump issued
26 the declaration, there had been no sudden, unexpected change in illegal immigration at the
27 southern border. According to official government data, illegal border crossings in 2017 reached

1 their lowest point in 46 years; they remained close to that historic low, and well within the
2 fluctuation range for the past several years, in 2018. *See* Lori Robertson, *Illegal Immigration*
3 *Statistics*, FactCheck.Org, (Jan. 9, 2019), <https://tinyurl.com/ybn5mr7s>; John Burnett, *Arrests for*
4 *Illegal Border Crossings Hit 46-Year Low*, NPR (Dec. 5, 2017, 11:10 AM),
5 <https://tinyurl.com/y84xapfl>.

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 stated 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/ycxmurfu>, 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.

19 Second, no previous president has invoked emergency powers to take an action for which
20 Congress had explicitly withheld its consent.⁷ Here, President Trump for two years sought
21 funding from Congress to build a wall along the southern border, and Congress consistently
22 refused to provide it. Indeed, Congress voted repeatedly not to give the president the authority
23 and funds that he requested.

25 ⁷ The closest comparison is President Ronald Reagan’s emergency declaration in 1983, which he used to
26 continue certain export controls under IEEPA after a statute authorizing such controls had lapsed. *See* Exec. Order
27 No. 12444, 48 Fed. Reg. 48215 (Oct.14, 1983). As noted above, however, the legislative history of IEEPA indicates
Congress’s awareness that presidents would be able to use IEEPA for that very purpose. *See supra* pp. 10-11.
Importantly, that was not a case in which Congress voted to deny the president authority or funding for the very
action he then attempted to take.

1 The President has been quite forthright that his purpose in declaring an emergency was to
2 get around Congress. In the weeks leading up to the declaration, he repeatedly stated that he
3 would give Congress time to change its mind about funding the wall, and that he would declare
4 an emergency only if Congress refused to give him what he wanted. On January 10, President
5 Trump stated his preference for “do[ing] the deal through Congress,” but he added that if the
6 deal did not “work out,” he would “almost ... definitely” declare a national emergency. *Remarks*
7 *by President Trump Before Marine One Departure*, White House (Jan. 10, 2019),
8 <https://tinyurl.com/yycew5dk>. Asked about his threshold for declaring an emergency, President
9 Trump responded, “My threshold will be if I can’t make a deal with people that are
10 unreasonable.” George Sargent, *Trump: I have the ‘Absolute Right’ to Declare a National*
11 *Emergency if Democrats Defy Me*, Wash. Post (Jan. 9, 2019), <https://tinyurl.com/y5f5eqwg>. On
12 February 1, Trump reiterated that he was planning to wait until February 15, the date on which a
13 temporary appropriations measure would lapse, before issuing an emergency declaration. *See*
14 *Excerpts from Trump’s Interview with the New York Times*, N.Y. Times, (Feb. 1, 2019),
15 <https://tinyurl.com/y9gsosk4>; see also *Transcript: President Trump on “Face the Nation,”* CBS
16 News, (Feb. 3, 2019), <https://tinyurl.com/y8l38g72>. He predicted that “we will be looking at a
17 national emergency, because I don’t think anything is going to happen [in Congress]. I think the
18 Democrats don’t want border security.” *Remarks by President Trump in Meeting on Human*
19 *Trafficking on the Southern Border*, White House (Feb. 1, 2019), <https://tinyurl.com/y5ghp3eh>.

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

23 **III. Upholding Proclamation 9844 Would Create a Dangerous Precedent**

24 If allowed to stand, President Trump’s emergency declaration would create an
25 extraordinarily dangerous precedent. In the future, presidents would know that they could invoke
26 emergency powers to address even longstanding problems, and that they could use those powers
27 to take actions for which Congress has expressly withheld consent. In other words, where

1 emergency powers exist that could resolve a policy dispute with Congress, there would be
2 nothing to stop a president from deploying them, and it would require a veto-proof majority of
3 Congress to put an end to the contested policy. This would fundamentally upset the balance of
4 power between the president and Congress.

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

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

26 Another emergency power allows the president to detail any member of the U.S. armed
27 forces to “any . . . country that he considers it advisable to assist in the interest of national

1 defense.” 10 U.S.C. § 712(a)(3). This power has not been exercised during the 40 years the NEA
2 has been in effect. Yet this has also been a period of congressional acquiescence in executive
3 branch deployments of the military. *See* Louis Fisher, *Congressional Abdication: War and*
4 *Spending Powers*, 43 St. Louis U. L.J. 931, 967-80 (1999). There are some indications that
5 Congress is beginning to reassert itself in this area. *See* Karoun Demirjian, *With vote to end U.S.*
6 *involvement in Yemen’s war, House sets up Trump’s second veto*, Wash. Post, Apr. 4, 2019,
7 <https://tinyurl.com/y4fhw9aq>. If that continues—and if courts have given their blessing to
8 presidential use of emergency powers to resolve policy disagreements with Congress—the power
9 to detail members of the U.S. armed forces during national emergencies could give presidents a
10 convenient workaround.

11 The list goes on. There are statutory provisions that authorize the president, during a
12 national emergency, to prohibit or limit the export of any agricultural commodity, *see* 7 U.S.C. §
13 5712(c); to suspend statutory wage requirements for public contracts, *see* 40 U.S.C. § 3147; to
14 “coordinate” domestic transportation, *see* 49 U.S.C. § 114(g); and to sell off aliens’ property
15 without waiting for a court judgment, *see* 50 U.S.C. § 4309. If courts uphold President Trump’s
16 actions in this case, such formidable powers could henceforth become available—to President
17 Trump or to a future president—based simply on the president’s unilateral claim that he needs
18 them, and against the wishes of a majority of Congress.

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

25 CONCLUSION

26 For the foregoing reasons, we urge this court to grant the Plaintiff’s motion for summary
27 judgment and enjoin the operation of Proclamation 9844.

1 Respectfully submitted this 1st day of November, 2019,
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