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18 UNITED STATES DISTRICT COURT
 19 FOR THE NORTHERN DISTRICT OF CALIFORNIA

20 THE CITY OF PORTLAND AND THE CITY
 OF OAKLAND,

21 Plaintiffs,

22 v.

23
 24 WILLIAM BARR, in his official capacity as
 United States Attorney General; UNITED
 25 STATES DEPARTMENT OF JUSTICE;
 CHAD F. WOLF, in his official capacity as
 26 Acting Secretary of Homeland Security; and
 UNITED STATES DEPARTMENT OF
 27 HOMELAND SECURITY,

28 Defendants.

Civil Action No. 20-cv-7184

**COMPLAINT FOR
 DECLARATORY AND
 INJUNCTIVE RELIEF**

[Administrative Procedure Act Case]

INTRODUCTION

1
2 1. This lawsuit challenges the unlawful and unconstitutional overreach of federal law
3 enforcement in response to and in anticipation of civil protests in progressive United States cities.
4 In particular, the lawsuit challenges the federal government’s new policy authorizing the expanded
5 and unbounded jurisdiction of federal law enforcement under the guise of protecting federal
6 property, and the federal government’s related and unconstitutional practice of commandeering
7 local law enforcement officers for similar ends.

8 2. Plaintiffs are the cities of Portland, Oregon, and Oakland, California—cities that,
9 like others across the United States, have primary responsibility for the health, safety, and welfare
10 of their residents, including the protection and oversight of general public safety during protests.
11 Plaintiffs have police departments, fire departments, and other local governmental departments
12 whose purposes and responsibilities are to reduce and address violence and/or support public safety
13 in their communities. In conducting these important functions, Plaintiffs aim to respect, honor, and
14 protect the First Amendment rights, among other rights, of their residents and visitors, so that those
15 residents and visitors can demonstrate, march, and protest. Plaintiffs also have obligations under
16 local and state law to respond, as necessary, to threats of violence and community harm. Outside
17 of the exceptional actions taken by Defendants as described in this Complaint, Plaintiffs have long
18 operated with this understanding of their duties and authority.

19 3. Defendants are the Department of Justice (“DOJ”) and the United States
20 Department of Homeland Security (“DHS”), and the leaders of both departments. In response to
21 directives from President Donald J. Trump beginning in or around June 2020, Defendants
22 unilaterally, unlawfully, and unconstitutionally began instituting a policy that authorized the
23 deployment and operation of federal agents in United States cities, allegedly for the purpose of
24 assuring domestic “law and order” and “tak[ing] over cities.”

25 4. The full scope and parameters of the policy authorizing these actions are currently
26 unknown, as no ordinary public process was followed in its creation. However, for the first known
27 time, Defendants are using 40 U.S.C. § 1315—a statute which authorizes federal agents to protect
28 *federal* property and personnel—as the basis for, at a minimum: (a) deploying federal law

1 enforcement to quash civil protests in United States cities; (b) authorizing the engagement,
2 surveillance, and operations of these deployments to include non-federal property and virtually
3 limitless jurisdiction; and (c) erecting a fence around the Hatfield Federal Courthouse in Portland,
4 without a permit or City consent, that encroaches on the City’s right-of-way (the “Policy”).

5 5. Using that authority or other, unknown authorities, Defendants have also instituted
6 an unlawful practice in Portland of commandeering control of local law enforcement officers in
7 direct contravention of the City’s express revocation of consent, and for unknown or pretextual
8 ends (the “Practice”).

9 6. Based on information and belief, the Policy is a response to, incorporates, and/or is
10 guided by, the June 26, 2020 Executive Order 13933, *Protecting American Monuments,*
11 *Memorials, and Statues and Combating Recent Criminal Violence* (the “Executive Order”), signed
12 by President Trump following nationwide protests—quite possibly the largest social justice
13 protests in our nation’s history—over police brutality and systemic racism. The Executive Order
14 prescribes a set of directives aimed at punishing and responding to “State and local governments”
15 that had allegedly “lost the ability to distinguish between the lawful exercise of rights to free speech
16 and assembly and unvarnished vandalism,” or otherwise “failed to protect public monuments,
17 memorials, and statues.”

18 7. Based on information and belief, the Practice is similarly in response to,
19 incorporates, and/or is guided by, the Executive Order.

20 8. Armed with this Executive Order, Defendants instituted and/or continued refining
21 and executing the Policy, which concerns the broad deployment and operation of federal law
22 enforcement in United States cities without the consent, request, or authorization from the states
23 or local leaders; without using any known and non-pretextual legal authority to do so; and with the
24 purpose and/or effect of taking on quintessential general policing powers granted to other
25 governments.

26 9. Federal law enforcement agents have, under the Policy, been deployed to United
27 States cities, either secretly or with little warning, under at least three separate operations or
28

1 programs: Operation Legend; Operation Diligent Valor, which includes the recent deployment of
2 agents in Portland, Oregon; and the Protecting American Communities Task Force (“PACT”).

3 10. Although Defendants and/or their agents or employees have publicly claimed that
4 certain operations are for the purpose of protecting federal property under 40 U.S.C. § 1315,
5 internal memoranda, continuing public statements, and activities in cities such as Portland instead
6 reveal a distinct and meaningful policy shift to use federal law enforcement to unilaterally step in
7 or replace local law enforcement departments that do not subscribe to the President’s view of
8 domestic “law and order.”

9 11. Among other things, reported non-public memos from DHS reveal that, under the
10 Policy and in response to the Executive Order, federal law enforcement agents are now authorized
11 to engage in surveillance activities for threats to *any* public monument, memorial, or statue—
12 which in major cities like Plaintiff jurisdictions, could constitute surveillance within the *entire*
13 jurisdiction regardless of federal interests or harms at stake.

14 12. In addition, DOJ and/or DHS have engaged in a variety of unauthorized activities
15 under the Policy. Such activities in Portland have included surveilling the text messages of
16 protesters and building a fence that blocks the right-of-way on City property and refusing to
17 remove it upon request of City officials.

18 13. Defendants, as well as President Trump, have expressed an intent to expand or at
19 least continue the Policy. President Trump has stated: “We’re going to have more federal law
20 enforcement. That I can tell you.”—while threatening to send federal agents into major cities “run
21 by liberal Democrats.” For instance, he said: “We’re not going to let New York and Chicago, and
22 Philadelphia and Detroit and Baltimore and all of these—Oakland is a mess. We’re not going to
23 let this happen in our country.”

24 14. These threats are not new. President Trump has long threatened American cities led
25 by Democrats. But as recently as April 2020, Defendants did not purport to have, or act in
26 accordance with, the authority they now assert under the Policy. In April, numerous public
27 monuments, memorials, and statues were equally or more under threat from armed and uncivil
28 protesters who opposed public health measures to control COVID-19. But those protesters

1 expressed a different set of political views than the majority of those protesting after May 25, 2020,
2 and no policy was then in effect to allow or require the type of federal operations now occurring
3 or allowed to occur under the Policy.

4 15. The Policy threatens to upend the current federalism structure and working
5 relationships between local and federal law enforcement agencies. Section 1315 has never before
6 been interpreted to permit the actions taken by Defendants under its auspices.

7 16. Defendants have not and did not publicly rely on any of the limited authorities, as
8 described below, that would lawfully allow deployments of federal agents within the parameters
9 defined in such laws.

10 17. The Policy is not merely a change in Defendants' interpretation of their own
11 enforcement authority. The Policy is based on a misunderstanding, misinterpretation, error, and/or
12 disregard for the scope of Defendants' legal authority.

13 18. In addition, no constitutional authority has been offered for the related Practice of
14 commandeering Portland's law enforcement by refusing to release Portland law enforcement
15 officers from their temporary deputation as federal agents, conscripting them without consent and
16 against Portland's express wishes into ongoing deputation.

17 19. This monumental policy change and new commandeering practice harms Plaintiffs'
18 and other cities' abilities to safely govern and police in ways aligned with and responsive to
19 community goals and racial equity reforms. As local governments, Plaintiffs have independent
20 police forces; community relationships; and locally-determined policing policies, practices, and
21 procedures. Plaintiffs' police forces have always been able to expect when and how federal law
22 enforcement agents could assert federal powers within their jurisdictions. The use of deployments
23 and operations violating established constitutional parameters, politically motivated interventions,
24 and lawless commandeering of local law enforcement are unconstitutional and unauthorized in
25 part because of the havoc such actions impose on local jurisdictions and the innumerable ways in
26 which these deployments run roughshod over the longstanding federalist balance of the general
27 policing power.

28

1 20. Plaintiffs are further harmed by the Policy and Practice because they threaten,
2 intimidate, chill and/or discourage the exercise of constitutional or civil rights of their residents,
3 leaders, and/or the jurisdictions themselves.

4 21. The Policy and Practice also harm Plaintiffs to the extent they have and will
5 continue to incite violence and make it more difficult for Plaintiffs to fulfill their core public safety
6 missions.

7 22. Plaintiffs are additionally harmed by their increased costs, expenditures, and
8 resources devoted to responding to actions taken by Defendants under the Policy and Practice.

9 23. Plaintiffs therefore bring this action to enjoin Defendants’ new Policy and new
10 Practice, which are unconstitutional, arbitrary and capricious, in excess of Defendants’ legal
11 authority, and/or wholly pretextual.

12 **JURISDICTION AND VENUE**

13 24. This Court has jurisdiction under 28 U.S.C. § 1331 because this is a civil action
14 arising under the United States Constitution; the Administrative Procedure Act (“APA”), 5 U.S.C.
15 §§ 701-706; and other federal statutes.

16 25. This Court has the authority to issue declaratory and injunctive relief under the
17 Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202, and the APA, 5 U.S.C. § 706.

18 26. Venue is proper in this judicial district under 28 U.S.C. § 1391(b)(2) and (e)(1).
19 Defendants are United States officers or agencies sued in their official capacities, a substantial part
20 of the events or omissions giving rise to this action have occurred or will occur in this district, and
21 one Plaintiff resides in this district.

22 **INTRADISTRICT ASSIGNMENT**

23 27. Pursuant to the Northern District Civil Local Rule 3-2(c)-(d), the intradistrict
24 assignment should be to the Oakland or San Francisco Division because a substantial part of the
25 acts or omissions that give rise to this action are occurring in the County of Alameda.

26 **PARTIES**

27 28. The CITY OF PORTLAND is a municipal corporation governed by charter, located
28 in the District of Oregon, and existing under the laws and constitution of the State of Oregon.

1 Portland is home to more than 650,000 residents, and the City's leadership has committed to
2 significant reforms to local policing and other policies, with an aim toward promoting racial
3 justice.

4 29. The CITY of OAKLAND is a municipal corporation and charter city located in the
5 Northern District of California, organized and existing under and by virtue of the laws of the State
6 of California. The City of Oakland is home to over 420,000 people and consistently ranks as one
7 of the most ethnically and racially diverse major cities in the United States. Approximately 23%
8 of Oakland's residents identify as Black or African American, 26% as Hispanic or Latinx, 15% as
9 Asian or Asian-American, and 5.5% as multi-racial. The City's leadership is engaged in significant
10 reforms to local policing and other policies, with an aim toward promoting racial justice.

11 30. Plaintiffs are aggrieved by Defendants' actions and have standing to bring this
12 action because the Policy and its implementation and the Practice harm Plaintiffs' independent and
13 constitutionally recognized economic, dignitary, and proprietary interests and will continue to
14 cause injury unless and until the Policy is vacated and Defendants' practices are permanently
15 enjoined.

16 31. WILLIAM BARR is the United States Attorney General. He is sued in his official
17 capacity.

18 32. The UNITED STATES DEPARTMENT OF JUSTICE is a cabinet agency within
19 the executive branch of the United States government and is an agency within the meaning of 5
20 U.S.C. § 552(f).

21 33. CHAD F. WOLF is the purported Acting Secretary of Homeland Security. He is
22 sued in his official capacity.

23 34. The UNITED STATES DEPARTMENT OF HOMELAND SECURITY is a
24 cabinet agency within the executive branch of the United States government and is an agency
25 within the meaning of 5 U.S.C. § 552(f). Its stated missions involve anti-terrorism, border security,
26 immigration and customs. It was created in 2002 by combining 22 different federal departments
27 and agencies into a single Cabinet agency.

28

FACTUAL ALLEGATIONS

Background

35. Adherence to the Constitution is the bedrock of American democracy. Regardless of any changes to the interpretation of the Constitution over time, certain structures endure.

36. One such foundational structure is the separation of federal powers: the division of authority and responsibility that guides all legal action taken in the United States. Under the separation of powers, the Congress makes law, the Executive Branch implements that law, and the Judiciary assesses the legality of those laws and actions.

37. Another foundational structure is federalism: the division or sharing of legal power between the national government and other government units, including states, counties, cities, parishes, commonwealths, territories, and tribal governments (hereafter “other governments”). Other governments, including cities, “ensure[] that powers which ‘in the ordinary course of affairs, concern the lives, liberties, and properties of the people’ [are] held by governments more local and more accountable than a distant federal bureaucracy.” *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 536 (2012) (quoting *The Federalist* No. 45 at 293 (J. Madison)).

38. A federalist system’s division of power evolves, but in expected ways, such as through Congress passing new laws to further regulate other governments, or other governments using the courts to push back on laws or rules made by the Congress or the Executive Branch.

39. Within this federalism framework and under the Tenth Amendment to the United States Constitution, the general police powers are left to the states, who in turn often delegate such plenary authority to cities like Plaintiffs. *See, e.g.*, Cal. Const., art. 11, § 7; Or. Const., art XI, § 2. As the Supreme Court has long held, “the facets of governing that touch on citizens’ daily lives are normally administered by smaller governments closer to the governed.” *Nat’l Fed’n of Indep. Bus.*, 567 U.S. at 536.

40. Accordingly, the federal government has never created a federal domestic police force with broad powers. The general policing power, including over most violent crime, is left to other governments. As courts have repeatedly held, “We can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than

1 the suppression of violent crime and vindication of its victims.” *United States v. Morrison*, 529
2 U.S. 598, 618 (2000).

3 41. Instead, where Congress has authorized, the Executive Branch has executed, and
4 the Judiciary approved, the federal government has created a constellation of different law
5 enforcement agencies, each of which has a specific domain of authority as defined by federal
6 statutes. For the most part, those domains of authority are not coextensive with other governments’
7 general policing power.

8 42. Within the scope of those federal statutes, such federal law enforcement activities
9 have been limited to: (a) the enforcement of a direct federal interest (*e.g.*, enforcement of a federal
10 law); or (b) assisting other governments, which constitutes the enforcement of an indirect federal
11 interest.

12 43. Whether enforcing a direct federal interest or assisting other governments, federal
13 law enforcement acts within prescribed legal bounds. Either federal law enforcement is invited by
14 other governments to participate in any number of lawful collaborative activities or federal law
15 enforcement may intervene without invitation in the circumstances where federal law permits.

16 44. In the former category of invited collaboration, Plaintiffs have, like many other
17 cities, frequently engaged in lawful partnerships with federal law enforcement. From subject-
18 specific task forces to investigating borderless crimes, other governments often depend on and
19 engage with federal law enforcement to help protect residents and visitors. Plaintiffs have, for
20 example, partnered with the Federal Bureau of Investigation on child exploitation task forces; with
21 the Drug Enforcement Administration to combat illegal drug trafficking; with the Bureau of
22 Alcohol, Tobacco, Firearms and Explosives to proactively identify the source of guns used for
23 crimes; with the United States Marshals Service (“USMS”) to apprehend those fleeing the justice
24 system; and with the United States Secret Service to tackle identity theft.

25 45. These past and present local-federal relationships are voluntary and consensual.
26 Federal law enforcement and local law enforcement agencies generally work together in Plaintiffs’
27 communities with a mutual understanding of the mission, clear directives regarding jurisdictional
28 functions, and specific agreements (*e.g.*, via Memoranda of Understanding or Agreement) that

1 inform both sides of their respective obligations. Such partnerships were and are authorized by
2 law, typically memorialized by mutual agreement, and not the subject of this lawsuit.

3 46. In the latter category of uninvited intervention, the federal government has certain
4 powers that are superior to those of other governments, made so by the Supremacy Clause.

5 47. Such powers include federal enforcement of crucial fundamental federal rights,
6 including civil rights. Throughout the nation’s history, federal enforcement authorities have at
7 times overridden other governments’ ignorant or bigoted refusals to grant or defend
8 constitutionally protected rights. Whether desegregating schools or extending the voting franchise
9 to Black people, federal enforcement—without invitation or local approval—has been at times
10 both lawful and vital.

11 48. Such intervention powers may also, in extraordinary circumstances, permit the
12 deployment of federal forces domestically, in which federal law enforcement temporarily takes
13 over the general police powers otherwise reserved to other governments. Such circumstances are
14 constitutionally delineated by Article I, Section 8, one of the Militia Clauses (allowing Congress
15 to “call[] forth the Militia to execute the Laws of the Union”) and by Article IV, Section 4 (the
16 obligation to protect the states against invasion and against “domestic violence”).

17 49. The Constitution reserves both of those described powers for the Legislative
18 Branch, either exclusively or principally. The cited Militia Clause only gives power to Congress.
19 The Article IV Republican Form of Government Clause gives power first to the Legislature, and
20 then only to the Executive “when the Legislature cannot be convened.”

21 50. Under these authorities, Congress has, among other things, passed the Insurrection
22 Act of 1807, now codified as amended at 10 U.S.C. §§ 251-255, which allows domestic military
23 intervention when circumstances make it impracticable to enforce the law by any other means, and
24 the complementary Posse Comitatus Act of 1876, now codified at 18 U.S.C. § 1385, eliminating
25 virtually any use of the military to regulate American civilians.

26 51. These laws represent some key legal guardrails constitutionally implemented by
27 the Legislative Branch to limit and define where the Executive Branch may, without permission
28 and while overriding other governments’ prerogatives, nonetheless enforce federal law.

1 52. Specifically, the Insurrection Act empowers the President to call into service the
2 United States Armed Forces and the National Guard: (a) when formally requested by a state; (b)
3 to address an insurrection in any state, when that insurrection makes it impracticable to otherwise
4 enforce the law; or (c) to address an insurrection, domestic violence, unlawful combination or
5 conspiracy, in any state, which results in the deprivation of constitutionally secured rights, and
6 where the state is unable, fails, or refuses to protect those rights. 10 U.S.C. §§ 251-253.

7 53. There is a set legal process for invoking the Insurrection Act that is neither
8 clandestine nor equivocal. To invoke the Act, a president must issue a “proclamation to disperse”:
9 that is, “by proclamation, immediately order the insurgents to disperse and retire peaceably to their
10 abodes within a limited time.” 10 U.S.C. § 254. Such proclamations have been issued as Executive
11 Orders and/or as Proclamations published in the Federal Register.

12 54. The Insurrection Act has never been invoked in the 21st century. In its limited usage
13 in the 20th century, the federal government often invoked the Act to protect civil rights,
14 particularly the rights of Black children to attend desegregated schools.

15 55. When the Act was most recently invoked, in 1992, then-President George H.W.
16 Bush issued a general Proclamation and an operationalizing Executive Order. *See* Proclamation
17 No. 6427, 57 Fed. Reg. 19,359 (May 1, 1992); Exec. Order No. 12804, 57 Fed. Reg. 19,361 (May
18 1, 1992). Executive Order 12804 provided detailed instructions for Cabinet officials to respond to
19 the alleged insurrection in California. Among other things, it directed the Attorney General: “(1)
20 to coordinate the activities of all Federal agencies assisting in the suppression of violence and in
21 the administration of justice in and about the City and County of Los Angeles, and other districts
22 of California, and (2) to coordinate the activities of all such agencies with those of State and local
23 agencies similarly engaged.”

24 56. DOJ and Defendant Barr are aware of the legal process for invoking the
25 Insurrection Act. As an agency, DOJ has typically been involved when the Insurrection Act is
26 invoked. As an individual, Defendant Barr was serving in an official capacity as Attorney General
27 in 1992.

1 57. The Executive Branch’s authority under the Act, or under other such extraordinary
2 emergency powers, does not undergird the Policy.

3 58. Any invocations of emergency powers or interventions under those powers are rare,
4 reserved for extraordinary circumstances, and are not the subject of this lawsuit.

5 59. Finally, Executive Branch agencies, endowed by Congress or the Constitution with
6 particular powers, must, per Article II, Section 3, “take care” to execute their duties under those
7 authorities. Sometimes, those authorities are clearly defined by statute or a provision of the
8 Constitution. At other times, those authorities are further crystalized and concretized by Executive
9 Branch interpretations of the authority so granted. Those interpretations come in forms such as
10 regulations, rules, and myriad types of sub-regulatory guidance.

11 60. The legality of such Executive Branch interpretations of its authority is easily
12 tested, commonly through the APA, which governs how the Executive Branch creates and acts on
13 those interpretations, and what those interpretations are. Stated simply, the APA is a key method
14 by which the Judiciary may assess the legality of the Executive Branch’s interpretation of its
15 powers, including whether such interpretations are “arbitrary and capricious,” “contrary to
16 constitutional right[s],” or “in excess of statutory authority.” 5 U.S.C. § 706.

17 61. Such Executive Branch interpretations of its authority may also be tested through
18 other legal means, such as by questioning their constitutionality directly in federal court.

19 62. Such Executive Branch interpretations are or may be the subject of this lawsuit.

20 63. As these recitations reflect, the federal government has lawful tools to intervene—
21 voluntarily or involuntarily—in other governments’ exercise of their police powers. These
22 recitations also reflect that those tools are either used with mutual agreement, or without agreement
23 in circumstances, such as those enumerated, rooted in the Constitution. Finally, these recitations
24 reflect that the federal government follows lawful and expected paths to exercise authority over
25 other governments.

26 //

27 //

28 //

1 **Policy Change Regarding Deployment and Operation of Federal Forces**

2 64. Consistent with the above framework, until recently, Plaintiffs believed that they
3 understood the structure, procedures, and basis for both the invited and the uninvited deployment
4 and operations of federal law enforcement agents into their communities.

5 65. However, in recent months, following the direction of President Trump, Defendants
6 have instituted this new Policy, whose full parameters are unknown, but that, at minimum,
7 unlawfully expands the unilateral deployment and operations of federal law enforcement to quell
8 protests and broadly assert general police powers.

9 66. The Policy and each and every instance where Defendants, through their officers,
10 employees, and/or agents, unlawfully deployed or commanded federal law enforcement to act in
11 excess of or contrary to 40 U.S.C. § 1315 or the Constitution constitutes “final agency action”
12 under the APA.

13 **Prior Status Quo**

14 67. President Trump has long issued threats against cities he views as progressive or
15 racially diverse, including Plaintiffs. In 2017, he threatened to “send in the feds” to Chicago if
16 their mayor did not fix the “carnage,” and compared the city unfavorably to Afghanistan. In 2019,
17 in describing Los Angeles, New York, and San Francisco, he referred to these “sanctuary cities
18 run by liberal people” as places where “people living there are living in hell,” and threatened that
19 he might “intercede” or “may do something to get that whole thing cleaned up.” In 2020, he
20 repeatedly threatened Plaintiffs Portland and Oakland.

21 68. Separately, since President Trump took office, Americans have engaged in some of
22 the largest protests in our nation’s history. The day after his inauguration, between 3.2 million and
23 5.2 million people marched in the streets to protest for women’s rights and against the President.
24 Hundreds of thousands protested again for the same reason on the same day in the following years.
25 Since January 2017, millions of people have participated in protests across the country, including
26 protests at federal property, monuments, memorials, and statues, as well as at state and local
27 property, monuments, memorials, and statues.

28

1 69. Despite President Trump’s repeated threats, and despite thousands of protests by
2 millions of Americans, Defendants never previously asserted or exercised the authority they are
3 now asserting and exercising under the Policy, nor, on information and belief, engaged in the
4 related Practice.

5 70. An alleged source of the authority for the Policy is 40 U.S.C. § 1315. Under
6 subsection (a) of that statute, the Secretary of Homeland Security protects the buildings, grounds,
7 and property that are owned, occupied, or secured by the federal government.

8 71. Although the Federal Protective Service (“FPS”), a division of DHS, is typically
9 the main provider of security and law enforcement services at federal government facilities, the
10 Secretary of Homeland Security may transfer DHS officers or agents specifically “for duty in
11 connection with the protection of” that federal property. 40 U.S.C. § 1315(b)(1).

12 72. The scope of 40 U.S.C. § 1315 is clear. The statute states that the Secretary of
13 Homeland Security: “shall protect the buildings, grounds, and property that are owned, occupied,
14 or secured by the Federal Government (including any agency, instrumentality, or wholly owned
15 or mixed-ownership corporation thereof) and the persons on the property.” *Id.* § 1315(a).

16 73. The authority granted off federal property is limited—section 1315 only allows
17 designated employees to perform authorized duties outside of federal property “to the extent
18 necessary to protect the property and persons on the property.” *Id.* § 1315(b)(1). Further, in the
19 statute’s six specifically enumerated powers, only one power, § 1315(b)(2)(E), allows for activity
20 “on and off the property in question.” Per the canon of *expressio unius est exclusio alterius*,
21 including that these powers extend “on and off” federal property in one subsection implies that the
22 five other enumerated powers do not likewise extend “on and off” the property, unless they are to
23 advance the specific goal articulated in subsection (b)(1).

24 74. Outside of federal property, the Secretary of Homeland Security *may enter into*
25 *agreements* with federal agencies and with state and local governments for officers and agents
26 designated under section 1315 “to enforce Federal laws and State and local laws concurrently with
27 other Federal law enforcement officers and with State and local law enforcement officers.” *Id.*
28 § 1315(e). Similarly, the Secretary “may utilize the facilities and services of Federal, State, and

1 local law enforcement agencies, *with the consent of the agencies.*” *Id.* § 1315(d)(3)(emphasis
2 added).

3 75. Based on information and belief and on publicly available facts such as those
4 recited here, until as recently as May 2020, there had been no policy or practice through which
5 Defendants unilaterally deployed or commanded federal law enforcement under 40 U.S.C. § 1315
6 for general police purposes; to respond to or quash civil protests; to protect and surveil non-federal
7 property, monuments, memorials, or statues; or to unilaterally take over non-federal property.

8 76. For example, as recently as April 2020, hundreds of protestors gathered at the
9 Michigan State Capitol in Lansing to protest executive orders and shelter-in-place orders in light
10 of the COVID-19 pandemic.

11 77. The Michigan State Capitol was completed in 1878, has been listed on the National
12 Register of Historic Places since 1971, and was designated as a National Historic Landmark in
13 1992. The Capitol and its grounds contain at least one monument, three memorials, and several
14 statues. The Capitol is 0.1 miles from the Charles E. Chamberlain Federal Building and Post
15 Office.

16 78. During these so-called “lockdown protests,” many protestors openly carried
17 firearms in or around the Capitol, forcibly entered the Michigan State Capitol, issued threats
18 against Michigan Governor Gretchen Whitmer, and verbally assaulted Michigan state police.

19 79. As another example, as recently as May 2020, hundreds of protestors gathered at
20 the California State Capitol in Sacramento to protest executive orders and shelter-in-place orders
21 in light of the COVID-19 pandemic.

22 80. The California State Capitol was completed in 1874, has been listed on the National
23 Register of Historic Places since 1973, and was designated as a California Historical Landmark in
24 1974. The Capitol and its park are home to numerous monuments, memorials, and statues,
25 including the World Peace Rose Garden, the California Peace Officers’ Memorial, the Vietnam
26 Veterans Memorial, and the Thomas Starr King Memorial. The Capitol is one mile from the local
27 federal courthouse and under one mile from the local DHS office.

1 81. During these so-called “lockdown protests,” protesters gathered at the Capitol in
2 violation of stay-at-home orders, confronted California Highway Patrol officers, and displayed
3 depictions of California Governor Gavin Newsom as a Nazi in front of a Swastika banner.

4 82. In April and May, protestors also gathered outside the State Capitol in Salem,
5 Oregon. At least one protestor appears to be open carrying a rifle in news footage. Members of the
6 far-right militia groups the “Three Percenters” and “Proud Boys” also attended the protests.
7 Several of the protests were allegedly organized by militia groups in violation of Oregon Governor
8 Kate Brown’s stay-at-home orders.

9 83. Based on information and belief, federal law enforcement officers were not
10 deployed in response to any of these so-called “lockdown protests”; not to surveil the protestors
11 or public officials; not to assess threats to public buildings, monuments, memorials, or statues; not
12 to protect against civil unrest; and not to otherwise engage in general policing.

13 **Existing Framework for Local Law Enforcement Mutual Aid or Cross Designation with Other**
14 **Government Agencies**

15 84. As described above, there are numerous examples of how local law enforcement,
16 including Plaintiffs’ police departments, collaborate with or receive assistance from other law
17 enforcement agencies, including federal law enforcement agencies such as Defendants and their
18 subcomponents.

19 85. Coordinating with local law enforcement has, outside of the Policy and Practice,
20 been fundamental to how federal law enforcement agencies interact with their local counterparts.

21 86. Even in circumstances where the local jurisdiction has policies that are directly in
22 opposition to the federal law enforcement agency’s activities, the federal agencies, including
23 Defendants, have nonetheless coordinated with local agencies in some fashion, given the
24 longstanding recognition of the importance of such coordination.

25 87. For example, 28 C.F.R. § 0.112 governs special deputation powers of the USMS,
26 which is a bureau within DOJ. Pursuant to this section, the USMS Director is authorized to
27 deputize, in relevant part, “[s]elected federal, state, or local law enforcement officers whenever the
28 law enforcement needs of the U.S. Marshals Service so require.” 28 C.F.R. § 0.112(b).

1 88. The duties of the USMS include protecting the federal judiciary, apprehending
2 federal fugitives, managing and selling seized assets illegally acquired by criminals, housing and
3 transporting federal prisoners, and operating the Witness Security Program.

4 89. Separately, Plaintiffs have also long entered into and relied on “mutual aid”
5 agreements with fellow local governments, such as other city and county governments. These
6 mutual aid agreements set forth the circumstances under which mutual aid partners will come to
7 the assistance of a member of the agreement. For example, Oakland has requested assistance from
8 its mutual aid partners, such as Alameda County and surrounding cities, in responding to natural
9 disasters or to certain violent “Occupy” protests a decade ago. It is not uncommon for mutual aid
10 partners to request dozens or even hundreds of officers to assist with significant needs. Indeed, in
11 response to the recent demonstrations, Portland has sought and received mutual aid from numerous
12 other local law enforcement agencies.

13 90. No matter the originating source of the mutual aid, Plaintiffs’ police departments
14 follow specific procedures when any outside law enforcement participate in their operations, or
15 when outside law enforcement perform operations in their cities.

16 91. Those procedures typically include that, when any outside law enforcement agency
17 comes to assist Plaintiffs’ police departments, those outside agents or officers first check in at the
18 local staging center or emergency operations center, learn of the operation plan, and are connected
19 in some manner to the department’s communications systems. These universal steps are designed
20 to protect all law enforcement officers and ensure they are operating with similar information and
21 shared means of communication.

22 **Nationwide Protests for Racial Justice and Police Reform**

23 92. On May 25, 2020, George Floyd was tragically killed by Minneapolis police and a
24 video of his death was widely circulated in the media. On May 26, 2020, people gathered in
25 Minneapolis in protest. Shortly thereafter, people gathered throughout the nation, including in
26 Plaintiffs’ jurisdictions, to advocate for police reform and racial justice.

1 93. Polls have suggested that between 15 million and 26 million people participated in
2 these protests, making them the largest demonstrations in American history. Between May 22 and
3 August 22, approximately 93% of protests were peaceful.

4 94. Incidents of property damage and violence, however, were reported in many
5 jurisdictions in the country. Incidents of property damage occurred in suburban California, and
6 armed civilians and other non-state actors committed acts of violence in states including Florida,
7 Indiana, and Tennessee.

8 95. People began to gather in Downtown Portland on or around May 29, 2020,
9 including at an event titled “A Eulogy for Black America” organized by the Portland chapter of
10 the NAACP.

11 96. On May 29, 2020, Portland Mayor Ted Wheeler issued a statement that he stood
12 “in solidarity with those who grieve for the senseless death of George Floyd” and committed to
13 standing alongside “our black community and not just call out racism when we see it, but
14 meaningfully take a stand against it.”

15 97. In Portland, protests continued in June. The first few days of June were identified
16 as having the largest crowds of the Portland George Floyd protests, with numbers exceeding
17 10,000 people each day. During this time, a much smaller group of people engaged in significant
18 property damage and violence directed at police. Notwithstanding some criminal activity, the
19 majority of the protests remained peaceful, and toward the end of June, the scale of protests began
20 to decrease. The focal points of protests during June were the Justice Center (which houses the
21 Portland Police Bureau’s (“PPB’s”) Central Precinct and primary offices, as well as the
22 Multnomah County Detention Center) and other PPB and Multnomah County buildings.

23 98. At this time, President Trump continued his past practice of frequent and repeated
24 threats to deploy uninvited federal law enforcement and/or military power to progressive cities.

25 99. Protests continued nationally throughout June 2020, along with the President’s
26 threatening rhetoric.

27 //

28 //

1 **President Trump Issues the Executive Order; Defendants Institute the Policy**

2 100. On June 26, 2020, President Trump signed Executive Order 13933, entitled
3 *Protecting American Monuments, Memorials, and Statues and Combating Recent Criminal*
4 *Violence*.

5 101. The Executive Order announced that the federal government would: (a) prosecute
6 anyone vandalizing or desecrating public monuments, memorials, and statues; government
7 property; or religious property; (b) prosecute anyone inciting related violence; and (c) withhold
8 federal support from local and state governments that failed to protect such structures from
9 vandalism.

10 102. The Executive Order further stated that if the Secretary of the Interior, the Secretary
11 of Homeland Security, or the Administrator of General Services requested federal personnel “to
12 assist with the protection of Federal monuments, memorials, statues, or property,” they shall be
13 provided by the Department of Defense, DOJ, and/or DHS.

14 103. Defendants rapidly began to implement this Executive Order, in light of the
15 President’s perceived motivation of quelling protests, targeting Democratic cities, and establishing
16 broad federal police presence in certain cities.

17 104. Based on information and belief, such implementation constitutes all of or is a
18 substantial part of the Policy.

19 105. First, on July 1, 2020, Defendant Wolf announced—pursuant to the Executive
20 Order—the formation of PACT within DHS. PACT was charged with “conduct[ing] *ongoing*
21 assessments of potential civil unrest or destruction and allocat[ing] resources to protect people and
22 property,” including “potential surge activity to ensure the continuing protection of critical
23 locations.”

24 106. Second, Defendants began changing or continuing to change guidance regarding
25 the lawful scope of federal activity under 40 U.S.C. § 1315. Rather than limiting federal
26 involvement under that statute to federal laws or property, Defendants expanded the ability of
27 federal agents to address threats to *any* public monument, memorial, or statue, regardless of its
28 federal nature.

1 107. For example, a July 2020 leaked, unclassified document entitled “Job Aid: DHS
2 Office of Intelligence & Analysis (I&A) Activities in Furtherance of Protecting American
3 Monuments, Memorials, Statues, and Combatting Recent Criminal Violence” (“Job Aid”) shows
4 that parts of the Defendants’ intelligence community were now authorized to monitor and collect
5 information regarding protest activities beyond suspected or planned attacks on federal facilities,
6 including threats to damage or destroy *any* public monument, memorial, or statue.

7 108. The “Job Aid” was intended to “expand[] intelligence activities necessary to
8 mitigate the significant threat to homeland security articulated in the President’s executive order
9 of June 26, 2020.”

10 109. Finally, Defendants began deploying, cross-designating, and/or commanding
11 federal law enforcement agents pursuant to the Executive Order and the Policy.

12 110. Specifically, Defendant Wolf announced the deployment and pre-position of Rapid
13 Deployment Teams across the country ahead of the July 4th holiday. Defendant Wolf stated that
14 the task force would not “stand idly by while violent anarchists and rioters seek not only to
15 vandalize and destroy the symbols of our nation, but to disrupt law and order and sow chaos in our
16 communities.”

17 111. Taken together, the Executive Order, the creation or amendment of internal
18 guidance documents, the creation of the PACT, the creation of other cross-designated federal law
19 enforcement teams, and the deployment and operations of such teams, are, form part of, or are
20 results of, the Policy.

21 112. The Policy constitutes “final agency action.”

22 **Deployment and Other Activities in Portland**

23 113. The following recitations are merely limited examples of why the Policy and/or
24 specific acts in furtherance of the Policy constitute final agency action under which rights and
25 obligations have been determined and from which legal consequences have flowed.

26 114. It is unclear how many deployments of federal agents were made in July pursuant
27 to the Policy.

28

1 115. In the days before Defendants deployed federal personnel to Portland, the crowds
2 attending demonstrations had shrunk. By early July 2020, only about 150 people could be seen
3 gathering in downtown Portland on any given night.

4 116. On or about July 2, 2020, Defendant Wolf ordered the deployment of DHS, USMS,
5 U.S. Customs and Border Protection (“CBP”), and the FPS to Portland in response to civil protests
6 as part of Operation Diligent Valor.

7 117. Defendants did not seek Portland’s consent. Defendants did not act at the direction
8 of PPB incident command that had been policing nightly protests for over a month.

9 118. The federal forces deployed to Portland from CBP included members of BORTAC,
10 a paramilitary unit of the United States Border Patrol. BORTAC troops wear military-type
11 uniforms and armament, are trained for tactical raids on organized gangs smuggling persons or
12 drugs into the United States, and have in the past been deployed to such places as Afghanistan and
13 Iraq.

14 119. On information and belief, BORTAC troops have no training in civilian crowd
15 control.

16 120. Through Operation Diligent Valor, Defendants sent teams of agents—untrained in
17 crowd control and wearing military fatigues—onto Portland’s streets. Their uniforms bore no
18 governmental, administrative or personal names, just the word “police” in tape. Federal agents
19 used tactics and munitions that escalated violence in Portland.

20 121. On or about July 11, 2020, federal agents allegedly fired impact munitions into an
21 unarmed crowd. One of the bullets struck a protestor and fractured his skull.

22 122. Starting on or about July 14, 2020, federal agents drove around Portland in
23 unmarked vans and detained individuals associated with the protests. Federal agents were
24 patrolling and detaining individuals far beyond the immediate vicinity of the federal courthouse.
25 Agents allegedly seized at least one individual who was more than two blocks from the courthouse
26 and not engaged in any activity related to federal property.

27 123. Upon information and belief, federal agents seized multiple protestors and held
28 them for hours before releasing them for lack of probable cause. The federal agents gave no

1 justification for why they detained particular residents, searched their belongings, and placed
2 residents in cells for hours before reading them their *Miranda* rights.

3 124. Far from imposing peace in the City’s streets, the tactics and munitions used by
4 federal agents antagonized demonstrators, escalated the protests, and caused further unrest.

5 125. On July 22, 2020, federal agents fired tear gas into a crowd that included Portland
6 Mayor Wheeler.

7 126. Later reports of internal DHS documents showed that the Office of Intelligence
8 Analysis also collected and analyzed messages between protesters in Portland, specifically
9 surveilling protesters’ communications via the Telegram messaging app, discussing where to take
10 the protests and how to avoid officers. The purpose of this monitoring is still unknown. It is also
11 unknown whether the surveillance was limited to the protection of federal property or gathered on
12 federal property.

13 127. On July 29, 2020, the Governor Brown reached a negotiated agreement with the
14 federal government. Defendants agreed to withdraw federal agents from Portland with assurance
15 that Oregon State Police would take on additional duties guarding the safety of the federal
16 courthouse in Portland.

17 **Justifications for the Policy Are Pretextual**

18 128. Although the purported purpose of the deployment was to protect federal property
19 that had been vandalized or threatened during protests, anonymous statements from White House
20 Officials indicate such purpose was mere pretext. The sources alleged that President Trump
21 became interested in federal operations against protestors in Portland as a way to convey a “law-
22 and-order message” and to “amplify strife in cities.”

23 129. As stated above, DHS has cited 40 U.S.C. § 1315 as the legal basis for Operation
24 Diligent Valor and the general practice of deploying federal troops to Portland, despite the
25 observed scope and operations of agents being well beyond the purpose or function of protecting
26 federal persons or property.

27 130. The U.S. Crisis Monitor found that prior to that deployment, “over 83% of
28 demonstrations in Oregon were non-violent. Post-deployment, the percentage of violent

1 demonstrations [rose] from under 17% to over 42% [in Oregon], suggesting that the
2 federal response has only aggravated unrest.”

3 131. Despite statements justifying deployments as responses to crime or “anarchy,”
4 crime rates in Plaintiffs’ communities have been decreasing overall; neither city is in the list of top
5 10 United States cities with the largest number of violent crimes per 100,000 residents. Moreover,
6 Plaintiffs’ crime rates do not differ dramatically from those in other, Republican-run cities. For
7 example, violent crime rates in Fresno, Jacksonville, Oklahoma City, and Tulsa—cities with
8 Republican mayors—far exceed the violent crime rates in Portland. These cities also have murder
9 rates at twice that of Portland.

10 132. A comprehensive review by the Armed Conflict Location and Event Data
11 (“ACLED”) Project and the Princeton University Bridging Divides Initiative underscores the
12 overall peaceful nature of the social justice-related protests in summer 2020. Between May 25,
13 2020, and August 22, 2020, there were 7,750 Black Lives Matter-related demonstrations in 2,440
14 locations in all 50 states and Washington, D.C. Overall, in summer 2020, there were at least 10,600
15 demonstrations across the United States. Of those, more than 93% involved only peaceful protests.
16 And according to ACLED, violence occurred at around 220 locations.

17 133. President Trump and Defendants have repeatedly made public comments revealing
18 that the officially stated goal of operations such as those in Portland is not protecting federal
19 property. Instead, their statements suggest that the animating and invidious purpose for these
20 actions—that is, for the Policy—is to punish progressive cities and leaders and violently quell the
21 exercise of constitutionally protected activity. Specifically, the President’s, Defendants’, and
22 Policy’s purpose is to further the view that diverse and/or progressive cities and their leaders, and
23 movements for racial justice and police reform, are dangerous and extreme circumstances that
24 should be suppressed.

25 134. President Trump has also repeatedly commented that the purpose of deployment
26 under the Policy of federal agents to Portland was to “quell” the protests, and that the goal was to
27 “clean out this beehive of terrorists.” He has stated that protesters are “anarchists” who “hate our
28 country.” And in describing the deployment to Portland under the Policy, President Trump stated:

1 “We’ve done a great job in Portland Portland was totally out of control, and they went in, and
2 I guess we have many people right now in jail. We very much quelled it, and if it starts again, we’ll
3 quell it again very easily. It’s not hard to do, if you know what you’re doing.”

4 135. In addition, Defendant Wolf affirmed that actions taken under the Policy were
5 without other governments’ consent, asserting: “The city of Portland has been under siege for 47
6 straight days by a violent mob while local political leaders refuse to restore order to protect their
7 city I reiterate the Department’s offer to assist local and state leaders to bring an end to the
8 violence perpetuated by anarchists.”

9 136. Local and state leaders have not accepted that offer.

10 137. Local and state officials have repeatedly and vehemently stated their opposition to
11 the federal deployment in Portland. Oregon Attorney General Ellen Rosenblum filed a lawsuit
12 against the federal government to stop its deployment and tactics. Oregon Governor Brown stated:
13 “This political theater from President Trump has nothing to do with public safety. The President
14 is failing to lead this nation. Now he is deploying federal officers to patrol the streets of Portland
15 in a blatant abuse of power by the federal government.”

16 138. From the outset, the City of Portland has expressed its opposition to the deployment
17 of federal agents under Operation Diligent Valor without its consent.

18 139. Only a few days after the federal agents were deployed, on July 8, 2020, Portland’s
19 Deputy Police Chief Chris Davis made a public statement that the presence of federal agents, who
20 are “governed by their own policies and procedures,” only “complicates things” for PPB.

21 140. On July 19, 2020, Mayor Wheeler stated the following:

22 What’s happening here is, we have dozens, if not hundreds of federal troops
23 descending upon our city. And what they’re doing is, they are sharply escalating the
24 situation . . . our local and state law enforcement officials had contained the situation
25 . . . The tactics that the Trump administration are using on the streets of Portland are
26 abhorrent . . . this is completely unconstitutional.

27 141. In response to the tactics and munitions used by federal agents, and consequent
28 public outcry, on July 22, 2020, Portland’s City Council adopted Resolution 37496, which
prohibits PPB cooperation with any federal agents deployed to Portland under an executive order.

1 In response to Defendants’ actions under the Policy, on July 28, 2020, Oakland’s City Council
2 adopted Resolution No. 88276 (“Directing And Authorizing The City Attorney And The City
3 Administrator To Take Any And All Lawful Necessary Steps To Protect The Rights Of The People
4 And The City Of Oakland Against President Trump’s Threats To Take Actions That Result In
5 Harm To The People Of Oakland Or The City Of Oakland, And Against Any Related Actions
6 Federal Officers Take That Result In Harm To The People Of Oakland Or The City Of Oakland”).

7 142. The actions taken by Defendants in Portland under the Policy were and are not
8 taken pursuant to any known lawful federal authority.

9 **Plaintiffs Remain at Risk Under the Policy**

10 143. Rather than retreat from the activities in Portland, Defendants have expressed an
11 intent to expand the presence of federal law enforcement throughout the United States.

12 144. President Trump has indicated that, under the Policy, Defendants will continue to
13 target cities he views as progressive, stating in early September: “They’ll make every city look
14 like frankly, a Portland, or you look at other Democrat-run cities. Look at what’s happened in New
15 York, as high as 300% increase in crime. Chicago, Baltimore, take a look at Oakland. All
16 Democrat-run top 10 cities in the country and long beyond that, all Democrat-run.”

17 145. As recently as September 21, 2020, President Trump continued to propagate
18 disinformation about Plaintiffs. He stated: “What they’re talking about, you look at Portland, you
19 look at Chicago, you look at New York, you look at Baltimore and Oakland and all—these are
20 Democrat-run cities that are horrible on crime, there’s no law and order, no cash bail, no anything.”

21 146. Though most federal agents were temporarily pulled out of Portland, President
22 Trump has threatened that they can return at any time. The President also has stated the federal
23 government will further escalate any conflict if local law enforcement does not rein in “anarchists
24 and agitators.” He has consistently stated that he will not hesitate to send in federal authorities if
25 the local government could not stop “crime and violence” from breaking out.

26 147. The President’s threats and warnings are not limited to federal property. He recently
27 announced a plan to send law enforcement to polling places on election day, stating: “We’re going
28

1 to have sheriffs, and we're going to have law enforcement. And we're going to have hopefully
2 U.S. attorneys, and we're going to have everybody and attorney generals."

3 148. The President's provocations continue. He recently issued a memorandum
4 purporting to direct Defendants to review federal funding provided to "anarchist" cities, including
5 Portland, and to withdraw such funding to punish these cities.

6 149. Defendants continue to take new or continuing unlawful actions under the Policy.
7 For instance, DHS has erected and refused to remove a fence and barriers around the Hatfield
8 Federal Courthouse in Portland, which are in the City-controlled public right-of-way. The fence
9 and barriers, which extend into adjacent Main Street, effectively block an entire bike lane without
10 Portland's permission. The fence and barriers also extend onto Third Avenue and effectively block
11 vehicular travel in one lane.

12 150. The only statutory authority DHS has offered to Portland to justify the fence is 40
13 U.S.C. § 1315.

14 151. The fence was first erected by FPS on July 18, 2020. According to a statement
15 from U.S. Attorney Billy J. Williams, the federal government's stated purpose of the fence was
16 "to de-escalate tensions between protesters and federal law enforcement officers, and to allow
17 much-needed building repairs to begin."

18 152. The fence is not on federal property, and FPS did not seek permission before
19 erecting the fence. In order to lawfully erect the fence, Portland City Code Chapter 17.24 requires
20 a permit to be obtained from the Portland Bureau of Transportation ("PBOT"). FPS obtained no
21 such permit.

22 153. Portland has asked FPS multiple times to move its fence out of the right-of-way
23 and onto the sidewalk adjacent to the Courthouse. FPS has not yet done so and has taken the
24 position that they are permitted to install the fence and associated barriers pursuant to 40 U.S.C.
25 § 1315.

26 154. In an October 7, 2020, email to Portland officials, FPS indicated its contractor had
27 moved the fence to allow access to the storm drain and expected to move the fence back from the
28

1 bike lane “in the next few weeks.” This is merely the latest assurance by FPS that it will move its
2 fence.

3 155. A July 14, 2020, document obtained by Oregon Public Broadcasting indicated that
4 the federal government intended to rent the fence from its contractor for three to six months.

5 156. Defendants continue to have a presence and activities in Portland, and there is a
6 continued dispute regarding the scope of their authority under 40 U.S.C. § 1315, including the
7 ability to unilaterally take over City-controlled or -owned property under a pretext of securing
8 federal property.

9 **Defendant Wolf Was and Is Unlawfully Acting as Secretary of Homeland Security, and Any**
10 **Aspects of the Policy Promulgated or Implemented Under His Purported Authority Must Be Set**
11 **Aside**

12 157. Federal service in Senate-confirmed positions is governed by, among other statutes,
13 the Federal Vacancies Reform Act (“FVRA”), 5 U.S.C. § 3345 *et seq.* If a person is acting
14 unlawfully under the FVRA, their actions and their policies are “without force and effect.” 5 U.S.C.
15 § 3348(d)(1). An action promulgated “without force and effect” “may not be ratified.” *Id.*
16 § 3348(d)(2).

17 158. Congress has delegated the U.S. Government Accountability Office (“GAO”) to
18 play a core role in FVRA compliance: namely, per the FVRA, the GAO must collect information
19 about vacancies, and if the GAO “makes a determination that an officer is serving longer than the
20 210-day period including the applicable exceptions to such period under section 3346 or section
21 3349a, the Comptroller General shall report such determination immediately” to various
22 authorities, including Congress. 5 U.S.C. § 3349.

23 159. On August 14, 2020, the GAO issued a report under its FVRA duties and authority,
24 entitled “Department of Homeland Security—Legality of Service of Acting Secretary of
25 Homeland Security and Service of Senior Official Performing the Duties of Deputy Secretary of
26 Homeland Security.” In sum, the report finds that Acting Secretaries “Wolf and [Ken] Cuccinelli
27 were named to their respective positions of Acting Secretary and Senior Official Performing the
28 Duties of Deputy Secretary by reference to an invalid order of succession” and that “[b]ecause Mr.

1 Wolf draws his authority to serve as Acting Secretary from [an invalid] Delegation, Mr. Wolf
2 cannot, therefore, rely upon it to serve as the Acting Secretary.”

3 160. The GAO report also analyzed whether Defendant Wolf could be lawfully serving
4 under the succession provisions of the Homeland Security Act (“HSA”), 6 U.S.C. § 113(g)(2), and
5 found that he could not.

6 161. In addition to these findings from the GAO, numerous lawsuits have raised the
7 same or similar questions about Defendant Wolf’s authority, and have asked courts—under the
8 FVRA, the HSA, or other laws regarding agency authority—to set aside various policies
9 promulgated under that purported authority. *See, e.g., Immigrant Legal Resource Ctr. v. Wolf*,
10 2020 WL 5798269, at *9 (N.D. Cal. 2020) (holding that “[p]laintiffs have shown that they are
11 likely to succeed on the merits of their claim that Mr. Wolf was not validly serving in office” and
12 enjoining enforcement of the challenged rule); *Casa de Maryland, Inc. v. Wolf*, 2020 WL 5500165,
13 at *23 (D. Md. 2020) (holding that “because Wolf filled the role of Acting Secretary without
14 authority, he promulgated the challenged rules also ‘in excess of . . . authority’” and enjoining the
15 rules’ enforcement); *see also Bullock v. U.S. Bureau of Land Mgmt.*, 2020 WL 5746836 (D. Mont.
16 2020) (holding that William Perry Pendley, the person exercising authority of the Director of the
17 Bureau of Land Management, served unlawfully for 424 days and enjoining him from exercising
18 that authority); *L.M.-M., v. Cuccinelli*, 442 F.Supp.3d 1, 29, 34 (D.D.C. 2020) (holding that Acting
19 U.S. Citizenship and Immigration Services (“USCIS”) Director Cuccinelli “was designated to
20 serve as the acting Director of USCIS in violation of the FVRA” and “because Cuccinelli was
21 exercising the authority of the USCIS Director in violation of the FVRA, the directives were not
22 issued ‘in accordance with law,’ and must, accordingly, be set aside under the APA”).

23 162. The lawsuits, like the GAO report, generally explain that because the FVRA
24 generally bars acting officials from serving for more than 210 days in a position that requires
25 Presidential appointment and Senate confirmation, 5 U.S.C. § 3346, and because the last Senate-
26 confirmed DHS Secretary resigned on April 10, 2019, no one could have lawfully acted in that
27 role under the FVRA, without appointment and confirmation, after November 6, 2019. Defendant
28 Wolf assumed his office on November 13, 2019.

1 163. The lawsuits, also like the GAO report, generally further explain that the HSA sets
2 an order of succession in the event of a vacancy, 6 U.S.C. §§ 113(a)(1)(A), (a)(1)(F) and (g)(1),
3 and if certain enumerated positions are vacant, the Secretary may designate a “further order of
4 succession,” *id.* § 113(g)(2), but that because the Acting DHS Secretary *prior* to Defendant Wolf
5 unlawfully changed the order of DHS succession, Defendant Wolf cannot lawfully serve in his
6 role.

7 164. Finally, the lawsuits generally ask courts to set aside and/or enjoin actions by
8 officials acting unlawfully in federal agency roles, because those actions are “without force and
9 effect,” 5 U.S.C. § 3348(d)(1), “may not be ratified,” *id.* § 3348(d)(2), and were therefore
10 promulgated “in excess of statutory authority” and not “in accordance with law,” *id.* §§ 706(2)(C),
11 (2)(A).

12 165. These lawsuits have been largely successful.

13 166. On information and belief, Defendant Wolf promulgated and/or implemented all,
14 some, or part of the Policy challenged in this lawsuit, and any aspects of the Policy promulgated
15 and/or implemented under his authority must be set aside and/or enjoined.

16 **Related Practice of Unlawfully Commandeering Portland’s Law Enforcement Officers**

17 167. In addition and related to the Policy, Defendants continue to engage in a related
18 Practice that also asserts authority not delegated to them under the Constitution or under other
19 legal authority.

20 168. On or about September 21, 2020, the City of Portland, Oregon State Police, and
21 several federal law enforcement agencies, including the USMS, began logistics planning for an
22 anticipated rally of the Proud Boys in Portland on Saturday, September 26, 2020.

23 169. The Proud Boys are an extremist pro-White hate group. Members of the Proud
24 Boys, which appeared at the 2017 “Unite the Right” rally in Charlottesville, Virginia, “regularly
25 spout white nationalist memes and maintain affiliations with known extremists” and “are known
26 for anti-Muslim and misogynistic rhetoric.”

27 170. In anticipation of the Proud Boys rally, on September 25, 2020, Governor Brown
28 declared a state of emergency and issued an executive order for the purpose of implementing a

1 coordinated law enforcement response. As part of the order, Governor Brown temporarily assumed
2 control of local law enforcement, including PPB, the Multnomah County Sheriff’s Office, the
3 Gresham Police Department, and the Port of Portland Police.

4 171. Governor Brown appointed Multnomah County Sheriff Michael Reese and Oregon
5 State Police Superintendent Travis Hampton to serve as incident commanders in the law
6 enforcement coordination area, and they therefore assumed control of PPB, Multnomah County
7 Sheriff’s Office, Gresham Police Department, and Port of Portland Police.

8 172. The Governor’s executive order, by its own terms, became effective at 12:01 A.M.
9 Pacific Time on Saturday, September 26, 2020, and expired at 12:01 AM Pacific Time on Monday,
10 September 28, 2020. Governor Brown’s executive order and state of emergency were then
11 terminated at 6:00 AM on September 27, 2020.

12 173. Pursuant to a direction given by Superintendent Hampton, on September 25, 2020,
13 PPB Chief Charles Lovell authorized fifty-six officers, sergeants, and lieutenants from PPB’s
14 Rapid Response Team, which typically handles protests, to be deputized as federal agents for the
15 purposes of tactical response to the anticipated rally and disturbance of the peace caused by the
16 Proud Boys.

17 174. Because of the Governor’s executive order and over the course of dealing with
18 Oregon State Police, PPB anticipated that the deputation would be limited to the weekend
19 surrounding the Proud Boys hate-related event or so long as the state of emergency remained in
20 effect.

21 175. After the expiration of the state executive order, the federal deputation was in fact
22 no longer needed.

23 176. On September 29, 2020, Portland City Attorney Tracy Reeve wrote to the U.S.
24 Attorney’s Office in Portland to clearly and expressly communicate the City’s withdrawal of
25 consent to the federal deputation of the fifty-six PPB officers.

26 177. City Attorney Reeve explained that the Governor’s executive order had terminated,
27 and PPB “was back under the control and direction of the City of Portland, and specifically Police
28 Commissioner and Mayor Ted Wheeler and the Portland City Council.” Because the executive

1 order terminated, “[t]he City of Portland [did] not consent to the continuing federal deputization
2 of PPB officers and hereby formally withdr[e]w[] its consent to this deputization effective
3 immediately.”

4 178. Neither the U.S. Attorney’s Office nor any other federal agency, including the
5 USMS, responded to City Attorney Reeve’s communication.

6 179. Instead, on September 30, 2020, U.S. Attorney Williams and United States Marshal
7 for the District of Oregon Russ Burger issued a press release regarding the deputation of the PPB
8 officers.

9 180. The release stated that the “U.S. Marshal will not cancel the cross-deputation of
10 local and state law enforcement officers.” In defense of their decision to commandeer Portland’s
11 police force, U.S. Attorney Williams and United States Marshal for the District of Oregon Burger
12 stated that continued deputation would provide “accountability and deterrence” for “criminal acts”
13 and would support “front line law enforcement officers and their families in a way that they have
14 not seen from City Hall.”

15 181. Despite Defendant agencies’ purported desire to hold individuals accountable for
16 and deter criminal acts, it is the responsibility of PPB and other local law enforcement to generally
17 address criminal activity in Portland. It is the responsibility of the State of Oregon and City of
18 Portland to enact laws and enforce laws that strike the proper balance between deterring criminal
19 activity and supporting First Amendment expression. And it is the responsibility of Portland, as
20 the employer of PPB officers, to support and protect local law enforcement.

21 182. On October 2, 2020, Mayor Wheeler, as Police Commissioner, directed PPB
22 officers to take no further action of any kind pursuant to the federal deputation, including the
23 enforcement of any federal law.

24 183. Nonetheless, because the federal government has refused to recognize Portland’s
25 withdrawal of consent to deputation, Portland remains concerned about public confusion over the
26 chain of command for the deputized PPB officers and the appearance that the officers could be
27 ordered to respond to a federal chain of command, including by being ordered to enforce federal
28 law.

1 184. The practice of continued deputation of Portland's officers limits the City's law
2 enforcement discretion, creates potential conflict between Defendants and Portland over the use
3 and tactics of Portland's own officers and other law enforcement personnel, and unlawfully usurps
4 the legislative and governance prerogative of local officials.

5 185. The Practice of continued, non-consensual deputation of Portland's law
6 enforcement officers unconstitutionally infringes on Portland's authority to end the deputation and
7 unconstitutionally compels local officers to continue to serve as federal law enforcement officials,
8 whether in name or in scope of authority.

9 **Harm to Plaintiffs**

10 ***Economic Injury***

11 186. Plaintiffs have already suffered economic harms and will continue to suffer such
12 harms under the Policy and Practice.

13 **Portland's Economic Harms**

14 187. At the time of the federal government's deployment into Portland, protests in the
15 City were growing more peaceful and were more easily managed on a day-to-day basis by PPB.

16 188. As a direct result of the unlawful intervention by Defendants, Portland experienced
17 a significant increase in violent protests and civil disturbance. Dr. Robert Pape and his team of
18 researchers at the University of Chicago examined 122 protest events in Portland between May
19 28, 2020, and August 6, 2020, and found that violence behavior increased and peaceful protests
20 decreased during the 25 days when federal agents were present.

21 189. Following the removal of federal agents from the streets of Portland, PPB was
22 required to expend additional resources on crowd management and maintaining peace.

23 190. As a direct result of the unlawful intervention of Defendants, PPB was required to
24 spend additional money on overtime for patrol officers and other resources in response to the
25 heightened tensions within Portland.

26 191. Since July 2020 and continuing to the present, Portland's elected leadership and
27 other city officials have spent hundreds of hours in meetings, discussions, and other planning
28

1 efforts to respond to the presence of federal agents and to plan for possible additional federal
2 intervention under the Policy.

3 Oakland's Economic Harms

4 192. Although Plaintiff City of Oakland has not yet been subject to direct federal
5 intervention under the Policy, it has nonetheless already suffered and will continue to suffer
6 economic harms.

7 193. In response to the Policy, Oakland has also engaged in new outreach through the
8 departments that are members of its Emergency Operations Center, activities that would not have
9 been necessary and resources that would not have been required but for the Policy.

10 194. Oakland's elected leadership has devoted time since July 2020 preparing for
11 possible federal intervention under the Policy.

12 195. Oakland's economic harms will significantly increase if the City becomes a target
13 of deployment under the Policy, for many reasons. One such reason is the City's "mutual aid"
14 agreements, as described above. The City's mutual aid agreements with other governments have
15 never contemplated coming to the assistance of a sister government in the event of unprecedented
16 federal intervention, such as the interventions that have occurred and may occur under the Policy.

17 196. Oakland has had mutual aid requests rejected when the aid sought does not comport
18 with the agreements or conflicts with their partners' policies.

19 197. Oakland will suffer significant economic harm if it cannot rely on mutual aid. In
20 the limited instances in which mutual aid has been unavailable, for instance, the Oakland Police
21 Department has been forced to cancel days off, pay substantial additional overtime, and divert
22 officers from their assigned duties.

23 198. Defendants did not take either Portland or Oakland's economic harms into account
24 in enacting the Policy.

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1 ***Budgetary and Other Uncertainty; Impairment of Ability to Provide Services***

2 199. Plaintiffs depend on the clear delineation of and communication about federal,
3 state, and local police authority to safely govern and police their communities.

4 200. Plaintiffs must know or reasonably expect when federal law enforcement agents
5 will be or could be deployed in their cities, both as a constitutional and safety matter.

6 201. Plaintiffs have historically worked closely with Defendants' local representatives
7 to ensure the safety of the federal property Defendants have authority to protect.

8 202. Even when the federal government has, in the past, intervened involuntarily in
9 cities, counties, or states, it has done so using lawful processes, such as by filing enforcement
10 actions in court or, in extreme and rare circumstances, formally invoking powers such as the
11 Insurrection Act and following such statutes' requirements for a declaration. The Act is not
12 invoked secretly or ambiguously. 10 U.S.C. § 254.

13 203. The current Policy represents an entirely new process by which cities may find
14 federal law enforcement in the midst of civil protests, throughout their jurisdictions, and surveilling
15 their residents well beyond federal crimes or properties.

16 204. Plaintiffs' uncertainty about whether, when, and with what parameters federal
17 agents may be deployed to their cities under the Policy prevents them from appropriately advising
18 their police departments and fire departments, among others, and from fully planning their budgets.

19 205. Further, Plaintiffs' police departments, among other departments, have a strong and
20 abiding interest in the community relationships they have formed, often over many years, with
21 advocates, faith leaders, youth groups, and others in their jurisdictions. These relationships are
22 crucial to addressing racial justice issues, de-escalating and interrupting violence, and engaging in
23 successful long-term reform efforts. These relationships are also premised on Plaintiffs' police
24 departments being able to fulfill the terms of their agreements, both formal and informal, with their
25 community partners. Uncertainty regarding whether, when, and why federal law enforcement
26 authorities, who lack any knowledge of these crucial agreements and understandings, may
27 intervene in Plaintiffs' streets, harms Plaintiffs' capacity to honor their commitments to their
28 residents and reduce violence in their communities.

1 206. Finally, because the full scope of the Policy is vague and unknown, Plaintiffs' city
2 officials have no certainty about whether any particular decision they might make will lead to
3 federal intervention under the Policy.

4 207. Together, these injuries perceptibly impair Plaintiffs' ability to provide the services
5 they were formed to provide, and frustrate Plaintiffs' goals and values.

6 208. Under the Policy, federal enforcement actions are likely to violate or contravene
7 Plaintiffs' otherwise lawful policies and values.

8 ***Activity Considered Impermissible by Local Policy Permitted Under the Policy***

9 209. Plaintiffs have specific policies, practices, and procedures for activities such as the
10 use of force or use of surveillance by law enforcement authorities.

11 210. The City of Portland has a use of force policy, Directive 1010.00, and a crowd
12 control policy, Directive 0635.10. These policies govern a number of PPB policies, practices, and
13 procedures in responding to demonstrations, including PPB's use of impact munitions and
14 chemical agents. The use of chemical agents has been further restricted by order of Portland's
15 Police Commissioner, consistent with the City's values on policing.

16 211. The City of Oakland has a use of force policy, DGO K-3, and a crowd control
17 policy, Training Bulletin III-G. Those documents govern a number of Oakland Police Department
18 policies, practices, and procedures, including its use of nonlethal impact weapons and chemical
19 agents, as well as video and photographic recording of protesters engaged in protected First
20 Amendment activity.

21 212. These policies and trainings are intended to govern Plaintiffs' police departments'
22 interactions with their communities. Based on those policies and trainings, in Plaintiffs'
23 communities, residents have expectations for their interactions with local law enforcement.
24 Federal law enforcement officers have not been trained in municipal community policing, critical
25 civilian crowd management, and/or de-escalation techniques. The unconstrained actions of federal
26 forces undermine the work of local law enforcement, including ongoing violence prevention
27 programs and community engagement.

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1 213. Under the Policy, Plaintiff City of Portland has been unable to adhere to its local
2 policies favoring de-escalation of potentially volatile situations because Defendants' actions under
3 the Policy have inflamed local passions, encouraged violence, and generated the need for PPB
4 response where it otherwise would not have been needed.

5 214. Under the Practice, PPB officers have a reasonable likelihood of being
6 commandeered into engaging in activity that violates their local policies via their unconsented-to
7 deputation by Defendants. Defendants' unlawful deputation of PPB officers also presently harms
8 the City's public-accountability and community-engagement policies by propagating the false
9 narrative that City police are operating under Defendants' authority and not under the direction
10 and control of the City of Portland's elected officials.

11 ***Frustration of Federal Court Orders; Separation of Powers***

12 215. Plaintiffs are each, separately, under federal court orders that govern the activities
13 of their police departments in various ways.

14 216. Plaintiff City of Portland's police department operates in part under a Negotiated
15 Settlement Agreement in *United States v. City of Portland*, Case No. 3:12-cv-02265-SI (D. Or.
16 2012), as well as recent injunctions in *Don't Shoot Portland v. City of Portland*, Case No. 3:20-
17 cv-00917-HZ (D. Or. 2020) and *Index Newspapers LLC v. City of Portland*, Case No. 3:20-cv-
18 01035-SI (D. Or. 2020).

19 217. Plaintiff City of Oakland's police department operates under a longstanding
20 Negotiated Settlement Agreement in *Delphine Allen. v. City of Oakland*, Master Case File No.
21 C00-4599-TEH (N.D. Cal. 2012), as well as under a recent injunction in *Anti Police-Terror Project*
22 *v. City of Oakland*, Case No. 20-cv-03866-JCS (N.D. Cal. 2020).

23 218. Collectively, these various court orders bind Plaintiffs' police departments'
24 activities, including governing many of their policies, practices, and procedures, and limiting their
25 use of various forms of force.

26 219. Under the Policy, as carried out in, at a minimum, Portland, Defendants used arrest
27 techniques, force, and surveillance that would facially violate Plaintiffs' federal court orders.
28

1 220. Plaintiff City of Oakland would face the same bind if any deployments are sent to
2 Oakland under the Policy.

3 221. There is a reasonable likelihood that Defendants will, under the Policy, deploy
4 federal agents to Plaintiff Cities, either for the first known time or again to Plaintiffs already having
5 experienced or experiencing such deployments, as Defendants and President Trump continue and
6 are increasing such threats.

7 ***Loss of Use and Enjoyment of Public Facilities***

8 222. Portland has provided bike and vehicle lanes in its right-of-way on Main Street.

9 223. FPS's fence and barriers, erected without permission, prevent the use of enjoyment
10 of this public land by Portland and its residents. *See Gingery v. City of Glendale*, 831 F.3d 1222,
11 1227 (9th Cir. 2016).

12 ***Loss of Legislative Prerogative***

13 224. Plaintiff City of Portland shares in Oregon's sovereign general police power to
14 provide for the health and safety of its residents.

15 225. The federal government's commandeering of Portland law enforcement, complete
16 once Defendants DOJ and Barr refused to cancel the deputation of the PPB officers, presses these
17 officers into service in disregard of the City's own legislative and enforcement priorities.

18 **CLAIMS FOR RELIEF**

19 **FIRST CLAIM FOR RELIEF**

20 **(Administrative Procedure Act—Action Not in Accordance with the Law)**

21 **(Against All Defendants)**

22 **(5 U.S.C. § 706)**

23 226. Plaintiffs incorporate by reference the allegations set forth in each of the preceding
24 paragraphs of this Complaint.

25 227. Under the APA, courts must “hold unlawful and set aside agency action” that is not
26 in accordance with law, in excess of statutory authority, contrary to constitutional right, or without
27 observance of procedure required by law. 5 U.S.C. § 706(2).

1 228. Defendants may only exercise authority conferred by statute. *City of Arlington v.*
2 *FCC*, 569 U.S. 290, 297-98 (2013).

3 229. Defendants' Policy is "final agency action" under the APA because it is fairly
4 characterized as Defendants' final word on the matter and has legal consequences for Plaintiffs'
5 resident protestors during civil protests, as well as, independently, for Plaintiffs facing economic
6 harms and federal encroachment on police powers and the "take over" of their jurisdictions. *See*
7 *U.S. Army Corps of Engineers v. Hawkes Co., Inc.*, 136 S. Ct. 1807, 1813 (2016) (quoting *Bennett*
8 *v. Spear*, 520 U.S. 154, 177-78 (1997)); *see also New York v. U.S. Immigration & Customs*
9 *Enforcement*, 431 F. Supp. 3d 377, 386-88 (S.D.N.Y. 2019).

10 230. Agency action need not be in writing, or ever known to the public, to be judicially
11 reviewable as "final" action. *See Aracely, R. v. Nielsen*, 319 F. Supp. 3d 110, 138-39 (D.D.C.
12 2018); *Wagafe v. Trump*, 2017 WL 2671254, at *1, *10 (W.D. Wash. 2017); *Venetian Casino*
13 *Resort, LLC v. EEOC*, 530 F.3d 925, 931 (D.C. Cir. 2008) (concluding that "the record" as a whole
14 "leaves no doubt" that a policy exists, even though "the details ... are still unclear").

15 231. Furthermore, each instance where Defendants, through their officers, employees,
16 and agents, directly or constructively, unlawfully deployed or commanded federal law
17 enforcement to act in excess of or contrary to law constitutes "final agency action" under the APA.

18 232. 40 U.S.C. § 1315(b)(1) allows the Secretary of DHS to designate certain federal
19 employees "as officers and agents for duty in connection with the protection of property owned or
20 occupied by the Federal Government and persons on the property, including duty in areas outside
21 the property to the extent necessary to protect the property and persons on the property." These
22 authorized duties include enforcing federal laws, making arrests if federal crimes are committed
23 in the presence of an officer, and conducting investigations on and off the property for crimes
24 against the property or persons on the property.

25 233. 40 U.S.C. § 1315(d)(3) further allows the Secretary to "utilize the facilities and
26 services of Federal, State, and local law enforcement agencies, with the consent of the agencies."

27 234. 40 U.S.C. § 1315(e) also allows the Secretary to "enter into agreements with
28 Federal agencies and with State and local governments to obtain authority for officers and agents

1 designated under this section to enforce Federal laws and State and local laws concurrently with
2 other Federal law enforcement officers and with State and local law enforcement officers” “[]for
3 the protection of property owned or occupied by the Federal Government and persons on the
4 property.”

5 235. These statutory provisions do not authorize the designation of employees for
6 general law enforcement purposes in domestic United States cities where the intent, mission, and
7 purpose of the designation is not reasonably connected to such federally stated interests.
8 Significantly, 40 U.S.C. § 1315 does not represent Congressional authorization to suppress
9 insurrections under the Militia Clause. *See* U.S. Const. art. I, § 8, cl. 15.

10 236. Further, these statutory provisions do not authorize the expansion of federal
11 property into City- or State-owned rights-of-way, or the takeover of City property for federal
12 purposes, without the consent of the non-federal agencies, as Defendants assert.

13 237. The Policy therefore oversteps the constitutional limitations on the federal police
14 powers, including as enumerated in the Militia Clause, the Republican Form of Government
15 Clause, and the Tenth Amendment, and is not in accordance with and exceeds Defendants’
16 authority under 40 U.S.C. § 1315 because it (a) authorizes the designation of such agents to quell
17 civil protests and surveil and engage with threats to damage or destroy *any* public monument,
18 memorial, or statue, and (b) authorizes the expansion of federal physical boundaries and the take-
19 over of City rights-of-way for the purposes of securing federal property, without the express
20 consent of the City.

21 238. Defendants’ unlawful actions have caused, are causing, and will continue to cause
22 harm to Plaintiffs as alleged above, and there is a substantial likelihood that the requested relief
23 will redress this harm.

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SECOND CLAIM FOR RELIEF

(Administrative Procedure Act—Arbitrary and Capricious)

(Against All Defendants)

(5 U.S.C. § 706(2)(A))

239. Plaintiffs incorporate by reference the allegations set forth in each of the preceding paragraphs of this Complaint.

240. 5 U.S.C. § 706(2)(A) provides that a court shall hold unlawful and set aside agency action found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

241. Long-established principles of federalism, paired with congressional limitations, restrict the ability of the federal government to unilaterally deploy domestic military or police interventions.

242. Defendants have adopted a Policy to circumvent these limitations and deploy federal agents to quash civil protests, while publicly justifying the actions in the name of federal property protection. The motivation animating Defendants’ Policy is the “takeover” of City police forces and powers, and is untethered to strictly federal interests or activities.

243. Defendants’ purported justification for the Policy is wholly pretextual and, thus, arbitrary and capricious under the Administrative Procedure Act.

244. In enacting the Policy, Defendants have also acted arbitrarily and capriciously because Defendants did not fully consider the foreseeable harms of their policy and did not adequately explain the decision-making rationale behind the policy change, beyond a pretextual rationale.

245. In implementing the Policy, Defendants failed to consider, among many things, the direct and destructive impacts on local governments in their administration of general public safety, and the aforementioned harms that have and will flow to Plaintiffs.

246. Defendants’ unlawful action has caused, is causing, and will continue to cause harm to Plaintiffs as alleged above, and there is a substantial likelihood that the requested relief will redress this harm.

1 **THIRD CLAIM FOR RELIEF**

2 **(Federal Vacancies Reform Act; Homeland Security Act)**

3 **(Against Defendant Wolf)**

4 **(5 U.S.C. § 3345 *et seq.*; 6 U.S.C. § 113)**

5 247. Plaintiffs incorporate by reference the allegations set forth in each of the preceding
6 paragraphs of this Complaint.

7 248. The Secretary of Homeland Security may be appointed by the President only with
8 the advice and consent of the Senate, 6 U.S.C. § 112(a)(1), and when the Office of the Secretary
9 is vacant, the order of succession is governed by the FVRA and/or the HSA.

10 249. Under those authorities, Defendant Wolf is not legally authorized to hold the
11 position of Acting Secretary.

12 250. Under those authorities, Defendant Wolf is not legally authorized to perform the
13 duties and functions of the Secretary of Homeland Security.

14 251. Because Defendant Wolf is without legal authority to hold his position or to
15 perform its duties or functions, any contributions he made to the Policy or steps he took or is taking
16 to enact or enforce the Policy “shall have no force or effect,” 5 U.S.C. § 3348(d)(1), “may not be
17 ratified,” *id.* § 3348(d)(2), and must be set aside.

18 **FOURTH CLAIM FOR RELIEF**

19 **(Administrative Procedure Act—In Excess of Authority)**

20 **(Against Defendant Wolf)**

21 **(5 U.S.C. § 706(2)(C))**

22 252. Plaintiffs incorporate by reference the allegations set forth in each of the preceding
23 paragraphs of this Complaint.

24 253. Because Defendant Wolf is not legally authorized to hold the position of Acting
25 Secretary, any action he took to contribute to, direct, revise, promulgate, enact, or enforce the
26 Policy is “in excess of authority” under the APA and therefore must be held to be unlawful and set
27 aside.

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1 **FIFTH CLAIM FOR RELIEF**

2 **(Administrative Procedure Act—Not in Accordance with Law)**

3 **(Against Defendant Wolf)**

4 **(5 U.S.C. § 706(2)(C))**

5 254. Plaintiffs incorporate by reference the allegations set forth in each of the preceding
6 paragraphs of this Complaint.

7 255. Because Defendant Wolf is not legally authorized to hold the position of Acting
8 Secretary, any action he took to contribute to, direct, revise, promulgate, enact, or enforce the
9 Policy is “not in accordance with law” under the APA and therefore must be held to be unlawful
10 and set aside.

11 **SIXTH CLAIM FOR RELIEF**

12 **(Anti-Commandeering)**

13 **(Plaintiff City of Portland Against Defendants Barr and DOJ)**

14 **(U.S. Const., amend. X)**

15 256. Plaintiffs incorporate by reference the allegations set forth in each of the preceding
16 paragraphs of this Complaint.

17 257. The Tenth Amendment to the United States Constitution preserves the states’
18 historic, sovereign, and fundamental autonomy to regulate their own affairs, including and
19 especially the operations of their state and local governments.

20 258. General police powers are among those reserved to the States. “A state’s ability to
21 regulate its internal law enforcement activities is a quintessential police power.” *United States v.*
22 *California*, 921 F.3d 865, 887 n.11 (9th Cir. 2019), *cert. denied*, 2020 WL 3146844 (June 15,
23 2020).

24 259. States are permitted to delegate their police powers to their municipalities. “[T]he
25 delegated power of municipalities is as broad as the police power of the state, except as that power
26 may be restricted by terms of the grant or by the state constitution.” *D.C. v. John R. Thompson*
27 *Co.*, 346 U.S. 100, 109 (1953).

1 260. Oregon has so delegated its police power to its municipalities, which include the
2 City of Portland. Article XI, section 2 of the Oregon Constitution grants the “legal voters of every
3 city and town . . . power to enact and amend their municipal charter, subject to the Constitution
4 and criminal laws of the State of Oregon.” Portland’s charter identifies its power and authority to
5 exercise within the City and City-owned property “all the powers commonly known as the police
6 power to the same extent as the State of Oregon has or could exercise said power within said areas,
7 and to make and enforce within said areas all necessary or appropriate . . . police . . . and safety
8 laws and regulations.” Portland City Charter § 2-105.

9 261. The USMS’s refusal to honor the cancellation of the deputation of PPB’s officers,
10 by and through Defendants Barr and DOJ, commandeers a key Portland law enforcement agency
11 and unduly interferes with Portland’s police functions as delegated to it by the State of Oregon, in
12 violation of the Tenth Amendment. This Practice unconstitutionally infringes on Portland’s
13 authority to determine the status and deputation of PPB’s officers, and unconstitutionally compels
14 PPB’s officers to continue to serve under the force and guise of federal law.

15 262. Defendants DOJ and Barr have violated the authority of Portland to control and
16 direct its own police officers and, in doing so, have caused confusion regarding the role and
17 authority of deputized PPB officers and any legal obligations of these officers to execute orders
18 issued under the authority of the United States.

19 263. The violation caused by Defendants DOJ and Barr causes ongoing harm to Portland
20 and its residents.

21 **SEVENTH CLAIM FOR RELIEF**

22 **(Declaratory Judgment Act)**

23 **(Against All Defendants)**

24 **(28 U.S.C. §§ 2201-2202)**

25 264. Plaintiffs incorporate by reference the allegations set forth in each of the preceding
26 paragraphs of this Complaint.

27 265. The Policy oversteps the constitutional limitations on the federal police powers,
28 including as enumerated in the Militia Clause, the Republican Form of Government Clause, and

1 the Tenth Amendment, and is not in accordance with and exceeds Defendants’ authority under 40
2 U.S.C. § 1315 because it: (a) authorizes the designation of such agents to quell civil protests and
3 surveil and engage with threats to damage or destroy *any* public monument, memorial, or statue;
4 and (b) authorizes the expansion of federal physical boundaries and the take-over of City rights-
5 of-way for the purposes of securing federal property, without the express consent of the City.

6 266. Defendants’ purported justification for the Policy is wholly pretextual and, thus,
7 arbitrary and capricious under the Administrative Procedure Act.

8 267. In enacting the Policy, Defendants have also acted arbitrarily and capriciously
9 because Defendants did not fully consider the foreseeable harms of their policy and did not
10 adequately explain the decision-making rationale behind the policy change, beyond a pretextual
11 rationale.

12 268. Because Defendant Wolf is without legal authority to hold his position or to
13 perform its duties or functions, any contributions he made to the Policy or steps he took or is taking
14 to enact or enforce the Policy “shall have no force or effect,” 5 U.S.C. § 3348(d)(1), “may not be
15 ratified,” *id.* § 3348(d)(2), and must be set aside.

16 269. Because Defendant Wolf is not legally authorized to hold the position of Acting
17 Secretary, any action he took to contribute to, direct, revise, promulgate, enact, or enforce the
18 Policy is “in excess of authority” under the APA and therefore must be held to be unlawful and set
19 aside.

20 270. Because Defendant Wolf is not legally authorized to hold the position of Acting
21 Secretary, any action he took to contribute to, direct, revise, promulgate, enact, or enforce the
22 Policy is “not in accordance with law” under the APA and therefore must be held to be unlawful
23 and set aside.

24 271. An actual, present, and justiciable controversy exists between Plaintiffs and
25 Defendants concerning the legality of the Policy and regarding whether Defendant Wolf has legal
26 authority to hold his position or perform its duties or functions.

27 272. Plaintiffs seeks a declaratory judgment from this Court that the Policy is not in
28 accordance with law, in excess of statutory authority, contrary to constitutional right, or without

1 observance of procedure required by law pursuant to 5 U.S.C. § 706(2); that the Policy is arbitrary,
2 capricious, an abuse of discretion, or otherwise not in accordance with law within the meaning of
3 5 U.S.C. § 706(2)(A); that Defendant Wolf is without legal authority to hold his position or to
4 perform its duties or functions; and that aspects of the Policy promulgated under the purported
5 authority of Defendant Wolf must be set aside and/or enjoined.

6 273. Defendants DOJ and Barr have unduly interfered with Portland's police functions
7 as delegated to it by the State of Oregon, in violation of the Tenth Amendment, by refusing to
8 cancel the deputation of the PPB officers at Portland's request.

9 274. An actual, present, and justiciable controversy exists between Portland and
10 Defendants DOJ and Barr concerning the constitutionality of Defendants' refusal to cancel the
11 deputation.

12 275. Portland seeks a declaratory judgment from this Court that Defendant DOJ's and
13 Defendant Barr's refusal to cancel the deputation of PPB officers is violative of the Tenth
14 Amendment and the anti-commandeering doctrine.

15
16 **PRAYER FOR RELIEF**

17 Wherefore, Plaintiffs respectfully request that this Court:

- 18 1. Issue an order holding unlawful, vacating, and setting aside Defendants' Policy;
- 19 2. Declare that the Policy is not in accordance with law, in excess of statutory
20 authority, contrary to constitutional right, or without observance of procedure required by law
21 pursuant to 5 U.S.C. § 706(2);
- 22 3. Declare that the Policy is arbitrary, capricious, an abuse of discretion, or
23 otherwise not in accordance with law within the meaning of 5 U.S.C. § 706(2)(A);
- 24 4. Declare that aspects of the Policy promulgated under the purported authority of
25 Defendant Wolf must be set aside and/or enjoined;
- 26 5. Declare that Defendant DOJ's and Defendant Barr's commandeering of local law
27 enforcement is unlawful under the Tenth Amendment and order them to immediately
28 cancel the at-issue deputation of PPB officers;

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6. Award Plaintiffs costs, expenses, and reasonable attorneys' fees; and
7. Award any other relief the Court deems just and proper.

1 DATED: October 14, 2020

Respectfully submitted,

2 **OFFICE OF THE CITY ATTORNEY**
3 **CITY OF OAKLAND**

4 By: /s/ Barbara J. Parker

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Counsel for the Cities of Oakland and Portland

FILER'S ATTESTATION

Pursuant to Civil Local Rule 5-1(i)(3), regarding signatures, Malia McPherson, hereby attests that concurrence in the filing of this document has been obtained from all the signatories above.

DATED: October 14, 2020

/s/ Malia McPherson
Malia McPherson

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