KEN PAXTON
ATTORNEY GENERAL OF TEXAS

Written Testimony Before the House of Representatives Judiciary Committee, the Subcommittee on the Constitution and Limited Government

"The Southern Border Crisis: The Constitution and the States"

January 30, 2024

Brent Webster, First Assistant Attorney General of Texas

My name is Brent Webster and I have the honor to serve as the First Assistant Attorney General for Texas. I report directly to Texas Attorney General Ken Paxton, who has fearlessly challenged the disastrous, unlawful mandates of President Joe Biden.

Since President Biden has taken office, Texas has litigated 65 lawsuits fighting lawless actions taken by the Biden Administration. Time and again, Attorney General Paxton has disrupted President Biden's agenda, saving the American people from illegal policies and unconstitutional overreach. Attorney General Paxton has been so effective in standing up for the rule of law that Texas has become "a legal graveyard for Biden policies."[1]

Currently, we are litigating more than a dozen cases against the open-borders extremists in the Biden Administration who have allowed illegal aliens, cartels, human traffickers, drug smugglers, terrorists, and transnational criminal organizations to bring chaos into the heartland. While Texas has done its part to aid the U.S. Border Patrol, the federal government continues to fail us. The Biden Administration refuses to exercise its power to deny entry, which predictably results in more and more individuals illegally crossing the border. As the Supreme Court has explained, "an alien who is detained shortly after unlawful entry cannot be said to have 'effected an entry,'" and allowing aliens to enter by illegally crossing the Rio Grande into Texas—as well as Chicago, New York, and the rest of our country—will "create a perverse incentive to enter at an unlawful rather than a lawful location."[2] Moreover, as Chief Judge Moses of the Western District of Texas found following evidentiary hearings when we sued the Biden Administration for cutting our wire fencing, the federal government is letting in individuals with "no warning against criminal violation of immigration law; no attempt to prevent the same; no direction to enter at a lawful port of entry; no questioning; no document requests; and no search for drugs or weapons."[3]

[1] Tierney Sneed, "Why Texas is a legal graveyard for Biden policies," *CNN* (March 3, 2022), https://www.cnn.com/2022/03/03/politics/texas-biden-court-losses-paxton-bush/index.html.

[2] *Dep't of Homeland Sec. v. Thuraissigiam*, 140 S. Ct. 1959, 1983 (2020).

[3] *State of Texas v. U.S. Dep't of Homeland Sec.*, No. DR-23-CV-00055-AM, 2023 WL 8285223, at *12 (W.D. Tex. Nov. 29, 2023). I attach this order as Exhibit 1.

Instead of securing the border or assisting us to do so, the U.S. Department of Justice and the U.S. Department of Homeland Security ("DHS") have actively fought our efforts.[4] Federal officials have even brought in heavy equipment to destroy Texas's wire fencing near the Rio Grande for no other purpose than to allow more individuals to enter the United States by crossing the river other than at an official port of entry—which is a federal crime.[5]

President Biden's failure to enforce federal immigration law is causing enormous problems—in Texas and in the rest of the country. Per the Administration's own numbers, December of 2023 set a record for illegal immigration.[6] U.S. Customs and Border Protection reports released last Friday indicate that there were over 300,000 alien encounters at the southern border.[7] And that only represents the aliens reported by Border Patrol. The actual number is almost certainly greater.[8] As Chief Judge Moses observed in a recent order, the Biden Administration's "broader immigration policies, practices, and public statements" cause many migrants to "fear no additional criminal or immigration consequence" for failing to report to Border Patrol.[9] To the extent some "elect to declare themselves at a processing center, their decision to do so can hardly be attributed to any acts to restrict their movement."[10]

Instead of cracking down on this rampant lawlessness, the Biden Administration compounds the problem by apparently allowing 99.7% of the illegal aliens in custody to be released.[11] Out of the estimated 16.8 million illegal aliens in America, nearly 2.5 million live in Texas.[12] To give that number some context, there are more illegal aliens in Texas than there are people who reside in Dallas and Fort Worth combined. More than a dozen States have fewer *total* people—citizens and non-citizens alike—than there are illegal aliens in Texas.

Attorney General Ken Paxton is Texas's top law enforcement officer. We represent Governor Greg Abbott as he uses the powers invested in him by the sovereign people of Texas to launch Operation Lone Star—an historic effort to do the job that President Biden has refused to do. How does the White House thank Texas? By ordering their legions of federal lawyers, paid with

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[4] *See, e.g.*, *United States v. Abbott, et al.*, No. 1:23-cv-00853-DAE (W.D. Tex. July 24, 2023); *see also Texas v. DHS*, No. DR-23-CV-00055-AM (W.D. Tex. Oct. 24, 2023).

[5] 8 U.S.C. § 1325.

[6] "CBP Releases December 2023 Monthly Update," *U.S. Customs and Border Protection* (January 26, 2023), https://www.cbp.gov/newsroom/national-media-release/cbp-releases-december-2023-monthly-update#:~:text=CBP's%20total%20encounters%20along%20the,entry%20according%20to%20preliminary%20figures.

[7] *Id.*

[8] *See, e.g.*, *Texas v. DHS,* No. DR-23-cv-00055-AM, 2023 WL 8285223, at *5 (W.D. Tex. October 24, 2023) (Moses, C.J.) (noting specific instance of Border Patrol cutting fence to allow 4,555 aliens to enter Texas, while only 2,680 presented themselves for processing that day).

[9] *Id.* at 13.

[10] *Id.*

[11] *See* New Data Reveal Worsening Magnitude of the Biden Border Crisis and Lack of Interior Immigration Enforcement, Subcommittee on Immigration Integrity, Security, and Enforcement, United States House of Representatives, *available at* https://judiciary.house.gov/sites/evo-subsites/republicans-judiciary.house.gov/files/evo-media-document/2024-01-18-new-data-reveal-worsening-magnitude-of-the-biden-border-crisis-and-lack-of-interior-immigration-enforcement.pdf?_gl=1*rzh1cd*_ga*MTc4MTI1NTQ4OC4xNzAyOTIyOTIy*_ga_1818ZEQW81*MTcwNTY5ODU3OS4xLjEuMTcwNTY5ODYwOC4wLjAuMA.

[12] *See, e.g.*, "How Many Illegal Aliens Are in the United States? 2023 Update," *Federation for American Immigration Reform* (June 2023), https://www.fairus.org/sites/default/files/2023-06/2023%20Illegal%20Alien%20Population%20Estimate_2.pdf.

our tax dollars, to harass Texas with endless lawfare. Instead of fighting to secure the border, the Biden Administration is fighting Texas.

When Texas began deploying concertina wire fencing to deter aliens from attempting dangerous and illegal crossings of the Rio Grande, the Biden Administration ordered federal agents to cut, move, or destroy the barriers. By doing this, they are actively facilitating the violation of American law by foreign nationals and inviting them to make a potentially deadly river crossing instead of appearing at a designated port of entry. Attorney General Paxton sued President Biden and is currently fighting to safeguard public safety and prevent any more destruction of Texas's property.

When Texas deployed a line of water buoys on the Rio Grande at a hot spot of illegal activity to once again deter deadly river crossings and direct aliens to legal ports of entry, the Biden Administration sued and demanded that Texas remove the effective border security measure. This issue remains the subject of litigation.

Having reviewed extensive video, documentary, and testimonial evidence in court, Chief Judge Moses was struck by the perverse incentive the Biden Administration has created. As she put it, "Any rational observer could not help but wonder why the Defendants do not just allow migrants to access the country at a port of entry. If agents are going to allow migrants to enter the country, and indeed facilitate their doing so, why make them undertake the dangerous task of crossing the river? Would it not be easier, and safer, to receive them at a port of entry? In short, the very emergencies the Defendants assert make it necessary to cut the wire are of their own creation."[13]

Most recently, Governor Abbott ordered the Texas Military Department and the Department of Public Safety to deploy enhanced border security measures at Shelby Park in Eagle Pass, Texas. This small town of fewer than 30,000 Texans has borne the brunt of the Biden Administration's policies. Daily, hundreds if not thousands of aliens besiege their city. Indeed, the problem is so serious that the mayor of Eagle Pass has declared a state of emergency.[14] Instead of helping those who live in Eagle Pass, President Biden has essentially abandoned them. Texas will not abandon them, however, and we moved to secure Texas land near the border.

Once again, President Biden responded to Texas's efforts to protect Texans by making baseless allegations against Texas. Federal lawyers sent Attorney General Paxton vague letters seemingly threatening retribution if he essentially did not bend the knee and throw open the gates at the southern border. Let me set the record straight.

On January 11, the Texas Military Department secured Shelby Park in Eagle Pass, Texas, to protect public safety and to enhance various barriers that were protecting residents from ongoing illegal activities.[15]

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[13] *Texas v. DHS,* 2023 WL 8285223, at *4.

[14] *See* MaryAnn Martinez & Jorge Fitz-Gibbon, *Overwhelmed Texas City Declares State of Emergency As over 11K Migrants—Close to Half Its Population—Surge Across Border*, N.Y. POST (Sept. 20, 2023), https://nypost.com/2023/09/20/eagle-pass-texas-declares-state-of-emergency-over-migrants/.

[15] These facts are set forth in the State of Texas's Response to the United States' Supplemental Memorandum, *DHS v. Texas*, No. 23A607 (U.S. 2024), 2024 WL 210067 at *3. I attach this filing as Exhibit 2.

On January 12, three aliens apparently attempting to illegally cross the Rio Grande during an arctic vortex drowned on the Mexican side of the river. Federal Border Patrol agents only informed members of the Texas Military Department of the situation *after* Mexican authorities confirmed the deaths and recovered the bodies.[16] Upon hearing of the drownings, Texas conducted a thorough check to ensure that there was no one else in need of assistance. At no point, did Texas prevent federal authorities from rendering emergency aid to anyone attempting to illegally enter America.[17]

You do not have to take my word for it—the U.S. Department of Justice confirmed this series of events in their own legal filings.[18] Nevertheless, the U.S. Department of Homeland Security seemed to insinuate that Texas is responsible for the tragic drownings.[19] But we will not stand idly by as President Biden turns a park in a small Texas town into an unofficial and illegal port of entry. Attorney General Paxton sent DHS a response letter on January 17, denying the ridiculous demands. He wrote:

> Because the facts and law side with Texas, the State will continue utilizing its constitutional authority to defend her territory, and I will continue defending those lawful efforts in court. DHS should stop wasting scarce time and resources suing Texas, and start enforcing the immigration laws Congress already has on the books.[20]

After being thoroughly rebuffed, DHS sent another demand letter with even weaker grounds. The federal agency complained about Shelby Park and the fact that Texas had taken steps to secure the border. Further, the letter all but demanded that we remove all obstructions on the property, open the border to illegal aliens, and surrender Shelby Park.

Once again, Attorney General Paxton has denied the Biden Administration's unfounded requests in a letter on January 26, 2024.[21] Further, he issued reasonable counter-demands. By February 15, DHS must supply the official plat maps and deeds demonstrating the precise parcels to which they claim ownership, an explanation of how Texas is preventing access to those specific parcels, documentation showing that Eagle Pass or Texas ever granted permission for DHS to erect infrastructure that interferes with border security, and proof that Congress empowered DHS to turn a Texas park into an unofficial and illegal port of entry.

If the federal government is going to make such allegations, it must provide proof.

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[16] These facts are set forth in the State of Texas's Response to the United States' Second Supplemental Memorandum, *DHS. v. Texas*, No. 23A607 (U.S. 2024), 2024 WL 210069 at *4. I attach this filing as Exhibit 3.

[17] *Id.* at *4–5.

[18] *See* Second Supplemental Memorandum, No. 23A607 (U.S. 2024), 2024 WL 210068 at *1-2.

[19] *Id.* at *3.

[20] Texas Attorney General Ken Paxton to U.S. Department of Homeland Security General Counsel Jonathan Meyer, *Texas Office of the Attorney General* (Jan. 17, 2024), https://www.texasattorneygeneral.gov/sites/default/files/images/press/OAG%20Response%20to%20DHS%20Demand%20Letter%2001172024.pdf. I attach this letter as Exhibit 4.

[21] Texas Attorney General Ken Paxton to U.S. Department of Homeland Security General Counsel Jonathan Meyer, *Texas Office of the Attorney General* (Jan. 26, 2024), https://www.texasattorneygeneral.gov/sites/default/files/images/press/OAG%20Response%20to%20Second%20DHS%20Demand%20Letter%201262024%20_2032407913.pdf. I attach this letter as Exhibit 5.

While President Biden fails to deploy reasonable measures to prevent lawbreaking, Texas has passed new laws to stop it. The Texas Legislature passed Senate Bill 4 last year to deter aliens from illegally crossing the border by making an illegal crossing a state crime.[22] This legislation gives our law enforcement officers additional tools to keep Texans safe.

Specifically, S.B. 4 makes it a Class B misdemeanor to enter or attempt to enter Texas directly from a foreign nation at any location other than a lawful port of entry.[23] A state judge will also order the alien to leave the country after serving the sentence. If the alien then returns or refuses to leave, he will be charged with a state felony and punished accordingly.

I must also note that S.B. 4 respects asylum rights and legal presence.[24] Further, the law prohibits police from arresting anyone at a school, place of worship, healthcare facility, or facility designed to assist sexual assault survivors.[25] Altogether, this statute allows Texas to protect its residents by expelling illegal aliens and prosecuting those who break the law, have criminal records, or refuse to leave.[26] In other words, it gives Texas a fighting chance. Nevertheless, the Biden Administration and left-wing litigants have sued to stop the law from taking effect.

Throughout all of this, the Biden Administration has claimed that the States have no legal authority to secure their borders or protect their citizens. They suggest that only the federal government can do that. To justify this position, the Biden Administration relies on a misinterpretation of the Supreme Court's majority decision in *Arizona v. United States*.[27] However, as Attorney General Paxton recently explained to the U.S. Department of Homeland Security, *Arizona* is inapt here.[28] The Supreme Court only indicated that federal statutory law preempts state action when the federal government is fulfilling its constitutional obligation to "protect each of [the States] against Invasion."[29] Yet here, it appears that federal officials have all but abandoned the field of immigration enforcement.[30]

So what happens when the White House repeatedly refuses to enforce federal law and actively prevents the States from doing so? Thankfully, the Founding Fathers provided an answer in the Constitution. They "foresaw that States should not be left to the mercy of a lawless president," as Governor Abbott noted.[31] As Justice Scalia has observed, in our constitutional division of labor the States retain "inherent power to exclude persons from its territory, subject only to those

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[22] Tex. Pen. Code. Ch. 5B; Tex. Pen. Code § 51.02.

[23] Tex. Pen. Code § 51.02(a)-(b).

[24] Tex. Pen. Code § 51.02 (c)

[25] Tex. Pen. Code. § 51.02

[26] *Id.*

[27] *Arizona v United States*, 567 U.S. 387 (2012).

[28] *See* Texas Attorney General Ken Paxton to U.S. Department of Homeland Security General Counsel Jonathan Meyer at 3 (Jan. 17, 2024).

[29] *Id.*

[30] *See, e.g.*, *Texas v. DHS,* 2023 WL 8285223, at *14.

[31] Texas Governor Greg Abbott, "Statement On Texas' Constitutional Right To Self-Defense," (Jan. 24, 2024), https://gov.texas.gov/uploads/files/press/Border_Statement_1.24.2024.pdf. I attach this statement as Exhibit 6.

limitations expressed in the Constitution or constitutionally imposed by Congress. That power to exclude has long been recognized as inherent in sovereignty."[32]

In response to this crisis, Governor Abbott has invoked Texas's constitutional right to self-defense. To date, half of America's governors have voiced their support for Texas defending its sovereignty.[33] They know what the American people know—that President Biden has failed to follow federal law. The unending waves of aliens entering this country don't merely affect Texas. There is not a single region of the country that has not been marked in some way by this tragedy. Fentanyl, crime, welfare expenditures, healthcare and education costs, wage suppression, cost of living increases, tax hikes, and repurposing public services for other countries' citizens have all been burdening cities and towns from coast to coast.

One resident of New York City lamented the number of aliens in the city—which is only a fraction of what Texas has had to deal with. "Never in my life have I had a problem that I did not see an ending to. I don't see an ending to this," this New Yorker explained. "This issue will destroy New York City.… The city we knew, we're about to lose."[34]

Those were the words of the progressive, left-wing Democrat New York City Mayor Eric Adams. Reality has forced him to understand that uncontrolled immigration is an existential threat to American communities. While the Big Apple got the headlines, the same story has been played out in cities, towns, and neighborhoods across this country.

Federal courts have also agreed that President Biden has utterly failed to uphold his end of our national bargain. Chief Judge Moses, for example, found that "[t]he evidence presented amply demonstrates the utter failure of the [Biden Administration] to deter, prevent, and halt unlawful entry into the United States."[35] Further, Chief Judge Moses determined that federal officials "cannot claim the statutory duties they are so obviously derelict in enforcing as excuses to puncture [Texas's] attempts to shore up [their own] failing system. Nor may they seek judicial blessing of practices that both directly contravene those same statutory obligations and require the destruction of [Texas's] property."[36]

The situation at the southern border is as if the fire department set your house on fire and then sued when you tried to put out the flames.

Nevertheless, federal lawyers will continue suing Texas and any other State that has the courage to stand up for its rights. With that being the case, there are several clear steps that Congress could take that would dispel any confusion and keep the Biden Administration from continuing to wave around inapt pages from *Arizona*.

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[32] *Arizona*, 567 U.S. at 417 (Scalia, J., concurring in part and dissenting in part).

[33] "Republican Governors Band Together, Issue Joint Statement Supporting Texas' Constitutional Right to Self-Defense," *Republican Governors Association* (Jan. 25, 2024), https://www.rga.org/republican-governors-ban-together-issue-joint-statement-supporting-texas-constitutional-right-self-defense/.

[34] Jeff Coltin, "Adams: Cost of migrants 'will destroy New York City," *Politico* (Oct. 7, 2023), https://www.politico.com/news/2023/09/07/eric-adams-migrants-new-york-city-00114437.

[35] *Texas v. DHS*, 2023 WL 8285223, at *14.

[36] *Id.*

First, any type of funding deal passed by Congress should authorize the States to enforce federal immigration laws. This measure would cost the federal government nothing and would allow the States to implement the laws Congress has already enacted. Additionally, such a measure would free up existing federal resources to conduct other duties. By explicitly authorizing the States to enforce laws already on the books, Congress would settle any possible questions arising from the *Arizona* decision by legislatively overriding the issue without the need for additional litigation.

Second, Congress should allow the States to sue the federal government for monetary damages due to failure to enforce immigration law. Currently, the Biden Administration asserts that Texas, the States, and the American people generally cannot sue for damages because of federal sovereign immunity.[37] Texas can only sue the federal government for damages where Congress passes a law allowing us to do so. These instances are limited and constrict the ability of the States to hold federal agencies accountable. At the very least, Congress should act to let the States have monetary recourse when the federal government nullifies laws it does not want to enforce.

I would also like to address the idea currently being proposed of instituting a daily cap of 5,000 on border encounters before Title 42 automatically goes into effect. Aside from being a ridiculously high number that would still allow more than 1.25 million aliens to enter the country annually before even moderate restrictions go into place, it simply will not work.

The problem is that even when Congress enacts immigration laws, the White House argues that it has "prosecutorial discretion" to decide how best to enforce those laws.[38] Congress has already enacted sound laws—those laws are simply not being enforced. Given that reality, the solution isn't more laws; it is allowing the States to enforce the laws that already exist.

There is not a moment to lose.

The Center for Immigration Studies explained to this Committee earlier this month that, on average, each illegal alien places a nearly $70,000 burden on this country.[39] Nationally, people who are here in violation of our laws reportedly drain $42 billion a year from welfare programs and cost the already strained public education system $69 billion annually. According to the House Committee on Homeland Security, the total overall cost of illegal immigration is $451 billion.[40]

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[37] *See DHS v. Texas*, No. 23A607 (U.S. 2024), 2024 WL 51018, at *4.

[38] The Biden Administration has argued in court that "[t]he Secretary's decision whether to exercise his return authority resembles classic exercises of prosecutorial discretion because it involves a complicated balancing of factors peculiarly within the Executive's expertise, including how to best expend limited agency resources and whether a particular enforcement action … fits the agency's overall policies. The concerns justifying prosecutorial discretion are greatly magnified in the immigration context, which implicates the dynamic nature of relations with other countries and the need for enforcement policies to be consistent with this Nation's foreign policy." Appellants' Br. at 24, *Texas v. Biden*, No. 21-10806 (5th Cir. Sept. 20, 2021) (cleaned up, citations omitted).

[39] Steven Camorata, "The Cost of Illegal Immigration to Taxpayers," *Center for Immigration Studies* (January 11, 2024), https://judiciary.house.gov/sites/evo-subsites/republicans-judiciary.house.gov/files/evo-media-document/camarota-testimony.pdf.

[40] "The Historic Dollar Costs of DHS Secretary Alejandro Mayorkas' Open-Border Policies," *House Committee on Homeland Security* (Nov. 13, 2023), https://homeland.house.gov/wp-content/uploads/2023/11/Phase4Report.pdf.

A 2023 study showed that illegal aliens represented a $150 billion burden on state, local, and federal budgets—the GDP of a small country.[41] In Texas alone, the estimated cost of illegal aliens and their children sat at more than $13 billion.

But the price of this invasion is more than merely dollars. It has destroyed people's lives and ruined their livelihoods. Through unprecedented levels of illegal border crossings, Texans have been subjected to human trafficking, black-market fentanyl distribution, cartel violence, and loss of life across border communities.

Texas has drawn a line in the sand and will assert our constitutional rights. Attorney General Ken Paxton will use every lawful measure to secure legal recourse against this Administration's blatantly illegal actions.

Thank you to the Committee for their consideration of this critical issue.

[41] "The Fiscal Burden of Illegal Immigration on United States Taxpayers 2023," *Federation for American Immigration Reform* (Mar. 8, 2023), https://www.fairus.org/sites/default/files/2023-03/Fiscal%20Burden%20of%20Illegal%20Immigration%20on%20American%20Taxpayers%202023%20WEB_1.pdf.

Exhibit 1: Order, *State of Texas v. U.S. Dep't of Homeland Sec.*, No. DR-23-CV-00055-AM, 2023 WL 8285223, at *12 (W.D. Tex. Nov. 29, 2023)

2023 WL 8285223
Only the Westlaw citation is currently available.
United States District Court, W.D. Texas, Del Rio Division.

The STATE OF TEXAS, Plaintiff
v.
U.S. DEPARTMENT OF HOMELAND SECURITY; Alejandro Mayorkas, in His Official Capacity as Secretary of the U.S. Department of Homeland Security; U.S. Customs & Border Protection; U.S. Border Patrol; Troy A. Miller, in His Official Capacity as Acting Commissioner for U.S. Customs & Border Protection; Jason Owens, in His Official Capacity as Chief of the U.S. Border Patrol; and Juan Bernal, in His Official Capacity as Acting Chief Patrol Agent, Del Rio Sector U.S. Border Patrol, Defendants.

Civil Action No. DR-23-CV-00055-AM
|
Signed November 29, 2023

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MEMORANDUM OPINION AND ORDER

ALIA MOSES, Chief United States District Judge

***1** Pending before the Court is the State of Texas's (the "Plaintiff") Motion for a Preliminary Injunction or Stay of Agency Action (the "Motion") against the United States Department of Homeland Security ("DHS"); Alejandro Mayorkas, in his official capacity as Secretary of DHS ("Mayorkas"); United States Customs and Border Protection ("CBP"); United States Border Patrol ("BP"); Troy A. Miller, in his official capacity as Acting Commissioner for CBP ("Miller"); Jason Owens, in his official capacity as Chief of BP ("Owens"); and Juan Bernal, in his official capacity as Acting Chief Patrol Agent of the Del Rio Sector of BP ("Bernal") (collectively, the "Defendants"). (ECF No. 3-1.) Upon careful consideration of the record and relevant law, the Court **DENIES** the motion for preliminary injunctive relief.

I. BACKGROUND

A. Procedural Background

On October 24, 2023, the Plaintiff commenced this civil action against the Defendants. (ECF No. 1.) According to the Plaintiff, the Defendants are destroying its property by cutting the concertina wire ("c-wire" or "wire") fence the Plaintiff constructed near the U.S.-Mexico border. (*Id.* at 3-4.) The Plaintiff claims that this property destruction is intended to allow migrants to enter the country illegally. (*Id.* at 1-4.) The Plaintiff raises numerous claims against the Defendants, including common law conversion, common law trespass to chattels, and several violations under the Administrative Procedure Act ("APA"). (*Id.* at 23-28.) The Plaintiff seeks the following: preliminary and permanent injunctive relief to enjoin the Defendants from seizing or destroying the Plaintiff's property; a stay of agency action under 5 U.S.C. § 705; a declaration that the Defendants' actions are unlawful; and costs. (*Id.* at 28-29.) Together with the Complaint, the Plaintiff filed a motion for preliminary injunctive relief, which is presently before the Court. (ECF No. 3-1.)

Three days later, on October 27, 2023, the Plaintiff filed a Motion for a Temporary Restraining Order ("TRO"). (ECF No. 5.) One day later, the Plaintiff filed a Notice of Escalating Property Damage in Support of its Emergency Motion for a TRO. (ECF No. 8.) The Plaintiff alleged that the Defendants, knowing a motion for a TRO had already been filed, used a forklift to seize concertina wire and smash it to the ground. (*Id.*) The Court, considering the motion for a TRO *ex parte* and on an expedited basis, granted the request on October 30, 2023, which forbade the Defendants from interfering with the Plaintiff's concertina wire except for medical emergencies. (ECF No. 9 at 4, 11.) Following the TRO, the Defendants filed an opposition to the motion. (ECF No. 23-1.) Thereafter, the Plaintiff filed a reply in support of its request for a preliminary injunction. (ECF No. 27-1.)

The parties appeared before the Court on November 7, 2023 for an initial hearing on the motion for preliminary injunction. The Court heard testimony from the Plaintiff's witness, Michael Banks, Border Czar for the State of Texas, and from the Defendants' witnesses, Mario Trevino, Deputy Patrol Agent in Charge for the U.S. Border Patrol at the Eagle Pass South Station, and David S. BeMiller, Chief of Law Enforcement Operations at U.S. Border Patrol Headquarters. The Court also considered extensive arguments from the parties. On November 9, 2023, the Court extended the TRO for an additional 14 days to fully consider the parties' arguments and evidence. (ECF No. 33.) The Court then ordered that a second preliminary injunction hearing should be held, that the parties provide supplemental briefs on the APA claims, that the parties define various legal terms, and that the parties provide all documents and communications related to the cutting of the Plaintiff's c-wire and any other border barriers. (*Id.*)

***2** On November 14, 2023, the Defendants filed a Motion to Modify the Court's November 9, 2023 Order. (ECF No. 38.) The Defendants explained they would not be able to fully comply with the Court's order for production given the breadth of the order and the limited amount of time remaining before the next hearing, which the parties consented to have on mutually agreeable days between November 20 and November 29, 2023. (ECF Nos. 36, 38.) The Defendants proposed limiting the Court's discovery to seven custodians likely to have responsive documents to the Court's order. (ECF Nos. 38 at 4; 38-1 at 4.) These custodians included the Chief Patrol Agent and Deputy Patrol Agent of the Del Rio Sector, the Patrol Agents in Charge and Deputy Patrol Agents in Charge of the Eagle Pass North and Eagle Pass South Stations, and the Chief of Law Enforcement Operations. (ECF No. 38-1 at 4.) According to the Defendants, a targeted search of these seven individuals yielded over 310,000 emails and documents. (ECF No. 38 at 4.) Thus, the Defendants also requested that they be permitted to produce only responsive documents from the search described in paragraphs 11, 12, and 15 of the Courey Declaration. (*Id.* at 4-5.)

On November 15, 2023, the Court denied in part and granted in part the Defendants' motion to modify. (ECF No. 39.) Specifically, the Court ordered that its November 9, 2023 Order not be modified except to limit document production to the period between March 6, 2021, and November 9, 2023. (*Id.*) The parties had until November 21, 2023 to produce the documents as modified. (*Id.*) The Court also set the second preliminary injunction hearing for November 27, 2023. In a separate order, the Court set a virtual conference for November 21, 2023 regarding document production, the TRO, and the second preliminary injunction hearing. (ECF No. 41.)

Before the virtual conference, the Defendants reported that they reviewed more than 6,000 documents pulled from a search of the seven identified custodians' electronic records to include the modified period. (ECF No. 43 at 6.) From the pool, the Defendants produced approximately 1,182 documents and five videos, asserting they attempted to maintain appropriate controls to safeguard privileges and other necessary redactions and withholdings. (*Id.*) They stated these documents reflect that the c-wire "inhibits Border Patrol's ability to patrol the border and inspect, apprehend, and process migrants in this four-mile stretch of the border, and the ways in which Border Patrol has coordinated with Texas about the wire in this area." (*Id.* at 7.) They further stated that while Border Patrol and the Texas Department of Public Safety ("DPS") have coordinated concerning the c-wire, the documents reflect that the "relationship has deteriorated over time, driven at least in part by at least one instance in which Texas DPS personnel threatened to criminally charge Border Patrol for cutting the wire and DPS efforts to impede Border Patrol access to certain areas." (*Id.* at 8.)

Following the virtual conference, the Court ordered that the TRO be extended to November 29, 2023, at 11:59 p.m. on consent of the parties. (ECF No. 46 at 1.) The Court further ordered that the Defendants had until the morning of the second preliminary injunction hearing to produce the outstanding documents as previously ordered. (*Id.* at 2.) On November 26, 2023, the Defendants submitted additional documents to the Court for its review. The Plaintiff also submitted documents to the Court on November 21 and November 27, 2023. The Court held the second preliminary injunction hearing on November 27, 2023.

The Court now considers the Plaintiff's Motion for Preliminary Injunction. (ECF No. 3-1.) For purposes of clarifying the record, the Court makes its factual and legal determinations below based on the following: the Plaintiff's Complaint (ECF No. 1); the Plaintiff's Motion for Preliminary Injunction (and the appended declarations and exhibits) (ECF No. 5-1); the Plaintiff's Notice of Escalating Property Damage (and the appended declaration) (ECF No. 8); the Court's TRO entered on October 30, 2023 (ECF No. 9); the Plaintiff's video exhibits submitted on October 30, 2023

(ECF No. 10); the Defendants' Opposition to the Preliminary Injunction (and the appended declarations and exhibits) (ECF No. 23-1); the Plaintiff's Notice of Filing of Amended Declaration of Manuel Perez (ECF No. 26); the Plaintiff's Reply in Support of the Preliminary Injunction (and the appended declarations and exhibits) (ECF No. 27-1); the arguments, testimony, and evidence presented at hearings before the Court on November 7 and November 27, 2023; the Defendants' document production submitted to the Court *ex parte* and for *in camera* review on November 21, November 26, and November 29, 2023; and the Plaintiff's document production submitted to the Court *ex parte* and for *in camera* review on November 21 and November 27, 2023. [1] The Court also considers the Defendants' Supplemental Brief filed on November 21, 2023, and the Plaintiff's Supplemental Brief filed on November 27, 2023. (ECF Nos. 47, 48.)

B. Factual Background

***3** The U.S.-Mexico border presents a unique challenge that is equal parts puzzling to outsiders and frustrating to locals. The immigration system at the heart of it all, dysfunctional and flawed as it is, would work if properly implemented. Instead, the status quo is a harmful mixture of political rancor, ego, and economic and geopolitical realities that serves no one. So destructive is its nature that the nation cannot help but be transfixed by, but simultaneously unable to correct, the present condition. What follows here is but another chapter in this unfolding tragedy. The law may be on the side of the Defendants and compel a resolution in their favor today, but it does not excuse their culpable and duplicitous conduct.

i. The Border – A Brief Synopsis

Much of the 1,200-mile run of the Rio Grande River separating Texas and Mexico presents a bucolic setting, rolling from ranches to pecan orchards and back again. Twenty-nine official ports of entry dot the landscape, but much of the focus in this matter, and the border debate more broadly, is the vast stretches of land between. To guard this area, Congress created Border Patrol. Its principal statutory objective, in the words of the Defendants, "is to deter illegal entry into the United States and to intercept individuals who are attempting to unlawfully enter the United States." (ECF No. 23-1 at 13.) Border Patrol agents are empowered to apprehend noncitizens unlawfully entering the country, process them, inspect them for asylum or related claims, and in appropriate circumstances, place them in removal proceedings. (*Id.* at 13–14.)

In recent years, the character of the situation facing Border Patrol agents has changed significantly. The number of Border Patrol encounters with migrants illegally entering the country has swelled from a comparatively paltry 458,000 in 2020 to 1.7 million in 2021 and 2.4 million in 2022. (ECF No. 3-1 at 9–10 (citing internal DHS figures).) Border Patrol is on track to meet or exceed those numbers in 2023. (*Id.* at 10.) As expected, organized criminal organizations take advantage of these large numbers. *The New York Times* reported that conveying all those people to the doorstep of the United States has become an incredibly lucrative enterprise for the major Mexican drug cartels. (*Id.* at 10–12.) However, the infrastructure built by the cartels for human cargo can also be used to ship illegal substances, namely fentanyl. (*Id.* at 11.) Lethal in small doses, fentanyl is a leading cause of death for young Americans and is frequently encountered in vast quantities at the border. (*Id.*)

Migrant numbers increased apparently in response to softened political rhetoric. To prepare those additional migrants for parole, Border Patrol devoted increasing portions of its manpower to processing. (ECF No. 37 at 63, 64.) For this purpose, the Defendants set up a temporary processing center on private land in Maverick County, Texas close to the Rio Grande River. (*Id.* at 143–45, 163–65, 200, 223 (discussing the processing center and its location).) As it became known that additional migrants were being allowed entry into the country, more appeared at the border, requiring still more agents to be pulled from deterrence and apprehension to processing. (ECF No. 37 at 63, 64.) This became a cycle in which the gaps in law enforcement at the border grew wider even as more illegal entries occurred. (*Id.*)

ii. Operation Lone Star and the Concertina Wire

The Plaintiff launched Operation Lone Star in 2021 to aid Border Patrol in its core functions. (ECF No. 3-1 at 14.) Through that initiative, the Plaintiff allocated resources in an attempt to stem the deteriorating conditions at the border. (*Id.*; ECF No. 37 at 62–64.) The activity subject to dispute here is the Plaintiff's laying of concertina wire along several sections of riverfront. The wire serves as a deterrent—an effective one at that. The Court heard testimony that in other border sectors, the wire was so successful that illegal border crossings dropped to less than a third of their previous levels.

(ECF No. 37 at 71–74.) By all accounts, Border Patrol is grateful for the assistance of Texas law enforcement, and the evidence shows the parties work cooperatively across the state, including in El Paso and the Rio Grande Valley. (*Id.* at 71–75.) The Eagle Pass area, though, is another matter.

***4** Eagle Pass, and Maverick County generally, is the epicenter of the present migrant influx: nearly a quarter of migrant entries into the United States happen there. (ECF No. 3-1 at 18–19.) Naturally, the Plaintiff's efforts under Operation Lone Star flowed there as well. Just over 29 miles of concertina wire was installed in Maverick County by September 2023. (ECF No. 37 at 76.)

Of course, the installed wire creates a barrier between crossing migrants and law enforcement personnel, meaning that it must be cut in the event of an emergency, such as a drowning or heat exhaustion. The Plaintiff does not contest this. In fact, the Plaintiff itself cuts the wire from time to time to provide first aid or render treatment. (*Id.* at 79–80.) The problem arises when Border Patrol agents cut the wire without prior notification to the Plaintiff for reasons other than emergencies.

Plaintiff's Exhibit 10 neatly displays this issue. [2] In the video, Border Patrol agents are cutting a hole in the wire to allow a group of migrants to climb up from the riverbank. However, another hole already exists in the wire, less than 15 feet away, through which migrants can be seen passing. After completing the second hole and installing a climbing rope for migrants, agents then proceed to further damage the wire in that area and cut a third hole further down. Meanwhile, in the background, a Border Patrol boat can be seen situated in the middle of the river, passively observing a stream of migrants as they make the hazardous journey from Mexico, across the river, and then up the bank on the American side. At no point are the migrants interviewed, questioned as to citizenship, or in any way hindered in their progress into the United States. [3]

Border Patrol agents can be seen cutting multiple holes in the concertina wire for no apparent purpose other than to allow migrants easier entrance further inland. [4] Any rational observer could not help but wonder why the Defendants do not just allow migrants to access the country at a port of entry. If agents are going to allow migrants to enter the country, and indeed facilitate their doing so, why make them undertake the dangerous task of crossing the river? Would it not be easier, and safer, to receive them at a port of entry? In short, the very emergencies the Defendants assert make it necessary to cut the wire are of their own creation.

***5** Making matters worse are the cynical arguments of the Defendants in this case. During the second preliminary injunction hearing, counsel for the Defendants argued that although no Border Patrol agent can be seen making any sort of effort to physically restrain them, the migrants are in fact in custody because their path is bounded on both sides by wire and fence. It is disingenuous to argue the wire hinders Border Patrol from performing its job, while also asserting the wire helps. But regardless, the Court heard testimony that some 4,555 migrants entered during this incident, but only 2,680 presented themselves for processing that day at the Eagle Pass South Border Patrol Station. (ECF No. 37 at 113, 147–48.) [5] This information was provided to Banks by an unidentified Texas National Guardsman. (*Id.* at 113.) The Defendants do not contest the final processing number, only the number of entries on that day, though they do so without their own contrary evidence. (*Id.* at 148.)

II. STANDARD OF REVIEW

A preliminary injunction is an "extraordinary and drastic remedy," which is never awarded as a right. *Munaf v. Geren*, 553 U.S. 674, 689–90 (2008); *accord Pham v. Blaylock*, 712 F. App'x 360, 363 (5th Cir. 2017); *Miss. Power & Light Co. v. United Gas Pipe Line Co.*, 760 F.2d 618, 621 (5th Cir. 1985). Its purpose is to preserve the relative positions of the parties until a trial on the merits can be held. *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981); *Texas v. United States*, 809 F.3d 134, 187 n.205 (5th Cir. 2015). A preliminary injunction is warranted only when a movant can show (1) a substantial likelihood of success on the merits; (2) substantial injury to the moving party if the injunction is not granted; (3) that the injury outweighs any harm that will result if the injunction is granted; and (4) that granting the injunction will not disserve the public interest. *All. for Hippocratic Med. v. FDA*, 78 F.4th 210, 242 (5th Cir. 2023); Fed. R. Civ. P. 65. When the United States is the opposing party to a preliminary injunction, the third and fourth requirements merge. *Nken v. Holder*, 556 U.S. 418, 435 (2009). The party seeking the injunction must clearly carry the burden of persuasion on all four requirements. *Munaf*, 553 U.S. at 689-90; *Karaha Bodas Co. v.*

Negara, 335 F.3d 357, 363 (5th Cir. 2003). Thus, "the decision to grant a preliminary injunction is to be treated as the exception rather than the rule." *Karaha Bodas Co.*, 335 F.3d at 363–64 (quoting *Miss. Power & Light Co.*, 760 F.2d at 621).

III. JURISDICTIONAL ISSUES

A. Standing

To establish standing, a plaintiff must show an injury in fact caused by a defendant and redressable by a court order. *See* *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). The Plaintiff complains of three types of injuries caused by the Defendants' cutting or moving the fence: (1) harm to the fence; (2) harm from increased crime; and (3) increased state expenditures on healthcare, social services, public education, incarceration, and its driver's license program. (ECF No. 3-1 at 12-13, 40-41, 43; ECF No. 27 at 16-19.)

The Defendants do not challenge the Plaintiff's proprietary interest in the integrity of the fence. (*See* ECF No. 23-1 at 14 n.3.) They also admit that they did, in fact, cause the asserted harm to the fence. (*Id.* at 15.) Instead, the Defendants argue that states have "no cognizable interest in how the federal government exercises its enforcement discretion." (*Id.* at 38-39 (citing *United States v. Texas*, 143 S. Ct. 1964, 1970-71 (2023).) In that case, the Supreme Court held that states generally lack standing to assert "attenuated" injuries in the form of "indirect effects" of federal policies on "state revenues or state spending" derived from an alleged federal failure to make arrests or bring prosecutions. *Texas*, 143 S. Ct. at 1972 n.3, 1973-76.

***6** In addition, citing *Haaland v. Brackeen*, 143 S. Ct. 1609, 1640 (2023), the Defendants argue that the Plaintiff cannot assert claims on behalf of its citizens. (ECF No. 23-1 at 39.) *Haaland* found that states lacked standing to challenge a statute's rule governing child custody disputes based on a state's abstract "promise to its citizens" and indirect recordkeeping costs that were not "fairly traceable" to the federal policy. *Haaland*, 143 S. Ct. at 1640-41. The Defendants argue that the Plaintiff cannot claim standing based on an alleged rise in crime affecting the Plaintiff's citizens—such as drug smuggling, human trafficking, terrorist infiltration, and cartel activities (*see* ECF No. 3-1 at 7-8)—that the Defendants claim is similarly difficult to trace to their cutting or moving the fence. (ECF No. 23-1 at 39.)

While *Texas* and *Haaland* cast significant doubt on whether the Plaintiff can claim indirect increased expenditures or a rise in crime as bases for standing, they do not address direct physical damage to a state's property by agents of the federal government.[6] Here, the Plaintiff has direct proprietary interests in seeking to prevent or minimize damage to its fence caused by the Defendants' affirmative acts and to protect the Plaintiff's control and intended use thereof. The asserted harm is particularized, concrete, and directly traceable to the Defendants' conduct. *See* *Lujan*, 504 U.S. at 560. It also satisfies the APA's additional "zone of interests" standing requirement. *See Texas v. United States*, 50 F.4th 498, 521 (5th Cir. 2022) (holding the requirement is satisfied if a claim is "arguably within the zone of interests to be protected or regulated by the statute" and the test is "not especially demanding."). The APA expressly covers "sanctions" affecting a plaintiff, defined as an agency's "destruction, taking, seizure, or withholding of property." 5 U.S.C. § 551.

The only question is whether the relief the Plaintiff seeks can redress such injuries. That, of course, depends on whether such relief is available in the first place. While an award of monetary damages under the Federal Tort Claims Act ("FTCA") could perhaps redress past property damage, as the Defendants suggest (*see* ECF No. 23 at 21-22, 38), the Plaintiff does not seek that remedy. (*See* ECF No. 1.)[7] Absent other jurisdictional issues, the Court must therefore review the availability of injunctive relief or a stay of agency action and potential barriers thereto.[8]

B. Sovereign Immunity for Plaintiff's Common Law Claims

***7** In Counts One and Two of this suit, the Plaintiff asserts common law claims for conversion and trespass to chattels. (ECF No. 1 at 23-25.) When the Court granted the Plaintiff's *ex parte* motion for a TRO, it did so under the trespass to chattels claim. However, at the time, sovereign immunity was not considered. (*See* ECF No. 9 at 4.) For the reasons stated below, sovereign immunity presents a jurisdictional barrier to the Plaintiff's request for injunctive relief under its state law claims. That said, the Plaintiff may have alternative state law

relief for the damage the Defendants have previously caused to its concertina wire.

The Supreme Court has long recognized that "[i]t is axiomatic that the United States may not be sued without its consent and that the existence of consent is a prerequisite for jurisdiction." *United States v. Mitchell*, 463 U.S. 206, 212 (1983) (citing *United States v. Sherwood*, 312 U.S. 584, 586 (1941)); *accord* *FDIC v. Meyer*, 510 U.S. 471, 475 (1994) ("Absent a waiver, sovereign immunity shields the Federal Government and its agencies from suit."); *Loeffler v. Frank*, 486 U.S. 549, 554 (1988); *Price v. United States*, 174 U.S. 373, 375-76 (1899) ("It is an axiom of our jurisprudence. The Government is not liable to suit unless it consents thereto, and its liability in suit cannot be extended beyond the plain language of the statute authorizing it."); *see also La. Dep't of Envtl. Quality v. United States EPA*, 730 F.3d 446, 448-49 (5th Cir. 2013). The exemption of the United States from being sued without its consent, known as "sovereign immunity," extends to a suit by a State. *California v. Arizona*, 440 U.S. 59, 61-62 (1979) (quoting *Kansas v. United States*, 204 U.S. 331, 342 (1907)) ("It does not follow that because a State may be sued by the United States without its consent, therefore the United States may be sued by a State without its consent. Public policy forbids that conclusion."); *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 781-82 (1991); *Minnesota v. United States*, 305 U.S. 382, 387 (1939).

Only Congress can establish how the United States and its governing agencies can consent to be sued. *Gonzalez v. Blue Cross Blue Shield Ass'n*, 62 F.4th 891, 899 (5th Cir. 2023); *La. Dep't of Envtl. Quality*, 730 F.3d at 449 (citing *Mitchell*, 463 U.S. at 215-16) ("An agency cannot waive the federal government's immunity when Congress hasn't."). Moreover, the terms of consent to be sued may not be inferred or implied and must be unequivocally expressed in statutory text to define a court's jurisdiction. *United States v. White Mt. Apache Tribe*, 537 U.S. 465, 472 (2003); *United States v. Bormes*, 568 U.S. 6, 9 (2012); *Gonzalez*, 62 F.4th at 899. Further, a waiver of sovereign immunity and the conditions therein "must be construed strictly in favor of the sovereign." *La. Dep't of Envtl. Quality*, 730 F.3d at 449.

Congress has enacted legislation to create several exceptions to sovereign immunity. At issue in this preliminary injunction is the 1976 amendment to the Administrative and Procedures Act, passed under 5 U.S.C. § 702 ("Section 702"), which provides:

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: Provided, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought. 5 U.S.C. § 702.

***8** Section 702 has thus "waived sovereign immunity for suits seeking nonmonetary relief through nonstatutory judicial review of agency action." *Geyen v. Marsh*, 775 F.2d 1303, 1307 (5th Cir. 1985). "The intended effect of the amendment was to broaden the avenues for judicial review of agency action by eliminating the defense of sovereign immunity in cases covered by the amendment." *Doe v.*

United States, 853 F.3d 792, 798-99 (5th Cir. 2017) (internal citations omitted).

Under Fifth Circuit precedent, Section 702 waives immunity for two distinct types of claims. *See Ala.-Coushatta Tribe of Tex. v. United States*, 757 F.3d 484, 489 (5th Cir. 2014). First, it waives immunity for claims where a "person suffer[s] legal wrong because of agency action." *Id.* (citing § 702). "This type of waiver applies when judicial review is sought pursuant only to the general provisions of the APA." *Id.* Second, Section 702 waives immunity for claims where a person is "adversely affected or aggrieved by agency action within the meaning of a relevant statute." *Id.* (citing § 702). "This type of waiver applies when judicial review is sought pursuant to a statutory or non-statutory cause of action that arises completely apart from the general provisions of the APA." *Id.* (citing *Sheehan v. Army & Air Force Exch. Serv.*, 619 F.2d 1132, 1139 (5th Cir. 1980); *Trudeau v. FTC*, 456 F.3d 178, 187 (D.C. Cir. 2006)). Under this second type, there does not need to be final agency action; only "agency action" as defined by 5 U.S.C. § 551(13) is required. *Id.* (citing *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 882 (1990)). Because the Plaintiff's common law claims are separate and apart from those brought under the APA, they would not fall under the first type of waiver and could only be considered under the second type of waiver.

In the Motion for Preliminary Injunction, the Plaintiff asserts that Section 702 generally waives the United States's immunity from a suit "seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority." (ECF No. 3-1 at 40.) They further assert, "[the] Defendants have waived sovereign immunity for *ultra vires* claims under the APA via the 1976 amendment to Section 702, which 'waived sovereign immunity for suits seeking nonmonetary relief through nonstatutory judicial review of agency action.' " (*Id.* (quoting *Geyen*, 775 F.2d at 1307).) The Motion for Preliminary Injunction did not, however, explicitly contend that Section 702's waiver of sovereign immunity applies to the state law claims of conversion and trespass to chattels. (*See generally* ECF Nos. 1, 3-1.)

In response to the Motion, the Defendants contend that the Plaintiff cannot assert its state law claims of conversion and trespass to chattels because Congress has not waived the United States's sovereign immunity for such claims. (ECF No. 23-1 at 20.) The Defendants note that the Plaintiff invokes Section 702's waiver of sovereign immunity for actions in federal court "seeking relief other than money damages," but states no binding precedent that Section 702 covers its state law claims. (*Id.* at 21.)

In reply, the Plaintiff again relies on the statutory text of Section 702 and asserts that the waiver of sovereign immunity applies to "any action seeking relief other than money damages." (ECF No. 27-1 at 10.) In support of this theory, the Plaintiff asserts that the "plain text is clear —"[a]n action in" federal court "seeking relief other than money damages" means *any* action, whether under the APA, a different statute, or the common law." (*Id.* (citing § 702) (emphasis in original).) The Plaintiff relies on the D.C. Circuit's review of Section 702 and supposes that the D.C. Circuit held the waiver extends to "any action" seeking non-monetary relief. (*Id.* at 10-11 (citing *Trudeau*, 456 F.3d at 187).) The Plaintiff also cites a Supreme Court decision where instead of establishing that Section 702 can never apply to state law claims the Supreme Court held the waiver did not apply because the equitable lien sought constituted a claim for money damages. (*Id.* at 11 (citing *Department of Army v. Blue Fox, Inc.* 525 U.S. 255, 263 (1999).)

***9** In supplemental briefing, the Plaintiff asserts that the Defendants have not cited any case that finds the Plaintiff is barred from the state law injunctive relief they seek. (ECF No. 48 at 11.) The Plaintiff also claims that a finding for the Defendants would create a circuit split with at least three other circuits. (*Id.* (citing *Perry Capital LLC v. Mnuchin*, 864 F.3d 591, 620 (D.C. Cir. 2017); *Michigan v. U.S. Army Corps of Eng'rs*, 667 F.3d 765, 775 (7th Cir. 2011); and *B.K. Instrument, Inc. v. United States*, 715 F.2d 713, 727 (2d Cir. 1983).)

After an extensive review of the relevant law, the Court has not identified any case or legal authority that finds Congress unequivocally consented to suit for injunctive relief under common law conversion or trespass to chattels causes of action. The Fifth Circuit has also never recognized the availability of such a claim. Nor has any other circuit court. Absent binding precedent, the Plaintiff instead relies on a D.C. Circuit case that held Section 702's waiver of sovereign immunity permits "nonstatutory" actions. [9] *Trudeau*, 456 F.3d at 187.

This argument is unavailing for several reasons. The D.C. Circuit did not hold that Section 702 waives sovereign immunity for common law claims of conversion or trespass to chattels. *See id.* Instead, the plaintiff in *Trudeau* initially raised claims against the Federal Trade Commission ("FTC") for exceeding its statutory authority under 15 U.S.C. § 46(f) and violations of the First Amendment, but the non-statutory actions derived from the plaintiff's statutory and First Amendment claims. *Id.* at 190 ("[Plainitff] contends that his § 46(f) claim falls within the core of the doctrine of non-statutory review because the issuance of a false and misleading press release exceeds the FTC's authority to disseminate information in the public interest.") (internal quotations omitted); *see also* Brief for Appellants at 33, *Trudeau*, 456 F.3d 178 (No. 05-5365) (asserting "it is well-established the First Amendment itself provides a means for plaintiffs to seek 'equitable relief to remedy agency violations' thereof.") Although not explicitly stated, the non-statutory claims the D.C. Circuit recognized seem to present as *ultra vires* claims, as opposed to separate or independent common law causes of action for conversion and trespass to chattels. *See* *Trudeau*, 456 F.3d at 190 (holding "[t]here certainly is no question that nonstatutory review 'is intended to be of extremely limited scope,' [*Griffith v. Fed. Lab. Rel. Auth.*, 842 F.2d 487, 493 (D.C. Cir. 1988)], and hence represents a more difficult course for [plaintiff] than would review under the APA (assuming final agency action) for acts 'in excess of statutory ... authority,' 5 U.S.C. § 706(2)(C)."). And notably, the *Trudeau* case was considered under a motion to dismiss posture, not a preliminary injunction posture as in this case. *See generally id.*

The Plaintiff also contends that the absence of cited precedent barring their state law claims supports the waiver of sovereign immunity. Notwithstanding that the burden is squarely on the Plaintiff, the fact that a court has not barred such claims does not then mean that Congress has authorized them. It could imply the very opposite—that the sovereign immunity doctrine is so imposing that a plaintiff would not seek such equitable relief against the United States. More likely, however, it indicates that a separate, appropriate remedy already exists. *See, e.g.,* *Blue Fox, Inc.*, 525 U.S. at 263-64. Indeed, in *Blue Fox*, cited by the Plaintiff, the Supreme Court denied the equitable lien sought because it constituted a claim for money damages. *Id.*

***10** In order to find that sovereign immunity is waived for the Plaintiff's common law claims, the Court would have to conclude that the language in Section 702 unequivocally expresses Congress's consent to *all* non-monetary actions arising outside the APA. Statutory construction presumes Congress did not intend for Section 702's waiver to be so over-inclusive. Had Congress intended to include common law claims for conversion or trespass to chattels or other state law claims under Section 702, it could have so stated. To accept the Plaintiff's proposition would so broaden the scope of the APA that sovereign immunity would be effectively negated for state law causes of action seeking equitable relief. To the extent there is any ambiguity in the application or statutory interpretation of Section 702, the Court is reminded that "a waiver of the Government's sovereign immunity will be strictly construed, in terms of its scope, in favor of the sovereign." *Lane v. Peña*, 518 U.S. 187, 192 (1996). Thus, the Court finds that the Plaintiff's common law claims do not overcome sovereign immunity.

Although the Plaintiff did not raise the issue, the Defendants recognized that the FTCA " 'waives the United States' sovereign immunity from tort suits' in certain circumstances, and is 'the exclusive remedy for compensation for a federal employee's tortious acts committed in the scope of employment.' " (ECF No. 23-1 at 21-22 (quoting *McGuire v. Turnbo*, 137 F.3d 321, 324 (5th Cir. 1998); *Dickson v. United States*, 11 F.4th 308, 312 (5th Cir. 2021).) The record here shows that Border Patrol has been known to cut the fences and locked gates of private ranch owners to perform immigration duties. As most of the land near our southern border is privately owned, this relationship with Border Patrol has existed out of necessity for decades. In instances where Border Patrol causes harm to private property, such as damaging fencing and allowing livestock to escape, they will often *ex post* restore a rancher by repairing the property or through financial compensation. Such a cooperative relationship suggests that Border Patrol, and the federal government at large, acknowledge its duty to respect private property. So, too, could such a relationship between the Plaintiff and the Defendants exist. Thus, although the Plaintiff's common law claims seeking injunctive under conversion and trespass to chattels are unlikely to succeed, it is conceivable that the Plaintiff could pursue money damages for prior harm to its fence. The Court is not ruling on what would be appropriate for future potential harm; it only references prior harm.

IV. ANALYSIS

A. Likelihood of Success on the Merits

i. The Defendants' Conduct

a. The Defendants' Justifications

While the Plaintiff bears the burden on a motion for preliminary injunctive relief, the Court will first consider the Defendants' own explanations for their conduct before turning to the Plaintiff's allegations. The Defendants offer two justifications for their series of decisions to cut or move the Plaintiff's fence: (1) to discharge their statutory obligation to inspect, apprehend, and detain individuals unlawfully entering the United States; and (2) to prevent or address medical emergencies. (*See* ECF No. 23-1 at 15.)

1. Inspection, Apprehension, and Processing

The federal government "has broad, undoubted power over the subject of immigration and the status of [noncitizens]," which "rests, in part, on the National Government's constitutional power to 'establish an [sic] uniform Rule of Naturalization' and its inherent power as sovereign to control and conduct relations with foreign nations." *Arizona v. United States*, 567 U.S. 387, 394-95 (2012). To that end, Congress has specified who may be admitted to the United States, *see, e.g.*, 8 U.S.C. § 1182, criminalized unlawful entry and reentry, *see id.* §§ 1325, 1326, and determined who may be removed and under what conditions, *see id.* §§ 1182, 1225-1227; *Arizona*, 567 U.S. at 395-96.

Congress entrusted DHS with the "power and duty to control and guard the boundaries and borders of the United States against the illegal entry of [noncitizens]." 8 U.S.C. § 1103(a)(5). Congress has charged the Secretary of Homeland Security to "establish such regulations" and "perform such other acts as he deems necessary for carrying out his authority under [8 U.S.C. §§ 1101-1537]." *Id.* § 1103(a)(3). That includes "authoriz[ing] any employee ... to perform or exercise any of the powers, privileges, or duties conferred [by the Immigration and Nationality Act (INA)]." *Id.* § 1103(a)(4). Those employees authorized by the Secretary to enforce the INA are known as immigration officers. 8 U.S.C. § 1101(a)(18).

***11** U.S. Customs and Border Protection ("CBP"), in coordination with other federal agencies, bears responsibility to "enforce and administer all immigration laws," including "the inspection ... and admission of persons who seek to enter" the United States and "the detection, interdiction, removal ... and transfer of persons unlawfully entering ... the United States." 6 U.S.C. § 211(c)(8). U.S. Border Patrol is "the law enforcement office of [CBP] with primary responsibility for interdicting persons attempting to illegally enter ... the United States" and for "deter[ring] and prevent[ing] the illegal entry of terrorists, ... persons, and contraband." *Id.* § 211(e)(3)(A)-(B). Individual immigration officers, including Border Patrol agents, "interrogate any [noncitizen] or person believed to be [a noncitizen] as to his right to be or remain in the United States" and may "arrest any [noncitizen] who in his presence or view is entering or attempting to enter the United States in violation of any law." 8 U.S.C. § 1357(a)(1)-(2).

Before Congress enacted § 1357(a)(3), Border Patrol's "activities ... in certain areas [were] seriously impaired by the refusal of some property owners along the border to allow patrol officers access to extensive border areas in order to prevent such illegal entries." H.R. Rep. No. 82-1377, 1952 U.S.C.C.A.N. 1358, 1360. In response, Congress authorized agents to "access ... private lands" without a warrant within 25 miles of an external border "for the purposes of patrolling the border to prevent the illegal entry of [noncitizens] into the United States." 8 U.S.C. § 1357(a)(3). Congress intended that Border Patrol agents should "conduct[ ] such activities as are customary, or reasonable and necessary, to prevent the illegal entry of aliens into the United States." 8 C.F.R. § 287.1(c); *see* H.R. Rep. No. 82-1377, 1952 U.S.C.C.A.N. at 1360 (Section 1357(a)(3) "adequately authorize[s] immigration officers to continue their normal patrol activities, concerning which Congress has been well informed during the past 48 years, and which authority it unquestionably meant these officers to exercise.").

DHS has long made use of this provision to move or cut privately owned fencing within 25 miles of the international border when exigencies arise. Border Patrol guidance dating back to the 1980s has advised Border Patrol Agents to work with private landowners where the agents encounter locked

gates prohibiting access to the border. (ECF No. 23-2 at 3.) While Border Patrol guidance requires that agents take steps to work with the owner to gain access, it acknowledges that the agent may cut locks or fencing that prohibits access to the border. (*Id.*) When they must do so, Border Patrol guidance instructs agents to take steps to close gates, make available repairs to fencing, and take other steps to ameliorate any damage. (*See id.*)

Here, the Defendants claim that the appearance of any migrants at the Rio Grande qualifies as a situation requiring agents to cut the Plaintiff's fence. The Defendants argue that "[n]oncitizens who have already crossed the international boundary into the United States stand on a different legal footing from those who have not." (ECF No. 23-1 at 12.) Disregarding that entering the United States by crossing the river other than at an official port of entry is a federal crime, *see* 8 U.S.C. § 1325, the Defendants note that a person "present in the United States who has not been admitted or who arrives in the United States (whether or not at a designated port of arrival ...)" is "deemed ... an applicant for admission." *Id.* § 1225(a)(1).[10] Claiming that "[n]o immigration statute that Congress has enacted authorizes Border Patrol agents to simply push noncitizens already present in the United States back to Mexico," (ECF No. 23-1 at 13), the Defendants maintain that they must assist anyone who has unlawfully crossed the border to advance further into the United States for immigration processing after this initial "inspection."

***12** In short, the Defendants claim their hands are tied. They have a statutory duty to "inspect," so they claim they must cut or move the Plaintiff's fence to get to the river. Once at the river, they claim they have no authority to direct illegal entrants to return to Mexico, so they must cut or move the Plaintiff's fence to help such individuals proceed further into the United States. These claims fail to recognize the dual civil and criminal nature of the immigration statutes.

The Defendants first argue that the mere act of laying eyes on migrants as they wade through the Rio Grande, as seen in Plaintiff's Exhibit 10, qualifies as the beginning of a drawn-out inspection process. As noted above, this inspection process involves: no warning against criminal violation of immigration law; no attempt to prevent the same; no direction to enter at a lawful port of entry; no questioning; no document requests; and no search for drugs or weapons. (*See* Plaintiff's Ex. 10; ECF No. 37 at 84–85.) According to the Defendants, pure visual observation justifies cutting or moving the Plaintiff's fence to access the river.

This rests on two false and misguided propositions. First, Border Patrol agents already possess access to both sides of the fence by which to accomplish this extraordinarily superficial, hands-off "inspection": to the river and bank by boat and to the further-inland side of the fence by road. (*See, e.g.*, Plaintiff's Ex. 10; ECF No. 37 at 82.) The fence may conceivably slow Border Patrol agents' ability to respond to medical emergencies, as discussed below, but the evidence and testimony presented so far has not conclusively established that any delay would materially impede inspection practices of the kind described above.

Second, "an alien who is detained shortly after unlawful entry cannot be said to have 'effected an entry.' Like an alien detained after arriving at a port of entry, an alien like respondent is 'on the threshold.' " *DHS v. Thuraissigiam*, 140 S. Ct. 1959, 1982–83 (2020) (citations omitted); *see also* *Leng May Ma v. Barber*, 357 U.S. 185, 186–87 (1958). Federal officials can and historically do take steps to turn migrants on the threshold back across the border into Mexico. *See, e.g.*, *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 163 (1993) (finding that aliens could be repatriated "without giving them any opportunity to establish their qualifications as refugees"). The Defendants' view of immigration enforcement would "create a perverse incentive to enter at an unlawful rather than a lawful location," which is why the Supreme Court rejected it for a migrant who managed to "mak[e] it 25 yards into U.S. territory before he was caught." *Thuraissigiam*, 140 S. Ct. at 1982.[11]

***13** Border Patrol itself assesses agents' performance based on the number of migrants repelled, and thousands of migrants have, in fact, been "turned back" after crossing the Rio Grande. (ECF No. 37 at 66, 104.) The Defendants recently boasted their agents' authority to "turn back" migrants on the threshold of the international boundary. *See* Press Release, U.S. Customs & Border Protection (June 1, 2023), https://www.cbp.gov/newsroom/local-media-release/us-border-patrol-urges-migrants-not-endanger-their-lives-swimming (describing an incident on May 25, 2023, where Border Patrol agents were able to "turn [aliens] back south into Mexico" even after they "cross[ed] the maritime boundary line"). Publicly available records show that the Defendants regularly track incidents of successful "turn-backs" at the Border, including more than 5,000 "TBS"—*i.e.*,

"Turn Back South"—between October 2018 and March 2020. *See* USBP FOIA Documents at 22, 25, 30, 128-29, 136-54, available at https://int.nyt.com/data/documenttools/border-patrol-fence-breach/b9addab9d72a6a2a/full.pdf (embedded in Zolan Kanno-Youngs, *Armed Mexicans Were Smuggled in to Guard Border Wall, Whistle-Blowers Say*, N.Y. TIMES (Dec. 7, 2020), https://www.nytimes.com/2020/12/07/us/politics/border-wall-mexico.html).

The Defendants cannot justify cutting or moving the Plaintiff's fence whenever and wherever they find convenient based on a supposed need to access the river by both boat and foot so they may passively observe migrants crossing. Nor can they do so when the Defendants fail to direct migrants attempting to unlawfully enter the United States to return back across the border per longstanding, Supreme Court-sanctioned practice.

The Defendants next claim that they must cut or move the Plaintiff's fence to allow migrants to proceed toward a further-inland processing center. (ECF No. 37 at 198.) Once they pass through the fence, Border Patrol agents orally direct persons whom they have just witnessed illegally entering the United States to walk as much as a mile or more—with vanishingly little if any further supervision or direction—and present themselves at the nearest immigration processing center. (ECF No. 37 at 83–85, 112–13, 115–16, 147–48, 169–170.) Notably, the Defendants concede that their hope that the aliens will flow in an orderly manner from the breach they created in the Plaintiff's fence to the nearest processing center relies on the Plaintiff's fence along the route. [12] The Defendants claim that easing migrants' path toward the processing center in this manner is necessary to "apprehend" and "detain" the migrants.

Border Patrol itself has defined "apprehension" as "the physical control or temporary detainment of a person who is not lawfully in the United States which may or may not result in an arrest." Customs & Border Protection, *Nationwide Enforcement Encounters: Title 8 Enforcement Actions and Title 42 Expulsions Fiscal Year 2024*, https://perma.cc/YWE2-B6UZ. It has defined "detention" as "[r]estraint from freedom of movement." CBP, *National Standards on Transport, Escort, Detention, and Search* at 28 (Oct. 2015), https://perma.cc/6KRP-2XTH. No reasonable interpretation of these definitions can square with Border Patrol's conduct. Visual observation is not physical control. Opening fences does not restrain freedom of movement. Blind trust that migrants who have just been seen criminally violating one boundary will respect barriers along the road toward a processing center constitutes neither "apprehension" nor "detention." No unfair cynicism is required to suspect that some such migrants likely commit other crimes (*e.g.*, drug smuggling, human trafficking, etc.) during this process, providing ample incentive for the individuals posing the greatest public danger to flee rather than deliver themselves to the Defendants. [13] To the extent migrants who fear no additional criminal or immigration consequence because of the Defendants' broader immigration policies, practices, and public statements elect to declare themselves at a processing center, their decision to do so can hardly be attributed to any acts to restrict their freedom of movement by the Defendants.

***14** The Defendants cannot justify their wire-cutting based on purported "apprehension" and "detention" of migrants after they cross through the fence in the face of testimony of both parties strongly suggesting neither occurs without migrants' willing cooperation. (ECF No. 37 at 112, 115–116, 169–170). By ignoring the blatant criminal context of where, when, and how these "applicants for admission" enter the United States, the Defendants apparently seek to establish an unofficial and unlawful port of entry stretching from wherever they open a hole through the Plaintiff's fence to the makeshift processing center they established on private land a mile or more away. The Defendants even appear to seek gates in the Plaintiff's fence that the Defendants can control to facilitate this initiative. (*See id.* at 107-108, 114.) Establishing such a system at a particularly dangerous stretch of the river creates a perverse incentive for aliens to attempt to cross at that location, begetting life-threatening crises for aliens and agents both.

The evidence presented amply demonstrates the utter failure of the Defendants to deter, prevent, and halt unlawful entry into the United States. The Defendants cannot claim the statutory duties they are so obviously derelict in enforcing as excuses to puncture the Plaintiff's attempts to shore up the Defendants' failing system. Nor may they seek judicial blessing of practices that both directly contravene those same statutory obligations and require the destruction of the Plaintiff's property. Any justifications resting on the Defendants' illusory and life-threatening "inspection" and "apprehension" practices, or lack thereof, fail.

2. Medical Emergencies

At times, agents rescue individuals who have crossed into the United States illegally and who are in distress in or near the banks of the Rio Grande River. (ECF No. 23-2 at 4–5). These routine rescues, life-saving measures, and other such urgent care, often provided at grave risk to agents' safety, are a noble and legitimate part of Border Patrol operations. Injury, drowning, dehydration, and fatigue are real and common perils in this area of the border, particularly in the context of changing water levels and regular triple-digit heat. (*Id.*) The parties agree that medical emergencies justify cutting or moving the Plaintiff's fence. (ECF No. 37 at 28, 79; ECF No. 23-1 at 15). The Court endorses this agreement.

However, evidence suggests that these exceptional circumstances can be used to swallow a rule against wire-cutting such as the one the Court entered in the TRO. (*See, e.g.*, ECF No. 37 at 81.) While an ongoing medical emergency can justify opening the fence, the end of that exigency ends the justification. As a hypothetical example, cutting the wire to address a single individual's display of distress does not justify leaving the fence open for a crowd of dozens or hundreds to pass through. In addition, an emergency that can be just as adequately addressed by less destructive means, such as by reaching one or more individuals by boat rather than on foot, does not justify opening the fence at all. Moreover, given the greater potential for abuse, prevention of possible future exigencies rests on far more dubious grounds as a justification for destroying the use of private property than the need to address actual, ongoing crises. Further, the question of whether a situation rises to the level of an emergency is an objective inquiry of a reasonable person's judgment, not the subjective determination of a particular agent. With those qualifications, the Court accepts medical emergencies as a narrow, partial justification for the Defendants' conduct.

b. Plaintiff's Allegation of a Policy, Practice, or Pattern

The Plaintiff alleges that the Defendants' series of acts interfering with its wire fence represent a "a policy, practice, or pattern of seizing, damaging, and destroying Texas's personal property by cutting, severing, and tearing its concertina wire fence to introduce breaches, gaps, or holes in the barrier." (ECF No. 3-1 at 27.) The Plaintiff alleges that the Defendants "have authorized their officials or agents to engage in this conduct anytime an alien has managed to illegally cross the international border in the Rio Grande to process that alien in the United States—even where migrants are in no apparent distress or when any legitimate exigency has dissipated." (*Id.*) The Plaintiff suggests that orders to cut the Plaintiff's wire are largely implemented by Border Patrol supervisors, rather than lower-level agents, who allegedly often refuse to destroy or damage the Plaintiff's border infrastructure. (*Id.*; *see also* ECF No. 37 at 139–140, 150.)

***15** The Plaintiff argues that the sheer volume and regularity of similar incidents, together with repeated public statements from DHS itself, demonstrates an institutional policy, practice, or pattern of sanctioning Border Patrol agents' cutting or moving the fence even absent exigent circumstances. (ECF No. 27-1 at 16–17.) [14] The Defendants deny that any such alleged pattern reflects an intentional policy handed down by DHS or Border Patrol leadership. (ECF No. 47-1 at 16–18; *see* ECF No. 23-2 at 5; ECF No. 37 at 138, 186–87.)

The problem appears unique to the Del Rio sector. The testimony and evidence of both parties suggest that, by and large, Border Patrol agents have not cut the Plaintiff's wire except when faced with exigent circumstances in the El Paso and Rio Grande Valley Sectors. (ECF No. 47-1 at 16–18 (citing ECF No. 37 at 80, 96).) The Defendants argue that this disproves the notion that there is an agency-wide directive requiring or authorizing agents to cut the wire when they observe any unlawful border crossing. (*Id.* (citing ECF No. 37 at 80, 96).) The Defendants admit that supervisors in the Del Rio Sector have provided "guidance" to agents along the following lines: "(a) if there are no exigent circumstances, the agents should call a supervisor before any wire-cutting; and (b) if a supervisor is unavailable or exigent circumstances exist, the agents should use their judgment in determining how best to apprehend noncitizens or provide medical assistance." (*Id.* (citing ECF No. 37 at 137–41).) The Defendants emphasize that in both cases, agents have discretion to assess the situation and exercise their judgment whether to cut the wire. (*Id.* (citing ECF No. 23-2 at 6; ECF No. 37 at 110-11).)

Regular and frequent occurrence of the incidents in question between September 20, 2023, and the entering of the TRO, regardless of exigency, and the fact of communications between lower-and higher-ranking DHS officers regarding wire-cutting in the Del Rio Sector raise the possibility that an unwritten "policy, practice, or pattern" exists. However, the Court cannot find, on this procedural posture, that the evidence the Court has reviewed thus far conclusively establishes or disproves the existence of such an institutional

"policy, practice, or pattern." Such a determination would require further review of evidence and likely additional investigation.

ii. APA (Final Agency Action)

The Plaintiff asserts that the Defendants' interference with its c-wire is a final agency action and thus reviewable under the APA. (ECF No. 3-1 at 29.) The APA empowers courts to review only "final agency action." 5 U.S.C. § 704; *see also* *Lujan*, 497 U.S. at 885 ("When, as here, review is sought not pursuant to specific authorization in the substantive statute, but only under the general review provisions of the APA, the 'agency action' in question must be 'final agency action.' "). Absent a final agency action, a court lacks subject matter jurisdiction to consider a claim brought under the APA. *See* *Peoples Nat'l Bank v. Off. of the Comptroller of the Currency of the U.S.*, 362 F.3d 333, 336 (5th Cir. 2004); *accord* *Sierra Club v. Peterson*, 228 F.3d 559, 562 (5th Cir. 2000) ("Absent a specific and final agency action, we lack jurisdiction to consider a challenge to agency conduct.").

***16** An agency action is final when two conditions are satisfied. *See* *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997). First, the action "must mark the 'consummation' of the agency's decisionmaking process." *Id.* Second, "the action must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.' " *Id.* at 178 (quoting *Port of Boston Marine Terminal Assn. v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71 (1970)). Although this analysis is "flexible" and "pragmatic," courts take great care not to confuse final agency action with tentative or interlocutory agency actions, or broader programmatic decisions. *Lujan*, 497 U.S. at 891; *see also* *Peterson*, 228 F.3d at 562. The APA does not authorize courts to supervise "day-to-day agency management," *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 67 (2004), and thus, courts must reject invitations to find final agency action in an agency's "continuing (and thus constantly changing) operations." *Lujan*, 497 U.S. at 890.

As the party seeking preliminary injunctive relief, the Plaintiff bears the burden of showing a substantial likelihood that it will succeed on the merits of its APA claim, which requires final agency action. *Clark v. Pichard*, 812 F.2d 991, 993 (5th Cir. 1987) (discussing the standard for obtaining injunctive relief). Here, the Plaintiff alleges that the Defendants' interference with its concertina wire constitutes such a final action. (ECF No. 1 at 27.) Specifically, it asserts that "[s]ince September 20, 2023, federal agents have developed and implemented a policy, pattern, or practice of destroying Texas's concertina wire to encourage and assist thousands of aliens to illegally cross the Rio Grande and enter Texas." (*Id.* at 3.) The question, then, is whether the evidence presented thus far creates a substantial likelihood that the Plaintiff will ultimately establish the existence of final agency action.

At the November 7, 2023, hearing, the Court heard evidence from CBP officials involved in the decisions to cut or manipulate Texas's concertina wire. After the hearing, the Court took a step it rarely takes at this stage of injunction litigation and ordered the parties to produce additional documents regarding Texas's placement of the concertina wire and the Defendants' subsequent interference with it. (ECF No. 9.) The parties provided as much discovery as narrow time constraints allowed, and thereafter, the Court reviewed thousands of pages of emails, reports, and other documents. These documents shed further light on the events referenced at the November 7, 2023 hearing. But even viewed alongside the evidence presented at the hearing,[15] they fall short of demonstrating the existence of a final agency action.

Having considered the evidence presented at the November 7, 2023 hearing, the post-hearing document production, and the arguments of counsel, the Court finds that the Plaintiff has not, at this preliminary stage, shown a substantial likelihood that it will establish the existence of a final agency action. Of course, the Court does not suggest that the Plaintiff *cannot* establish final agency action when this case proceeds to be heard on the merits. As the Defendants note, the documents within the federal government's possession that mention the Plaintiff's concertina wire potentially number in the millions. (ECF No. 43 at 2.) Discovery may produce information that sheds new light on the nature of the directives to cut or otherwise interfere with the Plaintiff's concertina wire. But at this early stage of the case, the Court finds insufficient evidence of final agency action. Absent such final agency action, the Court need not address the Plaintiff's claims that the Defendants are engaging in arbitrary and capricious action or exceeding their statutory authority.

iii. APA (Ultra Vires)

***17** The Plaintiff correctly asserts that final agency action need not exist for the Court to address its non-statutory *ultra vires* claim. (ECF No. 48 at 13 n.7.) The Fifth Circuit recognizes that courts "may have jurisdiction to review an *ultra vires* agency decision under one of the exceptions to the final agency action rule." *Exxon Chemicals Am. v. Chao*, 298 F.3d 464, 467 n.2 (5th Cir. 2002); *see also Apter v. Dep't of Health & Hum. Servs.*, 80 F.4th 579, 589 (5th Cir. 2023) (noting that for *ultra vires* claims, agency action complained of "need not be final").

To prevail on its *ultra vires* claim, the Plaintiff must show that an agency had "no colorable basis" for the challenged actions. *Fla. Dep't of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 682 (1982). This standard sets a high bar for plaintiffs bringing *ultra vires* claims. *See Trudeau*, 456 F.3d at 190. "[A] state officer may be said to act *ultra vires* only when he acts 'without any authority whatever.' " *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 102 (1984). "There certainly is no question that nonstatutory review 'is intended to be of extremely limited scope.' " *Trudeau*, 456 F.3d at 190 (quoting *Griffith*, 842 F.2d at 493). Thus, plaintiffs bringing *ultra vires* claims face a higher burden than they do for traditional APA claims. *See id.* ("[*Ultra vires*] hence represents a more difficult course for Trudeau than would review under the APA (assuming final agency action) for acts 'in excess of statutory ... authority.' ") (quoting 5 U.S.C. § 706(2)(C)). Here, based on the evidence presented at the November 7, 2023 hearing and the documents submitted thereafter, the Court finds that there is insufficient evidence at this juncture to support a substantial likelihood of success on the Plaintiff's *ultra vires* claim.

B. Irreparable Harm and Public Interest

The possible harm suffered by the Plaintiff in the form of loss of control and use of its private property continues to satisfy the irreparable harm prong of preliminary-injunction analysis. (*See* ECF No. 9 at 7-8; *see also* above discussion of potential redressability for past violation of the Plaintiff's property under the FTCA.) The public interest calculation reflected in the Court's TRO decision stands. (*See id.* at 9-10.)

V. CONCLUSION

Accordingly, it is **ORDERED** that the Plaintiff's Motion for a Preliminary Injunction Order or Stay of Agency Action (ECF No. 3-1) is **DENIED**.

APPENDIX A

All Citations

Slip Copy, 2023 WL 8285223

Footnotes

1 The Court is cognizant of the general nature of contents of the documents and is not relying on any particular document in this order.

2 Because the video is not yet publicly available, the Court includes herewith still images taken from the video as Appendix A. Those images provide a visual representation of key moments that factor heavily in the Court's analysis.

3 It is important to note that the Court is aware of at least fourteen incidents of wire cutting. (ECF No. 3-2 at 10–13, 23–28; ECF No. 8-1.) However, the Court will focus on the September 20 incident, as shown in Plaintiff's Exhibit 10, because it is most illustrative for analysis purposes. The Court is aware of one additional wire cutting incident that took place after the TRO was issued, but the Court is satisfied that a sufficient emergency existed to justify the action.

4 The evidence suggests that on the day Plaintiff's Exhibit 10 was filmed, several migrants attempting to cross the river had been swept away. (ECF No. 37 at 127–28.) Accordingly, the wire was cut to rescue the individuals situated on the riverbank who had already entered the country, given the muddy and slippery conditions. (*Id.* at 132–33.) However, this assertion, made by Agent Mario Trevino, is totally uncorroborated by the condition of the migrants seen on the video. Regardless, Agent Trevino's testimony is not lent great weight by the Court given his evasive answers and demeanor.

5 Importantly, the Defendants raised concerns about the actions of the Plaintiff and its agents, suggesting the cooperative portrait the Plaintiff paints may not be entirely accurate.

6 The Plaintiff suggests that this case could fall within one of the potential exceptions contemplated in *Texas, see* 143 S. Ct. at 1973-74, thereby establishing standing based on indirect state expenditures. (ECF No. 37 at 25.) The Plaintiff cited *Texas v. United States* as an example of adequate standing derived in this manner. Because the Court finds the injury-in-fact prong of standing analysis satisfied by direct harm to the Plaintiff's property, the Court need not further examine this argument at this time. 809 F.3d 134 (5th Cir. 2015).

7 The Court recognizes that compensation for past injury cannot adequately redress the prospect of continuing or future harm for which the only appropriate remedy would be injunctive relief.

8 The Court pauses here to address the matter of jurisdiction. There is no dispute the Court holds jurisdiction over the Plaintiff's APA claims, but also asserted are various state law claims. The Court may maintain supplemental jurisdiction over the state law claim if it is so related to the other claim(s) that it forms part of the same case or controversy. 28 U.S.C. § 1367. Here, it is clear the state law claims are so bound up with the APA claims as to be part of the same case or controversy. Accordingly, the Court has the ability to, and does, exercise supplemental jurisdiction. Likewise, any issue not discussed in this order would not be outcome determinative at this stage of litigation.

9 To the extent that *Trudeau* supports the Plaintiff's position, the D.C. Circuit, as well as the Second and Seventh Circuits, are not binding on this Court.

10 The nation's immigration system is separate from its criminal justice system. An individual who enters the United States by unlawful means may freely apply for a change in his or her immigration status while serving time in federal prison. At the Rio Grande, Border Patrol agents can and should both process those they encounter as “applicants for admission” and arrest them for criminal conduct. As discussed below, Border Patrol agents may also simply direct such individuals to return to the far side of the river.

11 The Defendants argue that *Thuraissigiam* is inapposite for the proposition that a noncitizen who manages to cross the border has not really effected entry into the United States. (*See* ECF No. 47 at 21 n.5.) The Ninth Circuit there had held that a noncitizen had a constitutional Due Process right to more process than what Congress set out in § 1225(b)(1)(B)(ii), (v). The Supreme Court rejected that conclusion, holding that

"the procedure authorized by Congress" is sufficient for "due process as far as [a noncitizen] denied entry is concerned." 140 S. Ct. at 1982. The Supreme Court also noted that such a noncitizen "has ... those rights regarding admission that Congress provided by statute," *Id.* at 1983 (cleaned up). Like the Ninth Circuit in *Thuraissigiam*, the Defendants here seek to add to the requirements of the immigration statutes. This Court refuses to ignore Supreme Court precedent and follow the Ninth Circuit's example of inventing a novel barrier to immigration enforcement where none exists. Doing so "would undermine the 'sovereign prerogative' of governing admission to this country and create a perverse incentive to enter at an unlawful rather than a lawful location." *Id.* Those who enter the United States unlawfully do possess certain due process rights; the right to continue into the United States rather than be stopped at the border is not among them.

12 *See* forthcoming transcript of November 27, 2023 hearing. The Court has access to an audio recording of this hearing.

13 As noted above, the Plaintiff's fact witness claimed that during one incident, its personnel observed 4,555 migrants enter through holes the Defendants created while only 2,680 presented themselves for processing. (ECF No. 37 at 113, 147-48.)

14 The Plaintiff provides the following examples of the Defendants' public statements, each of which is consistent with the Defendants' position in this litigation: On June 30, 2023, a spokesperson for CBP justified federal officials' cutting Texas's fence as "consistent w/ federal law" simply because "[t]he individuals had already crossed the Rio Grande from Mexico [and] were on U.S. soil." (*See* ECF No. 3-1 at 22 (citing CBP statement).) On October 24, 2023, in response to inquiries about this lawsuit concerning Defendants' destruction of state property, a DHS spokesperson said: "Border Patrol agents have a responsibility under federal law to take those who have crossed onto U.S. soil without authorization into custody for processing." (*See* ECF No. 5 at 6 n.1 (citing DHS statement).) The Defendants reiterated the same policy in identical terms in statements to numerous news outlets after this Court granted a TRO. (*See* ECF No. 27-1 at 16-17.)

15 The Court continues to review the numerous documents provided by the parties and may supplement the factual findings in this Order in light of new information discovered through this review process.

Exhibit 2: State of Texas's Response to the United States' Supplemental Memorandum, *DHS v. Texas*, No. 23A607 (U.S. 2024), 2024 WL 210067.

No. 23A607

In the Supreme Court of the United States

DEPARTMENT OF HOMELAND SECURITY, ET AL.,
Applicants,

v.

STATE OF TEXAS

THE STATE OF TEXAS'S RESPONSE TO THE UNITED STATES' SUPPLEMENTAL MEMORANDUM REGARDING EMERGENCY APPLICATION TO VACATE THE INJUNCTION PENDING APPEAL

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Texas respectfully submits this response to the United States' supplemental memorandum advising this Court of putative developments on the border since Texas filed its Response to this Court on January 9, 2024. Texas acknowledges that it has seized control of a municipal park in Eagle Pass for law-enforcement and disaster-relief purposes. Until served with the U.S. Solicitor General's supplemental memorandum, however, Texas was unaware of federal law enforcement's current objections, and is working promptly to address them. *See* Fletcher Decl. ¶ 10. To the extent the allegations in the government's supplemental response were ever relevant, they have been or already are being addressed and do not justify the equitable remedy of emergency vacatur.

As Texas has previously explained, its agents have consistently sought to collaborate with federal border-patrol agencies. ROA.668-69. "[S]tate agents have given concertina wire to federal agents to assist them in deploying wire fencing, and federal agents have given concertina wire to state agents to assist them in doing the same." ROA.672; *see also* ROA.670-73. They have also shared materials with Border Patrol to, among other things, ensure roads are sufficiently improved to serve their intended law-enforcement purposes. Fletcher Decl. ¶ 10. "By all accounts," Border Patrol has been "grateful for the assistance of Texas law enforcement," and the evidence submitted to the district court "show[ed] the parties work cooperatively across the state, including in El Paso and the Rio Grande Valley" using wire fencing to reroute aliens to lawful ports of entry. App.27a. The supplemental memorandum demonstrates just how far that collaboration has broken down *on the federal side*.

A. The supplemental memorandum reflects a lack of on-the-ground understanding of what is happening in Maverick County, Texas. This case began when federal Border Patrol agents began cutting wire fences that, among other uses, helped channel individuals—unlawful migrants and U.S. citizens alike—to a lawful border crossing at a port of entry. Border Patrol began this practice of destroying Texas's property, according to the district court's findings, in order to "facilitate the surge of migrants into Eagle Pass," ROA.152-53,

using boats to "literally usher" people across illegally, ROA.1111. Border Patrol *previously* used the complex of municipal recreational facilities known collectively as "Shelby Park" to facilitate the daily entry of thousands of these individuals who chose not to enter at the lawful port of entry. Fletcher Decl. ¶ 6. But for several weeks, it is the case that large groups of people no longer *cross* at Shelby Park—and Defendants, in any event, abandoned the area months ago. *Id.* ¶ 6, 8; Escalon Decl. ¶ 3, 4.

Shelby Park has always belonged to the City of Eagle Pass—not the federal government. Fletcher Decl. ¶ 3. It has typically consisted of golf courses, boat ramps, and other recreational facilities for local residents. *Id.* Because the area around Shelby Park *used* to be a popular spot for illegal crossings, there accumulated significant criminal activity and large amounts of waste, some of which was biohazardous. *Id.* To ensure that the Park could be used for its intended purposes of golfing, hiking, and picnicking, state law enforcement has for *years* used shipping containers and wire to limit access to the Park from the river. *Id.* ¶ 4. As a result, there has long been no line of sight for someone standing on the ground wishing to observe the river, except through very narrow apertures. *Id.* Observation up and down the river has instead been provided by cameras on "scope trucks" placed on strategic areas of high ground with a view of the river. *Id.* ¶ 5. Texas relies in part on Border Patrol to tell it what Border Patrol needs in terms of surveillance because they have no access to Border Patrol's cameras. *Id.*

For a time last year, Border Patrol used Shelby Park as a staging point for individuals who refused to seek to enter this country lawfully and submit to processing at nearby ports of entry. *Id.* ¶ 6. At the time, Border Patrol had a moderate presence in the area consisting of both personnel and equipment. Escalon Decl. ¶ 3. But in November 2023—after the district court issued its TRO preventing Defendants from destroying Texas's property—Defendants withdrew almost all personnel and equipment. Fletcher Decl. ¶6. Border Patrol even informed the Texas Department of Public Safety's Regional Director, Victor Escalon, that federal officials would *not* be present to monitor or administer aid unless Texas called

them. Escalon Decl. ¶ 3. Despite claiming that the medical carveout in the Fifth Circuit's injunction is not broad enough, App.5, 20, 36-37, Defendants' actual behavior in withdrawing from the Eagle Pass area shows they had little interest "be[ing] in a position to respond to emergencies" there. *Contra* Letter at 4-5.

Recently, illegal crossings at Eagle Pass have slowed. Escalon Decl. ¶ 4. That is itself evidence that the district court's TRO and the Fifth Circuit's injunction *have* remedied irreparable harm: In response to those orders preventing the United States from "establish[ing] an unofficial and unlawful port of entry," App.46a, cartels and other such groups predictably stopped attempting to cross there. Federal immigration officials understandably do not wish to acknowledge it, but the cartels go wherever they think they can find cheap, swift, and illegal entry. *See, e.g.*, App.46a-47a (describing how, factually, the federal government's destruction of Texas's property "provide ample incentive" for drug smuggling and dangerous crossings).

B. The supplemental memorandum also overstates what the Texas National Guard has done and its impact on Border Patrol operations. When Border Patrol ceased large-scale operations at the Park, a Border Patrol officer told state personnel that they would not be back unless the National Guard asked. Escalon Decl. ¶ 3. Leaving the area abandoned created a risk to anyone who might try to climb over obstacles that have been in place for years and also invited tampering with Texas's equipment stored at the Park. To ensure the safety of recreational users as well as aliens and to ensure the integrity of the State's equipment, Governor Abbott exercised his authority under Texas law to commandeer the Park. Tex. Gov't Code §418.017(c). The Texas National Guard, which had personnel and equipment stationed in Shelby Park, used wire to close a handful of gaps in the existing fencing. Fletcher Decl. ¶ 7. The Guard also used roadblocks to temporarily close the Park to local residents while they secured the facility. *Id.* It has since been reopened for recreational use. *Id.*

When the Texas National Guard closed the facility last night, certain federal supplies

and equipment remained in the vicinity that appeared to be remnants of a time when the area was being used to facilitate large-scale illegal border crossings. *Id.* Border Patrol asked for and received permission for their personnel to secure those materials. *Id.* Texas officials also offered to help Border Patrol retrieve any federal equipment or supplies that may have been left behind in the area. *Id.* Defendants' contention (at 3) that the National Guard "refused" Border Patrol agents access to the staging is, respectfully, inaccurate, for the reasons explained in the attached declaration.

The Solicitor General's late-night supplemental response was the first time that Texas learned of Defendants' claim that its remaining law-enforcement activities in the area depended on access to the municipal boat ramp located at Shelby Park. *Id.* ¶ 10. Nor did their leadership contact the Commander for Operation Lone Star, *id.*, or the Attorney General's Office to discuss their concerns before bringing them to this Court. To the best of Texas's knowledge, Border Patrol has not asked to launch any patrol boat from this boat ramp. *Id.*

For the avoidance of doubt, Texas officials support any and all efforts to protect human life, and to *actually* enforce federal laws. App.47a. As a result, well before start-of-business this morning, Texas officials were already investigating the Solicitor General's accusations. Texas has confirmed that the boat ramp in question is very congested, but it is primarily used by *state* craft under an agreement with local officials. Fletcher Decl. ¶ 8. Border Patrol typically launches boats from ramps that are either up- or down-stream from the ramps in question. *Id.* Although the road giving access to those ramps—like all roads in the Park—are not paved and can become muddy in inclement weather, the weather is not currently inclement, making the ramps accessible. *Id.*

To the best of Texas's knowledge, Border Patrol has continuously had access to the river—albeit not the Park—throughout the Texas National Guard's recent operation to secure the Park. When the Park was closed, Texas National Guard officers suggested alternative locations for Border Patrol to set up their mobile surveillance equipment, one

of which was a mere 400 feet further downriver and was described as "better" for the purpose of reconnaissance because of its higher elevation. *Id* ¶ 5. Access to both sides of the fence was *never* impeded because there are a number of other boat ramps in the vicinity unaffected by Texas's use of Shelby Park. *Id.* ¶ 8. Indeed, Border Patrol boats were seen in the water just yesterday after Texas secured the area. *Id.* ¶ 9. It appears that Border Patrol chose to voluntarily remove boats only after filing notice with the court. *Id.*

Nevertheless, Texas is currently working to ensure that Border Patrol has access to the boat ramp for the reasons cited by the Solicitor General in her brief—namely, surveillance, patrol, and humanitarian rescue. *Id.* ¶ 10. Texas would also be pleased—as it has in the past—to provide reclaimed highway material or assistance to improve access to the other boat ramps, and to otherwise help Border Patrol's Del Rio Sector do its congressionally assigned job of securing the border. *Id.*

C. Nothing in the supplemental memorandum justifies lifting the injunctive relief that the United States Court of Appeals for the Fifth Circuit concluded was "the only appropriate remedy" for Defendants' "continuing or future" interference with Texas's property interest. App.32a n.7, Nor does the supplemental memorandum address the irreparable harm that Texas is continuing to suffer from Defendants' "culpable and duplicitous conduct." App.25a, 53a. Texas's seizure of municipal property might create a dispute between the State and the City. But any state-law dispute does not implicate Defendants. And it does not change that the district court has found multiple legal violations by Defendants—findings "this Court will not 'lightly overturn.'" *Easley v. Cromartie*, 532 U.S. 234, 242 (2001) (citation omitted). In particular, Defendants' current protest that they need to destroy Texas's wire fence rings hollow given the district court's express finding that Defendants' supposed need to do so is "disingenuous," Pet.App.29a, and that "[n]o reasonable interpretation of" the relevant statutory language "can square with Border Patrol's conduct," *id.* at 45a-46a.

Perhaps more fundamentally, given the federal government's own decision more than

two months ago not to maintain operations in Shelby Park, it should not now be heard to complain that the Fifth Circuit's injunction covering that area requires emergency relief from this Court.

CONCLUSION

This Court should deny the Application.

Respectfully submitted.

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January 2024

DECLARATION OF VICTOR ESCALON

IN OPPOSITION TO THE EMERGENCY APPLICATION TO VACATE THE INJUNCTION PENDING APPEAL

1. My name is Victor Escalon. I am the Regional Director for the Texas Department of Public Safety ("DPS") with responsibility for the operations of DPS in South Texas, and specifically in Maverick County, Texas, where Shelby Park and the concertina wire that is the subject of this action are currently located.

2. I have responsibility for DPS operations in a total of twenty-seven counties of South Texas. These counties range along the Rio Grande River near Brownsville, Texas, to the area including Del Rio, Texas. I have served in this position for approximately four years. I have served with the DPS for a total of thirty years. I began working on Operation Lone Star in March of 2021 and continue to work in that capacity. Due to the nature of my employment, I am personally familiar with events occurring in the Shelby Park area.

3. In the summer of 2023, Border Patrol utilized the Shelby Park area as a staging point to process migrants that were crossing in the immediate area. U.S. Border Patrol at this time had a moderate presence on the scene. In and

around August 2023, Border Patrol left the area, and only responded to Shelby Park as needed. At the time of this withdrawal, I was informed by Border Patrol that they would not be present to monitor the area or administer assistance unless requested by Texas officials.

4. In the last two weeks the number of apprehensions dropped significantly in the Shelby Park and surrounding areas.

I hereby declare under penalty of perjury, pursuant to 28 U.S.C. § 1746, that the foregoing is true and correct to the best of my knowledge and information.

Signed this 12th day of January 2024.

Victor Escalon

Victor Escalon

Texas Department of Public Safety

DECLARATION OF CHRISTOPHER FLETCHER

IN OPPOSITION TO THE EMERGENCY APPLICATION TO VACATE THE INJUNCTION PENDING APPEAL

1. My name is Christopher Fletcher. I am a Colonel with Texas Military Department ("TMD") with responsibility for the operations of TMD in South Texas, and specifically in Eagle Pass, Maverick County, Texas, where the Shelby Park complex is located.

2. I have served with TMD for a total of approximately twenty-eight years. I serve as the Operation Lone Star Commander and began working on Operation Lone Star in January of 2022 and continue to work in that capacity.

3. I am familiar with the conditions and uses of the Shelby Park area, a municipal park owned by the City of Eagle Pass that includes a golf course, boat ramps, and picnic and other recreational facilities. Based on my observations, the Shelby Park complex, situated along the Rio Grande River, has historically attracted large numbers of illegal alien caravans that after crossing the Rio Grande River have traversed or loitered in the park. As a result, the area poses many

dangers to the local citizenry, including criminal activity, discarded refuse, and biohazards.

4. To ensure Shelby Park could be used for its intended purposes including golfing, hiking, memorial services and picnics, law enforcement has for several years used shipping containers and wire to limit access to the park. As a result, since installing these barriers years ago there are already obstructions, and therefore limited visibility, for someone wishing to observe the river.

5. Operations in this area rely on the use of scope trucks to provide visibility. TMD does not have access to Customs and Border Patrol ("CBP") scope trucks and surveillance, and we rely on CBP to communicate any specific needs for their operations. Upon closure of Shelby Park, TMD suggested that surveillance equipment may be relocated 400 feet downriver, which would provide a better view due to higher elevation.

6. During my service at the border, I have also observed CBP agents utilizing Shelby Park area for staging operations and patrols. In particular, CBP used Shelby Park as a staging operation to hold and question large numbers of individuals who had crossed the border illegally. I have also observed CBP boat such individuals down the river to the municipal park for the same purpose. The park is located very close to a port of entry where processing could be and often is conducted, yet CBP has used the municipal park for those purposes. In

November 2023, Defendants withdrew almost all personnel and equipment from Shelby Park.

7. On January 11, 2024, at approximately 7 p.m., TMD requested that CBP leave the Shelby Park area. The Shelby Park area had already been restricted with fencing, and on that date, TMD closed any additional gaps and gates to further ensure safety. While securing the facility, roadblocks were used to temporarily close the park to locals, and the park has since reopened. TMD advised CBP of their intention to closely coordinate with CBP to ensure that any federal property CBP had been storing in in the area, including items such as Pedialyte, diapers, and other materials remained secure. TMD assured CBP they could remove any of their property from the park, allowed CBP to remain at the location to ensure their supplies were protected, and offered to retrieve any supplies or equipment left behind.

8. To the best of my knowledge, CBP operations in the Shelby Park area had slowed in the past several weeks, and I am unaware that any federal law enforcement activities were dependent upon access to a specific boat ramp in the area. The boat ramp in Shelby Park is often congested and is used primarily by a variety of state officials under a local agreement with the City of Eagle Pass. There are other boat ramps in the area, upriver and down river, that remain accessible to and routinely used by CBP. Historically, CBP has used these more

remote boat ramps located outside of Shelby Park. The roads to the remote locations can become muddy in inclement weather. However, such conditions have not existed in recent weeks and the boat ramps are currently accessible. One ramp is within approximately one to two and half miles of Shelby Park.

9. On January 11, 2024, after CBP was informed by TMD of their intention to take control of Shelby Park, several CBP boats were witnessed conducting operations in the river unimpeded. Yet, the next day, January 12, 2024, CBP appeared to have ceased watercraft patrols. This appears to have been a voluntary choice on CBP's part that occurred following their filing in this Court.

10. While CBP did ask whether they could use the Shelby Park boat ramp, CBP never expressed a need to do so nor did they suggest that their law-enforcement activities were dependent on the municipal boat ramps at Shelby Park. I was never contacted by CBP leadership requesting access to the Shelby Park boat ramp. Additionally, to my knowledge, CBP has not asked to launch any patrol boat from this boat ramp since Shelby Park was closed for use as a makeshift center for staging operations. Upon learning of the apparent necessity for access to the Shelby Park boat ramp, something I learned following the January 12, 2024 filing with the Supreme Court, TMD began granting access on January 12, 2024, for the purpose of launching boats and gaining access to the river. In the past, TMD has shared materials with CBP to assist with operations and ensure

roads are sufficiently maintained for access. TMD remains willing to collaborate with CBP by providing reclaimed highway material and assisting with access to the Shelby Park boat ramp and other area boat ramps.

11. To the best of my knowledge, access to both sides of the fence was never impeded because there are other boat ramps in the vicinity, including two that are routinely used by CBP watercraft.

I hereby declare under penalty of perjury, pursuant to 28 U.S.C. § 1746, that the foregoing is true and correct to the best of my knowledge and information.

Signed this 12th day of January 2024.

FLETCHER.CHRISTOPHER.BRIAN.1122954141 Digitally signed by FLETCHER.CHRISTOPHER.BRIAN.1122954141 Date: 2024.01.12 22:46:31 -06'00'

Christopher Brian Fletcher

Texas Military Department

Exhibit 3: State of Texas's Response to the United States' Second Supplemental Memorandum, *DHS. v. Texas*, No. 23A607 (U.S. 2024), 2024 WL 210069.

No. 23A607

In the Supreme Court of the United States

DEPARTMENT OF HOMELAND SECURITY, ET AL.,
Applicants,

v.

STATE OF TEXAS

THE STATE OF TEXAS'S RESPONSE TO THE UNITED STATES' SECOND SUPPLEMENTAL MEMORANDUM REGARDING EMERGENCY APPLICATION TO VACATE THE INJUNCTION PENDING APPEAL

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The State of Texas respectfully submits this response to Defendants' second supplemental memorandum in support of their application to vacate the Fifth Circuit's injunction pending appeal. The loss of any human life in the Rio Grande is tragic—and preventable. That is one reason Governor Abbott ordered the installation of the concertina wire at issue in this case: As the district court found, following the submission of extensive evidence from all parties, "[t]he wire serves as a deterrent" against those who seek to ford the river and instead routes them to safe, lawful ports of entry. App.27a. The federal government has used such fencing for similar purposes in the past. App.27a. And the district court found that this fencing has been so "effective" that "illegal border crossings" have "dropped to less than a third of their previous levels." App.27a.

Unfortunately, as the district court also found, Defendants have "create[d] a perverse incentive for aliens to attempt to cross" the Rio Grande that "beget[s] life-threatening crises for aliens and agents both." App.47a. Especially in light of that finding, nothing in Defendants' account of recent events near Shelby Park justifies the relief sought for at least five reasons.

First, despite spending four pages describing how U.S. Border Patrol supposedly lacks access to land alongside a 2.5-mile stretch of the Rio Grande at Shelby Park, Defendants eventually admit (at 5) that "[t]hose broader issues of access are not presented here" and that "the government is not asking this Court to resolve them or to adjudicate any factual disputes about recent events." Instead, they acknowledge (at 5) that those facts are relevant, if at all, only to "various actions" that are forthcoming. Defendants appear to be making a veiled reference to a separate lawsuit or counterclaim against the State of Texas, as recently threatened by the U.S. Department of Homeland Security ("DHS") with respect to its supposed lack of access to the banks of the Rio Grande at Shelby Park. *See* Demand Letter from Jonathan E. Meyer, DHS General Counsel, to Ken Paxton, Attorney General of Texas (Jan. 14, 2024).

It is a rare thing for a party to submit briefing to this Court on issues it concedes (at 5) "are not presented." Yet Defendants do so here—inviting the Court (at 5) to grant emergency relief based on issues they are "not asking this Court to resolve . . . or to adjudicate." That is not an appropriate use of the emergency docket. *See, e.g.*, *Louisiana v. Am. Rivers*, 142 S. Ct. 1347, 1349 (2022) (Kagan, J., joined by Roberts, C.J., and Breyer and Sotomayor, JJ., dissenting) (expressing concern over deciding a case without full merits briefing on key issues); *Merrill v. Milligan*, 142 S. Ct. 879, 882 (2022) (Roberts, C.J., dissenting from grant of applications for stays) (explaining that emergency relief is inappropriate where there were "no apparent errors for our correction"); *Does 1-3 v. Mills*, 142 S. Ct. 17, 18 (2021) (Barrett, J., joined by Kavanaugh, J., concurring in the denial of the application for injunctive relief) (stressing the importance of hewing to standards governing applications for emergency relief).

Second, it is especially important not to vacate the injunction based on irrelevant assertions, advanced for the first time in this Court, given that the Fifth Circuit is actively undertaking expeditious consideration of this case. As Texas explained in its Response to the Application (at 10-11), the Fifth Circuit has already set an expedited briefing schedule that could lead to a resolution in a matter of weeks. Indeed, Texas filed its opening brief yesterday, additional briefing will be completed by the end of this month, and oral argument has been set for February 7, 2024. There is every reason to believe that the Fifth Circuit will issue a reasoned decision promptly.

Defendants also claim (at 5) that "Texas stands in the way of" their ability to respond to "ongoing emergenc[ies]," which are "expressly excluded from the injunction." If Defendants believe that Texas is violating the terms of the Fifth Circuit's injunction by thwarting them from responding to emergency situations, then their remedy is to ask the Fifth Circuit to enforce or modify that injunction. *See* 28 U.S.C. §1651; Fed. R. App. P. 8. It is typically the prerogative of the court that issued an order to determine whether its order has been violated or whether the circumstances have changed such that its order should be

modified. That rule applies with special force here because this is "a court of review, not of first view." *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005).

Third, were the Court inclined to indulge factual assertions that the asserting party admits are irrelevant, it should still decline to vacate the injunction based on those assertions because they are hotly disputed, if not false. According to Defendants (at 1-2), on January 12, 2024, an Acting Supervisory Border Patrol Agent went to the Shelby Park entrance gate to relay a communication received at approximately 9:00 p.m. from Mexican officials that two migrants were in distress on the U.S. side of the river and that three other individuals had drowned in the same area one hour earlier. According to Defendants (at 2, 5), the Guardsmen from the Texas Military Department ("TMD") who were manning the gate, and then their Staff Sergeant, denied the Border Patrol agent access to the park, with the latter purportedly stating that "Border Patrol was not permitted to enter the area 'even in emergency situations.'" As a result, Defendants allege that they have no access to the border at Shelby Park (at 4-5) and were prevented from participating in a "rescue mission" on January 12 (at 3).

Texas has conducted a diligent investigation into these allegations that refutes Defendants' dire accusation. Based on that investigation, the two Border Patrol agents who approached the gate on January 12 did not ask for admission to Shelby Park to respond to an emergency, nor did they advise either the Guardsmen or the Staff Sergeant that any "emergency" situation existed. Fletcher Decl. ¶¶ 9, 11-12 (Jan. 17, 2024); McKinney Decl. ¶¶ 5 ,7, 8; Pujitha Decl. ¶¶ 4-5. Far from it: The Border Patrol agents advised that Mexican authorities had already responded to drownings on the other side of the international border an hour earlier and that Mexican officials had the situation under control. Fletcher Decl. ¶ 12 (Jan. 17, 2024); McKinney Decl. ¶¶ 7; *cf.* Second Supplemental Memorandum 1. The Border Patrol agents never indicated that the two migrants they came to retrieve were in distress, Fletcher Decl. ¶¶ 9, 11-12 (Jan. 17, 2024); McKinney Decl. ¶¶ 5, 7, 8; Pujitha Decl. ¶¶ 4-5, and TMD surveillance never revealed any distressed migrants in

the river apart from a man and a woman that TMD took into temporary custody, Fletcher Decl. ¶¶ 4-7 (Jan. 17, 2024). At no point did the Border Patrol agents' actions or body language—let alone their words—convey any sense of emergency. Fletcher Decl. ¶ 13 (Jan. 17, 2024); McKinney Decl. ¶¶ 5-8; Pujitha Decl. ¶¶ 4-5.

Indeed, it would have been unusual for Border Patrol to become actively involved in search-and-rescue operations. Fletcher Decl. ¶ 9 (Jan. 12, 2024); Fletcher Decl. ¶ 16 (Jan. 17, 2024). And the Border Patrol agents who arrived at the Shelby Park gate on January 12 lacked the watercraft or equipment necessary for such operations. Fletcher Decl. ¶ 13 (Jan. 17, 2024); McKinney Decl. ¶ 7; Pujitha Decl. ¶ 4. Simply put, Texas's investigation indicates that Defendants did not claim to be dealing with any emergency, Fletcher Decl. ¶¶ 9, 11-12 (Jan. 17, 2024); McKinney Decl. ¶¶ 5-8; Pujitha Decl. ¶¶ 4-5, and the TMD Staff Sergeant did not tell the Border Patrol agents that they would never be "permitted to enter the area 'even in emergency situations,'" Fletcher Decl. ¶ 14 (Jan. 17, 2024); McKinney Decl. ¶ 8.

Nor can Defendants bolster their allegation that TMD denied Border Patrol access by pointing (at 3) to a Press Release from TMD about the January 12 incident. Defendants quote the Press Release's statement that "Border Patrol specifically requested access to the park to secure two additional migrants." But that same Press Release also reports that "[c]laims of Border Patrol requesting access to save distressed migrants are inaccurate." *See* Press Release, Texas Military Department, Update: TMD Investigation into Migrant Drownings (Jan. 14, 2024), http://tinyurl.com/yc52uj5j.

Fourth, to the extent the Court engages with Defendants' factual assertions, Defendants are incorrect (at 4) that Texas is "attempting to block Border Patrol's access to the land adjacent to the" contested "2.5-mile stretch of the Rio Grande." To the contrary, they themselves concede (at 4) that the very morning they filed their latest memorandum, an agent "was able to drive some way through the south end of the 2.5-mile stretch." They likewise acknowledge (at 4) that Texas has "restor[ed] Border Patrol's access to the Shelby Park boat ramp," which "enables Border Patrol to patrol along the river"—though they fail

to acknowledge that Border Patrol already had access to the river at multiple other nearby locations. *See* Tex. Resp. to U.S. Supp. Memo 4-5; Fletcher Decl. ¶ 8 (Jan. 12, 2024). More fundamentally, Defendants have not explained how Border Patrol's functional abandonment of the Shelby Park area more than two months ago, *see* Escalon Decl. ¶ 3 (Jan. 12, 2024); Fletcher Decl. ¶¶ 6, 9 (Jan. 12, 2024), comports with their assertion (at 5) that Border Patrol seeks to "patrol[] the border, identify[] and reach[] any migrants in distress, secur[e] those migrants, and even access[] any wire that it may need to cut or move to fulfill its responsibilities." At minimum, the Court should hesitate to vacate the Fifth Circuit's injunction, given the district court's factual finding that Border Patrol has been "obviously derelict in enforcing" such "statutory duties." App.47a.

Finally, Defendants' second supplemental memorandum seems to anticipate that their factual allegations might eventually prove false. They point (at 3) to public statements from TMD refuting Defendants' account and acknowledge that Texas might have additional facts rebutting their allegations. This Court should not reward an eleventh-hour effort to generate confusion with a grant of "extraordinary relief." *Does 1-3*, 142 S. Ct. at 18.

There are good reasons, moreover, to question Defendants' account. The district court found that Defendants are "creat[ing] a perverse incentive for aliens to attempt to cross" the Rio Grande and thus "begetting life-threatening crises for aliens and agents both." App.47a. Despite claiming in their first supplemental memorandum (at 5) an interest in "be[ing] in a position to respond to emergencies," Defendants drew down their presence in Shelby Park and reduced their water-rescue capability just one day after seeking emergency relief from this Court. Fletcher Decl. ¶ 9 (Jan. 12, 2024); Fletcher Decl. ¶¶ 15-16 (Jan. 17, 2024). Especially given their own decisions, Defendants should not be heard to blame Texas for a tragedy that had already occurred before any federal official even contacted Texas. *Cf.* App.25a, 29a (condemning "cynical," "culpable," and "duplicitous conduct"). But in all events, this Court should not be resolving factual disputes in the first instance.

CONCLUSION

This Court should deny the Application.

Respectfully submitted.

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January 2024

DECLARATION OF CHRISTOPHER FLETCHER

IN OPPOSITION TO THE EMERGENCY APPLICATION TO VACATE THE INJUNCTION PENDING APPEAL

1. My name is Christopher Fletcher. I am a Colonel with Texas Military Department ("TMD") with responsibility for the operations of TMD in South Texas, and specifically in Eagle Pass, Maverick County, Texas, where the Shelby Park complex is located.

2. I have served with TMD for a total of approximately twenty-eight years. I currently serve as the Operation Lone Star Commander and began working on Operation Lone Star in January of 2022 and continue to work in that capacity. Part of my duties include supervising current operations in the Shelby Park area, and I am familiar with events occurring in and around the Shelby Park complex. Specifically, I am aware of events observed by Texas service members near Shelby Park on January 12, 2024.

3. This declaration is based upon my personal knowledge and information provided to me in the course of my official duties regarding allegations made by Defendants in this case regarding the events of January 12, 2024.

4. TMD service members routinely patrol the area of the Shelby Park boat ramp, including at night. Prior to receiving any information from U.S.

Customs and Border Protection ("CBP") on 12 January 2024, TMD already had approximately twenty service members patrolling the area. TMD performs nighttime surveillance of the water with spotlights, night-vision goggles, and thermal-imaging devices. During the night, the Rio Grande becomes eerily quiet. Any persons in distress can easily be seen and heard, as can voices or sneezes from the Mexican shore.

5. Between the hours of 1830 and 1930 on 12 January 2024, an adult female migrant was found by TMD service members near the Shelby Park boat ramp. While she reported being tired and cold, the female migrant was not in distress and did not require immediate medical attention. The female migrant was transferred to the custody of Texas Department of Public Safety officials for transport.

6. Between the hours of 2030 and 2130 on 12 January 2024, an adult male migrant was found by TMD service members climbing in the vicinity of a shipping container on the Shelby Park complex. After the male migrant complained of potential hypothermia symptoms, he was transferred to the custody of Emergency Medical Services for treatment.

7. TMD witnessed an emergency response approximately ¼ mile downriver on the Mexican shore, but there was no evidence that Mexican

authorities directly across from the Shelby Park boat ramp were acting in response to events.

8. At approximately 2135 hours on 12 January 2024, two U.S. Border Patrol agents with U.S. Customs and Border Protection ("CBP") approached the gate to the Shelby Park complex, which is currently occupied by TMD service members. The CBP agents got out of their truck and initiated the conversation by requesting identifying information from the TMD service member at the gate. That atypical request was unlike daily and routine interactions with CBP agents, who do not normally seek such information from TMD service members. I have likewise ordered TMD service members not to seek such identifying details from CBP agents in routine interactions.

9. After a few minutes, CBP agents informed TMD service members that they were at Shelby Park to retrieve two migrants. CBP agents never alleged that the migrants were experiencing any kind of medical emergency and the agents never asked to be admitted to Shelby Park for the purpose of responding to an emergency.

10. Pursuant to standard protocols, TMD service members routinely elevate certain communications from CBP to the on-scene command staff and, if necessary, myself. This process usually takes only a minute or two. If CBP agents

request access for use of the boat ramp, TMD service members need not seek higher authorization and simply open the ramp gate for CBP.

11. At approximately 2142 hours, TMD service members put the CBP agents at the entrance gate in contact with a TMD staff sergeant via speakerphone. For the first time, CBP informed TMD that two drownings had occurred on the Mexican side of the river, and CBP again informed TMD that they were at Shelby Park to pick up two migrants. As before, CBP agents never alleged that those migrants were experiencing any kind of medical emergency and they never asked to be admitted to Shelby Park for the purpose of responding to an emergency.

12. The TMD staff sergeant knew that only two migrants had been encountered in the past three hours and offered to retrieve those migrants and bring them to the entrance gate for CBP. At that point, the TMD staff sergeant drove to the gate to speak to the CBP agents in person. When the TMD staff sergeant mentioned the potential emergency situation on the Mexican shore, the CBP agents informed the TMD staff sergeant that Mexican authorities had the situation under control and were recovering drowned bodies. Still, CBP agents never alleged that the migrants they asked to pick up were experiencing any kind of medical emergency and they never asked to be admitted to Shelby Park for the purpose of responding to an emergency.

13. These statements from CBP agents indicated that there was no need for TMD to initiate emergency-response protocols. The conversation was casual and friendly, and at no point did the CBP agents exhibit any kind of urgency. In fact, prior to the in-person contact, the CBP agents were observed casually scrolling their phones and relaxing in their truck. The CBP agents, moreover, had no watercraft or other equipment for performing a water rescue. As I have indicated before, CBP voluntarily ceased watercraft patrols earlier that day. Jan. 12, 2024, Fletcher Decl. ¶ 9.

14. The TMD staff sergeant never indicated to the CBP agents that they were barred from entering Shelby Park in the event of an emergency. Throughout this dispute, CBP has always had access through Texas infrastructure in emergency situations consistent with orders from the federal district court and the federal court of appeals.

15. After withdrawing almost all personnel and equipment from Shelby Park months ago, CBP first indicated its need for access to the Shelby Park boat ramp in court filings on January 11, 2024. The very next day, TMD issued a directive making clear that CBP also has routine access to that staging point for river access. Jan. 12, 2024, Fletcher Decl. ¶ 9.

16. But CBP is not postured to respond to active drownings; however, they will recover the deceased bodies. Additionally, I've only witnessed CBP

operating boats during the daylight hours. Despite several other TMD encounters with migrants, CBP never arrived at Shelby Park for access to retrieve individuals before or after this incident.

17. I am aware of public allegations that Border Patrol "attempted to contact the Texas Military Department, the Texas National Guard, and DPS Command Post by telephone" prior to this interaction on January 12, 2024. There is no evidence that CBP ever attempted to do so. Our systems, which track incoming calls and regularly record any missed communications, indicate no missed communications from the federal government that evening.

I hereby declare under penalty of perjury, pursuant to 28 U.S.C. § 1746, that the foregoing is true and correct to the best of my knowledge and information.

Signed this 17th day of January 2024.

FLETCHER.CHRISTOPHER.BRIAN.1122954141

Digitally signed by FLETCHER.CHRISTOPHER.BRIAN.1122954141
Date: 2024.01.17 12:38:53 -06'00'

Christopher Fletcher

Texas Military Department

DECLARATION OF SSG LINDSEY MCKINNEY

IN OPPOSITION TO THE EMERGENCY APPLICATION TO VACATE THE INJUNCTION PENDING APPEAL

1. My name is Lindsey McKinney. I am a Staff Sergeant with the Texas Military Department ("TMD") acting as first line supervisor to service members guarding and patrolling a portion of the Shelby Park complex, and specifically in Eagle Pass, Maverick County, Texas, where the Shelby Park complex is located.

2. I have served in the military for 13 years, with the most recent six years at the TMD. I began working on Operation Lone Star on August 13, 2021 and continue to work in that capacity. I am familiar with events occurring in and around the Shelby Park complex on 12 January 2024.

3. This declaration is based upon my personal knowledge regarding events of 12 January 2024.

4. On 12 January 2024, I was on duty working an eight hour shift from 1500 to 2300 hours. At approximately 2141 hours I received a telephone call from a subordinate service member guarding the Shelby Park entrance gate. The service member informed me that two Border Patrol agents from U.S. Customs and Border Protection ("CBP") were at the Shelby Park entrance gate. I requested that the

service member hand the phone to the CBP Agent so that I could speak with him directly.

5. While on the phone, the CBP Agent informed me they were at the park to retrieve two migrants. During our discussion, the CBP Agent never mentioned any type of distress or emergency but did inform me Mexico retrieved drowning victims. I told the CBP Agent that they could not enter the complex for the purpose of a non-emergency retrieval of the migrants. The CBP Agents never requested access to respond to an emergency. I was aware that TMD had only encountered two migrants in the past three hours at Shelby Park. I offered to retrieve those migrants and bring them to the CBP agents. I located the migrants near the boat ramp; however, I learned that the Texas Department of Public Safety (DPS) was tasked with transporting migrants in the Shelby Park complex.

6. I drove to the Shelby Park entrance gate to inform the CBP agents I was unable to transport the migrants as DPS is tasked with this duty. Prior to this, I noticed what appeared to be an emergency response on the Mexican shore.

7. When I arrived at the Shelby Park entrance gate, I approached the CBP Agents. One of the CBP agents once again informed me that Mexican authorities responded to two drownings. They also told me that Mexico had the situation under control. The CBP agents informed me again that they were at Shelby Park to retrieve two migrants. The CBP agents never mentioned an emergency situation or that any

migrants were in distress. The CBP agents did not have a boat or any emergency response equipment that would indicate an intended immediate response.

8. During my telephonic and in-person interactions with the CBP agents, the CBP agents did not seem rushed, did not express that there was an emergency, and did not portray a sense of urgency. The conversations I engaged in with the CBP agents were relaxed and cordial. I did inform the CBP agents that they would not be allowed to enter the Shelby Park complex for the purpose of a non-emergency retrieval of the migrants. At no time did I tell the CBP agents they could not enter the Shelby Park complex in the event of an emergency.

I hereby declare under penalty of perjury, pursuant to 28 U.S.C. § 1746, that the foregoing is true and correct to the best of my knowledge and information.

Signed this 17th day of January 2024.

Lindsey McKinney, SSG
Texas Military Department

DECLARATION OF SGT PRINCE ANOJ PUJITHA GUNAWARDANA

IN OPPOSITION TO THE EMERGENCY APPLICATION TO VACATE THE INJUNCTION PENDING APPEAL

1. My name is Prince Anoj Pujitha Gunawardana I am a Sergeant with the Texas Military Department ("TMD"), and I am currently serving in Eagle Pass, Maverick County, Texas, where the Shelby Park complex is located.

2. I have served with TMD for approximately five years. I began working on Operation Lone Star on 4 December 2023.Part of my duties include guarding the Shelby Park entrance gate, and I am familiar with events occurring in and around the Shelby Park complex on 12 January 2024.

3. This declaration is based upon my personal knowledge regarding events of 12 January 2024.

4. On 12 January 2024, I was on duty working an eight hour shift from 1500 to 2300 hours. On that date, I was guarding the Shelby Park entrance gate. At approximately 2135 hours, two Border Patrol agents with the U.S. Customs and Border Protection ("CBP") approached the gate. Before informing us of the reason for their arrival, the agents questioned me and my fellow service members at the gate. The CBP agents asked for our names, ranks, and other employment details. A few minutes later, the CBP agents informed us that they were at Shelby

Park to pick up two migrants. At no point did the CBP agents state that there was an emergency or that any migrants, including the two migrants they wanted to retrieve, were in distress. The CBP agents did not have a boat or any emergency response equipment.

5. Following my initial discussion with the CBP agents, I called Staff Sergeant McKinney to inform him of the situation. Staff Sergeant McKinney spoke to one of the CBP agents by phone. During the conversation with Staff Sergeant McKinney, the CBP Agent never mentioned an emergency or distress situation. After his telephone conversation with the CBP agents, Staff Sergeant McKinney travelled to the Shelby Park entrance gate and spoke with the CBP agents in person. Throughout my interactions with them, the CBP agents seemed relaxed and did not appear to be responding to any pressing or urgent matters.

I hereby declare under penalty of perjury, pursuant to 28 U.S.C. § 1746, that the foregoing is true and correct to the best of my knowledge and information.

Signed this 17th day of January 2024.

Prince Anoj Pujitha Gunawardana,
SGT
Texas Military Department

Exhibit 4: Texas Attorney General Ken Paxton to U.S. Department of Homeland Security General Counsel Jonathan Meyer (Jan. 17, 2024).

KEN PAXTON
ATTORNEY GENERAL OF TEXAS

January 17, 2024

Jonathan E. Meyer
General Counsel
U.S. Department of Homeland Security
2707 Martin Luther King Jr Ave SE
Washington, D.C. 20528-0525

Dear Mr. Meyer:

On behalf of the State of Texas, I write in response to your demand letter of January 14, 2024, in which you complain about how the Texas Military Department (TMD) recently seized and secured Shelby Park in the City of Eagle Pass, Texas. Your letter misstates both the facts and the law in demanding that Texas surrender to President Biden's open-border policies. Because the facts and law side with Texas, the State will continue utilizing its constitutional authority to defend her territory, and I will continue defending those lawful efforts in court. The U.S. Department of Homeland Security (DHS) should stop wasting scarce time and resources suing Texas, and start enforcing the immigration laws Congress already has on the books.

Your letter betrays a lack of on-the-ground understanding of what is happening in Shelby Park. While I need not correct every mistaken assertion, a few of your false claims must be debunked:

- Texas allows prompt entry into Shelby Park by any U.S. Border Patrol personnel responding to a medical emergency, and this access is not "limited to use of the boat ramp," as you say. TMD has ordered its Guardsmen not to impede lifesaving care for aliens who illegally cross the Rio Grande. To that end, TMD has erected gates that allow for rapid admission when federal personnel communicate the existence of some medical exigency.

- Your supposed commitment "to rendering emergency assistance to individuals in need" is belied by the fact that U.S. Border Patrol withdrew from Shelby Park last year and advised the Texas Department of Public Safety that *federal personnel would not be present to administer aid unless Texas called for help*. Moreover, the Del Rio Sector appears to be the only place along the Rio Grande where DHS does not keep boats on the water around the clock to provide water-rescue capabilities.

- Your attempt to blame Texas for three migrant deaths on January 12, 2024 is vile and, as you now should be aware, completely inaccurate. "Three individuals drowned" that

night on the Mexican side of the Rio Grande, but that tragedy is *your* fault. Contrary to your letter, TMD did not prevent U.S. Border Patrol from entering Shelby Park to attempt a water rescue of migrants in distress. The federal agents at the gate did not even have a boat, and they did not request entry based on any medical exigency. Instead**, *the federal agents told TMD's staff sergeant that Mexican officials had already recovered dead bodies and that the situation was under control*.** Texas's Guardsmen nevertheless made a diligent search, only to confirm that Mexican officials had recovered the migrants' bodies, downriver from the Shelby Park boat ramp and on their side of the river.

- Texas has seen no evidence, and you cite none, showing that the migrants who drowned actually reached the Texas shore. And this despite TMD Guardsmen surveilling the waters of the Rio Grande near Shelby Park with spotlights, night-vision goggles, and thermal-imaging devices.

- As a federal court has already ruled, it is DHS and Biden Administration policies that are leading migrants to risk their lives, and sometimes lose them, trying to cross the Rio Grande. If you really care about migrants being put in "imminent danger to life and safety," your agency should stop driving them into the waters of the river. Nobody drowns on a bridge. A federal court recently rebuked the Biden Administration for creating this dangerous situation: "If [DHS] agents are going to allow migrants to enter the country, and indeed facilitate their doing so, why make them undertake the dangerous task of crossing the river? Would it not be easier, and safer, to receive them at a port of entry?" *Texas v. DHS*, 2023 WL 8285223, at *4 (W.D. Tex. Nov. 29, 2023). By "creat[ing] a perverse incentive for aliens to attempt to cross" the Rio Grande, the court found, you are "begetting life-threatening crises for aliens and agents both." *Id.* at *14.

- Although Shelby Park does sit on "municipal land owned by the City of Eagle Pass," as you say, TMD has now taken that land from the City for law-enforcement and disaster-relief purposes in accordance with Texas Government Code § 418.017(c). It is immaterial that U.S. Customs and Border Protection entered into a "Memorandum of Agreement with Eagle Pass . . . on December 13, 2015," because the State of Texas never approved that transaction as required by Article IV, § 10 of the Texas Constitution. Your federal agency cannot have something that was not the City's to give.

Quite apart from the Shelby Park specifics, your demand letter rests on a more fundamental misunderstanding of federal law and the role of sovereign States within our constitutional order. This much is clear from your invocation of a federal statute that gives U.S. Border Patrol warrantless access to land within 25 miles of the border, but only "for the purpose of patrolling the border to *prevent* the illegal entry of aliens into the United States." 8 U.S.C. § 1357(a)(3) (emphasis added). President Biden has ordered your agency to do the exact opposite, in keeping with his open-borders campaign promise. There is not even a pretense that you are trying to *prevent* the illegal entry of aliens.

As a federal court recently found, DHS's "utter failure . . . to deter, prevent and halt unlawful entry into the United States" has left your agency powerless to "claim the statutory duties [it is]

so obviously derelict in enforcing as excuses to puncture [Texas's] attempts to shore up the [Biden Administration's] failing system." *Texas v. DHS*, 2023 WL 8285223, at *14 (W.D. Tex. Nov. 29, 2023). Indeed, Secretary Mayorkas's refusal to enforce federal immigration laws enacted by Congress has now put him in danger of impeachment by the U.S. House of Representatives. *See also* U.S. CONST. art. I, § 8, cl. 4 (empowering Congress, not the President, "[t]o establish an uniform Rule of Naturalization").

According to your letter, "[t]he U.S. Constitution tasks the federal government with . . . securing the Nation's borders." When were you planning to start?

President Biden has been warned in a series of letters, one of them hand-delivered to him in El Paso, that his sustained dereliction of duty in securing the border is illegal. By instructing your agency and others to ignore federal immigration laws, he has breached the guarantee, found in Article IV, § 4 of the U.S. Constitution, that the federal government "shall protect each of [the States] against Invasion." Texas, in turn, has been forced to invoke the powers reserved in Article I, § 10, Clause 3, which represents "an acknowledgement of the States' sovereign interest in protecting their borders." *Arizona v. United States*, 567 U.S. 387, 419 (2012) (Scalia, J., concurring in part and dissenting in part). Although you invoke the majority opinion in that case, it never addressed these crucial constitutional guarantees because Arizona did not raise them. Having abandoned the field of immigration enforcement, in defiance of Congress's commands, your agency is in no position to claim preemption under *Arizona v. United States* and the Supremacy Clause.

Rather than addressing Texas's urgent requests for protection, President Biden has authorized DHS to send a threatening letter through its lawyers. But Texas has lawyers, too, and I will continue to stand up for this State's constitutional powers of self-defense. Instead of running to the U.S. Department of Justice in hopes of winning an injunction, you should advise your clients at DHS to do their job and follow the law.

Sincerely,

Ken Paxton

Ken Paxton
Attorney General of Texas

cc: The Honorable Greg Abbott, Governor of Texas
Major General Thomas M. Suelzer, Adjutant General, Texas Military Department
The Honorable Merrick B. Garland, U.S. Attorney General

Exhibit 5: Texas Attorney General Ken Paxton to U.S. Department of Homeland Security General Counsel Jonathan Meyer, Texas Office of the Attorney General (Jan. 26, 2024).

KEN PAXTON
ATTORNEY GENERAL OF TEXAS

January 26, 2024

Jonathan E. Meyer
General Counsel
U.S. Department of Homeland Security
2707 Martin Luther King Jr Ave SE
Washington, D.C. 20528-0525

Dear Mr. Meyer:

I have received your second demand letter dated January 23, 2024, in which DHS continues to complain about how TMD secured Shelby Park in the City of Eagle Pass, Texas. In a previous response, I explained that your original letter "misstates both the facts and the law in demanding that Texas surrender to President Biden's open-border policies." Presumably because you have no meaningful response to our letter, your latest letter abandons earlier factual assertions, asserts new ones, and supplies even less of a legal basis for your demand. Once again, I respectfully suggest that any time you might spend suing Texas should be redirected toward enforcing the immigration laws Congress already has on the books.

Again, let's start with the facts. As I have already explained, U.S. Border Patrol withdrew from Shelby Park last year and deliberately reduced its ability to respond to medical emergencies in the vicinity. The tragic incident on January 12, 2024 that you once tried to pin on Texas had already occurred well before your agency's officers arrived at the Shelby Park gate—conspicuously lacking any equipment to perform an emergency rescue. And the supposed "Memorandum of Agreement" between U.S. Customs and Border Protection and the City of Eagle Pass from 2015 (2015 MOA) was never approved by Texas as required under the State's constitution.

Your latest letter disputes *none* of this. Instead, you now claim Texas has somehow restricted access to land owned by the federal government. Yet your first demand letter acknowledged that Shelby Park "is municipal land owned by the City of Eagle Pass," not the United States. Which is it?

If this newfound allegation of federal "property rights" were true, Texas would of course remove any obstructions to federal land pursuant to a lawful court order. This State will continue to respect another sovereign's property rights, even though the federal government refuses to do so. *See, e.g.*, *Texas v. DHS*, 2023 WL 7135677, at *3 (W.D. Tex. Oct. 30, 2023) (Moses, C.J.) (finding federal agents repeatedly trespassed to state chattels, and even "damaged more property a mere day after"

the State sought a temporary restraining order); *Texas v. DHS*, 88 F.4th 1127, 1136 (5th Cir. 2023) (observing that federal agents "have repeatedly 'damage[d], destroy[ed], and exercis[ed] dominion over state property'"), *vacated*, 2024 WL 222180 (U.S. Jan. 22, 2024) (mem.).

After conducting a diligent search in the arbitrarily short period you allotted for this rebuttal, it appears there are serious reasons to question both of your new claims of federal property rights.

First, you say the United States acquired fee-simple title to certain parcels in the Shelby Park area. But your own map shows that most of the tracts you reference fall outside the perimeter area secured by Texas at Shelby Park. With respect to parcels identified in your maps that are actually in the vicinity of the park, publicly available records suggest the United States does not even purport to own what your latest letter claims. For example, the home-cooked map attached to your letter insinuates that the United States has title to every parcel on the west side of Ryan Street bordering Shelby Park. Based on our necessarily cursory review, current records from Maverick County do not support that claim. **By February 15, 2024, Texas hereby demands that your agency supply the following documents and information to this office:**

- official plat maps and deeds demonstrating the precise parcels that you believe the United States owns; and
- your explanation of how exactly Texas officials are preventing access to those parcels by federal agents.

Second, you say the United States acquired a perpetual easement from the City of Eagle Pass in 2018. What I said last week about the 2015 MOA, I will say again about your latest claim: "Texas never approved that transaction as required by Article IV, § 10 of the Texas Constitution. Your federal agency cannot have something that was not the City's to give." You are invited to read that document at https://tlc.texas.gov/docs/legref/TxConst.pdf. But even if the 2015 MOA were somehow valid, you are not seeking "access consistent with" its terms. The "nonexclusive" easement from 2018 is attached for your convenience. Its express "purpose" was to allow "maintenance . . . of a road" along the river, including "the right to trim . . . trees" or other obstacles within the roadway. Elsewhere, the 2018 easement prohibits the United States from making any permanent improvements "other than a Roadway" without written City approval. If your federal agency wishes to help municipal officials with tree-trimming and road-maintenance chores, I suspect they would appreciate the help. The 2018 easement, however, nowhere contemplates allowing the federal government to deploy infrastructure that President Biden will use to wave thousands of illegal aliens into a park that will "continue to [be] use[d] and enjoy[ed]" for "recreation events." **By February 15, 2024, Texas hereby demands that your agency supply the following documents and information to this office:**

- any written approval from the City of Eagle Pass or the State of Texas consenting to allow your federal agents to erect the open-border infrastructure hinted at in your letter; and
- your explanation of where the Congress has empowered your federal agency to pursue this scheme, notwithstanding statutory provisions to the contrary.

Without clarifying both the metes and bounds of the federal government's alleged "property rights," and how its lawful access to such property has been in any way impeded, the State cannot meaningfully assess your demand. But to the extent your agency demands access in order to once again transform Shelby Park into "an unofficial and unlawful port of entry," *Texas v. DHS*, 2023 WL 8285223, at *14 (W.D. Tex. Nov. 29, 2023) (Moses, C.J.), **your request is hereby denied**.

To be clear, your latest letter points to no law supporting the agency's right to do that. In an unexplained reference to "Border Patrol's responsibility and statutory authorities," you parrot statutory language about the need "to patrol the border." But you (unsurprisingly) omit the statutory language that your agency continues publicly to disregard: Border Patrol is tasked with "patrolling the border *to prevent the illegal entry* of aliens." 8 U.S.C. § 1357(a)(3) (emphasis added). Instead, you fixate on a recent order from the Supreme Court of the United States. As you know, that unsigned order supplied no rationale for vacating a Fifth Circuit injunction. It may be that the Supreme Court was misled by allegations levelled by your federal agency, and which you repeated in your January 14th letter to our office. In any event, the Court's order certainly said nothing about access to Shelby Park, which even the federal government's lawyers acknowledged is "not presented" in that ongoing litigation. *See* Second Supplemental Memorandum at 5, *DHS v. Texas*, No. 23A607 (Jan. 15, 2024).

As I said before, this office will continue to defend Texas's efforts to protect its southern border against every effort by the Biden Administration to undermine the State's constitutional right of self-defense. You should advise your clients to join us in those efforts by doing their job and following the law.

Sincerely,

Ken Paxton

Ken Paxton
Attorney General of Texas

cc: The Honorable Greg Abbott, Governor of Texas
Major General Thomas M. Suelzer, Adjutant General, Texas Military Department
The Honorable Merrick B. Garland, U.S. Attorney General

Enclosure

Exhibit 6: Texas Governor Greg Abbott, "Statement On Texas' Constitutional Right To Self-Defense" (Jan. 24, 2024).

GOVERNOR GREG ABBOTT

January 24, 2024

The federal government has broken the compact between the United States and the States. The Executive Branch of the United States has a constitutional duty to enforce federal laws protecting States, including immigration laws on the books right now. President Biden has refused to enforce those laws and has even violated them. The result is that he has smashed records for illegal immigration.

Despite having been put on notice in a series of letters—one of which I delivered to him by hand—President Biden has ignored Texas's demand that he perform his constitutional duties.

- President Biden has violated his oath to faithfully execute immigration laws enacted by Congress. Instead of prosecuting immigrants for the federal crime of illegal entry, President Biden has sent his lawyers into federal courts to sue Texas for taking action to secure the border.
- President Biden has instructed his agencies to ignore federal statutes that mandate the detention of illegal immigrants. The effect is to illegally allow their *en masse* parole into the United States.
- By wasting taxpayer dollars to tear open Texas's border security infrastructure, President Biden has enticed illegal immigrants away from the 28 legal entry points along this State's southern border—bridges where nobody drowns—and into the dangerous waters of the Rio Grande.

Under President Biden's lawless border policies, more than 6 million illegal immigrants have crossed our southern border in just 3 years. That is more than the population of 33 different States in this country. This illegal refusal to protect the States has inflicted unprecedented harm on the People all across the United States.

James Madison, Alexander Hamilton, and the other visionaries who wrote the U.S. Constitution foresaw that States should not be left to the mercy of a lawless president who does nothing to stop external threats like cartels smuggling millions of illegal immigrants across the border. That is why the Framers included both Article IV, § 4, which promises that the federal government "shall protect each [State] against invasion," and Article I, § 10, Clause 3, which acknowledges "the States' sovereign interest in protecting their borders." *Arizona v. United States*, 567 U.S. 387, 419 (2012) (Scalia, J., dissenting).

The failure of the Biden Administration to fulfill the duties imposed by Article IV, § 4 has triggered Article I, § 10, Clause 3, which reserves to this State the right of self-defense. For these reasons, I have already declared an invasion under Article I, § 10, Clause 3 to invoke Texas's constitutional authority to defend and protect itself. That authority is the supreme law of the land and supersedes any federal statutes to the contrary. The Texas National Guard, the Texas Department of Public Safety, and other Texas personnel are acting on that authority, as well as state law, to secure the Texas border.

Greg Abbott
Governor of Texas