

THE SOUTHERN BORDER CRISIS: THE CONSTITUTION AND THE STATES

HEARING BEFORE THE SUBCOMMITTEE ON THE CONSTITUTION AND LIMITED GOVERNMENT OF THE COMMITTEE ON THE JUDICIARY U.S. HOUSE OF REPRESENTATIVES ONE HUNDRED EIGHTEENTH CONGRESS SECOND SESSION

TUESDAY, JANUARY 30, 2024

Serial No. 118–60

Printed for the use of the Committee on the Judiciary



Available via: <http://judiciary.house.gov>

U.S. GOVERNMENT PUBLISHING OFFICE

WASHINGTON : 2024

COMMITTEE ON THE JUDICIARY

JIM JORDAN, Ohio, *Chair*

DARRELL ISSA, California	JERROLD NADLER, New York, <i>Ranking Member</i>
KEN BUCK, Colorado	ZOE LOFGREN, California
MATT GAETZ, Florida	SHEILA JACKSON LEE, Texas
ANDY BIGGS, Arizona	STEVE COHEN, Tennessee
TOM McCLINTOCK, California	HENRY C. "HANK" JOHNSON, JR., Georgia
TOM TIFFANY, Wisconsin	ADAM SCHIFF, California
THOMAS MASSIE, Kentucky	J. LUIS CORREA, California
CHIP ROY, Texas	ERIC SWALWELL, California
DAN BISHOP, North Carolina	TED LIEU, California
VICTORIA SPARTZ, Indiana	PRAMILA JAYAPAL, Washington
SCOTT FITZGERALD, Wisconsin	MARY GAY SCANLON, Pennsylvania
CLIFF BENTZ, Oregon	JOE NEGUSE, Colorado
BEN CLINE, Virginia	LUCY McBATH, Georgia
KELLY ARMSTRONG, North Dakota	MADELEINE DEAN, Pennsylvania
LANCE GOODEN, Texas	VERONICA ESCOBAR, Texas
JEFF VAN DREW, New Jersey	DEBORAH ROSS, North Carolina
TROY NEHLS, Texas	CORI BUSH, Missouri
BARRY MOORE, Alabama	GLENN IVEY, Maryland
KEVIN KILEY, California	BECCA BALINT, Vermont
HARRIET HAGEMAN, Wyoming	
NATHANIEL MORAN, Texas	
LAUREL LEE, Florida	
WESLEY HUNT, Texas	
RUSSELL FRY, South Carolina	

SUBCOMMITTEE ON THE CONSTITUTION AND LIMITED GOVERNMENT

CHIP ROY, Texas, *Chair*

TOM McCLINTOCK, California	MARY GAY SCANLON, Pennsylvania, <i>Ranking Member</i>
DAN BISHOP, North Carolina	STEVE COHEN, Tennessee
KEVIN KILEY, California	VERONICA ESCOBAR, Texas
HARRIET HAGEMAN, Wyoming	CORI BUSH, Missouri
WESLEY HUNT, Texas	SHEILA JACKSON LEE, Texas
RUSSELL FRY, South Carolina	HENRY C. "HANK" JOHNSON, Georgia
Vacant	BECCA BALINT, Vermont

CHRISTOPHER HIXON, *Majority Staff Director*
AARON HILLER, *Minority Staff Director & Chief of Staff*

C O N T E N T S

TUESDAY, JANUARY 30, 2024

	Page
OPENING STATEMENTS	
The Honorable Chip Roy, Chair of the Subcommittee on the Constitution and Limited Government from the State of Texas	1
The Honorable Mary Gay Scanlon, Ranking Member of the Subcommittee on the Constitution and Limited Government from the State of Pennsylvania	4
The Honorable Jerrold Nadler, Ranking Member of the Committee on the Judiciary from the State of New York	6
WITNESSES	
The Hon. Mark Brnovich, Former Arizona Attorney General	
Oral Testimony	9
Prepared Testimony	11
Christopher Hajec, Director of Litigation, Immigration Reform Law Institute	
Oral Testimony	13
Prepared Testimony	15
The Hon. Brent Webster, First Assistant Attorney General, Texas	
Oral Testimony	17
Prepared Testimony	19
Omar Jadwat, Director, Immigrants' Rights Project, American Civil Liberties Union	
Oral Testimony	88
Prepared Testimony	90
LETTERS, STATEMENTS, ETC. SUBMITTED FOR THE HEARING	
All materials submitted for the record by the Subcommittee on the Constitution and Limited Government are listed below	120
Materials submitted by the Honorable Mary Gay Scanlon, Ranking Member of the Subcommittee on the Constitution and Limited Government from the State of Pennsylvania, for the record	
A report on the Supreme Court's Opinion on <i>Arizona v. United States</i> , 567 U.S. 387 (2012), Thomson Reuters	
An article entitled, "Republicans now say it might be okay to ignore the Supreme Court," Jan. 29, 2014, Washington Post	
An article entitled, "Brnovich, lagging in the polls, begs Ducey to declare an 'invasion' to militarize the border," Jul. 7, 2022, Arizona Mirror (AZM)	

THE SOUTHERN BORDER CRISIS: THE CONSTITUTION AND THE STATES

Tuesday, January 30, 2024

HOUSE OF REPRESENTATIVES

SUBCOMMITTEE ON THE CONSTITUTION AND LIMITED GOVERNMENT

COMMITTEE ON THE JUDICIARY

Washington, DC

The Committee met, pursuant to notice, at 10:13 a.m., in Room 2141, Rayburn House Office Building, the Hon. Chip Roy [Chair of the Subcommittee] presiding.

Members present: Representatives Roy, Jordan, McClintock, Bishop, Kiley, Hageman, Fry, Scanlon, Nadler, Cohen, Escobar, and Balint.

Also present: Representative Biggs.

Mr. ROY. The Subcommittee will come to order. Without objection, the Chair is authorized to declare a recess at any time. We welcome everyone to today's hearing on the Southern Border, the Constitution, and the States.

Without objection, our colleagues, Mr. Biggs and Mr. Armstrong, will be able to participate in the hearing today for the purpose of questioning the witnesses if a Member on the Subcommittee yields him time for that purpose.

I will recognize myself for an opening statement.

I want to thank our witnesses for appearing before the Committee today. Thank you for your time and your service. We are here today because the President of the United States is failing to fulfill his duty to defend our country, to defend the borders of the United States, as required by the Constitution. Specifically, the Constitution States the United States shall guarantee to every State in this Union a Republican form of government and shall protect each of them against invasion.

Now, I have read, heard, and I am aware of the academic arguments about the definition of invasion, and I am sure we will cover that in the hearing today. The reality of those of us living on the front lines, the reality of those of us who live in Texas, Arizona, States along the border, notwithstanding any protestations to the contrary, we are experiencing invasion at the Southern border.

Since the beginning of this administration, there have been more than seven million encounters at our Southern border. That in and of itself doesn't define an invasion, but when you compare it to the

2.4 million encounters of the previous administration and when you look at what is actually occurring now with over five million aliens having been released into the United States which includes more than 1.8 million known gotaways. This is a mix of releases, gotaways, people that have come in under the so-called CBP One app released, people that have been released in the United States with dates to appear as late as 2035, 2031, 2, 4, 5. These numbers on the gotaways, by the way, are likely conservative estimates.

Secretary Mayorkas himself admitted some 85 percent of migrants encountered at the border are being released immediately, automatically, released into the United States. That is not a border. That does not allow for any actual determination of an asylum claim or any legitimate claim under law. Importantly, these releases include hundreds, thousands of criminals that have wreaked havoc on our communities. In 2022, 20-year-old Kayla Hamilton was raped and murdered in her home in Maryland by an MS-13 gang member released by this administration. We have examples like that in every State in the union and we have hundreds of examples like that in Texas, of criminal activity of people being released by this administration.

Even those with ties to extremist groups and activities have entered the country through our border to include the migrant wanted in Senegal for terrorism-related crimes. Last March, a member of the terrorist group Al-Shabaab crossed the Southern border, was released, traveled to Minnesota where he was eventually arrested by ICE.

Again, there are many of these examples. In the instance of beginning of Fiscal Year 2021, 331 known or suspected terrorists have been caught crossing the Southern border. I know my colleagues on the other side of the aisle, someone will pull that apart about well, what list do you have that are associated with terrorists or a real terrorist list? Well, is it FARC, but it is not a certain part of the world. The fact is there is an increasing number of known individuals affiliated with dangerous groups across this world that are flooding into the United States because this administration refuses to carry out its constitutional duty to maintain operational control of the border on behalf of the United States.

By the way, that 331 compares to just 11 from 2017–2020 under the administration of President Trump. With the 1.8 million known gotaways, we have no idea how many terrorists and criminals have escaped undetected because these are the individuals that are actually not seeking Border Patrol. They are not coming across the river and saying, please, hi, Border Patrol, I am here. Can you take me in, send me over to an NGO and release me into the United States which is what we are doing to the vast majority of the numbers. Some 50,000 a month are coming in and we don't know who they are, but we know that there are some dangerous individuals because we know that they flee Border Patrol.

The flow of illegal immigration has also levied unbearable costs on American communities, particularly in Texas. American students have been kicked out of their schools so the buildings can be used to house illegal aliens. The healthcare system is burdened by unpaid medical bills for services provided to illegal aliens. Texas

has been forced to spend at least \$12.5 billion of its own funds to try to fill the void.

This invasion of our Southern border is a clear and present danger to the citizens of this country and particularly to the people that I represent in Texas, as do my colleagues from Texas. A record number of Texans and Americans are dying from cartel and Chinese-driven fentanyl pouring across our Southern border. Now, I have seen and read the articles by my colleagues on the Left, academics on the Left who say well, “that is just fentanyl.” It comes through the ports of entry. Nothing you can do that can stop that. It has nothing to do with the fact that we have wide open borders, despite the fact that the experts on the border, the Border Patrol folks who have to actually do the job, who are pulled off the line to process people in direct contravention of our laws, they will tell you that this much worse because they are unable to police the borders. They are unable to do their job between the ports of entry or at the ports of entry at the level that they should be able to do so.

As a result, six children in the school district in which my family resides just Southwest of Austin in Hays County, Texas, died from fentanyl poisoning last year alone. We have had witnesses testify here. We had the mother and the father of one of those kids testify here. We just ignore it. We ignore this grim reality of what is happening to our country.

Since 2021, over 5,000 people have died of fentanyl poisoning in Texas alone, but Texas has actually been on the low end historically, but it is going up. Most of the traffic went through Texas to other parts of the country, but now it is sticking. More than 75,000 Americans have died of fentanyl-related poisonings in 2022 alone. We are still waiting for the 2023 data. Over 200 a day. Basically, an airplane full of human beings that are American citizens or people that live in this country who have died from fentanyl-related poisonings every day.

I met last week in Brackettville, Texas, about three hours from my house, about 45 miles from Eagle Pass, with about 200 landowners and local officials in South Texas breaking down in tears of the destruction of their community. One rancher, who has had to fix his fence 400 times. He has had to repair his fence 400 times in the last three years. The ranch he has had in his family losing livestock. Now, people dismiss that as if it is no big deal. It is a really big deal to the families and the ranchers who have ranches in South Texas for years.

Talked to residents who live near the border have high-speed car chases that are commonplace, that result in the death of American citizens recently and migrants. We act like this is compassionate that a thousand migrants died along the Southwest border of the United States last year, almost a thousand. This flow of illegal immigration has enriched and emboldened the cartels. John Modlin, the Chief Border Patrol Agent in the Tucson Sector, has told Congress that,

Nobody crosses without paying the cartels, so the cartels determine when people cross, how many people cross at the time, all of that, it is controlled by them.

Now, we all know that. We have seen numerous embed reporters who start in South America, come up through Darien Gap, go

through the entire process that the United Nations is fueling, China is helping fund, cartels are getting enriched by moving human beings for profit into the United States through a dangerous journey where individuals die along that journey, little girls get sold into the sex trafficking trade, all that happens, and it is purposeful to flood the United States so that people like our colleague, Yvette Clarke from New York, can say, "I need more people in my district just for redistricting purposes," in the context of a conversation about saying there is, "no room at the inn" for people to come to the United States. That was a direct quote.

This is very clearly an invasion. It is a purposeful one and it is inflicting dangerous consequences on our country and the people of Texas. We are here to talk about the constitutional powers for States to be able to manage that process in the absence of any effort by the Federal Government. The Constitution contemplates that States could repel and defend themselves against invasion because they expected the Federal Government to do its job. In almost a throw-away clause at the end of Article I, but a clause nonetheless, it says the Governors, the people of the State, have the right to defend themselves. It says,

No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

Now, why would this be? Could it be because as Thomas Jefferson put it self-preservation is paramount to all law? The fact of the matter is, of course, the people of Texas have a right to defend themselves just as I have a right to defend my home and my family if it is under attack. I don't go check the statute book. I don't go open the Constitution to determine what I do in the face of a danger posed to the people in my home, my family, as a citizen, who derives his rights and the rights for my family from God, not from government. We have the right to defend ourselves. It is inherent. The Constitution reflects that, and it reflects the fact that Governors and States can, should, step in if the Federal Government refuses to do its job.

I look forward to hearing comments from our witnesses and getting their perspectives on these topics. With that, I will now recognize the Ranking Member, the gentlelady from Pennsylvania, Ms. Scanlon, for her opening statement.

Ms. SCANLON. Thank you, Mr. Chair. From a constitutional perspective which is, after all, the purview of this Subcommittee, the answer to the question posed by today's hearing, the extent to which States can act independently of the Federal Government with respect to immigration matters including border enforcement, has been well-settled law for over 150 years. The Supreme Court has been unequivocal that the Constitution does not allow States to reject Federal policy instead of their own immigration regimes and that when a State purports to stand in the Federal Government's shoes and take over Federal immigration enforcement, it unlawfully violates the principles that the removal process is entrusted to the discretion of the Federal Government.

So, why is this hearing happening today? To try to breathe life into a crackpot legal theory that is so extreme that even hard-core conservative scholars have rejected it, declaring correctly that this is an attempt to subvert our constitutional order for political purposes. Federal supremacy over immigration rests on several constitutional bases. These include the Federal Government's inherent power over the conduct of U.S. relations with foreign countries including with respect to matters of national security and its power to establish a uniform rule of naturalization as provided for in Article I, Section 8.

Federal law governing immigration is the supreme law of the land and State laws may not undermine the comprehensive and complex Federal regulatory framework governing immigration. We cannot have 50 different sets of immigration laws, each of them potentially having different foreign relations and natural security implications. Such a system would be chaotic. It would leave the country vulnerable, and it would make Americans less safe. That is why the Constitution's Framers entrusted those matters to the national government to the exclusion of the States. Attempts by the States to enact and implement their own immigration enforcement policies that conflict with Federal law are clearly unconstitutional.

In pressing the extreme and unconstitutional legal theories that the House Majority and its witnesses are making today; they are attempting to put the rabbit in the hat. Even if they are blocking bipartisan legislation to address border security and funding, they are arguing that the Federal Government's failure to have a stronger border security gives States a license to enact their own immigration policies. This is a fallacy.

The Constitution doesn't say the States are free to ignore the Constitution and Supreme Court precedent unless the House Freedom Caucus gets its way. It is Congress' responsibility to enact immigration legislation and the funding necessary to implement. Enacting such legislation requires compromise, bipartisanship, and actually voting on measures which can be signed into law. The House Majority is not interested in meeting that responsibility and has blocked the President's request for supplemental border funding and is now refusing to even consider a bipartisan border security bill that has been hammered out by Senate Democrats and Republicans with the administration. They have done so at the urging of the disgraced former President who wants to campaign on lies about border security.

As we will see, fringe legal fantasy being pushed in this hearing and by some State officials hinges on a tortured reading of the Constitution that defies both constitutional history and legal precedent. They are promoting the idea that the States have the power to take matters into their own hands because they are being invaded and they claim that that meets the language of Article 1, Section 210, Clause 3 of the Constitution. Our Founders and credible legal scholars are clear that the invasion clause refers to protection against armed hostility from a Nation State or organized political entity, not people fleeing danger in their home country and seeking protection under international and U.S. asylum laws and not even from those engaging in criminal activity.

We should be clear that the courts have considered the volume of immigrants coming to our border when repeatedly reaffirming that this migration crisis does not equal an invasion. I cannot decide which is more disturbing, the torturous attempt to evade the clear constitutional order with racist dog whistles and inflammatory and demagogic rhetoric being used to justify this invasion argument.

We also need to be mindful of the damage done to our constitutional order when advocates for this extremist position are really saying that States are not bound by Federal law or Supreme Court decisions with which they disagree. It is disturbing when the Chair of the House Judiciary Committee on the Constitution posts on social media that Texas should ignore the Supreme Court's decision last week after the court held the Federal Government could remove razor wire that Texas had unlawfully placed at the border. The truth is that Republicans in the House, some State officials, and the national leader of the Republican Party want to block bipartisan action on immigration reform so that they can campaign on the issue. They want to grandstand in camo at the Rio Grande and impeach officials so they can campaign on bluster and boogymen rather than doing the hard work of actually solving problems. That is why today's hearing is yet another irresponsible and potentially dangerous exercise in taxpayer funded political theater. We need to enact legislation to address border issues rather than just have campaign talking points.

With that, I would seek unanimous consent to introduce the Supreme Court's Opinion in *Arizona v. United States*, 132 Supreme Court 2492 from 2012.

Mr. ROY. Without objection.

Ms. SCANLON. A *Washington Post* article published yesterday, January 29, 2014, entitled, "Republicans Now Say It Might Be OK to Ignore the Supreme Court."

Mr. ROY. Definitely without objection.

Ms. SCANLON. Thank you. I yield back.

Mr. ROY. With that, I do not believe the Chair is here. I will recognize the Ranking Member of the Full Committee, Mr. Nadler, for his opening statement.

Mr. NADLER. Thank you, Mr. Chair, and congratulations on assuming the Chairmanship of this Subcommittee. I served as Chair and Ranking Member of the Subcommittee for three years and it holds a special place in my heart.

Unfortunately, today's hearing was not an auspicious start. It is based on a crackpot legal theory that would have the public believe that Federal supremacy over immigration and foreign relations is an open question. There is no open legal question regarding the States' subordinate role in immigration, foreign policy, or border security. The Constitution is clear. The Federal Government is supreme in these matters, and it is well-settled law that the Constitution gives the Federal Government primary authority over immigration matters.

As Justice Kennedy, a Reagan appointee wrote, "The Government of the United States has broad, undoubted power over the subject of immigration." The Constitution explicitly provides Congress with the power to establish a uniform law of naturalization

and tasks the Federal Government with conducting foreign commerce and foreign relations which the Supreme Court has repeatedly noted are interlinked.

As the court has observed, the treatment of foreign nationals within the United States can impact foreign diplomacy and trade including the treatment of Americans abroad. There is a good reason then why the framers have assigned these responsibilities to the national government. On matters of immigration and foreign policy, the Nation must speak with one voice. We cannot have 50 different immigration or foreign policies, otherwise, there would be chaos at home and danger to Americans abroad.

The supremacy clause further ensures that the Constitution and duly enacted Federal laws are the supreme law of the land, trumping any State laws to the contrary. Despite the Supreme Court's crystal-clear reasoning to the contrary, we will hear from the Majority's witnesses today that the States retain the sovereign power to exclude foreign nationals. That contention was part of the doctrine of John C. Calhoun of nullification. I thought Andrew Jackson and the Civil War settled this definitively and put this notion to rest.

Nonetheless, on this basis, the Majority and its extreme MAGA Republican allies make the preposterous argument that the States can ignore the Federal Government and the Supreme Court because the Constitution permits States to defend themselves from imminent invasion when the Federal Government has failed to act.

There are so many practical and legal problems with this outrageous and absurd theory that I do not know even where to begin. Any logical or dare I say originalist interpretation of the Framers' use of the word invasion in the Constitution makes it clear that the word invasion refers to an imminent attack by foreign armed forces. Multiple Federal Courts presented with this question have concluded in the words of the Third Circuit, "no support for a reading of the term invasion to mean anything other than a military invasion."

It clearly does not mean the so-called invasion that MAGA Republicans scream about day and night in their extreme Right-wing media echo chamber. That invasion is often a dog whistle for the Great Replacement theory, racist and anti-Semitic trope that suggests that a liberal cabal is directing non-White populations to "invade Western countries" to replace their "Native White population." After all, who can forget the neo-Nazis and White Nationalists chanting Jews will not replace us in Charlottesville?

I trust, however, that the American public knows the difference between armed soldiers crossing the border and mothers with their children fleeing violence in the hopes of claiming asylum as is permitted under Federal law. There is then no constitutional basis for this MAGA Republican argument that Texas or any other State can ignore Federal laws at the Southern border. If there is no real constitutional controversy, why are we here today?

The real purpose of today's hearing is to serve as one more distraction from the MAGA Republican Majority's total failure on border policy. In their desperation to avoid blame for their utter inability to govern, MAGA Republicans instead seek to justify unconstitutional State action by blaming the Biden Administration and

threatening to impeach Secretary Mayorkas. If they are looking for someone to blame, they should be pointing the finger at themselves. The Constitution invests Congress with the authority to address immigration and border security policy. Yet, instead of doing the hard work of negotiating a bipartisan approach to immigration and border security, as is being done in the Senate, the Republican Majority is holding hearings like this one and they are taking their marching orders from former President Trump, who within the past few days has publicly called on House Republicans to sink a border security deal before most Members have even seen the text, no matter what it says; also, that he has an issue to run on in November.

I must also note that I was deeply disappointed to see the Chair's public call to Texans to ignore the Supreme Court's order allowing the Federal Government to remove razor wire that Texas placed on the border. Such remarks from the Chair of the Constitution Subcommittee no less, are highly irresponsible, dangerous to our democracy, and sadly, typical of the extreme MAGA Republicans this Congress. This hearing is nothing but a shameful exercise in political theater, but I appreciate the witnesses for appearing and I look forward to their testimony. I yield back.

Mr. ROY. I thank the Ranking Member. I thank him for his kind acknowledgment of my assuming the gavel of the Constitution Subcommittee and obviously, his work prior to that and I would simply note that New York City Mayor said, "The migrant crisis will destroy New York City." That sounds pretty dangerous to me when we are talking about current dangers this country is facing.

Without objection, all other opening statements will be included in the record, and I will now introduce today's witnesses.

The Honorable Mark Brnovich. Mr. Brnovich is a partner at Boies Schiller Flexner, LLP, and the former Attorney General of Arizona. Prior to serving as Attorney General, he served as an Assistant Attorney General in Arizona and as an Assistant United States Attorney.

Mr. Christopher Hajec. Mr. Hajec is the Director of Litigation at the Immigration Reform Law Institute and is responsible for overseeing IRLI's public interest litigation. IRLI is a nonprofit legal organization that advocates and litigates for responsible immigration policies.

Mr. Brent Webster. Mr. Webster is the First Assistant Attorney General of Texas, a point of personal privilege, a position that I once held, so I know the job well. Prior to joining the Attorney General's Office, Mr. Webster served as a criminal prosecutor in Texas for 10 years and served as the First Assistant District Attorney in Williamson County, Texas. He has also served as a civil litigator and criminal defense attorney in private practice.

Mr. Omar Jadwat. Mr. Jadwat is the Director of Immigrants' Rights Project at the American Civil Liberties Union. He has litigated a number of cases involving immigration law while at the ACLU. He first joined the ACLU as a Skadden Fellow in 2002, and we will begin by swearing you all in.

Would you please rise and raise your right hand? Do you swear or affirm under penalty of perjury that the testimony you are about

to give is true and correct to the best of your knowledge, information, and belief so help you God?

Let the record reflect that the witnesses have answered in the affirmative. Thank you. Please be seated.

Please know that your written testimony will be entered into the record in its entirety. Accordingly, we ask you to summarize your testimony in five minutes.

Mr. Brnovich, you may begin.

STATEMENT OF THE HON. MARK BRNOVICH

Mr. BRNOVICH. Mr. Chair, Madam Chair, thank you very much for having me today. Once again, the views expressed today are my own and I am here today as a former, two-time elected State Attorney General, as well as a former Federal Prosecutor and State gang prosecutor. I am proud to have served our country in the United States military as an Army Judge Advocate General, as well as being a first generation American. I understand the American dream and this issue better than most. Our Nation is founded on the rule of law. As I sit here today not only as a former Federal Prosecutor and a State gang prosecutor, but a husband and as a parent, I worry our Nation is under assault from cartels and gangs that have seized control of our Southern border. We have seen an unprecedented amount of lawlessness, human smuggling, sex trafficking, and illegal drugs flooding into this country. I do believe and we have written a formal legal opinion stating that this is an invasion pursuant to the United States Constitution.

The State Self-Defense Clause in Article I, Section 10, provides that a State may defend itself when it has been, "actually invaded, or in such imminent danger as will not admit delay," and the State does not need the consent of Congress to do so. The Invasion Clause of Article IV, Section 4, provides that, "the United States shall protect each State against invasion." This clause provides dual protection against an invasion broadly defined. This includes not only defending against actions by foreign hostilities, but also other enterprises and more powerful neighbors as the Constitution States. This encompasses a broad self-defense against nonhostile actors such as cartels and gangs operating at our Southern border.

Furthermore, the Import-Export Clause of Article I, Section 10, also recognizes that States retain sovereign authority to execute inspection laws, which requires operational control of the State's border to channel entry of goods to authorized ports of entry. This is an aspect of the historical police power that is expressly reserved for the States. In sum, both the power of self-defense against actually being invaded and the power to execute inspection laws are sovereign powers that have been retained by the States under the U.S. Constitution and this allows the States to permit an on-ground invasion at their borders that is a threat to public safety and security.

The on-ground violence and lawlessness at our Southern border has been caused by the cartels and gangs is extensive, well documented, and persistent. Therefore, it satisfies the definition of actually invaded and invasion under the Constitution. Two conclusions flow from this. First, the Federal Government has a duty to protect States under the Invasion Clause. Second, when the Federal Gov-

ernment fails to meet its constitutional duties, States retain the independent authority under the State Self-Defense Clause to defend themselves when actually being invaded.

There is nothing in the Federal constitutional or statutory law authorizing the Federal executive to thwart the States from ensuring on-the-ground safety and an orderly border within their States. Nor is there any conflict with this and the orderly conduct of immigration policy by the Federal executive. No State should ever be put in the position that border States have been put in through the Federal Government's recent actions. The Federal Government is failing to fulfill its duty under Article IV, Section 4, of the Constitution to defend the States from invasion. The State Self-Defense Clause exists precisely for situations such as the one present.

Please, let us always remember, the States created the Federal Government, not the other way around. When the Federal Government refuses or neglects to protect its citizens, the States have an obligation and ability to do so.

[The prepared statement of the Hon. Brnovich follows:]

Statement of Former Arizona Attorney General Mark Brnovich

Thank you for having me today. I am the former two time elected State Attorney General of Arizona, as well as a former federal prosecutor and state gang prosecutor. I am proud to have served our country as an Army Judge Advocate General, as well as being a first generation American. I understand more than many what the American dream represents. But it is founded on the rule of law. And as I sit here today not only as a former federal and state prosecutor, but as a husband and parent, I worry that our nation is under assault from cartels and gangs that have seized control of our southern border. We have seen an unprecedented amount of lawlessness, human smuggling, sex trafficking and illegal drugs flooding into our country. I believe this qualifies as an invasion pursuant to the United States Constitution.

The State Self-Defense Clause in Article I, Section 10 provides that a State may defend itself when it has been “actually invaded, or in such imminent Danger as will not admit of delay,” and the State does not need the consent of Congress to do so. The Invasion Clause in Article IV, Section 4 provides that “[t]he United States ... shall protect each [state in this union] against invasion.” These clauses provide dual protection against invasion broadly defined. This includes defending against actions by “foreign hostility [and] ambitious or vindictive enterprises of [a state's] more powerful neighbors.” This encompasses defense against hostile non-state actors such as cartels and gangs operating at our southern border.

The Import-Export Clause in Article I, Section 10 also recognizes that States retain sovereign authority to execute inspection laws, which requires operational control of the border to channel entry of goods to authorized ports of entry. This is an aspect of the historical police power that is expressly preserved for the States. In sum, both the power of self-defense against being “actually invaded” and the power to “execut[e] [their] inspection laws” are sovereign powers that were retained by the States under the U.S. Constitution to permit States to control on-the-ground conditions at their borders that are essential to public safety and security in a State.

Statement of Former Arizona Attorney General Mark Brnovich

The on-the-ground violence and lawlessness at our southern border caused by cartels and gangs is extensive, well-documented, and persistent. It can satisfy the definition of “actually invaded” and “invasion” under the U.S. Constitution. Two conclusions flow from this. First, the federal government has a duty to protect states under the Invasion Clause. Second, when the federal government fails to meet its Constitutional duties, states retain the independent authority under the State Self-Defense Clause to defend themselves when being invaded.

There is nothing in federal constitutional or statutory law authorizing the federal executive to thwart States from ensuring on-the-ground safety and an orderly border within the State's own territory. Nor is there any conflict with this and the orderly conduct of immigration policy by the federal executive. No State should be put in the position that border states have been put in through the federal government's recent actions. The federal government is failing to fulfill its duty under Article IV, Section 4 of the Constitution to defend the States from invasion. The State Self-Defense Clause exists precisely for situations such as the present.

Please let us remember, the state's created the federal government. Not the other way around. When the federal government refuses or neglects to protect its citizens, the state's have the obligation to do so.

Mr. ROY. Thank you, Mr. Brnovich.
Mr. Hajec, you may begin.

STATEMENT OF CHRISTOPHER HAJEC

Mr. HAJEC. Chair Roy, Ranking Member Scanlon, and distinguished Members of the Subcommittee, thank you for the opportunity to appear before you today to testify on the vital and timely subject of what, under the Constitution, States may do about the border crisis.

Overall, the Constitution provides well for this emergency, in my view, because it empowers the States to act in two ways. In the current circumstances, States may pass nonpreempted laws to deal with this crisis and they may also decide to engage in war.

The Supremacy Clause of the Constitution provides that the Constitution, and Federal laws made in pursuance of it, is the supreme law of the land. Potentially, then, Federal immigration law may preempt measures States take to deal with the border crisis.

Despite this potential, the actual preemption picture, at this time, is not so dire for the States. This is very much because of what the States are trying to accomplish and the contrary thing the administration they are reacting to is trying to accomplish.

The administration is in the poor legal posture of adopting enforcement policies calculated to achieve the direct opposite of the purpose of Federal immigration law. That purpose is operational control of the border, and that is defined as zero illegal entries. The law requires zero illegal entries. The administration seems to want as many as possible.

These policies clearly lack preemptive force. If a State interferes with the administration's efforts not to enforce the law, that is not the same as interfering with the law. A State is free to pursue congressional objectives that the administration has spurned, as long as it does not, as it does not violate Federal law while doing so.

Take, for example, Texas' placement of razor wire to block illegal entries at issue in one case now before the courts. This wire does not violate any Federal law and it is effective in achieving Congress' purpose in the immigration laws. It does not stand as an obstacle to those purposes, but only to the anti-enforcement purpose of the administration. Such executive enforcement or nonenforcement policies lack preemptive force, as the Supreme Court has clearly held. They are not the law and are not supreme.

In short, there is much that States can do, including in the area of defensive barriers, even without invoking their powers of self-defense under the Constitution.

Also, Article I, Section 10, Clause 3, of the Constitution provides that, without the consent of Congress, States may engage in war if actually invaded. Governor Abbott of Texas has invoked this provision and acted under it, declaring that his State is being invaded by the trafficking cartels, which are giving cover and material support by the flood of illegal aliens from around the world who pay the cartels to smuggle them in.

Decisions about these matters, in my view, are very much Governor Abbott's to make. There are grounds for thinking that whether a State has been invaded, and also what steps to repel an inva-

sion are appropriate, is a nonjusticiable political question to be decided by States, not the courts.

In the 1990s, States such as California, Florida, and New Jersey sued the Federal Government for failing to repel the invasion of their States by illegal aliens, and thus, violating the Federal Government's duties imposed on it in another constitutional provision, to protect the States from invasion.

The courts uniformly threw these cases out, holding that the question of whether a State had been invaded for purposes of this provision was a nonjusticiable political question to be decided by the Federal Government, not the courts. The Constitution commits this question to political actors, and the courts lack workable standards for resolving it.

By the same token, the question of whether a State has been invaded for purposes of Section 10 is a nonjusticiable political question for that State to decide, not the courts. Here, too, the Constitution commits that question to political actors, and courts lack workable standards for resolving it.

Likewise, the courts lack workable standards for deciding whether a given war measure, such as Texas' razor wire and floating barriers, is an appropriate means of waging war. That, too, is a nonjusticiable political question for the State to decide, not courts, which are ill-equipped to decide war.

Thus, following the example of the courts that threw out the invasion cases against the Federal Government, the courts should throw out cases against Texas' war because they present nonjusticiable political questions. This question of war is one to be decided by political actors, not the courts.

Thank you.

[The prepared statement of Mr. Hajec follows:]

CHRISTOPHER HAJEC

Chairman Roy, Ranking Member Scanlon, and distinguished Members of the Subcommittee: My name is Christopher Hajec, and I am an attorney and the Director of Litigation of the Immigration Reform Law Institute. Thank you for the opportunity to appear before you today to testify on the vital and timely subject of what, under the Constitution, states may do about the border crisis.

Overall, the Constitution provides well for this emergency, in my view, because it empowers the states to act, in two ways. In the current circumstances, states may pass non-preempted laws to deal with this crisis, and they may also decide to engage in war.

The Supremacy Clause of the Constitution provides that the Constitution, and federal laws made in pursuance of it, is the supreme law of the land. Potentially, then, federal immigration law may preempt measures states take to deal with the border crisis.

Despite this potential, the actual preemption picture, at this time, is not so dire for the states. This is very much because of what the states are trying to accomplish, and the contrary thing the administration they are reacting to is trying to accomplish.

The administration is in the poor legal posture of adopting enforcement policies calculated to achieve the direct opposite of the purpose of federal immigration law. That purpose is operational control of the border, and that is defined as *zero* illegal entries. The law wants zero illegal entries; the administration seems to want as many as possible.

These policies clearly lack preemptive force. If a state interferes with the administration's efforts not to enforce the law, that is not the same as interfering with the law. A state is free to pursue congressional objectives that the administration has spurned, as long as it does not violate federal law while doing so.

Take, for example, Texas's placement of razor wire to block illegal entries, at issue in one case now before the courts. This wire does not violate any federal law, and it is effective in achieving Congress's purpose in the immigration laws. It does not stand as an obstacle to those purposes, but only to the anti-enforcement purpose of the administration. Such executive enforcement or non-enforcement policies lack preemptive force, as the Supreme Court has clearly held. They are not the law, and are not supreme.

In short, there is much that states can do—including in the area of defensive barriers—even without invoking their powers of self-defense under the Constitution.

Also, Article I, Section 10, Clause 3, of the Constitution provides that, without the consent of Congress, states may engage in war if actually invaded. Governor Abbott of Texas has invoked this provision and acted under it, declaring that his state is being invaded by the trafficking cartels, which are given cover and material support by the flood of illegal aliens from around the world who pay the cartels to smuggle them in.

And decisions about these matters, in my view, are very much Governor Abbott's to make. There are strong grounds for thinking that whether a state has been invaded—and also what steps to repel an invasion are appropriate—is a non-justiciable political question to be decided by states, not the courts. In the 1990s, states like Illinois and New York sued the federal government for failing to repel the invasion of their states by illegal aliens, and thus violating the federal government's duty, imposed on it in another constitutional provision, to protect the states from invasion. The courts uniformly threw these cases out, holding that the question of whether a state had been invaded for purposes of this provision was a non-justiciable political question to be decided by the federal government, not the courts. The Constitution commits this question to political actors, and the courts lack workable standards for resolving it.

By the same token, the question of whether a state has been invaded, for purposes of Sec. 10, is a non-justiciable political question for that state to decide, not the courts. Here, too, the Constitution commits that question to political actors, and courts lack workable standards for resolving it. Likewise, the courts lack workable standards for deciding whether a given war measure—such as Texas's razor wire and floating barriers—is an appropriate means of waging war. That, too, is a non-justiciable political question for the state to decide, not courts, which are ill-equipped to decide war.

Thus, following the example of the courts that threw out the invasion cases against the federal government, the courts should throw out cases against Texas's war, because they present non-justiciable political questions. This question of war is one to be decided by political actors, not the courts. Thank you.

Mr. ROY. Thank you, Mr. Hajec.
 Mr. Jadwat, you may begin.
 Or, OK, sir. Mr. Webster, you may begin.

STATEMENT OF THE HON. BRENT WEBSTER

Mr. WEBSTER. Thank you, Chair Roy, for the invitation today. Thank you also, Ranking Member Scanlon and distinguished Members.

I want to begin, first, by stating that I have the honor to serve as the First Assistant Attorney General of Texas under Attorney General Ken Paxton. We represent the State in all litigation.

We also have proactively sought to hold the Federal Government accountable for their illegal actions in over 65 lawsuits. 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 America.

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. It also incentivizes dangerous situations.

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 lawful location."

This is very important for my testimony today because what matters is lawful ports of entry versus illegal entry. The illegal entry is where the major harm is done. At no point is Texas contesting the right of any party to avail themselves of a legal port of entry. What's at issue is the invasion that occurs in the other locations that are not ports of entry.

I encourage everyone listening to this hearing to read Judge, Chief Judge Alia Moses' facts, findings of facts, in what is commonly known as the Concertina Wire Case, as she lays out very, very dire circumstances and a significantly damning picture of the Biden Administration's failure to enforce the laws Congress passed. Again, it is not Texas that is failing to abide by Congress' laws. It is the Biden Administration that is failing to abide by Congress' laws.

Now, to be clear, Governor Abbott has invoked his constitutional right, his constitutional right to self-defense, and rightfully so. As a prosecutor, I was very aware of the dangers that the cartels faced, and I know that they control Northern Mexico. So, they have operational control of that area. They are functionally the government, the governing body, of that area, and they are leading this incursion.

They're interested in making money. They make money off of human trafficking, off immigration, drugs, you name it. They're down for whatever way, but their goal is to invade our Nation.

Now, Governor Abbott has invoked his right to self-defense, and he's adopted three strategies.

First, Operation Lone Star. He has mobilized law enforcement and fought to re-route these immigrants toward the ports of entry and provide barriers and stop them from illegally crossing. As we know, that's a felony, to illegally cross. So, he has placed those barriers up using manpower. He then used concertina wire.

The Supreme Court of the United States has at no time ordered us to withdraw our concertina wire. That is false. We sued the Federal Government for cutting our concertina wire.

To read from Judge Moses' opinion, "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. Any rational observer could not help but wonder why the Defendants"—the Defendants are the Federal Government—"do not just allow migrants to access the country at a port of entry," which is only a mile away from where this concertina was laid.

Instead of supporting our attempts to route these individuals to the port of entry and prevent the felony of crossing, illegally crossing, at the border, the Federal Government has turned their guns against us and used their resources to sue the State of Texas for defending itself.

They are snubbing their nose at Congress. They show up in the U.S. Supreme Court and they argue that they have prosecutorial discretion to disregard the laws Congress passed in the nineties.

Congress should care about that, and Congress should do something about that. So, I'm here today to ask help from Congress. Please help Texas. Please help stop this invasion.

[The prepared statement of the Hon. Webster follows:]



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

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*MTcwNTY50DU3OS4xLjEuMTcwNTY5ODYwOC4wLjAuMA.

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

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.

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%202032407913.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

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*.

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

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 Camarota, “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)**

State of Texas v. U.S. Department of Homeland Security, Slip Copy (2023)
2023 WL 8285223

 KeyCite Yellow Flag - Negative Treatment
Injunction Pending Appeal Granted by State v. United States Department
of Homeland Security, 5th Cir.(Tex.), December 19, 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

Attorneys and Law Firms

Amy Snow Hilton, Heather Lee Dyer, Munera Al-Fuhaid,
Ralph Michael Molina, Monroe David Bryant, Jr., Ryan
Daniel Walters, Office of the Texas Attorney General, Austin,
TX, Susanna Dokupil, Office of the Attorney General of
Texas, Special Litigation, Austin, TX, Robert E. Henneke,
Texas Public Policy Foundation, Austin, TX, for Plaintiff.

Christopher A. Eiswerth, Faith Johnson Lowry, Jean Lin,
DOJ-Civ, Washington, DC, Robert D. Green, United States
Attorney's Office, San Antonio, TX, Stephen Ehrlich, U.S.
Department of Justice, Washington, DC, for Defendants.

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 Courery 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; 

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 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.*

State of Texas v. U.S. Department of Homeland Security, Slip Copy (2023)
2023 WL 8285223

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. ⁸ 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 ⁹ *Sheehan v. Army & Air Force Exch. Serv.*, 619 F.2d 1132, 1139 (5th Cir. 1980); ¹⁰ *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 ¹¹ 5 U.S.C. § 551(13) is required. *Id.* (citing ¹² *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 ¹³ *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 ¹⁴ *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 ¹⁵ *Department of Army v. Blue Fox, Inc.* 525 U.S. 255, 263 (1999).)

¹⁶ 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 ¹⁷ *Perry Capital LLC v. Mnuchin*, 864 F.3d 591, 620 (D.C. Cir. 2017); ¹⁸ *Michigan v. U.S. Army Corps of Eng'rs*, 667 F.3d 765, 775 (7th Cir. 2011); and ¹⁹ *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 ²⁰ *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 (“[Plaintiff] 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 8 U.S.C. § 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.' " *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.**

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**

KEN PAXTON
Attorney General of Texas

BRENT WEBSTER
First Assistant Attorney General

AARON L. NIELSON
Solicitor General
Counsel of Record

LANORA C. PETTIT
Principal Deputy Solicitor General

J. ANDREW MACKENZIE
Assistant Attorney General

OFFICE OF THE
ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Tel.: (512) 936-1700
Aaron.Nielson@oag.texas.gov

Counsel for the State of Texas

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.

KEN PAXTON
Attorney General of Texas

BRENT WEBSTER
First Assistant Attorney General

AARON L. NIELSON
Solicitor General
Counsel of Record

LANORA C. PETTIT
Principal Deputy Solicitor General

J. ANDREW MACKENZIE
Assistant Attorney General

OFFICE OF THE
ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Tel.: (512) 936-1700
Aaron.Nielson@oag.texas.gov

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 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,CHRISTOPH
ER.BRIAN.1122954141

Digitally signed by
FLETCHER,CHRISTOPHER.BRIAN.112
2954141
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.**

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**

KEN PAXTON
Attorney General of Texas

BRENT WEBSTER
First Assistant Attorney General

OFFICE OF THE
ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Tel.: (512) 936-1700
Aaron.Nielson@oag.texas.gov

AARON L. NIELSON
Solicitor General
Counsel of Record

LANORA C. PETTIT
Principal Deputy Solicitor General

WILLIAM F. COLE
JOSEPH N. MAZZARA
Assistant Solicitors General

J. ANDREW MACKENZIE
Assistant Attorney General

Counsel for the State of Texas

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.

KEN PAXTON
Attorney General of Texas

BRENT WEBSTER
First Assistant Attorney General

AARON L. NIELSON
Solicitor General
Counsel of Record

LANORA C. PETTIT
Principal Deputy Solicitor General

WILLIAM F. COLE
JOSEPH N. MAZZARA
Assistant Solicitors General

OFFICE OF THE
ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Tel.: (512) 936-1700
Aaron.Nielson@oag.texas.gov

J. ANDREW MACKENZIE
Assistant Attorney General

Counsel for the State of Texas

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 $\frac{1}{4}$ 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
HER, BRIAN.112295414
1

Digitally signed by
FLETCHER, CHRISTOPHER BRI
AN.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.

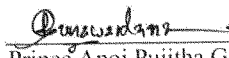
4. On 12 January 2024, I was on duty working an eight hour shift from 1500 to 2300 hours. On that date, I was guarding the Shelby Park entrance gate. At approximately 2135 hours, two Border Patrol agents with the U.S. Customs and Border Protection ("CBP") approached the gate. Before informing us of the 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
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
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.

A handwritten signature in black ink, appearing to read "Greg Abbott".

Greg Abbott
Governor of Texas

Mr. ROY. Thank you, Mr. Webster.
Now, Mr. Jadwat.

STATEMENT OF OMAR JADWAT

Mr. JADWAT. Thank you, Mr. Chair and Members of the Subcommittee, for the opportunity to testify on this important subject.

For 150 years, the Supreme Court has been crystal-clear. Regulation of entry into and expulsion from the United States are Federal matters from which the States are excluded. From *Chy Lung v. Freeman* in 1875 to *Arizona v. United States* in 2012, the Court has repeated this point over and over.

States can't evade this rule by claiming they are merely stepping into the shoes of the Federal Government and enforcing Federal laws. Again, this is black-letter law.

In Arizona, the Supreme Court underlined that, when a State purports to take over Federal immigration enforcement for itself, it unlawfully violates the principle that the removal process is entrusted to the discretion of the Federal Government.

If the rules were different, the already difficult task of managing and operating the immigration system would be infinitely more complex. No administration and no Congress would stand a chance of developing a coherent immigration policy, and the end result would be more chaotic and less effective by any measure.

I'd like to turn to what we know about the actual effects of these kinds of State efforts.

In Alabama, the one State where courts initially allowed a State immigration law like SB 1070 to take effect, terrified parents kept their children out of school; families lost their water service; immigrants were told by landlords that they were no longer welcome as renters; people were racially profiled by the police; Brown people buying groceries were asked by checkout clerks for their papers, and children who did show up at school were asked why they hadn't yet gone back to Mexico. New verification rules meant long lines for everybody at DMVs and courthouses and hassles for businesses seeking to renew their licenses.

What are we seeing today in Texas? According to *The Wall Street Journal*, Texas has spent years and billions of dollars on the most aggressive attempt by any State to take control over Federal border security. There is no indication it has worked.

Instead—and I quote, *The Wall Street Journal* again—

It is precisely the areas of the border targeted most intensively by Operation Lone Star that have experienced the most rapid 'increases' in unlawful border crossings since the operation began.

While failing at its task, Operation Lone Star has not only cost billions of dollars—I believe the price tag is now over \$10 billion—but it has imposed unjustifiable harms: Mass incarceration; severe injuries, including a miscarriage; deaths from vehicle crashes; racial profiling, and more.

As for the invasion hypothesis, the law contains no support whatsoever for the claim that the present circumstances amount to an "actual invasion" that inverts the Constitution's clear prohibitions on States engaging in war or taking over immigration enforcement. In fact, courts have uniformly rejected previous attempts by States

to claim that higher levels of unauthorized immigration amount to invasion.

Perhaps unsurprisingly, proponents of this claim uniformly refuse to grapple with the implication of their claim: That any Governor can declare virtually anything—crime, drugs, pollution, and dangerous goods—an invasion and supersede Federal laws at their will, or actually go to war against foreign countries or groups.

If that weren't sufficiently absurd, also, every court is required to accept the State's claim that its actions are, therefore, authorized by the Constitution. A Federal judge recently called this whole thing "breathtaking" and soundly rejected it.

Indeed, if ever an argument proved too much, it is this one. It would destroy the Constitution's principle of Federal supremacy and its careful delineations of the war power.

The invasion claim is made up and incredibly flimsy. The fact that some State officials are reaching for it now simply underlines that there is no legitimate way for them to do what they want to do.

Thank you, and I look forward to your questions.

[The prepared statement of Mr. Jadwat follows:]



Written Testimony of

Omar Jadwat

American Civil Liberties Union

Submitted to the U.S. House Subcommittee on the Constitution and Limited Government

For a Hearing On: "The Southern Border Crisis: The Constitution and the States"

January 30, 2024

The American Civil Liberties Union (“ACLU”) thanks the U.S. House Judiciary Subcommittee on the Constitution and Limited Government for the opportunity to submit this statement for the Subcommittee’s hearing on what authority, if any, the states have to engage in border enforcement when they disagree with the federal government’s approach.

The ACLU is a nonpartisan public interest organization with 4 million members and supporters, and 53 affiliates nationwide—all dedicated to protecting the principles of freedom and equality set forth in the Constitution. The ACLU has a long history of defending civil liberties, including immigrants’ rights. The ACLU, together with partner organizations, has vigorously and successfully challenged numerous unlawful state and local immigration regulations and policies, including Arizona’s SB 1070 and similar laws in other states, such as South Carolina and Alabama; Indiana’s effort to exclude refugees; and local ordinances seeking to penalize people who house or employ immigrants, such as those in Hazleton, Pennsylvania, and Farmers Branch, Texas.

Our testimony today reviews the well-established principles of constitutional law that forbid states from taking immigration matters into their own hands, and the evidence that such efforts have been not just unlawful, but profoundly harmful and counterproductive by any measure. We also briefly address claims by some state officials that they can override these constitutional limits by declaring that an “invasion” is underway. These claims are unsupported, dangerous, and cannot stand up to even cursory scrutiny.

* * *

1. **The Constitution prohibits state regulation of immigration**

For 150 years—ever since Congress began systematically regulating immigration—the Supreme Court has been crystal clear: Regulation of entry into and expulsion from the United States are exclusively federal matters from which the States are excluded. *See, e.g., Chy Lung v. Freeman*, 92 U.S. 275, 280 (1875) (“The passage of laws which concern the admission of citizens and subjects of foreign nations to our shores belongs to Congress, and not to the States.”); *Truax v. Raich*, 239 U.S. 33, 42 (1915) (“The authority to control immigration—to admit or exclude aliens—is vested solely in the Federal government.”); *Hines v. Davidowitz*, 312 U.S. 52, 62 & n.10 (1941) (noting the “continuous recognition by this Court” of “the supremacy of the national power

... over immigration ... and deportation”); *Takahashi v. Fish & Game Comm’n*, 334 U.S. 410, 419 (1948) (“The Federal Government has broad constitutional powers in determining what aliens shall be admitted to the United States [and] the period they may remain,” and “the states are granted no such powers”); *De Canas v. Bica*, 424 U.S. 351, 354 (1976) (“Power to regulate immigration is unquestionably exclusively a federal power.”); *Arizona v. United States*, 567 U.S. 387, 409 (2012) (“the removal process is entrusted to the discretion of the Federal Government”).

The lower courts have likewise recognized that entry, exclusion, and deportation are exclusively federal matters. *See, e.g., Texas v. United States*, 50 F.4th 498, 516 (5th Cir. 2022) (because “[p]olicies pertaining to the entry of aliens and their right to remain here are entrusted exclusively to Congress[,] [a]n attempt by Texas to establish an alternative classification system ... would be preempted”) (cleaned up); *Villas at Parkside Partners v. City of Farmers Branch, Tex.*, 726 F.3d 524, 537 (5th Cir. 2013) (en banc); *United States v. Alabama*, 691 F.3d 1269, 1293 (11th Cir. 2012) (“The power to expel aliens has long been recognized as an exclusively federal power.”); *Lozano v. City of Hazleton*, 724 F.3d 297, 315 (3d Cir. 2013) (similar). Texas state courts agree. *Hernandez v. State*, 613 S.W.2d 287, 290 (Tex. Crim. App. 1980); *Gutierrez v. State*, 380 S.W.3d 167, 173, 176 (Tex. Crim. App. 2012).

States cannot evade this rule by claiming they are merely stepping into the shoes of the federal government and enforcing (or reinforcing) federal laws. The federal system includes several alternative removal procedures, including full removal proceedings with trial-like processes subject to administrative and judicial appeals, 8 U.S.C. § 1229a, and expedited removal proceedings, a shortened form of proceedings applicable to recent border crossers, 8 U.S.C. § 1225(b)(1). And it includes a range of protections that are available even to people who entered unlawfully or are removable on other grounds. Asylum, a form of humanitarian protection that can lead to permanent residence and eventually citizenship, is specifically available “whether or not” a noncitizen enters “at a designated port of arrival,” and “irrespective of such [noncitizen’s] status.” 8 U.S.C. § 1158(a)(1). Removal to persecution or torture is prohibited, in compliance with the United States’ obligations under international treaties. *See id.* § 1231(b)(3); Pub. L. No. 105-277, Div. G, Title XXII, § 2242, 112 Stat. 2681, 2681-822 (1998) (codified as Note to 8 U.S.C. § 1231). In addition, individuals who are placed in full removal proceedings may apply for other forms of relief Congress has extended, including cancellation of removal. 8 U.S.C. § 1229b(b).

Noncitizens may also apply affirmatively for numerous other forms of relief outside of removal proceedings, including visas for victims of crimes and trafficking, § 1101(a)(15)(U); 1101(a)(15)(T); temporary protected status, § 1254(a), and Special Immigrant Juvenile Status for noncitizens under 21 years of age, § 1101(a)(27)(J).

Given the complexities of this system, and the range of tools it provides to federal authorities, federal discretion is and must be a central feature of the immigration system. A “principal feature of the removal system is the broad discretion exercised by immigration officials.” *Arizona*, 567 U.S. at 396. Federal officials “decide whether it makes sense to pursue removal at all.” *Id.* Federal officials choose among the several removal processes Congress established. *See Biden v. Texas*, 142 S. Ct. 2528, 2535 (2022). Federal officials decide whether to deploy the associated criminal immigration charges. *See Ga. Latino All. for Hum. Rts. v. Governor of Ga.*, 691 F.3d 1250, 1265 (11th Cir. 2012). And once removal procedures have been initiated, federal officials decide whether to extend relief to otherwise removable noncitizens. *See, e.g., INS v. Yueh-Shaio Yang*, 519 U.S. 26, 30 (1996).

That is why, time and again, the courts have ruled that when a state purports to stand in the federal government’s shoes and take over federal immigration enforcement for itself, it unlawfully “violates the principle that the removal process is entrusted to the discretion of the Federal Government.” *Arizona*, 567 U.S. at 409; *Farmers Branch*, 726 F.3d at 534 (same); *id.* at 546 (Dennis, J., specially concurring) (same); *Alabama*, 691 F.3d at 1295; *United States v. South Carolina*, 720 F.3d 518, 531-32 (4th Cir. 2013); *Georgia Latino All.*, 691 F.3d at 1265.

Again, this has been settled law for 150 years. In 1875 the Supreme Court explained that if the Constitution allowed states to reject federal policy and set up their own immigration regimes, “a single State [could], at her pleasure, embroil us in disastrous quarrels with other nations.” *Chy*, 92 U.S. at 280; *see also United States v. Texas*, 599 U.S. 670, 679 (2023) (immigration policy discretion “implicates not only ‘normal domestic law enforcement priorities’ but also ‘foreign-policy objectives’”) (quoting *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 490-91 (1999)); *Hines*, 312 U.S. at 64 (“Experience has shown that international controversies of the gravest moment, sometimes even leading to war, may arise from real or imagined wrongs to another’s subjects inflicted, or permitted, by a government.”). “The Constitution of the United States is no such instrument.” *Chy*, 92 U.S. at 280.

Of course state officials may hold the opinion that that a particular administration goes too far or not far enough in its exercise of discretion, and may find an administration's policies frustrating. State officials may also believe that Congress was wrong to create the various immigration procedures and forms of relief in the federal immigration code.

But immigration policy is and must be a *federal* decision. If the rule were different, the already-difficult task of managing and operating the immigration system would be infinitely more complex. No administration—and no Congress—would stand a chance of developing a coherent immigration policy, and the end result would be worse on every metric—including fairness, efficiency, efficacy of enforcement, and impact on international relations.

2. State immigration enforcement efforts unjustifiably harm immigrants and citizens alike

Following Arizona's passage of SB 1070 in 2010, several states quickly enacted similar laws. Most of the laws were immediately blocked in court, and the Supreme Court sealed SB 1070's fate in 2012, enjoining almost all of its key provisions. But even before that ruling, the vast majority of states that initially considered their own copycat measures decided not to advance them. One significant reason is that they saw what state immigration enforcement actually means in practice.

In Alabama, the one state where courts initially allowed a state immigration scheme to take effect, a crisis ensued. Terrified parents kept their children out of school to avoid the threat of immigration queries. Families lost their water service because they lacked government-issued ID. Immigrants were told by landlords that they were no longer welcome as renters. People were racially profiled by police and questioned about their immigration status. Latine shoppers buying groceries were asked by check-out clerks for their papers, and children who did show up at school were asked why they hadn't yet gone back to Mexico. New verification rules meant long lines for everybody at DMVs and courthouses, and hassles for businesses seeking to renew their licenses. Experts estimated that, if the law stayed in effect, losses to the state economy could amount to billions of dollars annually.

In Arizona, where most parts of SB 1070 never went into effect, the possibility that they would nevertheless terrified communities, caused some people to move out of the state, and cost

the state hundreds of millions of dollars in conference cancellations and lost output. Longer-term, however, other results became apparent: the bill's sponsor became the first state lawmaker in Arizona history to be recalled, and young people opposed to the law became a generation of activists that continues to shape the state's politics today.

What we're seeing happen now only reinforces the lessons of the past. A recent Wall Street Journal article on Texas's Operation Lone Star is instructive. It notes: "Texas has spent two years and billions of dollars on the most aggressive attempt by any state to take control over federal border security. There's no indication it has worked." Texas has spent \$4.5 billion so far, yet the massive spending has not achieved its stated objectives of reducing unlawful immigration. In fact, "it is precisely the areas of the border targeted most intensively by Operation Lone Star that have experienced the most rapid increases in unlawful border crossings since the operation began."

While ineffective in achieving its objectives, the Texas scheme has nevertheless caused enormous harms, contributing to hundreds of injuries and deaths.

A November 2023 Human Rights Watch report found that vehicular pursuits under Operation Lone Star have led to crashes that killed at least 74 people and injured at least another 189, including drivers, passengers and bystanders. Among those injured was a seven-year-old girl out to get ice cream with her grandmother. Since OLS went into effect in 2021, our colleagues at the ACLU of Texas have also documented the use of racial profiling in OLS traffic stops. In December, a U.S. citizen family in El Paso were rammed off the road and detained by armed, plainclothes officers with Operation Lone Star in unmarked vehicles who were ostensibly looking for smugglers.

Various news outlets have reported on other harms caused by Texas's actions under Operation Lone Star, including a miscarriage and severe lacerations suffered by a pregnant woman entangled in razor wire Texas has deployed; instructions to "to push a nursing mother back into the river, to deny water to migrants even in extreme heat and to block a 4-year-old who was trying to cross coils of razor wire from reaching shore"; and diversions of funds from criminal and juvenile justice systems to deploy police and military personnel to the border.

3. Declaring an “invasion” does not give a state the power to regulate immigration

In an attempt to deflect from the long line of precedent demonstrating that, under our Constitution, states cannot take immigration matters into their own hands, some activists and state officials have started to argue that a state’s authority to “engage in War” when it is “actually invaded,” under Article I, Section 10, Clause 3 of the Constitution, amounts to a constitutional trump card. The claim is that the present circumstances amount to “actual invasion,” and that efforts to deter, detain, or remove immigrants are therefore lawful exercises of states’ authority to “engage in War.”

First, the claim of invasion, a term that conjures a military incursion by a hostile nation, is nonsensical on its face. After all, the increased immigration at the border is driven by people seeking *fleeing* hostility and asking the United States for *protection*. Whether by seeking interviews at ports of entry or by flagging down Border Patrol officials after entering without inspection, people are presenting themselves to US officials for inspection and processing from the US under our laws, not attempting to overthrow the US or our laws.

In addition, the law contains no support whatsoever for the claim that present circumstances amount to an “actual invasion” that inverts the Constitution’s clear prohibitions on states’ engaging in war or taking over immigration enforcement. To the contrary, previous attempts by states to claim that higher levels of unauthorized immigration amount to “invasion” uniformly failed. See *Padavan v. United States*, 82 F.3d 23, 28 (2d Cir. 1996) (“In order for a state to be afforded the protections of the Invasion Clause, it must be exposed to armed hostility from another political entity, such as another state or foreign country that is intending to overthrow the state’s government.”); *New Jersey v. United States*, 91 F.3d 463, 469 (3d Cir. 1996) (finding “no support” for “reading of the term ‘invasion’ to mean anything other than a military invasion.”); *California v. United States*, 104 F.3d 1086, 1091 (9th Cir. 1997) (“In *The Federalist* No. 43, James Madison referred to the Invasion Clause as affording protection in situations wherein a state is exposed to armed hostility from another political entity.”); *Chiles v. United States*, 69 F.3d 1094, 1097 (11th Cir. 1995).

Perhaps unsurprisingly, proponents of this claim can’t even agree on such basic questions as the definition of “actual invasion.” And none of them grapple in any way with the implication

of their claim: that any governor can declare an “invasion” and supersede federal laws—or literally wage war against the “invader”—at their will, and that every court is required to accept the state’s claim that its actions are therefore authorized by the Constitution. A federal judge recently rejected that “breathtaking” claim. *United States v. Abbott*, No. 1:23-CV-853-DAE, 2023 WL 5740596, at *12 (W.D. Tex. Sept. 6, 2023) (rejecting argument that “once Texas decides, in its sole discretion, that it has been invaded, it is subject to no oversight of its ‘chosen means of waging war’”). What’s more, several legal activists who are sympathetic to efforts to restrict immigration have refused to endorse the proponents’ theories, *e.g.*, Jonathan Turley, *Invasion or Evasion? Crisis at the Border Is a Political, Not a Constitutional Problem*, THE HILL (July 6, 2022); Texas Public Policy Foundation, *The Meaning of Invasion Under the Compact Clause of the U.S. Constitution*.

If ever an argument proved too much, it is this one. It would destroy the Constitution’s principle of federal supremacy and its careful delineations of the war power. In short, the “invasion” claim is made-up and incredibly flimsy, and the fact that some state officials are reaching for it simply underlines that the Constitution prohibits what they wish to do.

Mr. ROY. Thank you, Mr. Jadwat.

We will now proceed under the five-minute rule with questions. The Chair recognizes the gentleman from California for five minutes.

Mr. MCCLINTOCK. Thank you.

Mr. Chair, it should be obvious to all of us: The Nation that will not enforce its immigration laws has no immigration laws. If it has no immigration laws, it has no borders, and if it has no borders, it ceases to be a Nation.

This is the crisis that the Biden Administration has unleashed by its deliberate decision to open our borders to literally millions of illegal migrants. Its effect is now being felt across the country. Its impact on our schools, our hospitals, our social safety net, law enforcement, public safety, and national security is absolutely catastrophic.

One part of the crisis caused by this administration is before us today. It's the constitutional tension between the governments of the States that bear the burdens of mass illegal migration and the Federal Government that has caused it.

Fortunately, though, we've got a Constitution that establishes institutions that are designed to resolve these tensions, these disputes. The greater the strain that these issues place on us, the closer we need to hew to that Constitution.

Immigration law is an enumerated power of the Congress. That should be indisputable. National defense is an enumerated power of the Congress. That, too, should be indisputable, with the exception of an actual invasion when States retain their sovereign right to self-defense.

At the center of today's hearing is: How do we resolve these disputes arising under the Constitution? That's the reason we have a third branch of government. This question is the rightful province not of the U.S. Congress, but of the U.S. Supreme Court. Under our Constitution, as Americans, we owe to it, in the words of the Mayflower Compact, "all due submission."

So, this brings me to the agreement with the minority on this, this narrow, but critical point: The Constitution must be upheld in all matters. The Supreme Court has ultimate jurisdiction over legal disputes arising under that Constitution, and this is never more important than when we're in a crisis—and this is a crisis.

Let me ask the Majority witnesses: What am I missing? Go ahead.

Mr. HAJEC. You're missing that the courts don't decide everything under the Constitution.

Mr. MCCLINTOCK. No, they decide disputes arising from the Constitution. This is a dispute between the State and Federal Governments over what constitutes an invasion and what measures the States can legally take within the sphere of the enumerated powers of Congress involving national defense and immigration.

Mr. HAJEC. Right. Courts decide cases in court, controversies in court. If this goes to court—and it is before the Fifth Circuit now—

Mr. MCCLINTOCK. Well, it's a dispute arising out of the Constitution. Isn't it?

Mr. HAJEC. Yes.

Mr. MCCLINTOCK. Where else would be—

Mr. HAJEC. The court—

Mr. MCCLINTOCK. —the constitutional forum to resolve such a dispute?

Mr. HAJEC. We don't disagree about that. What courts can do is say that this issue is nonjusticiable; it's a political issue, and send it back to the States for the Federal Government—

Mr. MCCLINTOCK. The courts could do that and—

Mr. HAJEC. The courts were not interested in talking about what an invasion was.

Mr. MCCLINTOCK. The courts—you're absolutely right, the court—but that still is the province of the courts, not of the Congress, not of the administration, and certainly not of the States.

Mr. HAJEC. I would, I would agree. I would just—

Mr. MCCLINTOCK. OK. Good. Well, I'm glad to hear that.

Mr. HAJEC. Punting to the courts—

Mr. MCCLINTOCK. Let me just go on.

First, any other thoughts from the other Majority witnesses?

Mr. WEBSTER. I think Congress could authorize the States to enforce immigration under their congressional powers.

Mr. MCCLINTOCK. It could, exactly right.

I think that's the whole point. Congress can enact new laws in concert with the Constitution. It can propose changes in the Constitution to the States. From that standpoint, you're in the right place. We're the legitimate place to propose changes to the Constitution or to change the laws under that Constitution.

The fact remains the issue is not going to be solved, though, by bills that won't be signed or laws that won't be enforced or funds that will only be used to expedite more illegal entries into the country without expelling any. It's not going to be solved by replacing one Leftist official with another.

It's going to be solved by the American people electing an administration that's actually dedicated to enforcing our laws, upholding our Nation's sovereignty, and defending our country.

This is not a place to resolve the disputes arising between the States and the Federal Government. That belongs to the courts. The enforcement belongs to the Executive Branch. It is not doing its job.

This was set in motion by the American people that elected that administration. I tell them, "If you voted for this administration, this is exactly what you voted for." If you're surprised by that, you weren't paying any attention because this is exactly what they promised to do; this is exactly what they've done, and this is exactly what they have defended for the last three years.

Thank you, Mr. Chair. I yield back.

Mr. ROY. I thank the gentleman from California.

I now recognize the Committee Ranking Member, Mr. Nadler.

Mr. NADLER. Thank you, Mr. Chair.

Mr. Chair, I find myself in rare agreement with Mr. McClintock—not on the subject of immigration and not on the actions of the Biden Administration, not on the causes of what's happening, but on the constitutional question which is clear.

Mr. Jadwat, is there an open legal question as to whether the States have independent authority over immigration and foreign policy?

Mr. JADWAT. No.

Mr. NADLER. Or is it clear that the Constitution gives the Federal Government primacy over these matters?

Mr. JADWAT. No, Mr. Congressman, it's clear that this is the Federal Government's job.

Mr. NADLER. Generally, how would you characterize the Supreme Court's rulings in cases where the Federal Government has challenged State regulation of immigration matters on the basis that such regulations are preempted by the Supremacy Clause and Federal law? Have they been more favorable to the Federal Government or to the States?

Mr. JADWAT. To the Federal Government.

Mr. NADLER. How would you characterize these rulings in general?

Mr. JADWAT. Again, I think it's clear. The Court has reiterated time and again that this is an area where the Federal Government has exclusive authority and that States can't enact their own rules or purport to step into the shoes of the Federal Government and enforce Federal laws.

Mr. NADLER. Thank you.

Now, the premise of this hearing is that we are faced with an invasion from abroad, a foreign invasion, and the States have the power under the Constitution to repel an invasion. Now, multiple Federal courts have presented with this question, have concluded, in the words of the Circuit Court, of the Third Circuit, rather, quote,

That there is no support for reading the term "invasion" to mean anything other than a military invasion.

Mr. Jadwat, has there been any military invasion of the United States? Any foreign armies crossing our borders recently?

Mr. JADWAT. No, sir, not to my knowledge.

Mr. NADLER. Not, in fact, since 1814?

Mr. JADWAT. I'll take that, yes.

Mr. NADLER. Yes, I would not include the Confederacy. That was a civil war.

Now, is there any question that the term "invasion" does not refer to what's happening now because there's no military force invading us, and that whatever is happening at our border, however you want to characterize it, it's not an invasion under the meaning of the Constitution?

Mr. JADWAT. Yes, I think that's clear, both under the decisions of the courts that have discussed that question and under the plain terms of the Constitution itself.

Mr. NADLER. So, there is no basis for Texas, or any other State claiming authority, to do anything other than what the Federal Government does in this area?

Mr. JADWAT. That's right.

Mr. NADLER. It's correct?

Mr. JADWAT. Yes.

Mr. NADLER. Thank you.

Are you familiar with the "great replacement conspiracy theory"?

Mr. JADWAT. Yes.

Mr. NADLER. How does the argument that we heard here today that there is a, quote, “actual invasion of the Southern border,” feed into this racist conspiracy theory?

Mr. JADWAT. I think that when you talk about people invading the country, “poisoning the blood of America,” those sorts of terms, it adds fuel to the fire of these kinds of theories.

I also think, in particular, when you think about the term “invasion,” it paints the so-called invaders as violent, and even more so, it authorizes violence against those people.

In war, we can do things that would be illegal in any other context—killing, violence, all sorts of terrible things. According to the folks at this table, they’re not speaking metaphorically; they’re not just using rhetoric; they are actually authorized to engage in war against people who are coming to this country. That I think is profoundly dangerous.

Mr. NADLER. So, you think that promoting this actual invasion argument is not only wrong as a matter of law, but potentially dangerous to innocent people and to the country as a whole?

Mr. JADWAT. Yes, I do.

Mr. NADLER. Let me ask Mr. Hajec, given the Court’s uniform, every decision I’m aware of for the interpretation of the term “invasion” in the Constitution as meaning an invasion, a foreign invasion by a military force, how do you justify Texas’, or any other States’ independent actions in this area?

Mr. HAJEC. By the Constitution, it’s a—the only—there’s nothing, there’s no sort of law of war, Clausewitzian definition of “invasion” that has anything to do with that constitutional provision.

Mr. NADLER. I just quoted the Third Circuit that says, “No support for reading of the term invasion to mean anything other than a military invasion.”

Mr. HAJEC. This is—

Mr. NADLER. Every other court that has addressed this issue said the same thing. You’re saying that every Federal—

Mr. HAJEC. This is the court—

Mr. NADLER. You’re saying that every Federal court is wrong and you’re right?

Mr. HAJEC. The courts that have said that I believe are wrong. The Constitution simply uses the word “invasion,” and it would carry its meaning in ordinary language—

Mr. NADLER. The courts—

Mr. HAJEC. If you look at dictionaries at that time—

Mr. NADLER. Forget dictionaries. Our courts interpret the Constitution and are authoritatively—

Mr. HAJEC. Courts interpreted the Constitution belongs to the people—

Mr. NADLER. Our courts have interpreted the phrase “invasion” to mean a foreign military invasion, and anything to the contrary is nonsense.

I yield back.

Mr. ROY. The Chair will recognize myself for five minutes for questions.

Let me just ask each and every one of you a question. The 3,000-plus Americans that died on September 11th, do you think they’re

comforted by the definition of “invasion” that has been posited by the Ranking Member?

Just go down the line. Mr. Brnovich, do you think they’re comforted by that definition of “invasion”?

Mr. BRNOVICH. Well, I can’t speak to other Members of the Committee, but I will just say that, obviously, the President is at the apex of his or her power when it comes to border issues and immigration. So, I feel like there’s two ships passing in the night.

Mr. ROY. Just for time’s sake—

Mr. BRNOVICH. This is an issue related to security, border security not immigration.

Mr. ROY. Right. Mr. Brnovich, question: 3,000 Americans were killed?

Mr. BRNOVICH. Yes.

Mr. ROY. People are trying to say that there’s a specific invasion, that we haven’t been invaded since 1814. Do you think the families of the 3,000 who were killed would suggest that what happened on September 11th—the product of overstayed visas and a bad system that we have here in terms of protecting against unwanted attacks—that this is an invasion from the standpoint of any logical conclusion of American who’s concerned about their safety and well-being? Yes?

Mr. BRNOVICH. September 11th was an invasion and an attack on the—

Mr. ROY. Mr. Hajec, would you think so?

Mr. HAJEC. I would think they would not be comforted.

Mr. ROY. Right.

Mr. Webster?

Mr. WEBSTER. It was an invasion.

Mr. ROY. Right.

Now, Mr. Jadwat, yes or no?

Mr. JADWAT. I wouldn’t purport to speak for the families of people who were killed on that—

Mr. ROY. Right. Do you think, as an American, it was an invasion to have people come in and bomb buildings, fly planes into buildings, and kill 3,000 people?

Mr. JADWAT. Within the meaning of that clause of the Constitution—

Mr. ROY. People who overstayed visas?

Mr. JADWAT. Within the meaning of that clause of the Constitution, because it’s—I agree with everybody here—it was an attack. I was blocks away when it happened.

Mr. ROY. So, is that a yes or no? No. You’re saying, “No,” then?

Mr. JADWAT. Not within—I don’t think so, not within—

Mr. ROY. Right. So, for the average American watching this, and they’re saying, “OK, that is how we have to live in the modern world.” Say, that, OK, unless the Redcoats are marching right in, coming right up in through New York, coming up the river and saying, “OK, we’re here,” right? Or unless there’s an army coming across the Rio Grande, that’s the invasion.

When 3,000 Americans are dead because we were attacked by people who overstayed their visas, because we have a very broken immigration system, or we now have people who are going around the country that just end up in Minnesota, who have been here for

a year, that are clearly affiliated with terrorist organizations, that somehow we don't have to be concerned about whether or not that's an invasion? Right?

Do you believe that President Biden is responsible for the crisis at the Southern border, yes or no?

Mr. Brnovich?

Mr. BRNOVICH. Absolutely.

Mr. ROY. Mr. Hajec?

Mr. HAJEC. Yes.

Mr. ROY. Mr. Webster?

Mr. WEBSTER. Yes.

Mr. ROY. Mr. Jadwat?

Mr. JADWAT. No.

Mr. ROY. President Biden is responsible for the crisis at the Southern border?

Mr. JADWAT. President Biden is responsible for the policies of his administration.

Mr. ROY. So, is he responsible for the present crisis at the Southern border?

Mr. JADWAT. To the extent that his administration—

Mr. ROY. Is that a yes or no?

Mr. JADWAT. Would you let me finish?

Mr. ROY. I mean, is it yes or no? Is he responsible for the crisis at the Southern border, he and—

Mr. JADWAT. He is responsible for the policies of his administration and their effects at the border.

Mr. ROY. Well, I'll take that as a yes, then. Is the Biden Administration responsible for the border crisis this country is facing? That I think was a yes.

Do you believe that what is currently happening on the Southern border constitutes an invasion, as we understand it in the Constitution and as applied in today's world, where we're dealing with the forces that we're dealing with around the world, the forces who want to endanger the American people?

Mr. Brnovich, yes or no, is what is currently happening on the Southern border an invasion?

Mr. BRNOVICH. As our first in the Nation opinion expresses, this does constitute an invasion, pursuant to the U.S. Constitution.

Mr. ROY. Thank you, Mr. Brnovich.

Mr. Hajec?

Mr. HAJEC. Yes, because the cartels are committing hostile encroachment onto Texas, and that constitutes an invasion.

Mr. ROY. Thank you, Mr. Hajec.

Mr. Webster?

Mr. WEBSTER. Yes, absolutely.

Mr. ROY. You? Mr. Jadwat?

Mr. JADWAT. No.

Mr. ROY. I think we know the answer.

Mr. JADWAT. No.

Mr. ROY. You believe it's no?

Mr. JADWAT. Not within the meaning of that clause of the Constitution.

Mr. ROY. So, here's a question. Do you believe that States like Texas or Arizona, or any other State, has a right to defend their

citizens and take action to secure the border, particularly in the complete and abject failure of the Federal Government to do so, as the Constitution contemplated, notwithstanding the views expressed by some on both sides of the aisle to the contrary? Yes or no, do the citizens of those States have the right to defend their citizens and take actions to secure their border?

Mr. Brnovich?

Mr. BRNOVICH. The Governor does, indeed, have the ability to call up the National Guard or use State resources to protect the citizens of their State.

Mr. ROY. Mr. Hajec?

Mr. HAJEC. Yes, it's clear—that right is clearly stated in the Constitution.

Mr. ROY. Mr. Webster?

Mr. WEBSTER. Yes, for Texas.

Mr. ROY. Mr. Jadwat?

Mr. JADWAT. Again, 150 years of Supreme Court precedent says that States do not have the authority to take immigration matters into their own hands, and no Governor—

Mr. ROY. Was, was Dred Scott a good thing?

Mr. JADWAT. No Governor has the right—

Mr. ROY. Was Dred Scott an opinion that we should follow?

Mr. JADWAT. We're not talking about Dred Scott here. We're talking about 150—

Mr. ROY. Do we—next, next question—do we—right, but—

Mr. JADWAT. No Governor—

Mr. ROY. —it does matter.

Mr. JADWAT. No Governor—and no Governor has the authority to override that Supreme Court precedent or—

Mr. ROY. That wasn't the question. That wasn't the question.

Mr. JADWAT. —the Constitution by claiming that an invasion has taken place.

Mr. ROY. Mr. Jadwat, with all respect, that wasn't the question.

Your time is up. You may answer the question. We know where you stand.

Do we have operational control of our Southern border, as defined by the Secure Fence Act of 2006, which States, Operational control means the "prevention of all unlawful entries into the United States." It includes "entries by terrorists, other unlawful aliens, instruments of terrorism, narcotics, and other contraband." Yes or no?

Then, I'll finish my questions.

Mr. BRNOVICH. No.

Mr. HAJEC. No.

Mr. WEBSTER. Do not.

Mr. ROY. Mr. Jadwat?

Mr. JADWAT. No, and we never have, and we never will, by that definition.

Mr. ROY. Well, at least that's consistent with Secretary Mayorkas, who told me, under oath, in this room, that he did have operational control.

With that, I would recognize Mr. Cohen, the gentleman from Tennessee.

Mr. COHEN. Thank you. Thank you. I am going to ask Mr. Webster because he is from Texas, most of the immigration is coming through Texas, is it not?

Mr. WEBSTER. Currently yes.

Mr. COHEN. Are most of those immigrants staying in Texas?

Mr. WEBSTER. There are a lot of them staying in Texas, but they are routing throughout the country. It's affecting the whole Nation.

Mr. COHEN. Are most of them staying in Texas?

Mr. WEBSTER. No.

Mr. COHEN. Where are they going to?

Mr. WEBSTER. Well, you'd have to ask each one of them where they're going.

Mr. COHEN. I don't have time for that. You should have an idea. [Laughter.]

Mr. WEBSTER. I do know that the mayor of New York has expressed concerns about how many are arriving in his city, so there's a lot there.

Mr. COHEN. Because your either Governor DeSantis or your Governor have sent—they have put them on airplanes and sent them to New York: Buses, airplanes, whatever, and sent them to Chicago and sent them to Denver. Other than those vacation tours, as your Governors have planned, where are these people going?

Mr. WEBSTER. Well, you'd have to ask the Biden Administration. They also bus individuals and fly individuals into the interior. Also, the local cities do as well. San Antonio, El Paso have all bussed and brought people out of Texas, out of their cities.

Mr. COHEN. I would suspect most of them are staying in Texas, more than any other State, and yet I read these proposals by certain Republicans; and Mr. Roy got into it as well, by mentioning Ms. Clark, that the Democrats allegedly are all in favor of the immigration folks—people coming into our country because they want them to come into their districts for the Census in 2030 to get more Congress people and more money. Most of the people are staying in Texas.

So, it seems like Texas would get the Congressmen and Texas would get the money, so it doesn't make any sense that these States—and in fact—New York doesn't want them, and Chicago doesn't want them, and Denver doesn't want them, so they are obviously not caring about the 2030 Census.

Is it Jadwat? Have you heard these theories about the 2030 Census and the reason the Democrats are doing this?

Mr. JADWAT. This is actually new to me.

Mr. COHEN. It is new? Well, I read—Marsha Blackburn, one of my Senators wrote that you might wonder why Democrats want to leave our border open. The explanation is straightforward. Blue States know they are on track to lose congressional seats and Federal tax dollars when the next Census is tabulated. By taking in undocumented immigrants who count toward the Census population Democrat-run States can help offset these losses and retain their congressional seats and Federal funding.

Is that loony?

Mr. JADWAT. It seems farfetched to me.

Mr. COHEN. Most of the immigrants are staying in the Red States: Texas and Arizona, and I guess they go to California. I

mean, why not? That is a Blue State. Anyway, neither here nor there.

The main thing about this hearing which is astonishing to me is we have got a bill in the Senate that they are working on which will be the most comprehensive reform of border security ever. President Biden has said that if it—he will sign it and he will close the border. That is what I think the Republicans want. That is what I think they have campaigned on. Now, Mr. Trump doesn't want that to happen. So, when he talks to Speaker Johnson he tells him to stop that bill. We don't want to have an immigration bill because it might help Joe Biden say I have worked on the immigration crisis, and I have helped stem it.

So, instead of working to help our country and stop the invasion—there is an invasion on our Southern border. We don't want to stop the invasion until Mr. Trump gets a chance to deal with his border issue. We all know what Mr. Trump's border is. It is the security fences around the prison that he is going to go to if he doesn't get elected President. That is his border issue. He doesn't want to have to deal with that border.

For that reason, we are going to let the invasion on the Southern part of our country continue, let all these people come in who are raping our women and cheating our friends and doing all these terrible things and ripping off veterans. We are going to let that happen until Mr. Trump can see to it that he doesn't go to the big house with the borders that he fears.

It is just insane that we don't look after our country, which we should. We should encourage the Senate, which they would do, to pass their bill. Mr. McConnell says it is the best bill they will ever have. So does Linsey Graham. Quite a few Republican Senators are working on this. Langford. They all want to pass it and they say they are going to get a much better bill than if they wait until the next administration, if there is a next administration, that this would be the best bill possible. You always know the legislation is evolutionary, so you accept a bill.

Anyway, this is just—we need to get a focus on the real issues, which is passing a border bill, protecting our border, protecting our country, and that would be passing a bill that the Senate has, which is a good bill, and getting it into the House, passing it here, and not listening to Mr. Trump. I believe.

Mr. ROY. I thank the gentleman from Tennessee.

I will now recognize my friend and the gentleman from California.

Mr. KILEY. Thank you, Mr. Chair. I have a question for Mr. Jadwat, the witness with the ACLU.

If I am to understand your position correctly, you are opposed to Governors mobilizing their National Guard to secure the border. Is that correct?

Mr. JADWAT. I wasn't talking about the National Guard. I was talking about State efforts to actually do immigration enforcement.

Mr. KILEY. I see. So, I have a press release here from September 2023. It says,

Governor Newsom increases California National Guard presence at the border to crack down on fentanyl smugglers.

Would you take that—would you say that action by Governor Newsom is appropriate and within the bounds of his authority?

Mr. JADWAT. It might be, yes. I have no familiarity with what is referenced in that article.

Mr. KILEY. Well, the press release again: It says,

Governor Newsom increases California National Guard presence at the border. Cracking down on illegal drugs including fentanyl being smuggled into California, Governor Newsom is increasing the number of California National Guard service members deployed to interdict drugs at U.S. ports of entry along the border by approximately 50 percent. Governor Newsom said, "Fentanyl is a deadly poison ripping families apart and communities apart. California is cracking down," he said, "and today we're going further by deploying more Cal Guard service members to combat this crisis and keep our community safe."

So, the Governor saw a public safety issue arising from the situation at the border and mobilized the National Guard to try to keep our community safe. Would you say that was appropriate by the Governor?

Mr. JADWAT. It probably would. I would point out that what we're talking about there, fentanyl at the ports of entry, that's where the fentanyl is and that's where the focus ought to be to the extent that's a concern.

Mr. KILEY. OK. You are making a policy judgment as to what's the greatest, most effective thing to do.

Mr. JADWAT. No, I mean I'm pointing out that as a factual matter—

Mr. KILEY. I am asking you about his authority.

Does he have that authority?

Mr. JADWAT. CBP, the Cato Institute, everyone who's looked at the question agrees that overnight approximately 90 percent of the fentanyl that's coming—

Mr. KILEY. Again, that is not what I'm asking. I am asking about his authority. Do you agree he had the authority to do that?

Mr. JADWAT. Again, I don't know the details of that, but it sounds like what was happening was that he was deploying the National Guard either in cooperation with the Federal Government to assist them at POEs, which sounds like the reasonable thing to do.

Mr. KILEY. So, we have the former Attorney General of Arizona, first Attorney General of Texas here. Would you say that in some sense your Governors, either at the time or now, were simply following the Newsom precedent, that he saw a public safety risk rising from the border and so made use of California resources to assist?

Mr. WEBSTER. Well, Texas would never follow California precedent.

[Laughter.]

Mr. KILEY. Fair enough.

Mr. WEBSTER. It's a similar strategy.

Mr. BRNOVICH. Yes, clearly States, even States like California, want to do everything they can to protect the citizens within our States, and that means at times they will deploy the National Guard. It means at times they will deploy Department of Public Safety or State police officers. Because I think even the State of California recognizes that there is an unprecedented amount of ille-

gal drugs, of illegal human trafficking coming into our country and because of that the cartels have seized operational control of our Southern border, and as a result of that every American is less safe and every child is more in danger of dying of a drug overdose.

Mr. KILEY. Thank you.

Mr. Jadwat, you also testified that, "States do not have the authority to take immigration matters into their hands." You said, "the Constitution prohibits State regulation of immigration." You said that, "entry exclusion and deportation are exclusively Federal matters." Federal officials, you said, "decide whether it makes sense to pursue removal, et al."

Would the same logic apply to States or other jurisdictions that have adopted so-called sanctuary policies where they actively interfere with Federal immigration enforcement? Can we assume based on your testimony that you oppose those efforts as well?

Mr. JADWAT. I don't think you should assume that because I think what so-called sanctuary policies are generally about is States opting out of Federal enforcement. That's an authority that States have under the Tenth Amendment that protects States against commandeering by the Federal Government.

So, for example, if the Federal Government said to Texas, we want you to take your land and your personnel and build a processing center on the border, Texas could say no, thank you. That's what States and cities are doing with their sanctuary laws. No, thank you. We're not going to use police or our facilities—

Mr. KILEY. OK. That is under sanctuary policies—for example, in California we had someone who was arrested, was in custody. ICE asked to know when he was going to be released and the sheriff's office said we can't tell you because of the sanctuary State law. That individual was released the next week. He killed his own three daughters and their chaperone.

So, that seems like it is pretty actively interfering with the Federal decision to pursue removal in this proceeding, does it not? So, by the very terms of your testimony that is something that would be unlawful as well.

Mr. JADWAT. Again it sounds like from what you said that the Federal Government asked the police to do something and they said no, or the sheriff to do something and they said no.

Mr. KILEY. Taking the decision out of the hands of the Federal Government authorities, correct?

Mr. JADWAT. That's again the anticommandeering principle that was elucidated by the Supreme Court in *Prince v. United States*, which was about sheriffs not doing the Federal Government's bidding in enforcing gun regulations. It's the same principle that applies here.

Mr. KILEY. Thank you. My time has expired. I yield back.

Mr. ROY. I thank the gentleman from California.

I now recognize the gentlelady from Texas.

Ms. ESCOBAR. Thank you, Mr. Chair, and many thanks to our panel.

I represent El Paso, Texas. I am the only Member of this Committee who lives on the U.S.-Mexico border, and in fact, it has been my community that has had the highest numbers of apprehensions and encounters, and we probably will again this year.

This hearing is a very brazen effort to provide political cover to my Governor, Governor Greg Abbott, who has unconstitutionally used State resources to try to impose the State's own immigration policies and laws.

The current amount being used by the State is \$11 billion, \$11 billion of State taxpayer money, and I think we can all agree because a witness said earlier, "Texas has the highest number of encounters." That is true. El Paso, the highest number of encounters.

Obviously, what Greg Abbott is doing is an absolute failure. There is nothing about what Greg Abbott is doing that is about trying to improve the situation, trying to solve a great challenge. It is all about political posturing, which is what this Subcommittee has become about, which is what this Committee has become about, and it is unfortunately about what this Congress has become about. It is really tragic because our Nation deserves bipartisan solutions that make sense and that help our country.

Instead, what we are doing here today is advancing a crackpot legal argument that is itself based on a racist conspiracy theory. That theory, the argument is rooted in the repeated cries of an invasion, which is a dog whistle for the Great Replacement theory.

The Great Replacement theory actually was a motivator for a White supremacist who drove to my community and slaughtered 23 people and injured dozens more. So, there are deadly consequences to this kind of hate speech.

Why else would the Majority invite a witness whose organization is linked to Right-wing anti-immigration organization founded by a White nationalist if not to promote these theories.

Mr. JADWAT, I would like to ask you, are you familiar with the Great Replacement conspiracy theory?

Mr. JADWAT. Yes.

Ms. ESCOBAR. How does the argument that there is an actual invasion at the Southern border feed into this racist conspiracy theory?

Mr. JADWAT. So, I think it dehumanizes people by treating them not as people, but as invaders. As I discussed before, it paints them as violent when everybody here would agree that the vast majority of people who come to the border are not. It authorizes violence against them, and that is the truly dangerous piece of this language.

Again, the contention here is it doesn't just—this is not a rhetorical point. This is not a metaphor that they're using. They're saying as a matter of law that we are authorized to use the tools of war in responding to what we have termed an invasion. I think you heard this comparison to defending your home against an invasion and how you wouldn't look at the Constitution or the statute books before you took matters into your own hands and responded with violence. That is not the way that we can or should be responding to what's happening on our border.

As you know, as somebody from a border community the sort of chaos and violence that would be unleashed if that were the rule would be profoundly, profoundly destructive.

Ms. ESCOBAR. I will close by saying it already has been and the survivors of the August 3, 2019, massacre in El Paso, Texas can

testify to just how destructive and dangerous that kind of language is. I yield back.

Mr. ROY. I thank the gentlelady from Texas.

I now recognize the gentlelady from Wyoming.

Ms. HAGEMAN. Thank you.

Mr. Brnovich, you stated a moment ago that States want to do everything they can to protect their citizens. Would you agree that every single Member of Congress should also take whatever steps are necessary to protect their citizens?

Mr. BRNOVICH. I believe every Member of Congress takes an oath to swear to uphold the Constitution of the United States and that includes protecting their citizens within their States or districts.

Ms. HAGEMAN. Mr. Jadwat, you defend sanctuary cities under the concept of the Tenth Amendment, which I am really excited to hear a liberal talk about the importance of the Tenth Amendment. I think we can have a lot more discussions about what we ought to be doing under the Tenth Amendment. You used the Tenth Amendment claiming that it is an anticommandeering theory, but isn't that exactly what the Biden Administration is doing, is commandeering the resources of Texas and Arizona and every other State in the Nation to absorb the costs associated with illegal immigration?

Mr. JADWAT. So, commandeering refers to—

Ms. HAGEMAN. I want you to answer my question.

Mr. JADWAT. Well, no. Not under the legal definition—

Ms. HAGEMAN. When Texas has to use its resources to absorb the costs associated with illegal immigration, isn't that commandeering?

Mr. JADWAT. Not within the meaning of the—

Ms. HAGEMAN. OK. Then, I am not going to bother with you if you are not going to actually engage on the terminology that you use.

Mr. Brnovich, in February 2022, you drafted an Attorney General opinion on the Federal Government's duty to protect the States and the States' sovereign power of self-defense when being invaded. One of the questions you address is what constitutes actually invaded for the State self-defense clause an invasion for the invasion clause. Mr. Brnovich, what do you conclude the scope of invasion means in the Constitution and does the Constitution's contrasting of invasion with insurrection, rebellion, and domestic violence create a situation where it can be applied to non-State actors?

Mr. BRNOVICH. Our opinion lays forth the distinction between domestic insurrections and rebellion versus an actual invasion. If you go back to the *Federalist Papers*, which were designed during the constitutional ratification, the debates in *Federalist 41*, *Federalist 42*, *Federalist 43*, James Madison set forth clearly that invasion constituted not only State, but non-State actors.

In fact, during the ratification, during the Virginia ratification debate one of the examples future President Madison used was the fact that there was pirates and smugglers off the coast of Virginia and that Virginia had a right to defend itself against people that were breaking the law. If the Federal Government, the Federal Navy, just—nonexistent at the time, couldn't do anything, then the State of Virginia could.

So, even a lot of the conversation, the discussion we've had today is about whether States can enforce immigration law. The reality is that the Federal Government—the President has had his/her height of power when it comes to immigration law. However, the courts have never said that States do not have the ability to protect themselves, that States do not have the ability to stop or repel an invasion.

If you read our opinion, we lay forth not only the facts—and we've heard so many facts from this Congress about the number of people dying. I mean, my goodness, more than 100,000 Americans dying from fentanyl and drug overdoses. We've seen a spike in Arizona just in the last five or six years from single-digit percentages into above 50 percent when it comes to those deaths.

We've seen a spike in violence. Anybody—I would urge you to come to the Southern border. When you see rape trees where women are being victimized and traumatized by human smugglers and the drug cartels you will ask yourself why isn't this Congress, why isn't this administration doing more, not only to protect our citizens here, but also to stop people from being exploited by the cartels and gangs?

Ms. ESCOBAR. It is an incredibly inhumane situation that has been created by this administration.

Joshua Trevino of the Texas Public Policy Foundation clarified that invasion means entry plus enmity, and the action of modern non-State actors can meet this threshold if they reach a scale where they overthrow or curtail the lawful sovereignty of a State.

Mr. Brnovich, you were the Attorney General of Arizona where you served as the Chief Legal and Law Enforcement Officer. Can you speak from your experience about whether the actions of the cartels displace State sovereignty and constitute entry and enmity?

Mr. BRNOVICH. As you know, the States are absorbing a cost not only fiscally, but a cost to human treasure as well. We just talked about the tragic drug overdoses and the drug deaths. We've also seen a spike in violence. If you talk to the sheriffs not only along our Southern border, but sheriffs in places like Pinal County, they will tell you they've seen a dramatic increase in the number of car pursuits and car chases which also are dangerous to our community.

It seems like every day now you see a video of literally cartel members escorting people across our border. So, as every day goes on and the administration refuses to act the cartels are getting more and more powerful. They have made billions, if not trillions of dollars off the last three years and what's happened. As a result of that my worry as an Arizonan and as a first generation American is that Mexico is on the brink of becoming a narco-State.

Ms. ESCOBAR. Thank you. I appreciate that and I yield back.

Mr. ROY. I thank the gentlelady from Wyoming.

I will now recognize the gentlelady from Vermont.

Ms. BALINT. Thank you, Mr. Chair. Let's talk about invasion. Let's talk about the invasion of the U.S. Capitol on January 6, 2021, when the heart of American democracy was attacked by a mob, many of them violent, of then President Trump supporters who fought to keep him in power illegally.

The evidence is overwhelming and yet many, many Republican Members of the House not only continue to deny the truth, but still will not admit that Joe Biden won the 2020 election. This includes our current House Speaker, who even as recently as several weeks ago refused to affirm that Joe Biden won the 2020 election and is the legitimate President of our Nation. The Speaker of the House.

It includes another Member of GOP House leadership who has taken to calling those imprisoned for their illegal actions on January 6th hostages. Hostages. They attacked our very democracy and yet they are the victims? It is morally bankrupt. This is not only a sick twisted perversion of the truth. It is also deeply offensive to Americans across this country.

What my extreme MAGA Republican colleagues and their apologists are doing is perpetrating a deeply cynical psychological manipulation. They tell us we can't trust our own eyes, that the men and women in uniform here at the Capitol were not battered and bloodied by the mob. They tell us that it is not true that Members and their staff were hiding in fear for their safety, that it is not true that Democrats and Republicans on that day knew that they were in danger, and that the President, who incited the riot and the invasion and the insurrection—they knew this truth and they said on that day we are done with this guy. We know the role that he played. We are done with this guy. They knew his role, they saw it up close, and then they backpedaled and apologized for Trump and spread misinformation.

So, I find this offensive as a public official who has sworn to uphold the Constitution, but it is also deeply concerning as an American who cares deeply about this country and the Constitution. So, you have to forgive me, you got to give me a little grace here for not being able to take this hearing seriously.

This hearing, as we have said, is an absurd legal argument. The Constitution is clear: The Federal Government is supreme in matters of immigration and border policy. With all due respect to Chair Roy, I believe that his call for Texas to ignore the Supreme Court is an endorsement of lawlessness and chaos.

I am a thoughtful and committed public servant. Yes, we need a secure border. Yes, we need humane border policy. We need immigration reform. We need more legal pathways for migrants to work. Yes, we are a deeply divided Congress, and we must work in a bipartisan manner to actually solve the immigration issues that have plagued us for decades. Yet, that is not what this hearing is about. It is worse than a distraction. It is worse than a waste of time. It is actually an insult to Americans everywhere.

Right now, Senators, Republicans and Democrats, are working on a compromise immigration bill. Right now, the President has said that he is prepared to sign a bipartisan immigration bill. Right now, the President has said he will put an additional \$14 billion into securing the border.

What has been the response from my Republican colleagues in the House? No. The response is no. Trump doesn't want it, so we don't want it. We don't want a solution, we don't want to alleviate suffering, we don't want to actually secure the border. So, you have to give me some grace, you have got to forgive me for not believing the calls for this being such an emergency.

A bipartisan group in the Senate says we have a solution. The MAGA response has been let's keep the chaos; we are good. Let's keep the suffering; we are good. The supposed extreme danger doesn't seem so extreme as I sit in this hearing because it is not good for the ex-President. So again, forgive me for not taking this hearing seriously.

Our Republican colleagues have made it clear repeatedly that they will not work in a bipartisan manner on actual immigration reform. I yield back.

Mr. ROY. I thank the gentlelady from Vermont.

Since my name was invoked, I will just note that border patrol agents reach out all the time and they are thankful that the razor wire is being implemented by Texas. So, keep it up.

I will now yield to the gentleman from South Carolina.

Mr. FRY. Thank you, Mr. Chair. I would like to yield two minutes to my colleague and good friend from Arizona, Mr. Biggs.

Mr. BIGGS. Thank you. I appreciate the yielding to me.

I am going to ask you, Mr. Brnovich, is it absurd on its face to argue that the same Federal Government that is not protecting the sovereign State from an invasion under Article 4, Section 4, also gets to determine the definition of what constitutes an invasion?

Mr. BRNOVICH. Mr. Biggs, yes, I think that this is quite the dilemma the administration has. I think most Americans and most Arizonans that I talk to ask me why was President Biden so quick to tear down the border fence in Texas, but so slow to shoot down a Chinese spy balloon? I think that is an indication of where the priorities are for this administration.

As you know, in Arizona we see—every day we deal with constituents, former constituents, people that have lost a loved one, very often teenagers, young people as a result of the fentanyl pouring across our Southern border. We've seen a rise and spike in violence. So, if the Federal Government is unwilling or unable to do its job to secure the border, then I think the States have every ability to do so.

Mr. BIGGS. It has previously been defined—one definition of invasion is an encroachment on rights of another. So, I guess I would ask you, in Arizona—I have got 30 seconds left—is the environmental damage caused by hundreds of thousands of people illegally entering the country, littering, tramping over actually natural wildlife preserves, destroying those preserves—might that constitute the damage—encroachment of the rights that constitutes invasion?

Mr. BRNOVICH. Yes, Congressman Biggs, we actually made this argument when we sued the Biden Administration over its failure to build the border wall. There's an average of eight pounds of trash per person left at our Southern border. So, not only are people that are crossing the Southern border destroying Arizona and Texas and other natural habitats, they're destroying game trails and they're leaving very often behind plastic bottles, gasoline tanks, and all sorts of other items that are nonbiodegradable—do constitute a threat to the environment and animals living in those regions.

Mr. BIGGS. I yield back to the gentleman from South Carolina.

Mr. FRY. Thank you, Mr. Biggs.

I am going to piggyback on—I think you were going to make a comment, general, about Replacement Theory earlier and you were out of time. Would you care to comment on that, sir?

Mr. BRNOVICH. Yes, I thank you very much for that question, Congressman Fry. I will tell you as a first generation American I find it very insulting for people to assume or accuse people up here, including myself, of somehow advocating some theory. What I do know as someone that grew up speaking Serbo-Croatian as my first language, I think it wasn't until the fourth grade that I realized my name was Brnovich and not Burniwich or Brontosaurusvich or any other words that rhyme with that. That's just what the teachers called me.

I will tell you this is a Nation founded on the rule of law and what we are seeing right now is that shredded in the process. As Americans we don't have a common religion, we don't have a common ethnic identity, but we are founded on these sacred documents: The Constitution and the Declaration of Independence. That's what binds us together.

Any time you have a process that not only creates a threat to public safety as we've seen with the gangs and cartels seizing operational control of our Southern border—and that affects all of us, but we also see the process of the President's failure and Secretary Mayorkas' failure to do their job a shredding of the U.S. Constitution. So, the very reason why people are coming here—because no matter who you are or where you come from you can become an American. It is being shredded in the very process and the rule of law is being undermined by the chaos that's occurring at our Southern border.

Mr. FRY. You are right, and it is frustrating, general. I am struck just being in this Committee room today, quite frankly, that my colleagues on the other side seem to be suffering from a little bit of amnesia because it wasn't long ago as a freshman that I sat down there in my first hearing and the comment was made by the Ranking Member that Republicans were imagining a border crisis. This wasn't like five years ago or 10 years ago. This was last year.

So, the amnesia has struck and now all of a sudden they are border hawks and they want to have us accept a Senate deal, which doesn't seem to be a deal in any which way for the American people.

What is interesting to me is we have always had an effort by the Feds under Republican and Democratic Administrations to fix the issue, right? Even the former Secretary of Homeland Security under Obama said that, "if 1,000 migrants in a day, that is a crisis point," but they want us to accept in a deal 5,000 and then they will shut down the border.

So, let me ask you this: Considering that the Federal Government, in general, is not doing its job, what remedies do States have to pursue fixes to this, because the burden is heaviest on those at the Southern border?

Mr. BRNOVICH. Congressman, this is exactly the reason I think States like Texas have done this very reluctantly. I mean as you said, this has been going on for years and for years the States were waiting for the Federal Government to do its job. It refuses to do so. So, I think it's incumbent on Congress to either impeach Fed-

eral officials that are refusing to do their job, to cutoff funding for those agencies, or alternatively—I mean even during the Obama Administration, during the Bush Administration we had Operation Streamline.

The laws exist where if there was a surge essentially to our Southern border—I wish we worried more about your Southern border than the border between Russia and Ukraine. If there was a surge to our Southern border with prosecutor and judges, once again you would see a dramatic decline in the number of people illegally the country.

So, the answer to this question, it shouldn't be. The States shouldn't have to do the job the Federal Government won't. The answer though is clearly that the Biden Administration won't do its job. The States are frustrated. People are dying. There are expensive costs not only in human treasure, but in real treasure. That's why States like Texas are finally acting.

Mr. FRY. Correct. \$1,100 per American citizen. That is an astronomical amount.

With that, Mr. Chair, I yield back.

Mr. ROY. I thank the gentleman from South Carolina.

I will now recognize the Ranking Member, the gentlelady from Pennsylvania.

Ms. SCANLON. Thank you, Mr. Chair.

I just wanted to try to clarify some of the points that have been made throughout the debate. The gentlewoman from Wyoming raised Mr. Brnovich's writings laying out his position with respect to the fringe legal theory about invasion that we have seen pressed in this hearing. We continue to want to point out that this is a political argument, that it is not a constitutional argument.

I would seek unanimous consent to place in the record the article in the Arizona Mirror from July 7, 2022, when Mr. Brnovich laid out his position entitled, "Brnovich lagging in the polls, begs Ducey to declare an 'invasion' to militarize the border."

Mr. ROY. Without objection.

Ms. SCANLON. Thank you.

I know Mr. Jadwat was asked some questions about whether there was a contradiction between the clear language of the Constitution and the Supreme Court's holdings saying that the Federal Government has sole authority over issues regarding immigration and admission to this country. He was asked whether the use of the National Guard in California to address smuggling and distribution of fentanyl in that State somehow was contradictory there.

Now, I know that we don't have before us the exact terms there, but is there a distinction, Mr. Jadwat, between the Federal supremacy on issues of border security and immigration and the State's ability to enforce criminal laws within their own State that do not directly address border security?

Mr. JADWAT. Yes, there is. The States obviously have criminal laws of their own and the ability to enforce them.

Ms. SCANLON. So, if someone brings fentanyl into the country and then seeks to distribute it in California, California would be justified in trying to stop that distribution in its State?

Mr. JADWAT. Yes. I assume that's illegal under California law.

Ms. SCANLON. You have been asked a lot of questions about the meaning of invasion, and many of those questions have kind of run roughshod over the constitutional meaning and the constitutional history. Can you just lay out one more time what the constitutional meaning is and the historical context for the invasion clause?

Mr. JADWAT. Sure. Again, the reference to invasion that folks are relying on here is actually an exception to the rule, right, actual invasion. The main point of the compact clause is that States can't engage in war or do any of that other long litany of things; that's a Federal responsibility, right?

So, the exception, for the clause itself to make sense, can't be so broad that it swallows the rule. The theory that they're putting forward here of an unreviewable ability of any Governor to point to pollution, to point to gangs, to point to people coming in and say, voila, invasion, I get to wage war would completely undermine the main purpose of the compact clause.

With respect to Mr. Brnovich, when Madison talked about pirates, he wasn't purporting to define what an invasion was at all, much less an invasion under that clause of the Constitution. When Madison did talk about the invasion clause in immigration, he said that "immigration was not an invasion"—well, he said that "invasions that require the war power and immigration are distinct things."

So, there's no contemporary support for their position at the time, at the founding. The text obviously doesn't support what they're saying. The implications of their argument, which again nobody has purported to address on this panel, are really breathtaking and would really undermine our entire constitutional system.

Ms. SCANLON. I appreciate that. If we do turn back to the actual clause in the Constitution, it talks about the obligation of the Federal Government, not the administration. So, our continuing concern is that we are in a situation here where our colleagues are blocking legislation that would allow the Federal Government to address issues of border security and they are blocking funding that would allow the administration to address border security, and then placing us in this position where they then flip it and try to argue.

I do want to thank Representative McClintock for pushing back on this deeply disturbing idea that the Federal Government is bound by the determination of individual States in interpretation of the Constitution. Again, that would completely upend our constitutional order.

I see my time is expired, so I would yield back.

Mr. ROY. I thank the Ranking Member, and I now recognize the gentleman from North Carolina, Mr. Bishop.

Mr. BISHOP. Thank you, Mr. Chair. I yield to the gentleman from Texas presiding, Mr. Roy.

Mr. ROY. I thank the gentleman.

Question for the panel: I mean what amount of death and destruction among the people of Texas, or any other State is sufficient to say the State should take action? Under the law. Like how much death should Texas take? How many Texans should die every day? Again, fentanyl. We have got 75,000 across the country, what-

ever the thousands are in Texas. How many of those should die every year before the State of Texas does something about it?

OK. Put aside the fentanyl because, oh, that is all ports of entry problem. That is bogus. We could have that debate separately. There are other issues about border patrols distracted. I would just say, Mr. Webster, as someone who is a Texan, what is your answer to that question? Right, before Texas takes action, the Governor is taking action in the absence of action by the President of the United States do you think there is a level of death/destruction/danger to the people of Texas that he should tolerate in the absence of the Federal Government doing its job?

Mr. WEBSTER. No, there's no—I think the Governor has a duty and obligation to protect the citizens of Texas and when he sees harms coming on Texas, he had an obligation to act, and has.

Mr. ROY. Yes. Mr. Jadwat, I mean is there a level of danger to the people of Texas that you believe would say the Governor has a right to defend itself, as in a family whose house is being invaded at night, has people coming in and trying to attack one's family? Does the Governor not have some duty to be able to defend? For example, if cartels came across the Rio Grande guns ablazing, not wearing the uniform of Mexico, but just a hodgepodge of individuals in various articles of clothing came across guns ablazing into Laredo, could the Governor repel that with DPS? Not the National Guard. Could the Governor say you guys—boys, shoot back?

Mr. JADWAT. Are you asking whether Texas has the police power to address armed people running around in the street shooting guns?

Mr. ROY. Coming across the Rio Grande. They are armed. Can the Governor repel that?

Mr. JADWAT. Once they are in the State of Texas if they're violating Texas' criminal laws, of course the Governor has the ability to—

Mr. ROY. Oh, so if they are violating Texas' criminal laws apparently the Governor can do something about it? That is an interesting observation. I think it is an important one. Because of course the Governor of Texas can deal with it if the laws of Texas are being violated, and the people that the Governor is supposed to represent are entitled to defend them.

I would ask another question, which is would the States, in this case Texas or Arizona—we have two representatives from those two States here, past and present. Would those States have entered the Union had the theory being promulgated by my colleagues on the Left been openly put forward and said that we, the Federal Government, will not enforce immigration laws to the tune of 900,000 releases last year, plus hundreds of thousands of more through parole, plus hundreds of thousands more gotaways, overwhelming the jails, that we said, oh, sure, just use the jails? Go do it. Go arrest people that are bad actors, filling the jails, filling the hospitals, filling the schools. If the Federal Government had said here is the deal, Arizona, here is the deal, Texas, can either of you gentleman imagine a scenario in which Arizona or Texas would have joined the Union? Texas in 1845 and, forgive me for not knowing the year for Arizona.

You, Mr. Brnovich, or Mr. Biggs would know.

Mr. Webster, could you answer that question? Would they have joined the Union under that theory?

Mr. WEBSTER. If I was there, I can't imagine taking on a situation where I would be defenseless, and what you're proposing is a situation where Texas would be defenseless.

Mr. ROY. Correct.

Mr. Brnovich, can you imagine that scenario?

Mr. BRNOVICH. Well, I will just go—as we talk about first principles and documents—and Mr. Webster just spoke, so let me quote from Daniel Webster's 1806 dictionary, the first American dictionary. At that time the word invaded was defined to mean, "enter or seize in a hostile manner." Webster's 1828 dictionary furthermore went to describe invasion to include "attack, assault, assail, to attack, or infringe, or encroach on, and violate."

If you look—with all due respect to my colleague at the end of the table; he had mentioned James Madison, look, I mean during the constitutional debates if you read *Federalist 43*, you read the original *Federalist Papers*, the States entered this Union. The States created the Federal Government with an expectation that the President, the Commander-in-Chief would exercise authority when it came to the Commander-in-Chief authority in defending the States.

However, that's why you have to read this all together: Article 1, Section 10, and also, Article 4. The States have this inherent right to defend themselves when the Federal Government will not do its job. So, it's not an offensive or a proactive power, so to speak. It is defensive in nature that every State has the ability to defend itself and its citizens from either State or non-State hostile actors.

Mr. ROY. Well, I agree, and I appreciate the comments from the gentleman from Arizona, the Attorney General. I appreciate that.

With that I am going to recognize the Chair of the Judiciary Committee, the gentleman from Ohio, Mr. Jordan.

Chair JORDAN. Thank you, Mr. Chair.

Mr. Webster, what if we just called a time out? What if we just said no more? We are pace to get the 12 million. What if we just said time out? No more migrants can come into the country. Wouldn't that make some sense?

Mr. WEBSTER. That would make absolute sense and would be what Congress intended when it passed the laws we have on the books right now that gave the President the power to stop this.

Chair JORDAN. Mr. Attorney General Brnovich, would you say the same? Would you say call a time out? It has gotten to—we are on pace in the Biden Administration to reach 12 million, the equivalent of the entire population of Ohio. Maybe it is time to say time out. Three years and 10 days of this is enough.

I would argue the way we do that in a legislative body—the way our Constitution works is we have power of the purse. So, we say no money can be used to process or release into the country any migrant. How about this for Texas and for Arizona and for New Mexico? No money can be used to take down any border structures that those States have put up to enforce the law. What if we just said you can't spend money to tear down the fence you are putting up? You can't spend money to process and release into the country new migrants coming and just say time out. It has gotten so bad,

let's just call a halt to it now and have an election and see what the American people say.

Mr. BRNOVICH. Mr. Chair, obviously the States have become very frustrated with the inability of the Federal Government to do its job. As I have mentioned previously, Congress does have remedies. Congress could impeach officials for failing to protect our—

Chair JORDAN. Well, they are doing that right now, yes.

Mr. BRNOVICH. That's what I've heard. Congratulations. I'm glad it's finally happening. You also have the ability, I believe, to cutoff funding, as you mentioned, to the Federal Government to stop them from interfering with Texas' ability to—

Chair JORDAN. I am not trying to cut you off because you agreeing with me, but I want to recognize—I told him I would give him four minutes; I am giving him 3:20—so, I yield my time to the gentleman from Arizona.

Mr. BIGGS. I thank the Chair.

So, my extreme Marxist colleague, who is a mindless follower of Joe Biden, raised the specter of insurrection and lawlessness. The lawlessness that she was talking about was January 6th. How about the lawlessness at the border every day? Title 8 is violated every day by this administration.

Ms. BALINT. Can I raise a point of order?

Mr. BIGGS. The Title 8—

Mr. ROY. Just hold on the time. The gentlelady has a point of order.

Ms. BALINT. Can we ask Members of the Committee not to cast dispersions on Members of the Committee?

Mr. BIGGS. Oh, we had aspersions cast on us by your Member, ma'am.

Mr. ROY. Yes, my observation is that extreme MAGA is used on a daily basis by the second—

Mr. BIGGS. Repeatedly.

Mr. ROY. —and so saying extreme Marxist is fair game. I yield—have the gentleman from Arizona continue.

Mr. BIGGS. Thank you. So, the lawlessness that you see is coming across the border every day, failure by this administration to enforce the law.

So, let's get back to this. I would just want to say one other thing: This is relative to what we have heard from one of our panelists. He is conflating again immigration law with border security. Now, there is a reason that you have three provisions in the Constitution that kind of addresses Article 1, Section 10, twice, Article 4, Section 4. One is dealing with invasion, and that is the security and safety of the Nation, of the sovereign States. The sovereign States that actually created this Federal Government.

The article in Section 10 that Mr. Brnovich brought forward with the authority under Article 1, Section 10, that a State may defend itself when it has been actually invaded. Also, the invasion clause, Article 1—Article—excuse me, Article 4, Section 4. That is what we have been talking about. The import-export clause. That is the one I want to get to. Article 1, Section 10. A very unique understanding, but it gets at the heart of this.

Expand please, Mr. Brnovich, in about 30 seconds your idea of the sovereign authority that rests with a State under the import-export clause, Article 1, Section 10.

Mr. BRNOVICH. Thank you, Mr. Biggs, for bringing up this very, very important point we haven't had a chance to discuss today.

The import-export clause provides that States do have the ability to control what kind of goods are coming into their States. Even if you accept the premise of what other Members of this Committee have talked about as far as States not being able to enforce immigration law, that's generally true, however States can control what is coming into their States.

So, for example, Arizona, we have 10 ports of entry. I believe in Texas there's 28 ports of entry. If the Biden Administration wants to create an 11th, 12th, 29th, 30th port of entry, then Congress and the Federal Government can do that. The States at the same time have the ability to force and channel all people, all goods, and commerce into those lawful ports of entry. So, I do believe there's a very strong constitutional argument putting aside some of the other language, but even under the import-export clause that States have the ability to force anyone coming into Texas, Arizona, or California, any other border State, into those lawful ports of entry.

Mr. BIGGS. So, we get to the point it—also again, just we were discussing about Article 4, Section 4, the invasion clause—in this clause; this is actually even more explicit, the authority rests with the sovereign State. It does not devolve into the Federal Government.

Why would you allow the Federal Government then to say you can't have control of import-export and you can't control what—and determine what an invasion is when the sovereign State—and don't forget, the Founders intended to recognize the sovereignty of the States to govern themselves. If you are going to turn the definition of invasion over to the Federal Government, who is violating the invasion clause, it just stands logic on its head. Yield back. Thank you.

Mr. ROY. I thank the gentleman from Arizona.

I assume there are no more witnesses from my colleagues on the other side of the aisle.

So, with that, this will conclude today's hearing. We thank the witnesses.

We don't have any more witnesses, right? OK.

That concludes today's hearing. We thank the witnesses for appearing before the Committee today.

Without objection, all Members will have five legislative days to submit additional written questions for the witnesses or additional materials for the record.

Without objection, this hearing is adjourned.

[Whereupon, at 12:04 p.m., the Subcommittee was adjourned.]

All materials submitted for the record by Members of the Subcommittee on the Constitution and Limited Government can be found at: <https://docs.house.gov/Committee/Calendar/ByEvent.aspx?EventID=116766>.