

No. 22-58

In the Supreme Court of the United States

UNITED STATES OF AMERICA, *ET AL.*,

Petitioners,

v.

STATE OF TEXAS AND STATE OF LOUISIANA,

Respondents.

***On Writ of Certiorari to the
U.S. Court of Appeals for the Fifth Circuit***

**MOTION OF SHERIFF BRAD COE *ET AL.* TO
SUPPLEMENT JURISDICTIONAL
ALLEGATIONS UNDER 28 U.S.C. § 1653**

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PARTIES TO THE PROCEEDING

Petitioners—defendants-appellants below—are the United States of America; the U.S. Department of Homeland Security (“DHS”); U.S. Customs and Border Protection (“CBP”); U.S. Immigration and Customs Enforcement (“ICE”); U.S. Citizenship and Immigration Services (“USCIS”); Alejandro Mayorkas, in his official capacity as Secretary of Homeland Security; Chris Magnus, in his official capacity as Commissioner of CBP; Tae D. Johnson, in his official capacity as Acting Director of ICE; and Ur Jaddou, in her official capacity as Director of USCIS.

Respondents—plaintiffs-appellees below—are the State of Texas and the State of Louisiana.

Movants—plaintiffs in *Coe v. Biden*, No. 3:21-cv-0168-JVB (S.D. Tex.) and movants for intervention in this action—are Kinney County, Texas, and Kinney County Sheriff Brad Coe in his official capacity; Edwards County, Texas, and Edwards County Sheriff J. W. Guthrie in his official capacity; McMullen County, Texas, and McMullen County Sheriff Emmett Shelton in his official capacity; Hudspeth County, Texas, and Hudspeth County Sheriff Arvin West in his official capacity; Live Oak County, Texas, and Live Oak County Sheriff Larry Busby in his official capacity; Real County, Texas, and Real County Sheriff Nathan Johnson in his official capacity; Galveston County, Texas; and the Federal Police Foundation, ICE Officers Division.

RULE 29.6 STATEMENT

Movant Federal Police Foundation, ICE Officers Division, has no parent company, and no publicly held company owns 10 percent or more of its stock. The

other movants are Texas officials and counties, with no parent companies or stock.

TABLE OF CONTENTS

Parties to the Proceeding i
Rule 29.6 Statement..... i
Table of Authorities..... ii
Motion to Supplement Jurisdictional Allegations
under 28 U.S.C. § 1653 1
Introduction..... 1
Argument..... 2
Conclusion 3
Supplemental Appendix..... i
Declaration of Thomas Homan 1
Declaration of Tully Shahan..... 7

TABLE OF AUTHORITIES

Cases

Mathews v. Diaz,
426 U.S. 67 (1976) 2
Newman-Green, Inc. v. Alfonzo-Larrain,
490 U.S. 826 (1989) 2
Willingham v. Morgan,
395 U.S. 402 (1969) 2

Statutes

28 U.S.C. § 1653 1-2

Rules, Regulations and Orders

S.Ct. Rule 21..... 1

MOTION TO SUPPLEMENT
JURISDICTIONAL ALLEGATIONS
UNDER 28 U.S.C. § 1653

Pursuant to this Court’s Rule 21, movants Kinney County, Texas, and Kinney County Sheriff Brad Coe in his official capacity; Edwards County, Texas, and Edwards County Sheriff J. W. Guthrie in his official capacity; McMullen County, Texas, and McMullen County Sheriff Emmett Shelton in his official capacity; Hudspeth County, Texas, and Hudspeth County Sheriff Arvin West in his official capacity; Live Oak County, Texas, and Live Oak County Sheriff Larry Busby in his official capacity; Real County, Texas, and Real County Sheriff Nathan Johnson in his official capacity; Galveston County, Texas; and the Federal Police Foundation, ICE Officers Division (collectively, “Movants”) respectfully move this Court to supplement their jurisdictional allegations in support of their pending motion to intervene in this action with the two declarations accompanying this motion in the Supplemental Appendix (“Supp. App.”) attached hereto.

INTRODUCTION

On October 25, 2022, Movants filed their motion to intervene in this action. On November 3, 2022, the federal petitioners filed an opposition to that motion. The state respondents did not oppose the motion to intervene. Because the federal petitioners question Movants’ standing, Fed. Opp’n at 4, Movants seek this Court’s leave to supplement their jurisdictional allegations pursuant to 28 U.S.C. § 1653, which provides that “[d]efective allegations of jurisdiction

may be amended, upon terms, in the trial or appellate courts.” *Id.*

The Declaration of Thomas Homan, Supp. App. 1a, provides additional evidence that the challenged policies caused the increase in illegal immigration across the southern border. *See* Homan Decl. ¶¶ 16, 18-19, Supp. App. 5a-6a. Mr. Homan is a former Acting Director of the U.S. Immigration and Customs Enforcement (“ICE”) with over 34 years of experience with ICE and its predecessor agency. *Id.* ¶¶ 3-4, Supp. App. 7a.

The accompanying Declaration of Tully Shahan, Supp. App. 7a, provides additional evidence that the county movants generally and Kinney County specifically suffer financial harm from the challenged policies and the resulting increase in illegal immigration. *See* Shahan Decl. ¶¶ 5-7, Supp. App. 8a-9a. Judge Shahan is the County Judge of Kinney County. *Id.* ¶ 2, Supp. App. 8a.

Both declarations thus provide additional information that is relevant to establishing Movants’ standing to challenge the federal immigration policies at issue in this action.

ARGUMENT

Section 1653 allows appellate courts to amend the allegations of jurisdiction with later-filed affidavits or declarations. *Willingham v. Morgan*, 395 U.S. 402, 407 & n.33 (1969); *Mathews v. Diaz*, 426 U.S. 67, 75 n.9 (1976); *cf. Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 830-31 (1989).

CONCLUSION

The Court should grant this motion to supplement the jurisdictional allegations supporting the motion to intervene.

Dated: November 15, 2022 Respectfully submitted,

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SUPPLEMENTAL APPENDIX

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DECLARATION OF THOMAS HOMAN

I, Thomas Homan, hereby declare:

1. I reside in Fredericksburg, Virginia, am a United States citizen more than 18 years of age, and am fully competent to testify in a federal court.

2. On February 23, 2022, the district court in this action designated me as an expert on Immigration Enforcement, and on the same date I testified as such an expert in this action for respondents.

3. I am the former Acting Director of U.S. Immigration and Customs Enforcement (ICE), U.S. Department of Homeland Security (DHS), a position I held from January 2017 to June 30, 2018.

4. I have over thirty-four years of experience working for ICE and its predecessor entity, the Immigration and Naturalization Service (INS).

5. I hold a Bachelor of Science degree in Criminal Justice from the State University of New York Polytechnic Institute (formerly SUNYIT) at Utica-Rome.

6. I am a 34-year veteran of law enforcement, having begun my career as a police officer in New York in 1983. In 1984, I became a U.S. Border Patrol Agent with the former Immigration and Naturalization Service (INS) in Campo, California. In 1988, I became an INS Special Agent in Phoenix, Arizona, and was later promoted to Supervisory Special Agent and Deputy Assistant Director for Investigations. In 1999, I became the Assistant District Director for Investigations (ADDI) in San Antonio, Texas, and three years later transferred to the ADDI position in Dallas, Texas.

7. The INS was abolished by the Homeland Security Act of 2002, and ICE was created to perform many of its former enforcement functions, along with the investigative functions of the former U.S. Customs Service.

8. Upon the creation of ICE in March 2003, I was named the Assistant Special Agent in Charge in Dallas, Texas. In August 2004, I was named the Deputy Special Agent in Charge (DSAC) in that same office. As DSAC, I directed the day-to-day operations of seven local offices, with more than 200 special agents and support personnel, conducting investigations related to terrorism, export enforcement, illicit financing, money laundering, human trafficking, intellectual property rights violations, and cybercrimes.

9. In March of 2009, I became Enforcement

and Removal Operations (ERO) Assistant Director for Enforcement at ICE Headquarters. In that position, I was responsible for ICE's enforcement initiatives and components through which ERO identifies and arrests removable aliens, including the Criminal Alien Program, the National Fugitive Operations Program, Field Training, the 287(g) Program, the Law Enforcement Support Center, the Fugitive Operations Support Center (now the National Criminal Analysis and Targeting Center), the Detainee Enforcement and Processing Offenders by Remote Technology Center, and the Interoperability Response Centers. In October of the following year, I was promoted to Deputy Executive Associate Director for ERO, and in May 2013, I was promoted to Executive Associate Director for ERO, a position I held until January 2017.

10. From November 2017 to 2018, I held the position of Deputy Director and Senior Official Performing the Duties of the Director of ICE. From January 2017 until June 30, 2018, I served as Acting Director of ICE. In both positions, I directly oversaw ICE's core operational programs, as well as the agency's managerial and administrative support functions.

11. I subsequently authored a book about the problem of illegal immigration and solutions titled *Defend the Border and Save Lives: Solving Our Most Important Humanitarian and Security Crisis* (Center Street 2020).

12. I make this declaration on the basis of my own personal and professional knowledge and experience, as well as information available to me in my positions in public service.

13. On January 20, 2021, inauguration day, DHS issued a memorandum (“January Memo”) in which it announced an immediate 100-day pause of all removals of removable aliens and limited post-pause immigration law enforcement priorities to three categories: (1) National Security (limited to terrorists, spies, or other serious security threats); (2) Border Security (limited to illegal aliens who entered the United States after November 1, 2020); and (3) Public Safety (limited to aliens who have been convicted of an aggravated felony).

14. On February 18, 2021, ICE issued an interim guidance memorandum largely reiterating the enforcement priorities set forth in the January Memo while imposing a new preapproval requirement for non-priority enforcement actions. Under the interim guidance, immigration officers were required to make a written proposal and obtain preapproval from supervisory personnel before taking an enforcement action against a non-priority alien.

15. On September 30, 2021, DHS Secretary Mayorkas issued a memorandum establishing final guidance for immigration enforcement (“Final Memorandum”). In the Final Memorandum, Secretary Mayorkas retained the general priority categories first established in the January Memo, but eliminated any presumption that enforcement action is warranted against aliens who fall within a priority category. Instead, the Final Memorandum states that DHS “personnel must evaluate the individual and the totality of the facts and circumstances and exercise their judgment accordingly,” J.A. 115, and that “[w]hether a noncitizen poses a current threat to

public safety is not to be determined according to bright lines or categories, [but by] an assessment of the individual and the totality of the facts and circumstances.” J.A. 113.

16. As a matter of practice, many arrests are made on little notice and on the streets. Thus, in my opinion, the requirement, even in “priority” cases, that an agent undertake an intensive investigation of “the totality of facts and circumstances” not ascertainable from a quick database search before taking any routine enforcement action will result in drastically fewer arrests; the typical arrest cannot be delayed for such an extensive investigation.

17. Also, the Final Memorandum provides that “[t]he fact an individual is a removable noncitizen therefore should not alone be the basis of an enforcement action against them.” J.A. 112. Thus, absent some aggravating factors, aliens previously defined as removable by Congress and subject to enforcement action at any time are now made unremovable under the Final Memorandum.

18. The memoranda, and especially the language just mentioned, have resulted in historic illegal immigration on the southern border. In FY2021 there were over 1.7 million illegal crossings, and in FY2022 that number increased to more than 2.3 million. This represents two years of historic highs.

19. In my opinion, these increases are in large part because the memoranda have sent a clear message to potential illegal border-crossers that previous immigration law enforcement policies have been largely abandoned. Indeed, mere unlawful

6a

presence has been declared insufficient to warrant DHS action, and, in practice, only extremely dangerous criminal aliens have the potential to face deportation. From my experience in immigration enforcement, including my time in charge of ICE, it is clear that those who desire to cross our border illegally respond to incentives such as the ones in the memoranda. Consequently, I have no doubt that the memoranda have contributed substantially to the increased influx of illegal aliens over our southern border from February 2021 to the present.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 15th day of November 2022 in Fredericksburg, Virginia.

s/ _____
Thomas Homan

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DECLARATION OF TULLY SHAHAN

I, Tully Shahan, hereby declare:

1. I reside in Kinney County, Texas, am a United States citizen more than 18 years of age, and am fully competent to testify in a federal court.

2. I am the County Judge of Kinney County, Texas, which is a plaintiff in *Coe v. Biden*, No. 3:21-cv-0168-JVB (S.D. Tex.), and a movant for intervention in the above-captioned case. Following my election as County Judge of Kinney County, I have served in that office since 01/01/2015.

3. This declaration states the financial costs to Kinney County caused by the sharp increases, which continue to escalate, in the numbers of illegal aliens and human smugglers in Kinney County since February, 2021, and the consequent increases in crime by illegal aliens and smugglers.

4. As Sheriff Brad Coe of Kinney County

stated in his declaration of October 24, 2022, in this action, crime has increased greatly in Kinney County since February 2021, and these increases have been even greater in fiscal year 2022 than in 2021. The vast majority of these crimes have been committed by illegal aliens and smugglers.

5. As Sheriff Coe stated, these increases, over pre-February 2021 levels, in crimes committed by illegal aliens and smugglers in Kinney County in fiscal year 2022 have caused his office to spend well over \$50,000 more of County funds than his office was or will be reimbursed for by the State of Texas in Operation Lonestar and other programs designed to offset such expenses.

6. In addition to these net expenditures by the Sheriff's office in fiscal year 2022, Kinney County incurred the following net expenditures to deal with the increases, over pre-February 2021 levels, in crimes committed by illegal aliens and smugglers in Kinney County in fiscal year 2022:

- EMS immigration non-transport: over \$65,000
- Autopsies and EMS transport: over \$8,000
- Fuel expense: over \$17,000
- Total: over \$90,000

These expenses are above and beyond what Texas has reimbursed or will reimburse the County for in Operation Lonestar and other programs.

7. Thus, when expenditures by the Sheriff in fiscal year 2022 to deal with the increases, over pre-February 2021 levels, in crimes committed by illegal aliens and smugglers in Kinney County and additional such expenditures by the County in that

9a

year are combined, the County has spent over \$140,000 more than Texas has reimbursed or will reimburse it for under Operation Lonestar and other programs designed to offset such expenses.

8. I have personal knowledge concerning the information contained in this declaration.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 14th day of November 2022 in Bracketville, Texas.

s/ _____
Tully Shahan
County Judge,
Kinney County, Texas