No. 23A607

IN THE SUPREME COURT OF THE UNITED STATES

DEPARTMENT OF HOMELAND SECURITY, ET AL.,
APPLICANTS

v.

STATE OF TEXAS

REPLY IN SUPPORT OF APPLICATION TO VACATE THE INJUNCTION PENDING APPEAL

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The court of appeals invoked state common law to enter an extraordinary injunction barring U.S. Border Patrol agents from accessing the very border they are charged with patrolling and migrants they are charged with apprehending, inspecting, and processing. That interposition of state authority to obstruct federal law-enforcement operations turns the Supremacy Clause on its head. It pits state officers against federal officers in a manner that unsettles the underpinnings of our federal system and conflicts with the Immigration and Nationality Act (INA), which limits state involvement in immigration enforcement to cooperation with, not opposition to, federal officers. See 8 U.S.C. 1357(g); Arizona v. United States, 467 U.S. 389, 410 (2012). And it does so by disregarding the limits on Congress's waiver of the government's sov-

ereign immunity in the Administrative Procedure Act (APA) and the restrictions on injunctive relief in the specific context of immigration enforcement. Texas provides no basis for that result.

The district court recognized -- and Texas does not directly dispute -- that Border Patrol agents may remove obstacles that impede their access to the border for purposes of carrying out their statutory responsibilities at the border. Texas's opposition thus hinges on the assertion that Border Patrol agents do not actually cut or move the concertina wire fence in furtherance of their responsibilities to apprehend, inspect, and process migrants on the other side who have crossed the border unlawfully. Indeed, Texas goes so far as to characterize Border Patrol agents as abdicating their responsibilities and instead engaging in a concerted effort to enable the migrants to proceed into the interior unimpeded. But that startling and sweeping accusation -- which contravenes the presumption of regularity in government operations -- is based on a fundamental misunderstanding of what apprehension, inspection, and processing entail under the INA in the circumstances that the agents confront. Both the law and the record show that Border Patrol agents acted consistent with their statutory responsibilities when they moved or cut the wire to apprehend migrants who had already crossed the international border and directed them to another location for processing. And even if that were not true, unauthorized actions by Border Patrol agents in the past would not justify the district court's sweeping grant of

injunctive relief, which is not limited to such allegedly unauthorized conduct and instead undisputedly restrains agents when they are lawfully carrying out their federal responsibilities.

The balance of equities also weighs strongly in favor of vacating the court of appeals' injunction. If that injunction is left in place, it will impede Border Patrol agents from carrying out their responsibilities to enforce the immigration laws and guard against the risk of injury and death, matters for which the federal government, not Texas, is held politically accountable. Weighed against that substantial harm to the government and the public is the cost to Texas of repairing its concertina wire where it has been cut or moved -- harm for which the State can seek compensation from the federal government. That is not the sort of irreparable injury that could justify extraordinary injunctive relief.

I. THIS COURT WOULD LIKELY GRANT REVIEW IF THE COURT OF APPEALS REVERSES THE DISTRICT COURT'S DENIAL OF A PRELIMINARY INJUNCTION

Texas contends (Opp. 11) that this Court's review would not be warranted if the court of appeals directed the entry of preliminary injunctive relief in the form issued by the motions panel, characterizing the decision as a "narrow, fact-bound dispute" over Border Patrol agents' actions. But the breadth of the order shows otherwise. It flatly prohibits Border Patrol agents from moving or cutting the wire along a 29-mile stretch of the Rio Grande under any circumstances absent an extant emergency, thereby barring

those agents from carrying out their law-enforcement responsibilities with respect to migrants on the other side of the wire. And it evinces a basic misunderstanding of what those statutory responsibilities entail. Such an injunction plainly raises important questions concerning a State's ability to regulate federal officers and interposes state authority as an obstacle to the faithful performance of their duties. The court of appeals' reasoning would permit multiple States -- or even private individuals -- to invoke state common law to control the federal government in a way that is inconsistent with this Court's longstanding precedents. See Appl. 16.

Texas is unable (Opp. 28) to downplay the inconsistency in the court of appeals' decision with that of the en banc Ninth Circuit in Geo Group, Inc. v. Newsom, 50 F.4th 745 (2022). Because both the injunction here and the law at issue in Geo Group would "control [the federal government's] operations" under its statutory authority, id. at 755, neither is permissible. The court of appeals' contrary reasoning would warrant this Court's review.

II. THE GOVERNMENT IS LIKELY TO SUCCEED ON THE MERITS

For multiple independent reasons, this Court would likely reverse a decision directing entry of a preliminary injunction like the one the court of appeals has imposed pending appeal.

A. Federal Law Authorizes Border Patrol Agents To Cut Or Move Texas's Concertina Wire Where They Find It Necessary To Perform Their Responsibilities Under Federal Law

The INA provides for the inspection, apprehension, and detention of any noncitizen who is present in the United States. 8 U.S.C. 1225(a)(3), 1226. Border Patrol is expressly charged with the "inspection" and "processing" of noncitizens seeking to enter the United States, and the "detention, interdiction, removal, departure from the United States, short-term detention, and transfer" of persons illegally entering the country. 6 U.S.C. 211(c)(8). And Texas does not dispute that the INA authorizes Border Patrol to "access * * * private lands" within 25 miles of the international border "for the purpose of patrolling the border to prevent the illegal entry of aliens," 8 U.S.C. 1357(a)(3), as well as to interrogate and arrest certain noncitizens suspected of unlawfully crossing the border, 8 U.S.C. 1357(a)(1) and (2). Although Texas hedges at times, it does not ultimately dispute that in the exercise of that authority, Border Patrol agents may remove or cut through physical obstructions. See Opp. 26; see also C.A. ROA 1136-1137 (Texas witness agreeing that Border Patrol may "cut locks on gates if they need to do so to apprehend a migrant"); Appl. App. 41a-42a. As the district court noted, Border Patrol has long "cut locks or fencing that prohibits access to the border." Appl. App. 42a. If that were not the case, any State or individual property owner could erect barriers that would prevent Border Patrol from enforcing the immigration laws.

Texas contends that Border Patrol moves or cuts the wire fence not to carry out its official duties, but instead simply to allow noncitizens who have crossed the border to proceed into the interior unimpeded. That claim contravenes the presumption of regularity, which provides that "in the absence of clear evidence to the contrary, courts presume that [public officers] have properly discharged their official duties." United States v. Chemical Foundation Inc., 272 U.S. 1, 14-15 (1926). In line with that presumption, the record shows that cutting the wire to encourage illegal immigration would "violate the Border Patrol's standards of conduct," C.A. ROA 1213, and that agents instead moved or cut the wire to facilitate the apprehension, inspection, and processing of migrants who had crossed the border, or to provide assistance in cases of danger to migrants, see Appl. 20 & n.5.

In support of its assertion to the contrary, Texas relies on the events of September 20. See, e.g., Opp. 13. But Border Patrol cut the wire that day after several migrants on the United States side of the river attempted to climb up the bank and had been "swept away" by the strong current and elevated water levels due to releases from a dam north of the river. C.A. ROA 1153-1154; see id. at 1149. Border Patrol noted that more migrants had already crossed the border, and that the steep riverbank had become "oversaturated and very muddy and very slippery" as migrants attempted to climb it. Id. at 1158-1159; see id. at 1161. Under those circumstances, Border Patrol reasonably determined that "it

was only a matter of time before more people were going to be swept away" by the strong current, and it cut the wire to avoid that result, id. at 1154, allowing agents to reach the migrants on the riverbank so that they could be apprehended and processed, id. at 1195-1196.

Texas contends (Opp. 12-13) that the district court made factual findings that cutting the wire on that day was not in furtherance of Border Patrol's responsibilities to apprehend and process noncitizens. But any such finding rests on an unsupported and plainly erroneous view of what those statutory responsibilities entail. Apprehension includes "temporary detainment," CBP, Nationwide Enforcement Encounters: Title 8 Enforcement Actions and Title 42 Expulsions Fiscal Year 2024, https://perma.cc/YWE2-B6UZ, and detention includes "[r]estraint from freedom of movement," CBP, National Standards on Transport, Escort, Detention, and Search at 28 (Oct. 2015), https://perma.cc/6KRP-2XTH. Neither requires the kind of physical custody that the district court appeared to demand. See Appl. App. 46a; C.A. ROA 1224. Under a correct application of those definitions, the noncitizens were apprehended as they exited the river: They were not free to proceed further into the United States on their own, but were directed to a staging area for further evaluation and processing, along a narrow direct road bounded by the concertina wire on one side and fencing on the other, in an area with law-enforcement

officers present. See C.A. ROA 1145, 1195-1196; see also Appl. App. 16a-19a.

Texas protests (Opp. 13) that the video showing the migrants' exit from the river does not show Border Patrol agents undertaking the inspection and processing of noncitizens on the riverbank. But nothing in the INA, implementing regulations, sound law-enforcement practices, or common sense suggests that a Border Patrol agent in the field must (or even could) conduct the necessary questioning, review any relevant documents, determine nationality, complete forms, and check and input information into databases at the precise spot where the agent first encounters a noncitizen he believes has entered the country illegally. It was manifestly reasonable for Border Patrol agents to direct the migrants to a staging area where other agents were present to begin the intake process in a controlled and orderly setting, before the migrants were transported by bus to a processing center to complete inspection and processing. C.A. ROA 1145-1146. Cutting or moving the concertina wire that the district court itself described as "creat[ing] a barrier between crossing migrants and law enforcement personnel," Appl. App. 27a, therefore was plainly part of and in furtherance of the agents' duties to apprehend, inspect, and process the migrants.

Texas claims (Opp. 13) that "almost 2,000 migrants crossed * * * without ever being processed." But that claim rests on a hearsay assertion from a Texas witness who reported that an unnamed

Texas officer said that he had counted the migrants entering the country on September 20 and that his number exceeded those that Border Patrol processed that day. See C.A. ROA 1139. Such a statement is too thin a reed on which to rest a conclusion that those migrants evaded processing altogether. There could be other factors or a mix of factors, particularly given the complex circumstances at issue here. For example, when a large group of migrants crosses the border, processing all of them may take more than a single day. And temporary processing centers often include "hold rooms" that are "intended for short-term detention, generally under 72 hours, while individuals are processed and/or transferred for removal, detention, or prosecution." See Office of the Immigration Detention Ombudsman, OIDO Inspection: Eagle Pass Soft-Sided Facility 3 (Nov. 14, 2023), https://perma.cc/T5MA-PHJD. But the record does not show and DHS is not in a position to represent the time it took to process those who entered on September 20 given the complex dynamics. At the same time, Texas presented no evidence that its personnel saw any migrants fleeing to the interior rather than moving to the staging area. C.A. ROA 1138-1139. And even if Border Patrol's operations in these challenging circumstances were imperfect in some respect, that in no way suggests that it was not pursuing lawful objectives.

Texas also disputes (Opp. 26-27) whether Border Patrol agents could ever appropriately deem it necessary to cut the wire to fulfill their responsibilities to apprehend, inspect, and process

noncitizens. Although Texas points (Opp. 27) to Border Patrol's access to boats with which it may reach migrants crossing the river, it acknowledges that those resources are insufficient. As the record shows, the boats can carry only three to six passengers at a time. C.A. ROA 1155-1157. Trying to bring migrants onboard those boats could present its own hazards. When large groups of migrants cross the international boundary, the boats would be easily overwhelmed. And when river or environmental conditions do not allow Border Patrol to safely deploy their small boats, this mode of access is entirely unavailable.

Texas shifts (Opp. 27) to a suggestion that Border Patrol's position means that it could "destroy every fence in a 30,000-square-mile area" within 25 miles of the border whenever it may be convenient to cross unobstructed. But Border Patrol has never claimed any such authority. It has simply maintained that Border Patrol agents may move or cut the wire when they find it necessary to access the border they are charged with patrolling and migrants they are charged with apprehending, just as they may cut locks or fences. See Appl. App. 22a-23a. Consistent with that scope of authority, Border Patrol has rarely cut the wire Texas placed in other border sectors, where the different environment has made moving the wire unnecessary to apprehend migrants. See id. at 49a; C.A. ROA 1220 (noting that "terrain" and "infrastructure" matter in the effective deployment of concertina wire). By contrast, the wire at issue here runs along the riverbank and into

the water at various points along the stretch, thereby preventing migrants from walking laterally along the wire to reach an access point where they may be apprehended. C.A. ROA 1151-1152. And when Border Patrol had previously attempted to set up infrastructure near a gate with access to the river, Texas piled dirt "on either side of the gate preventing [Border Patrol] from even opening it." Id. at 1171. Border Patrol thus assessed that, in this environment, the wire restricts its "ability to perform [its] duties" and can "potentially cause harm to human life." Id. at 1220.

When Border Patrol agents are vastly outnumbered and face blocked access points and dangerous conditions in the river and on the bank, they must exercise judgment as to the best use of limited resources to apprehend, inspect, and process noncitizens safely and efficiently. Texas and the lower courts may prefer for Border Patrol to operate differently, but as this Court has "repeated time and again, an agency has broad discretion to choose how best to marshal its limited resources and personnel to carry out its delegated responsibilities." Massachusetts v. EPA, 549 U.S. 497, 527 (2007). That is especially so with respect to ongoing law-enforcement operations -- and all the more so when a State has deliberately erected a barrier that prevents Border Patrol agents from reaching migrants who have crossed the border. See United States v. Sharpe, 470 U.S. 675, 686 (1985) (noting that courts "should not indulge in unrealistic second-guessing" when law enforcement is "acting in a swiftly developing situation").

B. The United States Cannot Be Enjoined On The Basis Of State Tort Law

Texas's attempt to impede the federal government in carrying out its statutory law-enforcement authority is inconsistent with both the Supremacy Clause and the federal government's sovereign immunity. Under either, the injunction cannot stand.

1. Under The Supremacy Clause, States Cannot Control Or Impede The Federal Government's Execution Of Federal Law

From McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819), through the present day, this Court has repeatedly affirmed that the Supremacy Clause prohibits States from impeding or controlling the federal government's exercise of its responsibilities. Id. at 436; see United States v. Washington, 596 U.S. 832, 838 (2022). Texas rejects (Opp. 25) that foundational Supremacy Clause principle, asserting that this Court has repudiated it. That is incorrect. As Washington explained, the Court's understanding of the Supremacy Clause has "evolved" such that state laws that "'increase the cost to the Federal Government of performing its functions'" may be permissible. 596 U.S. at 838 (citation omitted). But the Court made clear that laws that "'regulate the United States directly'" remain prohibited. Ibid. (brackets and citation omitted). Texas's invocation of its state tort law here falls squarely in the latter category. The injunction does not simply increase the federal government's operational costs or otherwise indirectly affect Border Patrol through measures directed at third

parties with whom it deals. Texas has invoked its state common law to obtain an injunction that, under the threat of contempt, directly prohibits Border Patrol itself from taking steps integral to carrying out its federal statutory responsibilities at the border. Cf. Northwest, Inc. v. Ginsberg, 572 U.S. 273, 283-284 (2014) (noting in a suit by a private party that "state tort law that imposes certain requirements" can "'disrup[t] the federal scheme no less than state regulatory law to the same effect'") (citation omitted, brackets in original). That is plainly the type of direct interference with federal operations that the Supremacy Clause forbids.

Indeed, the very case that Texas cites (Opp. 24) for the proposition that the federal government may be subject to state tort law supports the opposite conclusion here: The Court in Johnson v. Maryland, 254 U.S. 51 (1920), made clear that federal officers are "not subject to the jurisdiction of the State in regard to those very matters of administration which are * * * approved by Federal authority." Id. at 56 (citation and internal quotation marks omitted). The Court simply explained that "when the United States has not spoken, the subjection to local law would extend to general rules that might affect incidentally the mode of carrying out the employment." Ibid. Texas's invocation of its tort law is in no way incidental to the federal government's patrol of the border. And the Court in Johnson further reiterated that when an officer is "acting under and in pursuance of the laws of

the United States," state law "will not be allowed to control the conduct" of federal officials, regardless of how "universally applicable" the law may be. Id. at 56-57.*

The result of Texas's position would be that States across the country could invoke their laws to impede the federal government's exercise of its authority. Even more disturbing are the implications of Texas's claim (Opp. 25) that the Supremacy Clause is not relevant because Texas is acting here only as a proprietor. As an initial matter, that assertion cannot be credited. Texas erected the concertina wire fence not to protect state land or facilities but to impose an obstruction at the border that prevents Border Patrol agents from reaching migrants who have unlawfully entered. In any event, under Texas's logic, any private person could likewise invoke state common law to seek an injunction prohibiting the government from carrying out its statutory authority. That is plainly incorrect. The Supremacy Clause applies equally to private parties seeking to invoke state common law that is inconsistent with federal authority. See, e.g., Northwest, 572 U.S. at 284.

* Texas attempts (Opp. 26) to characterize Johnson as solely a "preemption case[]," but that is incorrect. The Court in Johnson framed the question as "whether the State can interrupt the acts of the general government itself" and noted that cases prohibiting the States from "interfer[ing]" with the federal government "establish the law governing this case." 254 U.S. at 55-56.

2. The APA Does Not Waive The United States' Sovereign Immunity From State Tort Claims

The United States' sovereign immunity provides an independent basis for vacating the injunction. The court of appeals' reliance on the waiver of sovereign immunity in the APA was erroneous and Texas's arguments are contrary to the text and history of 5 U.S.C. 702 and this Court's precedent.

Remarkably, Texas never even acknowledges that Section 702 by its own terms does not "confer[] 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. In Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak, 567 U.S. 209 (2012), this Court explained that, under that statutory language, the APA's waiver of sovereign immunity does not apply where a separate federal statute "specifically authorizes" a type of action against the federal government and subjects that action to particular limits. Id. at 216. The Federal Tort Claims Act (FTCA) is just such a statute -- it specifically authorizes tort claims against the United States based on state law, but subject to various exceptions and limited to damages relief. See 28 U.S.C. 1346(b), 2680(a). The FTCA does not provide for injunctive relief, and Congress specifically designed it to "prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an

action in tort." United States v. Varig Airlines, 467 U.S. 797, 814 (1984).

It would be wholly inconsistent with that design to permit state-law tort claims without limitation and allow injunctive relief -- a remedy that is far more disruptive to the ongoing operations of the federal government than a retrospective award of damages. And that disruption is particularly significant in a case involving law-enforcement activities, which "call[] for a very high degree of judgment and discretion" that this Court has been reluctant to second-guess. Foley v. Connelie, 435 U.S. 291, 298 (1978).

Texas nevertheless argues (Opp. 18) that Match-E-Be-Nash-She-Wish supports a waiver of sovereign immunity here because the Court held that "some general similarity of subject matter" cannot "alone trigger a remedial statute's preclusive effect." 567 U.S. at 223. But this is not a suit involving only "similar subject matter" to that covered by the FTCA, ibid.; it is precisely the same claim -- the violation of state tort law -- that may be brought under the FTCA. This Court recognized that "[w]hen Congress has dealt in particularity with a claim and has intended a specified remedy -- including its exceptions -- to be exclusive, that is the end of the matter; the APA does not undo the judgment." Id. at 216 (brackets; citation, and internal quotation marks omitted).

Texas relies (Opp. 17-18) on various circuit decisions, but in none of those cases did the court prospectively enjoin the

federal government to comply with state law. And in any event, those decisions are inconsistent with Match-E-Be-Nash-She-Wish, and with then-Judge Kavanaugh's concurring opinion in El-Shifa Pharm. Indus. Co. v. United States, 607 F.3d 836, 854 (D.C. Cir. 2010) (en banc), cert. denied, 562 U.S. 1178 (2011), which explained that "the APA does not borrow state law or permit state law to be used as a basis for seeking injunctive or declaratory relief against the United States." Ibid. Texas acknowledges (Opp. 18-19) that its position is irreconcilable with that reasoning.

Texas's position also flies in the face of the wealth of precedent holding that the APA does not waive sovereign immunity for claims that seek specific performance of a contract because the Tucker Act and Little Tucker Act "impliedly forbid[]" such relief by providing a damages remedy. 5 U.S.C. 702; see Appl. 29-30 (collecting cases). Texas simply ignores those cases, but their reasoning applies equally here. The court of appeals' contrary decision cannot be squared with this Court's precedent, the history of the APA, and the requisite strict construction of waivers of sovereign immunity. See Appl. 26-33.

C. The Court Of Appeals Lacked Authority To Enjoin Or Restrain Enforcement Of The INA

Section 1252(f)(1) deprived the court of appeals of jurisdiction to enter the injunction pending appeal because that injunction requires officials to "refrain from taking actions to * * * carry out" the provisions of the INA governing inspection

and apprehension of noncitizens. Garland v. Aleman Gonzalez, 596 U.S. 543, 550 (2022). Texas's contrary arguments fail.

At the outset, Texas suggests (Opp. 28-29 & n.6) that applicants waived this argument in the district court by agreeing to extend the temporary restraining order. Applicants agreed to that two-day extension to allow the court to conduct a second preliminary injunction hearing on the Monday after Thanksgiving. Applicants have maintained that Section 1252(f)(1) prohibits injunctive relief throughout the proceedings. And in any event, Section 1252(f)(1) explicitly limits the "jurisdiction or authority" of the lower courts. 8 U.S.C. 1252(f)(1). Because such limitations speak to "a court's power," they "can never be forfeited or waived." United States v. Cotton, 535 U.S. 625, 630 (2002).

As to substance, Texas rehashes (Opp. 29-31) its arguments that the injunction does not interfere with the operation of Sections 1225 and 1226 because Border Patrol allegedly does not cut the wire to apprehend, inspect, or process migrants, but instead engaged in a concerted undertaking to "wave thousands of people into Texas" unimpeded. Opp. 29. That argument fails for the reasons already explained. See pp. 6-11, supra.

Texas also contends (Opp. 31) that it is not seeking to enjoin Border Patrol from carrying out its responsibilities "based on differing understandings of what those responsibilities entail." But that is precisely what is happening. Texas's position and the lower courts' decisions reflect a basic misunderstanding of Border

Patrol responsibilities and the way in which they are carried out. Texas is wrong in asserting that Border Patrol has not apprehended noncitizens at the time they cross through the wire and are directed to staging areas for further processing. See p. 7, supra. And even if Texas were correct in its narrow view of what Border Patrol properly regards as apprehension, the direction of migrants to the staging area is a reasonable course in aid of apprehension and initiation of processing there. Moreover, contrary to Texas's contention (Opp. 31), Border Patrol's determination that cutting the wire is necessary to apprehend noncitizens does implicate the allocation of scarce resources to facilitate its responsibilities to inspect and process noncitizens, because it lacks resources to do so by boat or on the riverbank at the location at issue here. See pp. 8-10, supra. Chief Judge Sutton's analysis thus squarely applies: Border Patrol acted to "prioritiz[e] the use of scarce resources" to facilitate implementation of the relevant statutory provisions. Arizona v. Biden, 40 F.4th 375, 394 (6th Cir. 2022) (Sutton, C.J., concurring).

Nor is Texas correct in claiming that the injunction has only a "collateral effect" on the operation of Sections 1225 and 1226. Opp. 31 (citation omitted). Border Patrol agents' inability to cut or move the wire directly obstructs their ability to perform their duties by maintaining a physical barrier between the agents and the migrants who have just crossed the border. The injunction thus violates Section 1252(f)(1) by precluding Border Patrol from

taking actions that (in the Government's view) are permitted under Sections 1225 and 1226. See Aleman Gonzalez, 596 U.S. at 551.

D. Texas's Alternative Arguments Do Not Support The Injunction

As an alternative ground for the injunction pending appeal, Texas reasserts its APA and ultra vires claims. The court of appeals declined to address those claims, Appl. App. 12a n.7, and the district court correctly rejected them, id. at 50a-53a.

First, the APA authorizes review only of "final agency action." 5 U.S.C. 704. The district court "reviewed thousands of pages of emails, reports, and other documents," and determined that Texas failed to satisfy its burden of demonstrating a "substantial likelihood that it will establish the existence of a final agency action" subject to APA review. Appl. App. 51a. That is because there is no agency policy requiring Border Patrol agents to cut or move Texas's wire. Instead, the guidance within Eagle Pass indicates that (1) agents may cut locks or fences that impede border access when necessary to carry out their statutory duties; (2) absent exigent circumstances, agents should call a supervisor before cutting the wire; and (3) if exigent circumstances exist or a supervisor is unavailable, agents should use their judgment. See C.A. ROA 622, 624-625. That guidance does not constitute final agency action because it "'only affects [a party's] rights adversely on the contingency of future administrative action.'" DRG Funding Corp. v. Secretary of Hous. & Urban Dev., 76 F.3d 1212, 1214 (D.C. Cir. 1996) (quoting Rochester Tel. Corp. v. United

States, 307 U.S. 125, 130 (1939)). It does not "mark the consummation of the agency's decisionmaking process," and it does not determine "rights or obligations" or result in "legal consequences." United States Army Corps of Eng'rs v. Hawkes Co., 578 U.S. 590, 597 (2016) (citation omitted).

Second, even if Texas challenged final agency action, the decision whether to cut the wire in order to apprehend and inspect migrants in any particular instance goes to the core of law-enforcement judgment that is "committed to agency discretion by law" and therefore not subject to judicial review under Section 701(a)(2). See Lincoln v. Vigil, 508 U.S. 182, 191 (1993); see also United States v. Texas, 599 U.S. 670, 679 (2023) (holding that the Executive Branch's law-enforcement discretion "extends to the immigration context," where it "implicates not only 'normal domestic law enforcement priorities' but also 'foreign-policy objectives'") (citation omitted).

Third, even if review were available, it is not arbitrary and capricious to cut concertina wire to reach migrants on a narrow riverbank. As the district court recognized, guidance since at least the 1980s has permitted agents to cut locks or fences impeding border access. Appl. App. 41a-42a.

Finally, Texas's ultra vires claim is meritless because Border Patrol acted under statutory authority in moving or cutting the wire to access migrants. See Appl. 17-22; see pp. 5-11, supra. As this Court has explained, an ultra vires claim rests on "the

officer's lack of delegated power. A claim of error in the exercise of that power is therefore not sufficient." Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 690 (1949). Because Texas concedes that Border Patrol can cut the wire in some instances, Texas's claim is necessarily grounded on an assertion that Border Patrol erred in exercising its power. Texas's ultra vires claim therefore is without merit. See Appl. App. 33a-34a.

III. THE EQUITIES OVERWHELMINGLY FAVOR VACATUR OF THE INJUNCTION

The equities overwhelmingly support vacating the injunction pending appeal. Appl. 35-40. Texas does not dispute that enjoining the federal government from carrying out its statutory responsibilities is a per se irreparable harm, see Maryland v. King, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers) or that the injunction harms U.S. foreign relations. Nor can Texas refute the common-sense conclusion that Border Patrol agents may lack sufficient time as a result of the injunction to respond to emergency situations to prevent death or serious injury, given the many layers of concertina wire Texas has placed and the time it takes boats to travel in the area. C.A. ROA 1156, 1158. Instead, Texas repeats its refrain that none of this matters because, in Texas's view, Border Patrol is not carrying out its responsibilities and any risks to human life are of its "own creation." Opp. 34 (citation omitted). Texas's premise is wrong, see pp. 5-11, supra, and it has no other response to the manifest harms to the government and the public interest that the injunction imposes.

Texas contends (Opp. 10-11) that there is no need for this Court's intervention because the court of appeals granted applicants' request for expedited briefing and argument. But even on that expedited schedule, the injunction may remain in place for months, including during any en banc proceedings. Indeed, past practice shows the extended timeframe of a number of expedited cases in the Fifth Circuit. See, e.g., Feds for Med. Freedom v. Biden, No. 22-40043 (preliminary injunction granted on January 21, 2022, expedited briefing and argument completed on March 8, 2022, en banc proceedings ended March 23, 2023); Cochran v. SEC, No. 19-10396 (injunction pending appeal granted September 24, 2019, expedited briefing and argument completed on November 5, 2019, en banc proceedings ended December 13, 2021); Wages & White Lion Invs. v. FDA, No. 21-60766 (stay pending appeal granted October 26, 2021, expedited briefing and argument completed on January 31, 2022, en banc proceedings ended January 3, 2024).

Texas asserts (Opp. 32) that the injunction is warranted to prevent the destruction of its property. But the only cognizable injury that exists with respect to that property may be remedied by damages, which Texas has not attempted to recover through the statutory mechanisms applicants identified. See Appl. 38-39. Texas asserts (Opp. 32-33) that compensation is insufficient because this case "is not just about the monetary price of wire; it is about preventing continuing threats to public safety." But in a suit against the United States, Texas has no cognizable interest

in protecting its citizens from purported immigration-related harms. Cf. Haaland v. Brackeen, 599 U.S. 255, 295 (2023) ("[A] State does not have standing as parens patriae to bring an action against the Federal government.") (citation omitted). Nor can Texas claim (Opp. 35) a cognizable interest in deterring illegal immigration, which is likewise the province of the Federal Government. See Arizona v. United States, 567 U.S. 383, 408 (2012) (rejecting State's attempt to "achieve its own immigration policy").

This Court should therefore vacate the injunction pending appeal and restore Border Patrol agents' access to the border they are charged with patrolling and the migrants they are responsible for apprehending, inspecting, and processing.

CONCLUSION

This Court should vacate the injunction pending appeal entered by the United States Court of Appeals for the Fifth Circuit

Respectfully submitted.

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