

In the Supreme Court of the United States

DEPARTMENT OF HOMELAND SECURITY, ET AL.,
Applicants,

v.

STATE OF TEXAS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

This Court should deny the Application.

Respectfully submitted.

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January 2024

DECLARATION OF VICTOR ESCALON
IN OPPOSITION TO THE EMERGENCY APPLICATION TO VACATE
THE INJUNCTION PENDING APPEAL

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

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

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

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

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

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

Signed this 12th day of January 2024.

Victor Escalon

Victor Escalon

Texas Department of Public Safety

DECLARATION OF CHRISTOPHER FLETCHER
IN OPPOSITION TO THE EMERGENCY APPLICATION TO VACATE
THE INJUNCTION PENDING APPEAL

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Signed this 12th day of January 2024.

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Christopher Brian Fletcher

Texas Military Department