

In the Supreme Court of the United States

DEPARTMENT OF HOMELAND SECURITY, ET AL.,
Applicants,

v.

STATE OF TEXAS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

This Court should deny the Application.

Respectfully submitted.

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January 2024

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Signed this 17th day of January 2024.

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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.

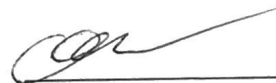
7. When I arrived at the Shelby Park entrance gate, I approached the CBP Agents. One of the CBP agents once again informed me that Mexican authorities responded to two drownings. They also told me that Mexico had the situation under control. The CBP agents informed me again that they were at Shelby Park 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.

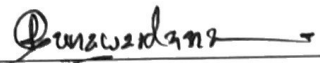
4. On 12 January 2024, I was on duty working an eight hour shift from 1500 to 2300 hours. On that date, I was guarding the Shelby Park entrance gate. At approximately 2135 hours, two Border Patrol agents with the U.S. Customs and Border Protection (“CBP”) approached the gate. Before informing us of the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