Nos. 23A814 & 23A815

In the Supreme Court of the United States

UNITED STATES OF AMERICA,
Applicants,

v.

THE STATE OF TEXAS; GREG ABBOTT IN HIS OFFICIAL CAPACITY AS GOVERNOR OF TEXAS; TEXAS DEPARTMENT OF PUBLIC SAFETY; STEVEN C. MCCRAW, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF TEXAS DEPARTMENT OF PUBLIC SAFETY

LAS AMERICAS IMMIGRANT ADVOCACY CENTER; AMERICAN GATEWAYS; COUNTY OF EL PASO, Texas

Applicants,

v.

STEVEN C. MCCRAW, IN HIS OFFICIAL CAPACITY AS DIRECTORY OF THE STATE OF TEXAS DEPARTMENT OF PUBLIC SAFETY

THE STATE OF TEXAS'S RESPONSE IN OPPOSITION

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PARTIES TO THE PROCEEDING

Applicants, plaintiffs-appellees below, are the United States of America; American Gateways; the County of El Paso, Texas; and Las Americas Immigrant Advocacy Center (collectively, "Plaintiffs").

Respondents, defendants-appellants below, are the State of Texas; Greg Abbott in his official capacity as Governor of Texas; the Texas Department of Public Safety; and Steven C. McCraw in his official capacity as Director of the Texas Department of Public Safety. Additional defendant-appellant below is Bill D. Hicks in his official capacity as District Attorney for the 34th Judicial District of Texas.

RELATED PROCEEDINGS

United States District Court (W.D. Tex.):

United States v. Texas, No. 24-cv-8 (Feb. 29, 2024)

Las Americas Immigrant Advocacy Ctr. et al. v. McCraw, No. 23-cv-1537 (Feb. 29, 2024)

United States Court of Appeals (5th Cir.):

United States v. Texas, No. 24-50149 (Mar. 2, 2024)

INTRODUCTION

Plaintiffs seek emergency relief from this Court before a merits panel of the Fifth Circuit can consider Texas Senate Bill 4 ("S.B.4")—a statute enacted to help address what the President of the United States recently acknowledged to be a border crisis. Plaintiffs do so even though S.B.4 mirrors rather than conflicts with federal law, and despite the Fifth Circuit's decision to expedite the briefing and argument schedule. This appeal will be argued in the Fifth Circuit on April 3, 2024, and the Fifth Circuit will undoubtedly expedite the issuance of its opinion. Given the Fifth Circuit's effort to promptly resolve this appeal, Plaintiffs need an especially extraordinary reason to sidestep the ordinary appellate process.

Plaintiffs say *Arizona v. United States*, 567 U.S. 387 (2012), provides that extraordinary reason. But it is Plaintiffs who contravene precedent. No Plaintiff, for example, is even subject to S.B.4—which does not apply to private organizations or government entities. Accordingly, under this Court's precedent, Article III standing is plainly lacking. Nor does any Plaintiff have a cause of action. When it comes to who can sue in federal court, only the *laws* of the United States are supreme—not the Executive Branch's policy preferences. And this Court has repeatedly held it is not in the business of creating causes of action Congress has not seen fit to enact.

Arizona, moreover, supports Texas. The Court in *Arizona* explained that State law *can* mirror federal law. That is unsurprising because the federal immigration law often expressly permits States to coordinate enforcement efforts with federal immigration officers. Unlike the statute in *Arizona*, no provision of S.B.4 intrudes on an exclusively federal field, and none conflicts with any federal statute. At a bare minimum, it is incredible to contend that *every* application of S.B.4 is preempted—the standard for a pre-enforcement facial injunction. This is particularly true because the Constitution recognizes

that Texas has the sovereign right to defend itself from violent transnational cartels that flood the State with fentanyl, weapons, and all manner of brutality.

Allowing S.B.4 to take effect will not cause any Plaintiff immediate or irreparable harm. On its face, S.B.4 allows Texas to help enforce federal immigration laws. Everyone benefits when Congress's legislatively chosen priorities are respected. At the same time, Texas suffers *per se* irreparable harm when enforcement of one of its statutes is facially enjoined. The State's injury is even sharper than usual here, moreover, because Texas is the nation's first-line defense against transnational violence and has been forced to deal with the deadly consequences of the federal government's inability or unwillingness to protect the border. By any measure, the Court should deny the Applications and allow the Fifth Circuit's merits panel to determine in the first instance whether S.B.4 is facially preempted.

STATEMENT OF THE CASE

I. The Border Crisis

Despite 28 legal entry points in Texas, U.S. Border Patrol encounters with individuals illegally crossing the border between ports of entry have increased from "a comparatively paltry 458,000 in 2020 to 1.7 million in 2021 and 2.4 million in 2022." *Texas v. DHS*, No. 2:23-cv-55, 2023 WL 8285223, at *3 (W.D. Tex. Nov. 29, 2023) (Moses, C.J.). Unfortunately, "organized criminal organizations take advantage of these large numbers," and "conveying all those people to the doorstep of the United States has become an incredibly lucrative enterprise for the major Mexican drug cartels." *Id.* As President Joseph Biden explained in this year's State of the Union address, "people pay these smugglers $8,000 to get across the border" because migrants know "if they get by and let into the country, it's six to eight years before they have [an immigration] hearing." Transcript of President Joseph Biden's State of the Union Address, ASSOCIATED PRESS (Mar. 8, 2024), https://tinyurl.com/ypsxhuju. Recognizing the need for stronger border security measures to prevent cartel activity, the President acknowledged that "it's highly unlikely that people

will pay that money and come all that way knowing that they'll be … kicked out quickly." *Id.* And "the infrastructure built by the cartels for human cargo can also be used to ship illegal substances, namely fentanyl." *Texas v. DHS*, 2023 WL 8285223, at *3. "Lethal in small doses, fentanyl is a leading cause of death for young Americans and is frequently encountered in vast quantities at the border." *Id.*

These violent cartels "have become potent paramilitary forces, with heavily armed mobile units able to stand their ground against the Mexican military." William Barr, Opinion, *The U.S. Must Defeat Mexico's Drug Cartels*, Wall St. J. (Mar. 2, 2023), https://tinyurl.com/drxcdnmv. One former U.S. Attorney General has thus stated that the cartels pose threats that look "more like ISIS than like the American mafia." *Id.* For example, they were able to overwhelm Mexico's military with "700 cartel paramilitary fighters with armored cars, rocket launchers and heavy machine guns." *Id.* These cartels, which "have increasingly acquired a transnational dimension," may be the fifth largest employer in Mexico. Rafael Prieto-Curiel et al., *Reducing Cartel Recruitment Is the Only Way to Lower Violence in Mexico*, 381 Science 1312 (2023). Given the cartel's violent character, it should come as no surprise that between 2021 and 2024, Border Patrol apprehended nearly 2,000 gang members and encountered 336 individuals on the terrorist watchlist. App.7a.[1]

The number of unaccompanied minors has also skyrocketed from 15,381 in 2020 to 118,938 in 2023—a 673% increase. App.6a. "[T]he majority of" these minors cross the border "on very dangerous, not-nice, human-smuggling networks that transport them through Central America and Mexico to the United States." Vice President Joe Biden, Remarks to the Press (June 20, 2014), https://tinyurl.com/4fbb9v6k. In recent years, such

[1] Texas cites to its own appendix as "App.__." It cites to the United States's appendix as "Fed.Gov.App.__," and to the Organizational Plaintiffs' and El Paso County's appendix as "Coalition.App.__."

human trafficking has metastasized "from a scattered network of freelance 'coyotes' to a multi-billion-dollar international business controlled by organized crime, including some of Mexico's most violent drug cartels." Miriam Jordan, *Smuggling Migrants at the Border Now a Billion-Dollar Business*, N.Y. Times (July 25, 2022), https://tinyurl.com/487kykkh.

The President has characterized the border as a "crisis." President Joe Biden Statement on the Bipartisan Senate Border Security Negotiations (Jan. 26, 2024), https://tinyurl.com/2y733m35. Unfortunately, the federal government has not only failed to contain the crisis, it helped create and exacerbate it. One of the first actions of the current Administration was to terminate the "Remain in Mexico" program that required "certain non-Mexican nationals arriving by land from Mexico [to be] returned to Mexico to await the results of their removal proceedings." *Biden v. Texas*, 597 U.S. 785, 791 (2022). Further, the federal government instructed federal officers in certain circumstances to not arrest and deport aliens. *See* Memo. from Acting Director, U.S. Immigration & Customs Enforcement, Dep't of Homeland Security (Feb. 18, 2021), https://tinyurl.com/fu6h7epf. And a federal court—after reviewing ample testimony and photographic and even video evidence—has documented federal officials refusing to enforce the law. *See, e.g.*, *Texas*, 2023 WL 8285223, at *3-4.

II. Senate Bill 4

In 2023, Texas enacted S.B.4 to help address the border crisis. Relevant to this litigation, S.B.4 amends Chapter 51 of the Texas Penal Code to include two State offenses that track federal immigration crimes prohibiting unlawful entry and reentry. S.B.4 also amends Article 5B of the Texas Code of Criminal Procedure to grant State judges certain remedial powers with respect to individuals who violate S.B.4's illegal-entry provision.[2]

[2] Plaintiffs do not challenge the remaining provisions of S.B.4.

Turning first to the illegal-entry provision, Texas Penal Code §51.02(a) makes it a crime for an individual to violate federal law, 8 U.S.C. §1325(a), by crossing into Texas at any location other than a lawful port of entry. This provision provides affirmative defenses to prosecution in certain instances: If the federal government grants an individual asylum, if an individual receives lawful-presence status, or if the individual was approved for benefits under the Deferred Action for Childhood Arrivals program. *See* §51.02(c).

Next, the illegal-reentry provision under Texas Penal Code §51.03(a) makes it a crime for an individual to illegally re-enter the country after having previously "been denied admission to or excluded, deported, or removed from the United States," or after having previously "departed from the United States while an order of exclusion, deportation, or removal is outstanding." This provision defines "removal" to include return orders issued by a magistrate or judge under Article 5B, or any other agreement in which an alien stipulates to voluntarily depart the United States pursuant to a pending criminal proceeding under either federal or state law. §51.03(c). Prosecution under either unlawful entry offense in Chapter 51 may not be abated simply on the basis that a federal determination regarding an individual's immigration status is pending. Tex. Code Crim. Proc. art. 5B.003.

Finally, Article 5B.002 allows judges to issue orders requiring aliens who have crossed the border illegally to return to the foreign nation from which they entered. This provision allows a judge, at any time prior to conviction, to dismiss pending charges and issue an "order to return to foreign nation" in lieu of prosecution. *See* art. 5B.002(b). For a voluntary dismissal, the alien must "agree[] to the order." *Id.* art. 5B.002(c)(1). If, however, proceedings continue and an alien is convicted, the judge issues a return order that takes effect after judgment. Art. 5B.002(d). Such an order does not itself remove anyone from the United States. Instead, the order requires a Texas official to transport the alien to an official port of entry and there to transfer the alien to the federal government. Art. 5B.002(e)(1)-

(2). The federal government then decides whether to remove the alien from the United States or instead to engage in some other federally authorized conduct.

State officers are prohibited from enforcing S.B.4 in certain locations, including schools, churches, and hospitals. Art. 5B.001. Likewise, S.B.4 makes "every provision, section, subsection, sentence, clause, phrase, [and] word" and "every application of the provisions [of S.B.4] to every person, group of persons, or circumstances … severable from each other." Act of Nov. 14, 2023, 88th Leg., 4th C.S., ch. 2, §8 (2023) (S.B.4). "If any application of any provision [of S.B.4] to any person, group of persons, or circumstances is found by a court to be invalid for any reason, the remaining applications of that provision to all other persons and circumstances shall be severed and may not be affected." *Id.* Finally, although no Texas court has yet interpreted S.B.4, Texas courts would, "if possible, interpret the statute in a manner that avoids constitutional infirmity." *Quick v. City of Austin*, 7 S.W.3d 109, 115 (Tex. 1998). Accordingly, consistent with S.B.4's goal of mirroring federal law, S.B.4 will almost certainly be construed to avoid conflicts with federal law and to enable greater coordination between federal and Texas officials.

III. Proceedings in the District Court

On December 19, 2023, Las Americas Immigrant Advocacy Center and American Gateways ("the Organizational Plaintiffs"), along with El Paso County, sued Steven C. McCraw, in his official capacity as Director of the Texas Department of Public Safety, and Bill D. Hicks, in his official capacity as District Attorney for the 34th Judicial District of Texas. No. 1:23-cv-1537 (W.D. Tex.). On January 3, 2024, the federal government sued Texas; Greg Abbott, in his official capacity as Governor; the Texas Department of Public Safety; and Director McCraw in his official capacity. No. 1:24-cv-8 (W.D. Tex.). Alleging that S.B.4 is preempted, all Plaintiffs sought a pre-enforcement facial injunction on January 12, 2024.

The district court consolidated the cases on January 31, 2024. On February 29, 2024, "mere days" before the law's March 5 effective date, the district court granted a preliminary injunction and refused to stay its order pending appeal. Fed.Gov.App.19a, 112a-116a.

IV. Appellate Proceedings

Texas immediately appealed to the Fifth Circuit and sought an administrative stay of the injunction and a stay pending appeal. The Fifth Circuit granted the administrative stay on March 2, 2024, but deferred decision on Texas's request for a stay pending appeal. Fed.Gov.App.2a. It then stayed the administrative stay for 7 days, making S.B.4's effective date March 10, 2024. Fed.Gov.App.2a.

Plaintiffs filed Applications in this Court seeking to vacate the Fifth Circuit's temporary administrative stay, which they mischaracterize as a stay. Justice Alito ordered Texas to respond to both Applications by March 11, and granted an administrative stay of the Fifth Circuit's own administrative stay through March 13. The Applications fault the Fifth Circuit for referring Texas's stay motion to the merits panel even though "[t]he Fifth Circuit has not yet indicated when it will assign the case to a merits panel or hold oral arguments." Fed.Gov.App.2a, 15a-16a; *see also* Coalition.App.1a, 3a n.1, 11a & n.5 (claiming the stay was "indefinite" and the court was "postponing its resolution"). The next day, however, the Fifth Circuit expedited the appeal as promised. It entered a briefing schedule calling for Texas's opening brief on the merits by March 13; response briefs by March 21; and a reply brief by March 26. The Fifth Circuit also set the case for oral argument on April 3, 2024.[3] In other words, these appeals will be briefed and argued before a Fifth Circuit merits panel in just over three weeks from today.

[3] As the Fifth Circuit has expedited this appeal, the issuance of an administrative stay is not unusual. Indeed, "[e]ntering temporary administrative stays so that a panel may consider expedited briefing in emergency cases is a routine practice in" courts of appeals. *In re Abbott*, 800 F. App'x 296, 298 (5th Cir. 2020) (per curiam); *see, e.g.*, *M.D. by Stukenberg v. Abbott*, No. 18-40057, ECF 12 (5th Cir. Jan. 19, 2018) (granting "temporary,

ARGUMENT

The Court should allow the Fifth Circuit to resolve in the first instance the merits of the district court's pre-enforcement facial injunction. Despite an acknowledged border crisis, the district court facially invalidated enforcement of S.B.4 on the theory that every application of this statute is preempted, no matter any case's facts. "Facial challenges," however, "are disfavored for several reasons," including that they "rest on speculation" about how state courts will construe a statute and what the facts will reveal. *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449-50 (2008). Plaintiffs thus must "establish that no set of circumstances exists under which the Act would be valid," *United States v. Salerno*, 481 U.S. 739, 745 (1987). They have not remotely done so.

Furthermore, a court of appeals' decision to stay a district court's ruling is "entitled to great deference," *Garcia-Mir v. Smith*, 469 U.S. 1311, 1313 (1985) (Rehnquist, C.J., in chambers), and the same factors that govern whether "to stay a judgment entered below are equally applicable when considering an application to vacate a stay," *Certain Named & Unnamed Non-Citizen Children & Their Parents v. Texas*, 448 U.S. 1327, 1330 (1980) (Powell, J., in chambers). The Court thus considers whether: (1) the party requesting a stay is likely to succeed on the merits; (2) that party will be irreparably injured absent a stay; (3) a stay will substantially injure the other parties interested in the proceeding; and (4) the public interest favors a stay. *See Nken v. Holder*, 556 U.S. 418, 426 (2009). This Court generally will vacate a court of appeals' stay, moreover, only if there is "a significant possibility that a majority of the Court eventually will agree with the District Court's

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administrative stay ... to provide sufficient time to receive any opposition and fairly consider whether a formal stay pending appeal should issue or whether this temporary stay should be dissolved") (Dennis, Southwick, and Higginson, JJ.). An administrative stay falls within the "power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936). Because of this expedited posture, the administrative stay will only exist long enough for the lower court to resolve the merits of the stay motion.

decision." *Certain Named & Unnamed Non-Citizen Children*, 448 U.S. at 1330-32.

While failure to meet any factor is fatal, Plaintiffs meet none of them. Not only should this pre-enforcement challenge not be in federal court, but Plaintiffs' argument misreads *Arizona*, rests on mischaracterizations of S.B.4, defies federalism, and invites rather than avoids constitutional conflict. And although allowing the Fifth Circuit to expeditiously resolve this appeal in the first instance will not harm any Plaintiffs' lawful interests, Texas will suffer significant, irreparable harm if it cannot enforce a validly enacted law. Plaintiffs' theory that Texas has little to no role to play in combatting the border crisis that is overwhelming the nation and Texas disproportionately is anything but equitable.

I. Texas is Likely to Succeed on Appeal.

If the Fifth Circuit ultimately vacates the preliminary injunction in this case, it is highly unlikely this Court would grant review, reverse the Fifth Circuit, and reinstate the district court's injunction—especially in an interlocutory posture such as this. And this is true even if one believes—wrongly—that certain applications of S.B.4 may be preempted. No matter one's view of S.B.4, for example, the district court's cursory treatment of severability is plainly inadequate. *See infra* at 31. Accordingly, at a minimum, the district court's injunction will have to be vacated for a more targeted severability analysis. Even setting aside such obvious legal error, moreover, Texas is likely to succeed on appeal.

A. These Cases Do Not Belong in Federal Court.

Plaintiffs urge the Court to rush straight to the merits of their claims. But these cases do not belong in federal court at all—even apart from the fact that no state court has yet had an opportunity to construe any provision of S.B.4. The Organizational Plaintiffs and El Paso County lack standing, and Congress has not provided any of the Plaintiffs with a cause of action. By themselves these threshold flaws require denial of the Applications.

1. In their Application, the Organizational Plaintiffs and El Paso County do not demonstrate that they have standing to bring this suit. But "each element [of standing] must be supported in the same way as any other matter on which the plaintiff bears the

burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992). Furthermore, even if they had attempted to make such a showing, they could not identify (1) an actual or imminent, concrete, and particularized "injury-in-fact" to themselves; (2) that is fairly traceable to SB4; and (3) that is likely to be redressed by a favorable decision. *See Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000).

The reason why they cannot demonstrate standing goes to the heart of S.B.4. Because it mirrors federal law, S.B.4 is enforceable only against aliens illegally present in Texas, not advocacy organizations or Texas counties. And in none of their briefs have these plaintiffs shown any intention "to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by [S.B.4]." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158-59 (2014) (quotation omitted). Nor have they shown "a credible threat of prosecution" under a law that can in no way be enforced against them. *Id.*

Below, these plaintiffs asserted that S.B.4 would require them to divert resources, but such strategic budgetary decisions are not enough to confer standing. The Organizational Plaintiffs' intended conduct—namely, distributing educational materials and resources—is not "arguably proscribed" by S.B.4. *Susan B. Anthony List*, 573 U.S. at 162. Any threat of prosecution under S.B.4 thus will not affect their routine activities, and facially enjoining the law will not redress their purported injuries. *See, e.g.*, *Lujan*, 504 U.S. at 562. And any diversion of resources would be a voluntary strategic choice, which does not confer standing. *See, e.g.*, *Lane v. Holder*, 703 F.3d 668, 675 (4th Cir. 2012) (citing *Simon v. E. Kentucky Welfare Rts. Org.*, 426 U.S. 26, 40 (1976)). As this Court has explained, plaintiffs "cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 416 (2013). El Paso County is also a subdivision of Texas, and this Court has held that such political subdivisions generally lack standing to sue their parent States. *See,*

e.g., *Coleman v. Miller*, 307 U.S. 433, 441 (1939); *City of Trenton v. New Jersey*, 262 U.S. 182, 188 (1923).

Additionally, these plaintiffs have also failed to show that they have appellate standing. "Article III demands that an actual controversy persist throughout all stages of litigation." *Hollingsworth v. Perry*, 570 U.S. 693, 705 (2013). When this Court considers whether a party has appellate standing, "the question is whether it has experienced an injury 'fairly traceable to the judgment below.'" *W. Virginia v. EPA*, 597 U.S. 697, 718 (2022) (quoting *Food Mktg. Inst. v. Argus Leader Media*, 139 S.Ct. 2356, 2362 (2019)). If the party has experienced such a traceable injury, "and a 'favorable ruling' from the appellate court 'would redress [that] injury,' then the appellant has a cognizable Article III stake." *Id.* But just as the enforcement of SB4 would not injure any of these plaintiffs, the administrative stay imposed by the Fifth Circuit also causes no injury.

For similar reasons, none of these plaintiffs can overcome sovereign immunity. They purport to sue state officials in their official capacities, who are protected by Texas's sovereign immunity. *See, e.g.*, *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100-01 (1984). While "*Ex parte Young*, 209 U.S. 123 (1908) allows suits for injunctive or declaratory relief against state officials [in their official capacities], provided they have sufficient 'connection' to enforcing" a state action that allegedly violates federal law, where there is no such connection, "the suit is effectively against the state itself and thus barred by the Eleventh Amendment and sovereign immunity." *In re Abbott*, 956 F.3d 696, 708 (5th Cir. 2020) (citations omitted), *cert. granted, judgment vacated as moot sub nom, Planned Parenthood Ctr. for Choice v. Abbott*, 141 S.Ct. 1261 (2021). Because no Texas official will enforce any part of this law against these plaintiffs, none can avail itself of *Ex Parte Young*. *Id.*

The district court disagreed with this straightforward analysis by relying on a Fifth Circuit case—*NAACP v. City of Kyle*, 626 F.3d 233 (5th Cir. 2010)—that predates *Susan B. Anthony List* by almost half a decade. Fed.Gov.App.12a-20a. The district court also

concluded that *Susan B. Anthony List* does not apply, and that the Organizational Plaintiffs' strategic choices to divert resources is an *indirect* injury sufficient to confer standing. *Id.* Yet as discussed, their alleged diversion of resources alone does not suffice. Further, the question of the indirectness of an injury typically goes to traceability, not injury-in-fact. *See, e.g.*, *Chevron Corp. v. Donziger*, 833 F.3d 74, 121 (2d Cir. 2016). And regarding the nature of the injury itself, the Court has said it requires a showing that "the threatened injury is real, immediate, *and direct*." *Davis v. FEC*, 554 U.S. 724, 734 (2008) (emphasis added). The lack of a direct injury here thus precludes finding standing. After all, "[t]he mere fact that an organization redirects some of its resources to litigation and legal counseling in response to actions or inactions of another party is insufficient to impart standing upon the organization." *Ass'n for Retarded Citizens of Dall. v. Dall. Cnty. Mental Health & Mental Retardation Ctr. Bd. of Trs.*, 19 F.3d 241, 244 (5th Cir. 1994).

2. All of the Plaintiffs' suits, moreover, fail because each Plaintiff only alleges a cause of action under the Supremacy Clause. Yet "the Supremacy Clause is not the source of any federal rights" and "certainly does not create a cause of action," either expressly or by implication, and it "is silent regarding who may enforce federal laws in court, and in what circumstances they may do so." *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 324-25 (2015). Instead, "private rights of action to enforce federal law must be created by Congress." *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001). Because Plaintiffs fail to identify any statute containing "'rights-creating' language" permitting their suit, and because they cannot rely on *Ex Parte Young*, their suit is a nullity. *Id.* at 288.

Similar analysis applies to the federal government, which also has brought a cause of action under the Supremacy Clause. Because the Supremacy Clause is not itself a cause of action, however, the federal government—like any litigant—needs a separate cause of action to seek an equitable remedy. No one disputes that Congress has not enacted a statutory cause of action that would allow the federal government to bring its claim here.

The federal government says it does not need a statutory cause of action because *In re*

Debs, 158 U.S. 564 (1895), provides a freestanding equitable cause of action. Absent legislation from Congress, however, "the equity jurisdiction of the federal courts is the jurisdiction in equity exercised by the High Court of Chancery in England at the time of the adoption of the Constitution and the enactment of the original Judiciary Act, 1789." *Grupo Mexicano de Desarrollo S.A. v. All. Bond Fund, Inc.*, 527 U.S. 308, 318 (1999). The federal government does not identify any case, much less one from 1789, holding that federal officers can bring a claim in equity to enforce the Supremacy Clause. Federal judges thus should not create a new cause of action given their "traditionally cautious approach to equitable powers." *Id.* at 329. Indeed, in recent years this Court has made clear—repeatedly—that federal courts should not recognize new implied causes of action. *See, e.g.*, *Hernandez v. Mesa*, 140 S.Ct. 735, 742 (2020).

Debs is not to the contrary. *First*, *Debs* arose from a bill in equity to abate a public nuisance connected with federal proprietary interests, a well-recognized equitable claim. *See Debs*, 158 U.S. at 585; *see also* Aditya Bamzai & Samuel L. Bray, Debs *and the Federal Equity Jurisdiction*, 98 Notre Dame L. Rev. 699, 737 (2022) ("[W]here there is no statutory basis for injunctive relief, the plaintiff should be required to connect her claim to some proprietary interest."). In other words, "[t]he crux of the *Debs* decision" was "that the Government may invoke judicial power to abate what is in effect a nuisance detrimental to the public interest." *United Steelworkers of Am. v. United States*, 80 S.Ct. 177, 186 (1959) (Frankfurter, J., concurring in the opinion of the Court). The federal government does not contend its claim here falls within that traditional cause of action, nor could it.

Second, the federal government's reliance on *Wyandotte* also misses the mark. *Wyandotte* describes *Debs* as removing nuisances obstructing interstate commerce, *Wyandotte Transp. Co. v. United States*, 389 U.S. 191, 201 (1967) (citing *Debs*, 158 U.S. at 586)—a principle that supports Texas's argument. And *Wyandotte* itself concerned the scope of available relief, not the existence of a cause of action. *See id.* at 193. The cases *Wyandotte* cites, moreover, stand for the unremarkable proposition that "the United States

may sue to protect its interests" *under an available cause of action*—a right Texas does not dispute. *Id.* at 201 (citing *Cotton v. United States*, 52 U.S. (11 How.) 229 (1850) (action in trespass); *United States v. San Jacinto Tin Co.*, 125 U.S. 273 (1888) (action to quiet title); *Sanitary Dist. of Chicago v. United States*, 266 U.S. 405 (1925) (statutory cause of action)). Where the federal government has a cause of action in equity, it can obtain an injunction. But it has such no cause of action here.

Third, that the federal government relied on a non-existent cause of action in *Arizona* is irrelevant because whether a cause of action exists does not go to jurisdiction, and no party in that case raised this issue. That historical fact is unsurprising, moreover, because the legal landscape when *Arizona* was decided was markedly different. Not only was *Arizona* decided pre-*Armstrong*, but it also predated the Court's wave of cases emphasizing that it is for Congress—not courts—to create causes of action. *See, e.g.*, *Hernandez*, 140 S.Ct. at 741-42. In all events, "[i]n our adversarial system of adjudication, we follow the principle of party presentation," *United States v. Sineneng-Smith*, 140 S.Ct. 1575, 1579 (2020), and "[q]uestions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents," *Gann v. United States*, 142 S.Ct. 1, 2 (2021). For the reasons documented by Professors Bamzai and Bray, there is no basis to read *Debs* as a limitless "litigation superpower." Bamzai & Bray, *supra* at 737. Instead, if Congress wants the federal government to be able to bring suits like this one, it must enact legislation.

Finally, the federal government argues (at 37) that it can pursue an equitable action under *Ex Parte Young*. There are two problems with this theory. First, the federal government raised it for the first time on appeal. And second, contrary to its contention, *Virginia Office for Protection and Advocacy v. Stewart*, 563 U.S. 247 (2011), does not give the federal government a cause of action under *Ex Parte Young*. As the Court has explained, *Ex Parte Young* creates an exception to sovereign immunity that "allows *certain private parties* to seek judicial orders in federal court" enjoining unconstitutional acts by

State officials. *Whole Woman's Health v. Jackson*, 595 U.S. 30, 39 (2021) (emphasis added). The case says nothing about whether the federal government can sue State officials acting in their official capacities without congressional authorization.

The district court was unmoved by these points. Fed.Gov.App.26a-29a. First, the district court suggests that this Court in *Armstrong* did not evaluate whether there was a cause of action in equity upon which the *Armstrong* plaintiffs could rely, but rather separately evaluated whether there was a cause of action in general and then whether relief in equity was available. This is inaccurate. *Armstrong* evaluated whether the plaintiffs had "an implied right of action under the Supremacy Clause to seek injunctive relief." *Armstrong*, 575 U.S. at 324. In other words, the question before the Court was whether plaintiffs could rely on equity to enforce a federal law. The separate treatment the district court refers to was simply a bifurcated analysis of whether there was a constitutional or statutory grant of authorization to private plaintiffs to sue to enforce federal law, the answer being "no" to both questions. *Id.* at 324-35. Notably, *Armstrong* says nothing at all about whether Congress has authorized the federal government to bring such a suit.

The district court also wrongly relied (Fed.Gov.App.28a-29a) on the fact that the United States "has brought many lawsuits under the Supremacy Clause … without any questioning of [it] as the basis for a federal cause of action," *United States v. Texas*, 557 F. Supp. 3d 810, 820 (W.D. Tex. 2021). But such cases do not grapple with the separation-of-powers problems posed by *Debs* or with this Court's recent cases explaining that inferring causes of action is a highly disfavored judicial activity. *See supra* at 14.

At bottom, the federal government's assertion of authority is breathtaking. It wants to be able to seek an injunction of any law passed by any State, despite Congress's failure to enact a statute granting such authority and without any grounding in traditional equitable principles. Yet where, as here, "the basis for the suit by the United States is a reach back almost 130 years for a litigation superpower, … it is more than appropriate for the historic limits on that superpower to be brought along as well." Bamzai & Bray, *supra*, at 737.

B. S.B.4 Is Not Preempted.

Plaintiffs' merits arguments fare no better. "In all pre-emption cases," *Wyeth v. Levine*, 555 U.S. 555, 565 (2009), courts should "start with the assumption that the historic police powers of the States were not to be superseded … unless that was the clear and manifest purpose of Congress," *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Plaintiffs attempt to flip this presumption on its head by advancing a sweeping theory of preemption that leaves no room for States to help enforce immigration laws even though Congress has invited States to do that very thing. Plaintiffs defend their approach by invoking *Arizona*, but nothing in *Arizona* justifies preemption here.

The federal government asserts (at 3) that "SB4 is both field and conflict preempted." According to the federal government (at 10), "[t]hree provisions of SB4 are relevant here": Sections 51.02(a) and 51.03(a), which create State offenses for violations of federal unlawful entry and reentry laws, and Article 5B.002, which permits judges to issue orders to return. *See supra* at 5. Yet as the federal government admits (at 10-11), Sections 51.02(a) and 51.03(a) "parallel[]" federal law. In fact, these sections create affirmative defenses if "the federal government has granted the defendant … lawful presence in the United States" or "asylum," thus confirming that they cannot be facially preempted. Tex. Penal Code §51.02(c)(1). And Article 5B.002 allows an illegal alien facing prosecution to voluntary depart in lieu of potential conviction, which means that Texas will deliver that person to the federal government at a lawful port of entry. Nothing about S.B.4 facially conflicts with federal law.

1. No provision of S.B.4 is field preempted. Courts infer field preemption rarely—only when an "unambiguous congressional mandate," *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 147 (1963), ousts the State entirely from a field "Congress occupies" exclusively, *Arizona*, 567 U.S. at 401. Nothing approaches such a mandate here. To the contrary, where, as here, the law "expressly contemplates concurrent regulation with

States and localities," "[t]hat ends the matter" with respect to field preemption. *Nat'l Press Photographers Ass'n v. McCraw*, 90 F.4th 770, 797 (5th Cir. 2024).

The federal government claims (at 19) that Congress created a "comprehensive and detailed regime governing entry and removal" when it enacted the Immigration and Nationality Act, and that "federal law fully occupies this field." It also claims (at 2) "that the authority to admit and remove noncitizens is a core responsibility of the National Government, and that where Congress has enacted a law addressing those issues, state law is preempted." But the federal government does not—and cannot—point to any decision from this Court recognizing "entry and removal" as an exclusive federal field. The federal government cites (at 20) *Truax v. Raich*, 239 U.S. 33 (1915), which says that the "authority" over immigration, including "to admit or exclude aliens" is a power "vested solely in the Federal Government." *Id.* (citing *Truax*, 239 U.S. at 42). Yet Texas does not question that power; no one doubts Congress's ability to enact and enforce the federal immigration code. And even if Congress alone has the sole power to lawfully admit or exclude aliens, that does not mean States cannot help enforce federal immigration laws, particularly when Congress itself has invited such assistance.

Under federal law, States enjoy wide latitude to regulate alien misconduct and prosecute crimes involving illegal entry and removal. Indeed, the federal immigration code is replete with state-federal cooperation.[4] Even the federal government acknowledges (at

[4] Examples abound: 18 U.S.C. §758 (crime for alien to "flee[]" from "State, or local law enforcement" around immigration checkpoints); 8 U.S.C. §1324(c) (States may make arrests for violation of alien smuggling prohibition); 22 U.S.C. §7105(c)(3)(C)(i) (contemplating "State or local" prosecution of alien "trafficking"); 8 U.S.C. §1101(a)(15)(T)(i)(III)(aa) (contemplating "State[] or local investigation or prosecution" of illegal trafficking); *id.* §1101(a)(15)(U)(iii) (State and local criminal laws can include trafficking); *id.* §1357(g)(1)-(10) (State and local officers perform functions of federal immigration officers related to the identification, apprehension, detention, and removal of illegal aliens); *id.* §1357(g)(10)(A) (State and local officers communicate with federal officials regarding the immigration status of *any* individual).

8-9, 26-27) that federal law "expressly contemplates several ways in which state and local officers may assist or cooperate with federal officials in their enforcement of" the immigration code. Courts thus have never "conclude[d] that the States are without any power to deter the influx of persons entering the United States… and whose numbers might have a discernable impact on traditional state concerns." *Plyler v. Doe*, 457 U.S. 202, 228 n.23 (1982). Nor does the federal code preclude States from facilitating aliens finding their way to ports of entry, the purpose of S.B.4's return orders. To the contrary, Congress wants everyone to present themselves at lawful ports of entry and has made it a federal crime for them to enter or exit anywhere else. *See* 8 U.S.C. §§1325(a), 1326(a).

Plaintiffs (and the district court) rely on *Arizona* to contend that immigration enforcement is an *exclusive* federal field. But *Arizona* says no such thing. In *Arizona*, the Court considered four state-law provisions, holding that one—§3—was field preempted, two—§5(C) and §6—were conflict preempted, and another—§2(B)—was not preempted at all. The provision that was field preempted, §3, would have created a state crime for failing to carry an alien registration card. *Arizona*, 567 U.S. at 400. The Court explained that although a State ordinarily "may make violation of federal law a crime," a principle of law that supports Texas here, a State "cannot do so in a field" such as alien registration "that has been occupied by federal law." *Id.* at 402. Because §3 attempted to regulate within such a preempted field, it too was preempted. *Id.* at 403-04 (citing *DeCanas v. Bica*, 424 U.S. 351, 356 (1976); *Hines v. Davidowitz,* 312 U.S. 52, 66-67 (1941)). But under *Arizona*, §3 would not have been preempted had it mirrored federal law *without* intruding on an exclusive federal field. That point is critical because the criminal provisions of S.B.4 mirror federal law and do not touch upon any exclusive federal field but rather address subjects for which Congress has invited State cooperation.

The Court used the word "exclusive" twice in *Arizona*, and only to describe the standard for finding field preemption. *Id.* at 399, 409. The only field preemption recognized in *Arizona* is "the field of alien registration," which is a domestic tracking program wholly

inapplicable here. *Id.* at 402. Moreover, *Arizona* did not find that State laws concerning entry and removal were field preempted, and nothing in *Arizona* precludes States from regulating entry and reentry or issuing return orders. Indeed, the Court in *Arizona* held three of the four challenged provisions of Arizona's law were *not* field preempted, including a provision that would have directly impacted the removal of illegal aliens. *Id.* at 416. And this Court has elsewhere rejected that federal law field preempts "every state enactment which in any way deals with aliens." *DeCanas*, 424 U.S. at 355. Otherwise, no State could enact or enforce any law affecting immigration—a demonstrably untenable position. *See, e.g.*, *supra* n.4.

The district court nonetheless concluded that all of S.B.4 is field preempted. Fed.Gov.App.55a. That legal error cannot be reconciled with *Arizona*.

2. The federal government also argues (at 3-4) that S.B.4 "conflicts with federal law in multiple respects." It claims (at 25-26) that S.B.4 "would fundamentally disrupt the federal immigration regime," and would prevent the nation from speaking "with one voice" in matters of foreign affairs. It further claims (at 27) that S.B.4 impacts the federal "procedures for determining removability," and "prevents noncitizens from asserting defenses to removal that would be available in the federal system." As examples, the federal government points (at 27) to "asylum," "withholding," and "protections under the Convention Against Torture." According to the federal government (at 27-28), "SB4 expressly rejects any deference to federal removal proceedings that could result in a grant of asylum or other relief or protection from removal" by precluding abatement "on the basis that a federal determination regarding the immigration status of the defendant is pending or will be initiated." The district court agreed, finding that "SB4 plainly conflicts with federal law by instructing state judges to disregard pending federal defenses." Fed.Gov.App.58a.

These conclusions rely on misunderstandings about conflict preemption and S.B.4. Conflict preemption arises only when it is "impossib[le]" to comply with both state and

federal law, or when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Arizona*, 567 U.S. at 399. Here, it is readily possible to comply with both federal and state law and S.B.4 furthers Congress's purposes and objectives. At a bare minimum, there is no basis to say that *every* application of S.B.4 conflicts with federal law—the requirement for a facial, pre-enforcement injunction.

In the preemption context, a state regulation "'stands as an obstacle'" to federal objectives if there is an "actual conflict between the two schemes of regulation" such that "both cannot stand in the same area." *Paul*, 373 U.S. at 141 (citing *Hines*, 312 U.S. at 67). But "[t]he mere fact that state laws like" S.B.4 "overlap to some degree with federal criminal provisions" on immigration "does not even begin to make a case for" preemption. *Kansas v. Garcia*, 140 S.Ct. 791, 806 (2020). "[I]f [this Court] were to hold that federal criminal law preempts state law whenever they overlap," the "federal system would be turned upside down." *Id.* "Indeed, in the vast majority of cases where federal and state laws overlap, allowing the States to prosecute is entirely consistent with federal interests." *Id.* And as the federal government acknowledges (at 26-27), *Arizona* permits State officials to "cooperate with the [federal government] in the identification, apprehension, detention, [and] removal of aliens not lawfully present in the United States." *Id.* (citing *Arizona*, 567 U.S. at 409). What is more, "with respect to illegal aliens," State laws that "mirror[] federal objectives" are *more*—not less—likely to be upheld. *Plyler*, 457 U.S. at 225. Likewise, as explained above, because Texas courts "interpret [] statute[s] in a manner that avoids constitutional infirmity," *Quick v*, 7 S.W.3d at 115, S.B.4 will presumably be construed and applied to avoid conflicts with federal law.

Like its federal counterpart, S.B.4 makes it a crime to cross into Texas at any location other than a port of entry, Tex. Penal Code §51.02(a); 8 U.S.C. §1325(a), or to illegally re-enter the country after having previously been "denied admission," been involuntarily "removed," or having voluntarily "departed from the United States," Tex. Penal Code §51.03(a); 8 U.S.C. §1326(a). S.B.4 also provides for return orders—something that no

federal law prohibits. Tex. Code Crim. Proc. art. 5B.002(c), (d); 8 U.S.C. §§1225(b)(1)(A)(i), 1229a(d), 1229c(a)(1). While the government claims (at 27-28) that S.B.4's return orders are "removal provisions" that eliminate federal defenses, like an individual's option to seek asylum, the return orders do no such thing.[5] A return order merely requires that an alien be transported to a port of entry, at which point the alien's potential removal is a question for federal immigration officers. Art. 5B.002(e). An alien may voluntarily agree to a return order in lieu of prosecution, dismissing all charges. Art. 5B.002(b)-(c). When a return order is issued, a State officer or agency is "responsible for monitoring compliance with the order," but has no additional authority or responsibility to effectuate removal. Art. 5B.002(e)(2). Nothing in S.B.4 prevents an alien from seeking asylum or any other federal relief with a federal immigration officer, and S.B.4 does not authorize or require State officials to make removal determinations, assess an alien's removal defenses, or interfere with the federal government's removal proceedings. App.36a. And S.B.4 does not alter State officers' routine practice of cooperating with federal authorities when an arrested or detained alien expresses a desire to seek asylum or other relief. App.35a. If such a person has a pending application for asylum or other relief, S.B.4 does not prevent State officers from coordinating with federal immigration authorities. App.36a. Thus, contrary to the federal government's assertions (at 25), S.B.4 does not permit State officers to make "unilateral determinations regarding unlawful entry and removal." By design, nothing in S.B.4 disrupts or conflicts with federal law, including federal defenses and removal relief. And even if federal law does provide some defense or right that is not provided for under

[5] Nor do return orders do what the district court claimed, and what the federal government recites in its Application (at 24-25): require an alien to "either depart into Mexico or … face 20 years in prison if they do not," or otherwise be forcefully removed "in handcuffs" or "under threat of handcuffs (and 20 years of prison)." Texas's declarant said no such thing. *See* App.34a-36a. The district court first asserted such colorful language, and the government now repeats it before this Court. *See* Fed.Gov.App.45a-46a.

S.B.4, that defense or right would continue to apply under basic principles of federal preemption. But it would not follow that *every* application of S.B.4 could be enjoined for that reason, including applications that have nothing to do with that defense or right.

Tellingly, Plaintiffs do not attempt to equate the conflict preempted provisions in *Arizona* with S.B.4's challenged provisions—undoubtedly because the differences between the provisions underscore why conflict preemption does not apply. In *Arizona*, two provisions of Arizona's law were deemed conflict preempted: §5(C) and §6. As to §5(C), the Court explained that "Congress made a deliberate choice not to impose [the] criminal penalties" that §5(C) created. 567 U.S. at 405. Because Congress rejected the penalties §5(C) would impose, the state law was an "obstacle" to Congress's objectives. *Id.* at 406.

Similarly, the Court determined that §6 was conflict-preempted because it allowed a State officer to arrest a person based on probable cause of removability but not the commission of a crime. *Id.* at 407-10. The Court explained that because "it is not a crime for a removable alien to remain present in the United States," even if removable, "the usual predicate for an arrest [under §6] is absent." *Id.* at 407. So §6 would have provided State officers "even greater authority to arrest aliens … than Congress has given to trained federal immigration officers," *id.* at 408, which would allow a State officer to make a "unilateral decision," "defeating any need for real cooperation" between State and federal officials, *id.* at 410.

By contrast, the Court held that Arizona's §2(B), which requires State officers to determine an individual's immigration status if the individual is arrested or detained "on some other legitimate basis," is neither field nor conflict preempted. *Id.* at 411. Because assessing immigration status requires consultation between State and federal officials, "[t]he federal scheme thus leaves room" for State action. *Id.* at 413. The Court buttressed that holding with the recognition that "[t]he nature and timing" of a pre-enforcement facial challenge "counsel caution in evaluating the validity" of a State-law "provision even before the law has gone into effect." *Id.* at 415. Accordingly, the Court held that "without the

benefit of a definitive interpretation from the state courts, it would be inappropriate to assume §2(B) will be construed in a way that creates a conflict with federal law." *Id.*

So too here. S.B.4's provisions mirror federal law and comport with federal objectives in reducing illegal border crossings. Critically, S.B.4 is unlike *Arizona*'s §3 because it does not intrude on a recognized, exclusive federal field; it certainly has nothing to do with the only federal field—alien registration—in *Arizona*. *See supra* at 18. Nor is S.B.4 like §5(C) or §6. Even the federal government acknowledges (at 6) that S.B.4 has *existing* federal law analogues, unlike §5(C). And unlike §6, S.B.4 only empowers State officers to arrest and detain aliens when there is probable cause of a criminal violation. S.B.4 does not allow a State officer's "unilateral decision" to arrest without probable cause of a crime, and it does not "provide state officers even greater authority" than their federal counterparts. *Arizona*, 567 U.S. at 408, 410. Instead, S.B.4 is most like *Arizona*'s §2(B), which requires States to cooperate with the federal government to enforce existing federal laws.

Critically, an alien can comply with *both* the federal immigration code and S.B.4 by entering this country legally at a port of entry and not reentering illegally; those subject to S.B.4, moreover, will be removed to that port of entry, and so placed in custody of federal officials. S.B.4 is also consistent with and reflects Texas's enforcement of its state criminal trespass law, Tex. Penal Code §30.05, which has been used for years to prohibit an alien's illegal entry and presence in Texas. The federal government has never—and does not now—challenge the State's authority to enforce the State's equally complementary border-based criminal trespass law.

The district court found conflict preemption "because [S.B.4] provides state officials the power to enforce federal law without federal supervision." Fed.Gov.App.56a. The court cited *Villas at Parkside Partners v. City of Farmers Branch*, 726 F.3d 524, 531-32 (5th Cir. 2013), and *Arizona*, 567 U.S. at 408, for this proposition, but neither case requires federal supervision; rather, they acknowledge the circumstances in which State officers can directly perform the functions of a federal immigration officer. The district court's analysis

again reflects plain legal error—thus once more confirming that the Fifth Circuit will ultimately conclude that the preliminary injunction must be vacated. Even on its own terms, moreover, the district court did not attempt to explain why every application of S.B.4 would conflict with federal law.

Regardless, if there were any question about a possible conflict between S.B.4 and federal law, principles of constitutional avoidance would answer it. As explained below, States have a constitutional right to defend themselves and issues relating to unlawful entry into a State go to the heart of a State's sovereignty. *See infra* at 25. The Court thus should construe immigration law to accommodate, rather than conflict with, S.B.4. The district court also failed to consider constitutional avoidance, which is another error of law.[6]

C. S.B.4 Does Not Offend the Dormant Foreign Commerce Clause.

The federal government, echoing the district court, also briefly contends that S.B.4 offends the Dormant Foreign Commerce Clause. States, however, are free to exercise their police powers despite potential consequences for foreign affairs. *See, e.g.*, *Medellin v. Texas*, 552 U.S. 491, 497-98 (2008). And so long as States do not discriminate against out-of-state economic interests, the Constitution broadly permits them to regulate commerce within their borders. *See, e.g.*, *Nat'l Pork Producers Council v. Ross*, 598 U.S. 356, 368–70 (2023). Here, Plaintiffs all but concede that S.B.4 is not motivated by protectionism and make no effort to show how S.B.4 flunks the so-called *Pike* balancing test. Nonetheless, they argue that S.B.4 is unlawful. This argument is wrong in numerous respects.

To begin, even assuming that *illegal* border crossings constitute "commerce," there is nothing "dormant" about Congress's lawmaking here. "Congress has undoubted power" to supersede the Dormant Commerce Clause, *S. Pac. Co. v. Arizona*, 325 U.S. 761, 769 (1945),

[6] No provision of S.B.4 is preempted under *Arizona*—either facially or as-applied. But if the Court reads *Arizona* so broadly that some provision is preempted, *Arizona* should be overruled as contrary to both statutory and constitutional text, structure, and history.

and Congress not only declined to preempt the field, but itself criminalized illicit, cross-border human trafficking and repeatedly has welcomed state cooperation to enforce that prohibition. *See supra* at 18. Furthermore, neither case relied on by the federal government (at 30) is on point. *United States v. Guest*, 383 U.S. 745 (1966), addressed Congress's efforts to protect the constitutional right to interstate travel. And *Japan Line Ltd. v. Los Angeles County*, 441 U.S. 434, 446 (1979), involved an effort to directly "tax the instrumentalities of foreign commerce" without authorization from Congress. Neither case is remotely comparable to S.B.4.

Regardless, the federal government's theory treats human beings as articles of commerce—without explaining why Congress would agree with such treatment. In *Henderson v. Mayor of City of New York*, 92 U.S. (2 Otto) 259 (1875), moreover, the Court addressed a per-passenger tax on a commercial vessel, and in *Chy Lung v. Freeman*, 92 U.S. (2 Otto) 275, 278 (1875), an official was authorized to bar commercial vessels from coming into port unless they "pa[id] such a sum of money as the commissioner may in each case think proper to exact." S.B.4, by contrast, has no commercial component; it is a pure exercise of Texas's police power. It is thus "not a regulation of commerce" but instead was "passed in the exercise of a power which rightfully belonged to the states." *Mayor of New York v. Miln*, 36 U.S. 102, 132 (1837).

D. Texas's Right of Self-Defense Further Supports the Fifth Circuit's Stay.

Even if federal statutory law or the dormant Commerce Clause arguably did run up against S.B.4, Texas has constitutional authority to defend itself. Upon joining the Union, "the States did not part with that power of self-preservation which must be inherent in every organized community." *Smith v. Turner*, 48 U.S. (7 How.) 283, 400 (1849) (McLean, J.). This sovereign power is confirmed by the State Invasion Clause, which recognizes that States may unilaterally respond when "actually invaded." U.S. Const. art. I, §10, cl. 3. Under any plausible reading of that constitutional provision, S.B.4 can be applied in at least some and likely many cases, by itself defeating Plaintiffs' facial challenge.

1. "No state shall, without the Consent of Congress, … engage in War, *unless actually invaded*, or in such imminent Danger as will not admit of delay." U.S. Const. art. I, §10, cl. 3 (emphasis added). A state thus may defend itself "if it is 'actually invaded.'" *Melendez v. City of New York*, 16 F.4th 992, 1018 (2d Cir. 2021). On its face, this provision represents "an acknowledgement of the States' sovereign interest in protecting their borders." *Arizona*, 567 U.S. at 419 (Scalia, J., dissenting in part); *see also* Robert G. Natelson & Andrew T. Hyman, *The Constitution, Invasion, Immigration, and the War Powers of States*, 13 British J. Am. Leg. Studies 1 (2024) (methodically exploring State authority to exercise the Constitution's "Self-Defense Clause").

The word "invasion" is capacious. Webster's 1806 dictionary—the first American English dictionary—broadly defines "invade" as meaning "to enter or seize in hostile manner." Noah Webster, *A Compendious Dictionary of the English Language* 164 (1806). Webster's 1828 dictionary further defines "invade" as including not just the entrance of a foreign army but also "1 … to enter as an enemy, with a view to conquest or plunder; to attack"; "2. To attack; to assail; to assault"; "3. To attack; to infringe; to encroach on; to violate." 1 Noah Webster, *American Dictionary of the English Language* 113 (1828). Samuel Johnson defined "invade" as "to enter in a hostile manner," and "invasion" as a "hostile entrance" or "an attack." Samuel Johnson, *[Johnson's] Dictionary* (reprint, Boston 1828). It has never required an attack by a foreign state or a danger of conquest.

History confirms this understanding. In urging adoption of the Constitution, James Madison explained that smuggling could justify a State military response:

> The militia ought to be called forth to suppress smugglers. Will this be denied? The case actually happened at Alexandria. There were a number of smugglers, who were too formidable for the civil power to overcome. The military quelled the sailors, who otherwise would have perpetrated their intentions. Should a number of smugglers have a number of ships, the militia ought to be called forth to quell them.

3 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 414 (Jonathan Elliot ed., Washington, D.C., 2d ed. 1836). Madison explained later that day that although States are generally "restrained from making war," that bar does not apply when they are "invaded, or in imminent danger. When in such danger, they are not restrained." *Id.* at 425. Nor was Madison alone in this opinion. According to John Marshall, it was "unquestionable that the state governments can call forth the militia, in case the Constitution should be adopted, in the same manner as they could have done before its adoption," and that "what excludes every possibility of doubt, is the last part of [the 10th section of the 1st article]—that 'no state shall engage in war, unless actually invaded, or in such imminent danger as will not admit of delay.' … This clearly proves that the states can use the militia when they find it necessary." *Id.* at 420.

As early as 1792, the United States determined that its power "[t]o provide for calling forth the Militia to … repel Invasions," U.S. Const. art. I, §8, authorized force to repel any "imminent danger of invasion from any … Indian tribe." *An Act [t]o provide for calling forth the Militia to execute the laws of the Union, suppress insurrections and repel invasions"*, 1 Stat. 264, 2d Cong., Sess. I, Ch. 28 (1792) (emphasis added). And the United States sent forces into Mexico to pursue non-state actors because the Mexican government "was incapable of policing" the border and tracking down Pancho Villa, who repeatedly crossed over the Rio Grande into Texas to kill and plunder. John S.D. Eisenhower, *Intervention! The United States and the Mexican Revolution 1913-1917*, at 227–50 (1993); *cf.* U.S. Const. art. IV, §4 (obligating federal government to protect States "against Invasion[]").

States have also exercised their power to repeal invasion. Of particular significance, Texas repeatedly responded with force against marauders who crossed into Texas from Mexico, both before and after Texas's statehood. *See, e.g.*, H. Rep. No. 343, at 13-17 (Feb. 29, 1876). Congress thus created a "special committee on the Texas frontier troubles" to study Texas's use of such force against "bands of Indians and Mexicans, who crossed the

Rio Grande River into the State of Texas." *Id.* at 1. The Special Committee quoted with approval Governor Sam Houston's letter to the U.S. Secretary of War about this "invasion"—Congress's word—"of Indians from Mexico in Texas," which justified Texas's "'repress[ing] such outrages upon our people.'" *Id.* at 15. Furthermore, after the U.S. Attorney General objected in 1874 to Governor Richard Coke's decision to respond with military force against "'thieves and marauders'" who crossed into Texas, Governor Coke observed that "'[n]o state has surrendered the right of defense of its people ….'" *Id.* at 15-16. "Attorney General Williams acquiesced in these conclusions, and the orders remained in force." *Id.* at 16.

2. Governor Abbott—acting as the "Commander-in-Chief of the military forces of the State" of Texas, Tex. Const. art. IV, §4—has invoked Texas's power to defend itself against transnational cartels engaged in terrorism, human trafficking, and fentanyl and weapons smuggling. What is more, cartels intentionally exploit vulnerable immigration policies and lapses in federal immigration enforcement for their financial gain—as President Biden recognized, "people pay these smugglers $8,000 to get across the border" because the consequences for illegally crossing the border can be relatively non-existent. State of the Union Address, *see supra* at 3. The dangers of cartel activity are hard to overstate: such lucrative, illicit conduct endangers border-state residents, oftentimes including vulnerable individuals and children, and results in extraordinary hazards and destruction, including high-speed chases. At a minimum, fighting back against cartels that "have increasingly acquired a transnational dimension" and operate as a "potent paramilitary force," Barr, *supra*, is permissible under any plausible reading of the State Invasion Clause. Plaintiffs do not dispute that armed and dangerous cartel members cross the border,[7] or that S.B.4

[7] *See, e.g.*, Anna Giaritelli, *Texas Drone Spots Armed Smuggler Leading Immigrants Across the Border*, WASH. EXAMINER (Aug. 3, 2023), https://tinyurl.com/29r5wz8k; Victor Nava, *Armed Men Believed to Be Mexican Cartel Members Wearing Body Armor Spotted*

could be used to combat such incursions. Because Plaintiffs must "establish that *no set of circumstances* exists under which the Act would be valid," *Salerno*, 481 U.S. at 745 (emphasis added), such applications of S.B.4 defeat their facial challenge.

The district court dismissed Texas's right to self-defense by contending that immigration is not an invasion. Whether that is always true is debatable. *See, e.g.*, *United States v. Abbott*, 92 F.4th 570, 579-80 (5th Cir. 2024) (Ho, J., dissenting) (collecting examples of "weaponized migration"). Regardless, it enough that even the district court recognized that "invasion" includes "a 'hostile entrance into the possession of another,'" "particularly"—not exclusively—by "a hostile army" seeking "conquest or plunder." Fed.Gov.App.72a. The district court also acknowledged that "'invasion' can refer to actions by non-state actors," Fed.Gov.App.86a, and that "some small fraction of immigrants may cross the border with malicious intent and… may be affiliated with paramilitary cartels," Fed.Gov.App.75a. Accordingly, on the district court's own terms, some applications of S.B.4 are constitutional—defeating a facial injunction.

The district court nonetheless concluded that an invasion requires a threat that cartels "will imminently overthrow the state government." Fed.Gov.App.78a. No Plaintiff repeats that argument—and for good reason. No one thought Pancho Villa was on the cusp of conquering Texas or that smugglers were about to overthrow Virginia. The district court also suggested that S.B.4 is not a "wartime measure" because it uses "standard operations of criminal enforcement." Fed.Gov.App.88a-89a. As Justice Holmes explained for the Court, however, the greater power to wage war against invaders and insurrectionists includes the lesser power to "arrest" them. *Moyer v. Peabody*, 212 U.S. 78, 84-85 (1909). The district court further observed that "SB 4 is not limited to times of invasions" and

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Crossing Southern Border into Texas, N.Y. POST (Aug. 8, 2023), https://tinyurl.com/36apzadn; Office of Tex. Governor, *Press Release, Texas Arrests MS-13 Gang Members, Smugglers Known for Sexual Abuse* (Aug. 11, 2023), https://tinyurl.com/y7cy95au.

suggested that Texas's efforts to repel an invasion cannot be "perpetual." Fed.Gov.App.91a-92a. Nothing in the Constitution's text, structure, or history, however, says a State must stop defending itself. Regardless, a facial injunction is unwarranted under *Salerno* so long as S.B.4 can *ever* be constitutionally enforced. Here, the district court's analysis at most suggests limits on S.B.4's application—not that it can never be applied.

The federal government's argument is also mistaken in many respects. *First*, it says (at 32-33) Texas has not been "actually invaded" because it has not been overrun by "a hostile and organized military force, too powerful to be dealt with by ordinary judicial proceedings." Yet so long as its decision is made in "good faith," *Sterling v. Constantin*, 287 U.S. 378, 399-400 (1932), just as the United States has exclusive "authority to decide whether [an] exigency has arisen" for purposes of Article I, Section 8, Clause 15, *Martin v. Mott*, 25 U.S. (12 Wheat.) 19, 29-30 (1827) (Story, J.), Texas has exclusive authority to decide whether such an exigency has arisen within its own borders under Article I, Section 10, Clause 3, *cf. Moyer*, 212 U.S. at 83-85; *Rucho v. Common Cause*, 139 S.Ct. 2484, 2495–96 (2019) (political question doctrine applies to state decisions). And even if such a fundamental determination could be second guessed by a court, history supports Texas. Congress' Special Committee, after all, agreed that Texas could combat bandits—the forerunners of today's even more dangerous cartels—who cross into Texas from Mexico.

Second, the federal government argues (at 33-34) that even if a State is being invaded, federal statutory law preempts State effort to repel the invasion. But when it comes to self-defense, the Constitution declares that Texas is *not* required to obtain Congress's "consent." U.S. Const. art. I, §10, cl. 3. The federal government's argument also contradicts "common sense," *Abbott*, 92 F.4th at 579-80 (Ho, J., dissenting). Simply put, States never agreed to relinquish their sovereign power to defend themselves. *Id.*

Third, the federal government argues (at 34-35) that a State can use its self-defense authority only "for a very limited time" until the "federal government has had time to respond." This argument is wrong three times over. One, such a fact-specific objection is

irrelevant under *Salerno*. Two, a State may defend itself without federal consent under two circumstances: when "actually invaded, or in such imminent Danger as will not admit of delay." U.S. Const. art. I, §10, cl. 3 (emphasis added). As to the second circumstance, the power ends with the imminent danger does. But as to the first, nothing bars a State from continuing to respond to ongoing hostilities. And three, any suggestion that Texas cannot defend itself because the federal government will protect the States ignores that the federal government is unable or unwilling to do just that.

Finally, the remaining Plaintiffs' efforts to satisfy the *Salerno* standard also falter. They say (at 29) that Texas can "address crimes committed by cartels" but only so long as Texas law is not preempted. The Constitution, however, trumps any statute. They also accuse Texas (at 29) of seeking to "unlock sweeping state authority free from any federal control." But facial injunctions are the exception, not the rule, and where the requirements for such extraordinary relief are not met, "courts must handle unconstitutional applications as they usually do—case-by-case." *United States v. Hansen*, 599 U.S. 762, 770 (2023). Nothing in Texas's argument prevents as-applied challenges to S.B.4.

E. At a Minimum, the District Court Misapplied Severability.

In all events, the district court failed to meaningfully engage with S.B.4's severability clause. That clause requires that "every provision, section, subsection, sentence, clause, phrase, [and] word" be severed, if necessary, to preserve the remainder of the law. Act of Nov. 14, 2023, 88th Leg., 4th C.S., ch. 2, §8 (2023). It also requires severability of "every application of the provisions of [S.B.4] to every person, group of persons, or circumstances" necessary to safeguard enforcement. *Id.* And it expressly commands that "[i]f any application of any provision [of S.B.4] to any person, group of persons, or circumstances if found by a court to be invalid for any reason, the remaining applications of that provision to all other persons and circumstances shall be severed and may not be affected." *Id.* "Severability is of course a matter of state law," *Leavitt v. Jane L.*, 518 U.S. 137, 139 (1996)

(per curiam), and Texas gives near-dispositive weight to a severability clause, *see e.g.*, *Builder Recovery Servs., LLC v. Town of Westlake*, 650 S.W.3d 499, 507 (Tex. 2022).

The district court recognized that it should enjoin only unconstitutional applications of S.B.4 while severing constitutional ones. Yet the district court chose to set aside the severability inquiry because it "would not be practicable" to do so here. Fed.Gov.App.112a, n.57. The district court observed that it could sever the underlying criminal offenses while enjoining the return order provisions but did not do so because, apparently, it believed that they may also raise conflict-preemption issues that the district court did not explore. Fed.Gov.App.112a n.57. Yet the district court should have investigated whether some applications could survive. For example, even if the district court found that Article 5B.002 regarding return orders conflicts with federal removal relief programs or disrupts foreign relations, as Plaintiffs contend, it should have severed that challenged provision from the rest of S.B.4. Doing so would have allowed §51.02 and §51.03, which mirror federal unlawful entry and reentry crimes, to take effect. And S.B.4's severability clause expressly requires this outcome; indeed, it requires that every word be severed if necessary, and every application of the law to every group of persons be individually assessed.

II. The Equities Also Support Texas.

Finally, the equities also overwhelmingly favor Texas. When the Court "assess[es] the lower courts' exercise of equitable discretion, [it] bring[s] to bear an equitable judgment." *Trump v. Int'l Refugee Assistance Project*, 582 U.S. 571, 580 (2017) (quoting *Nken*, 556 U.S. at 433). Before issuing or vacating a stay, the Court must "balance the equities" and "explore the relative harms to applicant and respondent, as well as the interests of the public at large." *Barnes v. E–Systems, Inc. Group Hospital Medical & Surgical Ins. Plan*, 501 U.S. 1301, 1305 (1991) (Scalia, J., in chambers) (internal quotation marks omitted). Particularly in the context of a facial, pre-enforcement injunction of a State law designed to address an acknowledged "crisis," such balancing strongly supports Texas.

To begin, permitting the expedited appeal in the Fifth Circuit to proceed with the administrative stay in place pending the merits panel's decision with respect to Texas's motion for a stay pending appeal will not irreparably harm any Plaintiff but millions of Texans will be harmed if S.B. 4 is enjoined. *See Nken*, 556 U.S. at 435. This is so because "the public interest demands effective measures to prevent the illegal entry of aliens at the Mexican border." *United States v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975). Moreover, when state laws are enjoined, a State necessarily suffers irreparable injury. *Maryland v. King*, 567 U.S. 1301 (2012) (Roberts, C.J., in chambers); *see also Walters v. Nat'l Ass'n of Radiation Survivors*, 468 U.S. 1323, 1324 (1984) (Rehnquist, J., in chambers).

Several additional points bear mentioning. The federal government's theory (at 38) that S.B.4 harms a federal interest is contrary to precedent. As the Court has explained, "in the vast majority of cases where federal and state laws overlap, allowing the States to prosecute is entirely consistent with federal interests." *Garcia*, 140 S.Ct. at 806. That observation is even more salient here because enforcing S.B.4 does not prevent the federal government from enforcing (or failing to enforce) immigration law.[8] Nor will other Plaintiffs suffer any injury. They speculate (at 30-32) about S.B.4's application, but such speculation fails to demonstrate harm to *them*. And even if Plaintiffs could piggyback on the alleged harms of non-parties—they cannot, *cf. O'Shea v. Littleton*, 414 U.S. 488, 496-97 (1974)—the whole point of S.B.4 is to mirror federal law.

The federal government speculates (at 38-39) about S.B.4's possible effects on foreign relations. Speculation, however, is not enough. *See, e.g.*, *Winter v. Nat'l Res. Def. Council*, 555 U.S. 7, 22 (2008) ("Our frequently reiterated standard requires plaintiffs seeking

[8] The district court relied (at 103) on the declaration of David S. BeMiller to show the irreparable harm that allegedly would be suffered by the federal government absent an injunction. But last week in *Texas v. DHS*, No. 2:23-cv-55 (W.D. Tex.), BeMiller, on cross-examination, testified that his declaration filed in this litigation relied on speculation. Texas will file the transcript of that hearing with the Court when it becomes available.

preliminary relief to demonstrate that irreparable injury is likely in the absence of an injunction."). Congress, moreover, has already weighed this issue and enacted a statutory scheme that invites State cooperation with respect to immigration enforcement. Congress's decision is paramount. In all events, the Court rejected an even stronger argument regarding foreign relations in *Medellin*. S.B.4 is an effort to mirror federal legislation. Facially enjoining such an important law, without even meaningfully considering severability, benefits no one.

CONCLUSION

This Court should deny the Applications.

Respectfully submitted.

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March 2024

APPENDIX

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IN THE UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

UNITED STATES OF AMERICA, *PLAINTIFF*, V. THE STATE OF TEXAS; GREG ABBOTT IN HIS OFFICIAL CAPACITY AS GOVERNOR OF TEXAS; TEXAS DEPARTMENT OF PUBLIC SAFETY; STEVEN C. MCCRAW, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF TEXAS DEPARTMENT OF PUBLIC SAFETY, *DEFENDANTS.*	CASE NO. 1:24-CV-00008-DAE (LEAD CASE) CONSOLIDATED WITH 1:23-CV-1537-DAE

DECLARATION OF MICHAEL BANKS

My name is Michael Banks. I am over the age of 18 and fully competent to make this declaration. Pursuant to 28 U.S.C. §1746, I testify as follows:

1. I am employed as the Special Advisor on Border Matters to the Governor of Texas, often referred to as the "Texas Border Czar." In that role, I am responsible for coordinating and implementing border security strategies under Operation Lone Star ("OLS").

Education, Training and Experience

2. For almost three decades, I worked in security and law-enforcement operations along the U.S.-Mexico border. For 10 years, I served in the United States Navy, where I worked in border law enforcement as a member of the Navy Military Police. I then spent 23 years working as an agent in the U.S. Customs and Border Protection ("CBP"), U.S. Border Patrol ("USBP"), an agency housed within the U.S. Department of Homeland Security

("DHS"), serving under five different presidential administrations—from President Clinton to President Biden.

3. I carried out those duties in leadership roles for CBP with responsibilities across California, Arizona, and Texas. From 2019 to 2021, I served as Patrol Agent in Charge for the McAllen, Texas Border Patrol Station, with responsibility for the command of a large station with over 600 agents, 80 supervisors, and 7 support staff, and for the management of budget and a payroll. During my time at the station, manpower grew to 1,100 with the addition of 210 Office of Field Operations officers and 198 National Guard and Activity Duty soldiers.

4. In my role as Patrol Agent in Charge for McAllen, I managed and oversaw the following: various enforcement, detention, and processing operations; seizure of property; fleet maintenance and supplies; facility construction and alteration; budgeting and procurement; technology projects; community relations; and partnerships with other agencies. I managed these operations for a dynamic operating environment that spans 53 river miles and a total of 7,254 square miles, including 10 cities, 3 ports of entry, National Parks, and several wildlife refuges. I also led and managed the following: labor and employment issues; air coordination; disruption initiatives; intelligence; Processing Investigations Team; Common Intelligence Picture; administrative reports; pay cap issues; trend analysis; agent deployments; technology deployments; specialty units; employee recognition; budget; Continuity of Operations; training requirements; health and safety; Integrated Mission Analysis; joint operations; media relations; International Liaison Unit; facilities; station enforcement targets; vehicle fleet; and critical incidents.

5. From 2022 to 2023, I served as Patrol Agent in Charge for Weslaco, Texas, with responsibility for the command of a large station with over 400 agents, 60 supervisors, and 5 support staff, and for the management of an annual budget and payroll.

6. While serving as Patrol Agent in Charge of Weslaco, I managed and oversaw the following: various enforcement, detention, and processing operations; seizure of property; fleet maintenance and supplies; facility construction and alteration; budgeting and procurement; technology projects; community relations; and partnerships with other agencies. I managed these operations for a dynamic operating environment that spans 48 river miles and a total of 5,144 square miles, including 8 cities, 2 ports of entry, National Parks, and several wildlife refuges. I led and managed the following: labor and employment issues; air coordination; disruption initiatives; intelligence; Processing Investigations Team; Common Intelligence Picture; administrative reports; pay cap issues; trend analysis; agent deployments; technology deployments; specialty units; employee recognition; budget; Continuity of Operations; training requirements; health and safety; Integrated Mission Analysis; joint operations; media relations; International Liaison Unit; facilities; station enforcement targets; vehicle fleet; and critical incidents.

7. I have also held leadership positions in CBP with responsibility for areas outside of Texas. From 2021 to 2022, I served as Deputy Chief for Law Enforcement Operational Programs at the U.S. Border Patrol Headquarters in Washington, D.C. In that position, I was the number five official in charge of the U.S. Border Patrol and had direct supervision over the immigration, prosecution, custody, and detention division which oversees and implements U.S. Border Patrol Policy for the entire U.S. border with respect to immigration, prosecution, custody, and detention.

8. I have been recognized for my decades of federal service in CBP and the U.S. Navy and I have received numerous awards. In 1994, I received the Navy and Marine Corps Achievement Medal for superior performance. In 1997, I received the Navy and Marine Corps Achievement Medal gold star in lieu of second award for superior performance, among other Navy awards and accommodations. In 2022, I received the U.S. Border Patrol Meritorious Achievement Award for my leadership in handling the 2021 migrant surge. In the years 2006 through 2022, I received Outstanding Performance awards for my leadership in CBP and was rated the top performer in each of these years when rated against my peers. In each of those years I also received case awards for Outstanding Performance in leadership.

Service as Texas Border Czar

9. On January 30, 2023, Governor Abbott named me the first ever Border Czar for the State of Texas. In that role, I work closely with the Texas Military Department ("TMD"), the Texas Department of Public Safety ("DPS"), the Texas National Guard (the "Guard"), the Texas Facilities Commission ("TFC"), local and municipal governments, and private landowners along the border.

10. My responsibilities as Border Czar include facilitating the construction of Texas's border wall, strategic advising on the deployment of other border infrastructure like concertina wire and buoy systems, and regular consultation with federal, state, and local law-enforcement partners to respond to the surge of illegal migration.

11. During my tenure, I have worked with other state agencies participating in OLS to coordinate strategic placement of border infrastructure based on identifying historical hotspots for illicit traffic and shifting illegal migration patterns across the Rio Grande. I

have worked with private landowners along the border to secure agreements to permit state construction of steel-bollard fencing. I have also advised on the safety, effectiveness, and costs for the deployment of buoy systems in the Rio Grande and placement of concertina wire to deter illegal and dangerous crossings.

12. To facilitate regular supervision of these efforts along the southern border, my office is based in the border county of Hidalgo County, Texas. I regularly travel along Texas's border with Mexico as part of my responsibilities as the Texas Border Czar. I also regularly observe the construction of the border wall and deployment of concertina wire, meet with state and federal law-enforcement officials, and monitor the mass illegal entry of migrants into this country.

The Border Crisis

13. Texas is facing an unprecedented immigration crisis at the border. The Biden Administration's cessation of previously effective border security measures and lax federal border enforcement policies have invited mass migration and incentivized illegal crossings over the U.S. southern border. In the last three years, more than 6 million illegal immigrants from more than 100 countries have crossed the U.S. southern border.

14. In my role as Border Czar, I routinely review and often rely on official CBP published data regarding the frequency of border crossings. CBP data reflects that unlawful crossings of the Southwest border in Fiscal Year 2023 reached a record high of 2,475,699, and that number does not include known or unknown "gotaways." Fiscal Year 2024 appears on track to break last year's record, with 785,422 border encounters in the last three months. The data also reflects that in December 2023, the frequency of border crossings rose to 302,034, an all-time high.

15. In addition, I have reviewed official data published by the U.S. Department of Health and Human Services ("DHHS"), dated February 1, 2024, and located at https://www.hhs.gov/sites/default/files/uac-program-fact-sheet.pdf. That data reflects that the number of unaccompanied minors the department has cared for over the course of a year has skyrocketed from 15,381 in FY 2020 to 118,938 in FY 2023. This dramatic 673% increase—in just three years—in the number of unaccompanied minors under DHHS care, is consistent with the massive influx of illegal crossings and immigration patterns I have observed at the border.

Effects of the Border Crisis

16. Unfortunately, the tidal wave of illegal migration across the southern border has been accompanied by an increase in migrant mortalities that occurred during illegal border crossings. Illegal crossings at points other than sanctioned points of entry have resulted in scores of tragic migrant deaths.

17. In FY 2023, 148 migrants died in just the El Paso Sector while attempting border crossings. I understand that figure is the highest number ever recorded and more than double the number of fatalities in the Sector in FY 2022. Since 2021, a total of 2,321 migrants have died attempting to cross the southern border. And 556 of those deaths were in the Del Rio Sector alone.

18. During my service as Texas Border Czar, one of the consequences of unchecked migration I have observed, is an increase in crimes against property owners and residents along the border. I am aware of numerous instances of ranches and homesteads being illegally entered by illegal immigrants and have received a multitude of reports of homes being burglarized by migrants. Additionally, border community residents are regularly

subjected to dangerous vehicle bailouts by illegal immigrants that often take place following pursuits by law enforcement personnel.

19. I have also reviewed data collected by the Texas Department of Public Safety as part of OLS. According to the data, as of February 5, 2024, roughly 4,353 bailouts and 9,886 criminal trespass arrests have occurred near the border since the beginning of OLS.

20. CBP publishes regular updates that contain official statistics related to enforcement actions. I periodically review this information as part of my official duties. The data reflects that in FY 2023, Border Patrol agents arrested 15,267 illegal immigrants with criminal convictions in the United States, a record high. I have attached CBP's FY 2024 YTD statistics which are incorporated herein as Exhibit A.

21. In addition, Border Patrol has encountered 336 persons on the terrorist watchlist from FY 2021 to FY 2024 at the southern border. This is up from 15 of such individuals encountered from FY 2017 to 2020, according to the aforementioned data update published by CBP.

22. The alarming influx of immigrants with criminal convictions and suspected terrorists along the southern border presents a grave security risk. I am aware that FBI Director, Christopher Wray testified before the U.S. House on Homeland Security on November 15, 2023, that the border crisis currently poses a major threat to national security. Director Wray acknowledged that the number of individuals on the terrorist watchlist encountered at the border has increased and that the FBI is still attempting to locate individuals on the terrorist watchlist who have illegally crossed into the U.S.

23. Additionally, Border Patrol reported that it apprehended 1,819 illegal immigrants with gang affiliations from FY 2021 to FY 2024.

24. Cross border drug smuggling is another challenge exacerbated by the crisis at the border. I am aware that as a result of drug trafficking by Mexican cartels, fentanyl is now the leading cause of death for citizens between the ages of 18 and 45. According to official publications from the Texas Department of State Health Services, since President Biden has been in office, at least 5,351 Texans have died in fentanyl poisoning-related events. Additionally, according to official estimates from US Centers for Disease Control and Prevention's National Center for Health Statistics, the national drug overdose death toll has topped 112,000 in a twelve-month period for the first time in 2023.

25. The costs of defending the southern border have also continued to mount. Since 2021, Texas has spent $11.2 billion to help secure the border and protect public safety as part of OLS. Texas has spent $13.66 billion on securing the border since 2016.

26. As a result of the spike in illegal migration, and accompanying crime, counties along the southern border have been under a continuous state of disaster since May 31, 2021. Governor Abbott has renewed his border disaster declarations approximately 32 times.

Texas's Efforts to Stem the Flow of Illegal Migration

27. In 2021, Governor Greg Abbott declared a border-security disaster and launched OLS. OLS utilizes multiple state and local agencies, including the DPS, TMD, TFC, and others to stem the flow of unlawful immigration. OLS's border security efforts have included: the use of state military and law-enforcement officers to fill border staffing deficits, increased vehicle inspections at the border, constructing miles of border wall, and the deployment of marine barriers and concertina wire at key strategic border crossing points.

28. I am aware that Governor Abbott invoked the Invasion Clauses of Article I, § 10 of the U.S. Constitution and Article IV, § 7 of the Texas Constitution in Executive Order GA-

41 to authorize Texas to take necessary measures to stop the invasion at the Texas border. I have attached GA-41 to this declaration as Exhibit B. I have also reviewed a letter Governor Abbott sent to President Biden informing him of this action, dated November 16, 2022. I have attached this letter as Exhibit C.

29. In an effort to push migrants towards legal ports of entry, Texas has purchased, constructed, and maintained 21 miles of steel bollard barriers and 83 miles of concertina wire fencing, and other border infrastructure.

30. To further relieve pressure on overwhelmed border towns, Texas has established a voluntary busing program to provide transportation services to illegal immigrants and allow them to travel from border areas to major cities throughout the country. To date, Texas has transported over 100,000 migrants to self-described "sanctuary cities."

31. As of February 5, 2024, as part of OLS, Texas has made 39,054 criminal arrests in the border region, including 35,289 felony arrests. Texas has been able to deter 95,469 illegal entries since the onset of Operation Lone Star. In addition, Texas has seized 461 pounds of fentanyl, or enough doses to kill 104 million Americans, as well as 27.8 thousand pounds of marijuana, 6 thousand pounds of cocaine, and 14.1 thousand pounds of meth near the Texas-Mexico border.

32. Following a withdrawal by federal officials, Texas law enforcement took operational control of Shelby Park in Eagle Pass, Texas. Eagle Pass is an area known to have a high number of illegal entries. Since Texas secured Shelby Park in Eagle Pass on January 11, 2024, there has been a 79% month to month decrease in illegal crossings in the area.

33. I am personally familiar with Texas's newly enacted law, SB 4, that I understand is the subject of consolidated lawsuits captioned *United States v. Texas*, No. 1:24-cv-8 (W.D. Tex.). I understand SB 4 goes into effect on March 5, 2024.

34. SB 4 creates criminal offenses related to illegal entry or reentry into the State from a foreign nation. It also allows magistrates and judges to issue orders to return to the foreign nation from which illegal entry or reentry occurred.

35. In my opinion, the provisions of SB 4 will provide law enforcement in Texas, primarily DPS, with important new tools to combat the massive influx of illegal migration and help stem the tide of illegal migration into Texas. When SB 4 is in effect, it will become a highly effective component of OLS's ongoing efforts to combat the crisis at Texas's southern border.

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.

Executed on this 7th day of February, 2024.

Michael Banks

Michael Banks
Deputy Director, Border Czar
Office of Texas Governor Greg Abbott

U.S. Customs and Border Protection

CBP Enforcement Statistics

U.S. Customs and Border Protection is the nation's largest federal law enforcement agency charged with securing the nation's borders and facilitating international travel and trade. Our top priority is to keep terrorists and their weapons from entering the United States.

At the nation's more than 300 ports of entry, CBP officers have a complex mission with broad law enforcement authorities tied to screening all foreign visitors, returning American citizens and imported cargo that enters the U.S. Along the nation's borders, the United States Border Patrol and Air and Marine Operations are the uniformed law enforcement arms of CBP responsible for securing U.S. borders between ports of entry.

Visit CBP's Southwest Border Migration page for demographic information regarding apprehensions and inadmissibles on the southwest border and the Assaults and Use of Force page for data on assaults on agents and officers, and uses of force by CBP personnel.

Total CBP Enforcement Actions

Numbers below reflect Fiscal Year (FY) 2017 - FY 2024.

Fiscal Year 2024 runs October 1, 2023 - September 30, 2024.

	FY17	FY18	FY19	FY20	FY21	FY22	FY23	FY24YTD
Office of Field Operations (OFO) Total Encounters[1]	216,370	281,881	288,523	241,786	294,352	551,930	1,137,452	354,753
U.S. Border Patrol Total Encounters[2]	310,531	404,142	859,501	405,036	1,662,167	2,214,652	2,063,692	634,066
Total Enforcement Actions	526,901	683,178	1,148,024	646,822	1,956,519	2,766,582	3,201,144	988,819

[1] Beginning in March FY20, OFO Encounters statistics include both Title 8 Inadmissibles and Title 42 Expulsions. To learn more, visit Title-8-and-Title-42-Statistics. Inadmissibles refers to individuals encountered at ports of entry who are seeking lawful admission into the United States but are determined to be inadmissible, individuals presenting themselves to seek humanitarian protection under our laws, and individuals who withdraw an application for admission and return to their countries of origin within a short timeframe.

[2] Beginning in March FY20, USBP Encounters statistics include both Title 8 Apprehensions and Title 42 Expulsions. To learn more, visit Title-8-and-Title-42-Statistics. Apprehensions refers to the physical control or temporary detainment of a person who is not lawfully in the U.S. which may or may not result in an arrest.

Search and Rescue Efforts

CBP agents frequently conduct life-saving efforts, while carrying out their respective missions. Numbers below reflect Fiscal Year (FY) 2019 - FY 2023.

Fiscal Year 2024 runs October 1, 2023 - September 30, 2024.

	FY19	FY20	FY21	FY22	FY23	FY24YTD
U.S. Border Patrol - Southwest Border Only	4,920	5,071	12,833	22,075	37,323	1,362
Air and Marine Operations - Nationwide	377	184	423	447	187	22

Close all | Open all

Arrests of Individuals with Criminal Convictions or Those Wanted by Law Enforcement

Arrests of Individuals with Criminal Convictions or Those Wanted by Law Enforcement

Numbers below reflect FY 2017 - FY 2024.

Fiscal Year 2024 runs October 1, 2023 - September 30, 2024.

	FY17	FY18	FY19	FY20	FY21	FY22	FY23	FY24YTD
Office of Field Operations								

	FY17	FY18	FY19	FY20	FY21	FY22	FY23	FY24YTD
Criminal Noncitizens Encountered[3]	10,596	11,623	12,705	7,009	6,567	16,993	20,166	4,805
NCIC[4] Arrests	7,656	5,929	8,546	7,108	8,979	10,389	11,509	2,853
U.S. Border Patrol								
Criminal Noncitizens Encountered[3]	8,531	6,698	4,269	2,438	10,763	12,028	15,267	4,247
Criminal Noncitizens with Outstanding Wants or Warrants	2,675	1,550	4,153	2,054	1,904	949	988	234

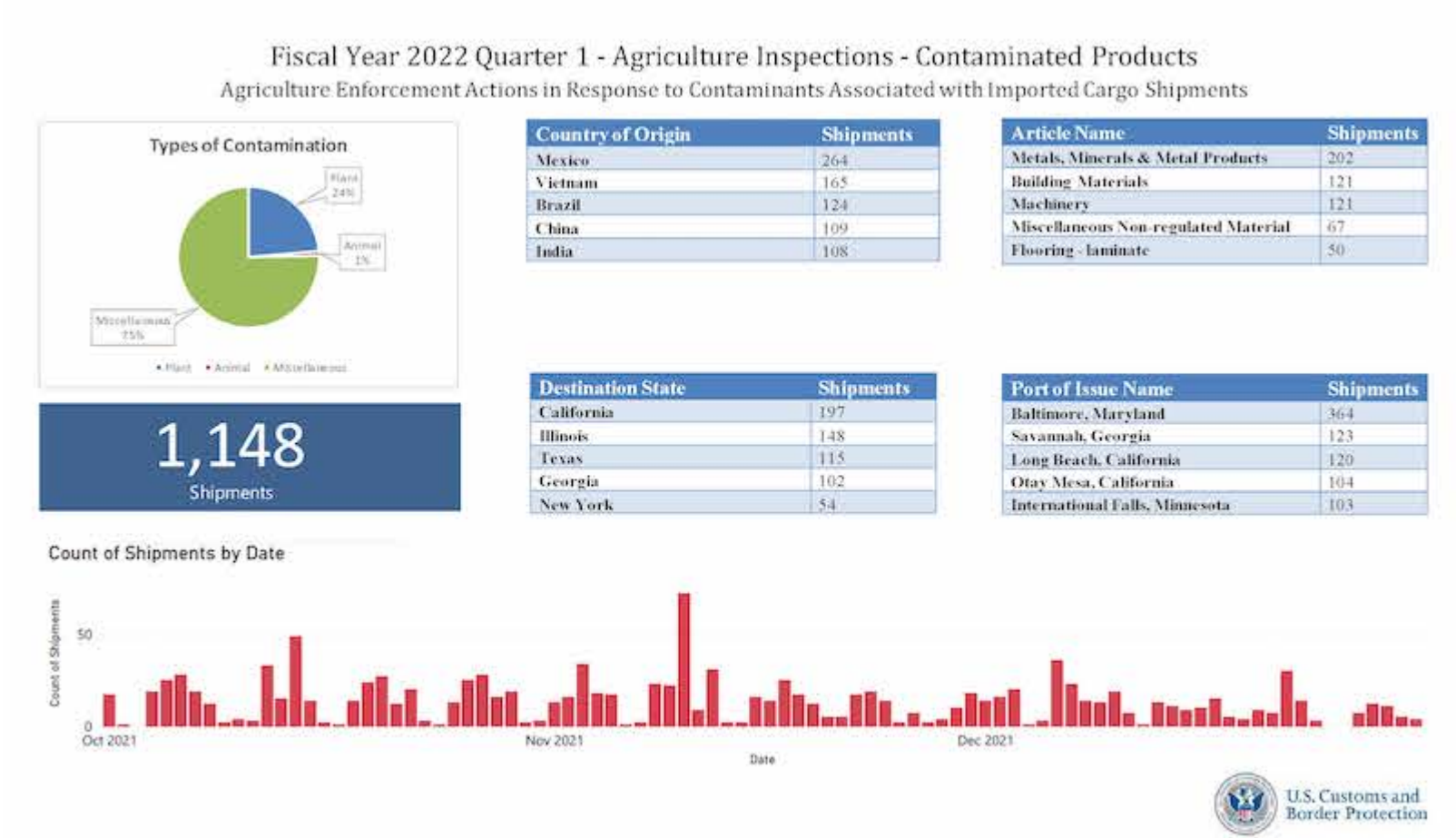
[3] Criminal noncitizens refers to noncitizens who have been convicted of crime, whether in the United States or abroad, so long as the conviction is for conduct which is deemed criminal by the United States. Criminal noncitizens encountered at ports of entry are inadmissible, absent extenuating circumstances, and represent a subset of total OFO inadmissibles. U.S. Border Patrol arrests of criminal noncitizens are a subset of total apprehensions. See U.S. Border Patrol Criminal Noncitizen Statistics for a breakdown of criminal noncitizen stats by type of conviction.

[4] NCIC (National Crime Information Center) arrests refers to the number of CBP arrests of individuals, including U.S. citizens, who are wanted by other law enforcement agencies.

Agriculture Enforcement

Current Report

Fiscal Year 2022 Quarter 1 Agriculture Inspections Contaminated Products



Previous Reports

Fiscal Year 2021 Quarter 4 Agriculture Inspections Contaminated Products

Fiscal Year 2021 Quarter 3 Agriculture Inspections Contaminated Products

Fiscal Year 2021 Quarter 2 Agriculture Inspections Contaminated Products

Fiscal Year 2021 Quarter 1 Agriculture Inspections Contaminated Products

Border Searches of Electronic Devices

In addition to longstanding federal court precedent recognizing the constitutional authority of the U.S. Government to conduct border searches, numerous federal statutes and regulations also authorize CBP to inspect and examine all individuals and merchandise entering or departing the United States, including all types of personal property, such as electronic devices. See, for example, 8 U.S.C. §§ 1225, 1357 and 19 U.S.C. §§ 482, 507, 1461, 1496, 1499, 1581, 1582. CBP established strict guidelines for conducting border searches of electronic devices in its January 2018 Directive on Border Searches of Electronic Devices.

Border searches of electronic devices have helped detect evidence relating to terrorist activity and other national security matters, child pornography, drug smuggling, human smuggling, bulk cash smuggling, human trafficking, export control violations, intellectual property rights violations and visa fraud. In Fiscal Year 2020, CBP processed more than 238 million travelers at U.S. ports of entry. During that same period of time, CBP conducted 32,038 border searches of electronic devices, representing less than .014 percent of arriving international travelers.

International Travelers Processed with Electronic Device Search

Month	FY 2018	FY 2019	FY 2020	FY 2021	FY2022	FY2023	FY2024YTD
October	2,539	3,026	3,959	2,969	3,275	3,493	3,689
November	2,446	2,962	3,805	2,909	2,991	3,250	3,614
December	2,509	3,365	3,966	2,760	3,894	3,343	3,588
January	3,090	3,765	4,450	3,014	3,642	3,441	
February	2,512	3,096	3,702	2,829	4,148	3,165	
March	2,921	3,526	2,514	3,445	4,976	3,401	
April	2,701	3,218	451	3,139	4,136	3,270	
May	2,764	3,138	616	3,323	4,156	3,758	
June	2,606	3,480	1,149	3,150	3,746	3,434	
July	2,798	3,458	2,047	3,244	3,524	3,333	
August	3,320	4,085	2,614	3,425	3,486	4,051	

Month	FY 2018	FY 2019	FY 2020	FY 2021	FY2022	FY2023	FY2024YTD
September	3,090	3,794	2,765	3,243	3,525	3,628	
Total	33,296	40,913	32,038	37,450	45,499	41,567	10,891

Currency Seizures

OFO and USBP Currency Seizures Dashboard

Explore Office of Field Operations (OFO) and U.S. Border Patrol (USBP) Currency & Other Monetary Instrument Seizures by Fiscal Year.

Monthly U.S. Border Patrol Nationwide Checkpoint Currency Seizures

Numbers below reflect FY 2018 - FY 2024.

Fiscal Year 2024 runs October 1, 2023 - September 30, 2024.

	FY18	FY19	FY20	FY21	FY22	FY23	FY24YTD
October	$35,829	$49,247	$33,558	$196,378	$60,687	$421,148	$80,382
November	$26,285	$51,269	$114,297	$17,528	$11,683	$16,527	$50,185
December	$2,822	$63,697	$156,961	$66,907	$5,118	$4,054	$10,920
January	$203,213	$59,857	$52,649	$192,116	$178,971	$162,679	
February	$117,933	$103,982	$84,475	$263,892	$17,826	$782,267	
March	$157,669	$110,924	$36,301	$135,123	$22,114	$127,327	
April	$17,913	$15,016	$49,559	$64,933	$42,254	$28,476	
May	$256,033	$129,766	$691,640	$29,188	$49,491	$110,894	
June	$31,494	$119,732	$511,781	$18,626	$9,476	$117,953	
July	$14,339	$86,696	$159,504	$73,779	$181,194	$63,240	

	FY18	FY19	FY20	FY21	FY22	FY23	FY24YTD
August	$169,592	$141,475	$275,751	$331,791	$6,081	$27,408	
September	$80,358	$33,487	$124,274	$39,257	$6,756	$38,871	
Total	$1,113,480	$965,148	$2,290,750	$1,429,519	$591,651	$1,900,844	$141,487

Drug Seizures

OFO and USBP Drug Seizures Dashboard

Explore Office of Field Operations (OFO) and U.S. Border Patrol (USBP) Drug Seizure Statistics by weight* and count of events by Fiscal Year.

Monthly U.S. Border Patrol Nationwide Checkpoint Drug Seizures

Numbers below reflect FY 2024.

Fiscal Year 2024 runs October 1, 2023- September 30, 2024.

	Marijuana	Cocaine	Heroin	Methamphetamine	Fentanyl	Other
October	183	115	0	1,083	167	13
November	3,705	51	9	723	289	27
December	183	66	10	296	5	14
Total	4,070	232	18	2,102	461	54

*weights are in pounds (lb)

See Air and Marine Operations Statistics for a breakdown of enforcement actions with non-CBP agencies.

Intellectual Property Rights (IPR) Seizures

Intellectual Property Rights (IPR) Seizures Dashboard

Explore the Office of Trade's Intellectual Property Rights (IPR) Seizures dashboard by Fiscal Year.

Gang Affiliated Enforcement

U.S. Border Patrol Nationwide Apprehensions by Gang Affiliation

Numbers below reflect FY2017 - FY2024.

Fiscal Year 2024 runs October 1, 2023 - September 30, 2024.

Gang Affiliation	FY17	FY18	FY19	FY20	FY21	FY22	FY23	FY24YTD
107th St	0	1	0	0	0	0	0	0
18th Street	61	145	168	36	28	110	65	10
Angelino Heights Sureno 13	1	0	0	0	0	0	0	0
Bandidos	0	0	0	0	0	0	0	0
Barrio Azteca	3	4	0	1	1	2	0	0
Barrio Van Nuys	0	0	1	0	0	0	0	0
Border Brothers	0	1	1	0	0	0	1	0
Brazilian Thugs	0	0	0	0	0	0	1	0
Brown Pride	0	0	0	0	0	0	0	0
Chirizos	0	1	0	0	0	0	0	0
Florencia 13	0	0	0	0	0	0	1	0
Folk Nation	0	0	0	0	0	0	0	0
Hard Times 13	0	0	0	0	0	0	0	0
Hells Angels	0	0	1	0	0	0	0	0
Hermanos Pistoleros Latinos (HPL)	3	2	2	2	1	1	2	0
Kfs	0	0	0	0	0	0	1	0

Gang Affiliation	FY17	FY18	FY19	FY20	FY21	FY22	FY23	FY24YTD
Largo 36								1
Latin Kings	6	7	24	4	6	11	13	3
Locos Surenos Trece	0	1	0	0	0	0	0	0
Los Traviosos	0	0	1	0	0	0	0	0
Los Zetas	0	0	0	0	0	0	0	0
MS-13	228	413	464	72	113	312	178	19
Mac 11	0	0	0	0	0	1	0	0
Mara 18	0	1	2	1	1	0	0	1
Mara-R	1	1	0	0	0	0	0	0
Maravilla Salva Trucha	0	2	0	1	0	0	1	0
Market Street	0	0	1	0	0	0	0	0
Mexican Mafia	4	3	7	2	5	4	3	0
Mexicles	0	0	0	0	0	0	0	0
Mexikanemi	3	0	0	0	0	0	1	0
Nortenos	6	5	6	1	5	2	3	2
Other	90	82	110	75	53	94	128	39
Outlaws	0	0	0	0	0	0	0	0
Pacific Street Gang	0	0	0	0	1	1	0	0
Paisas	53	62	90	93	79	146	133	27
Partido Revolucionario Mexican (PRM)	0	0	1	0	1	0	1	0
Playboys	0	0	0	1	0	0	0	0
San Fernando Valley Gang	0	0	1	0	0	0	0	0
South Los Angeles	0	1	0	0	0	0	0	0

Gang Affiliation	FY17	FY18	FY19	FY20	FY21	FY22	FY23	FY24YTD
Southwest Cholos	0	0	1	0	0	0	0	0
Surenos (sur-13)	66	66	70	66	46	54	57	17
Tango Blast	8	8	20	7	7	10	9	2
Texas Syndicate	1	1	3	0	1	2	0	1
Top Six	0	0	0	0	0	1	0	0
Tortilla Flats	0	0	0	1	0	0	0	0
Vallucos	0	0	1	0	0	0	0	0
Vilanos-13	0	1	0	0	0	0	0	0
West Park	1	0	0	0	0	0	0	0
Westside			1	0	0	0	0	0
Zetas	1	1	0	0	0	0	0	0
Total	536	808	976	363	348	751	598	122

Terrorist Screening Data Set Encounters

This table provides a summary of OFO encounters of all persons at ports of entry with records within the TSDS at the time of their encounter.

	FY17	FY18	FY19	FY20	FY21	FY22	FY23	FY24YTD
Office of Field Operations TSDS Encounters at Land Border Ports of Entry of All Nationalities*								
Southwest Border	116	155	280	72	103	67	80	5
Northern Border	217	196	258	124	54	313	484	89
Total	333	351	538	196	157	380	564	94
U.S. Border Patrol TSDS Encounters Between Ports of Entry of Non-U.S. Citizens								
Southwest Border	2	6	0	3	15	98	169	49

	FY17	FY18	FY19	FY20	FY21	FY22	FY23	FY24YTD
Northern Border	0	0	3	0	1	0	3	1
Total	2	6	3	3	16	98	172	50
Percentage of Total USBP Encounters	0.0007%	0.0015%	0.0004%	0.0007%	0.0010%	0.0044%	0.0083%	0.0079%

This table provides a summary of USBP encounters of non-U.S. citizens with records within the TSDS at the time of their encounter between U.S. ports of entry.

The Terrorist Screening Dataset (TSDS) – also known as the "watchlist" – is the U.S. government's database that contains sensitive information on terrorist identities. The TSDS originated as the consolidated terrorist watchlist to house information on known or suspected terrorists (KSTs) but has evolved over the last decade to include additional individuals who represent a potential threat to the United States, including known affiliates of watchlisted individuals.

Encounters of watchlisted individuals at our borders are very uncommon, underscoring the critical work CBP Agents and Officers carry out every day on the frontlines. DHS works tirelessly to secure our borders through a combination of highly trained personnel, ground and aerial monitoring systems, and robust intelligence and information sharing networks.

TSDS watchlisted non-citizens encountered by the CBP Office of Field Operations at land ports of entry prior to entry into the United States may be denied admission to our country upon presentation, barring justification for their arrest under CBP policy. TSDS watchlisted individuals encountered by the U.S. Border Patrol (USBP) after entering the country without inspection may be detained and removed, to the extent possible under CBP policy, or turned over to another government agency for subsequent detention or law enforcement action, as appropriate.

*POE totals may include multiple encounters of the same individual.

U.S. Border Patrol Recidivism Rates

Recidivism percentages are updated at the end of each fiscal year.

	FY 15	FY 16	FY 17	FY 18	FY 19	FY 20	FY21
Recidivism[5]	14%	12%	10%	11%	7%	26%	27%

[5] Recidivism refers to percentage of individuals apprehended more than one time by the Border Patrol within a fiscal year. Beginning in March FY20, USBP encounters statistics and recidivism calculations include both Title 8 Apprehensions and

Title 42 Expulsions. To learn more, visit Title-8-and-Title-42-Statistics. Apprehensions refers to the physical control or temporary detainment of a person who is not lawfully in the U.S. which may or may not result in an arrest.

Weapons and Ammunition Seizures

OFO and USBP Weapons and Ammunition Seizures Dashboard

Explore Office of Field Operations (OFO) and U.S. Border Patrol (USBP) Weapons and Ammunition Seizures dashboards by Fiscal Year.

Related Resources

Previous Year Statistics

- FY2023
- FY 2022
- FY 2021
- FY 2020
- FY 2019
- FY 2018

Source URL: *https://www.cbp.gov/newsroom/stats/cbp-enforcement-statistics*

GOVERNOR GREG ABBOTT

July 7, 2022

FILED IN THE OFFICE OF THE
SECRETARY OF STATE
1PM O'CLOCK
JUL 07 2022
Secretary of State

The Honorable John B. Scott
Secretary of State
State Capitol Room 1E.8
Austin, Texas 78701

Dear Mr. Secretary:

Pursuant to his powers as Governor of the State of Texas, Greg Abbott has issued the following:

Executive Order No. GA-41 relating to returning illegal immigrants to the border.

The original executive order is attached to this letter of transmittal.

Respectfully submitted,

Gregory S. Davidson
Executive Clerk to the Governor

GSD:gsd

Attachment

Executive Order

BY THE
GOVERNOR OF THE STATE OF TEXAS

Executive Department
Austin, Texas
July 7, 2022

EXECUTIVE ORDER
GA 41

Relating to returning illegal immigrants to the border.

WHEREAS, securing the international border is the federal government's responsibility, but President Biden has refused to enforce the immigration laws enacted by Congress, including statutes mandating detention of certain immigrants who have claimed asylum or committed a crime; and

WHEREAS, the cartels refer to these open-border policies as *la invitación* ("the invitation"), reflecting the perception that President Biden welcomes immigrants to make the dangerous trek across our southern border; and

WHEREAS, an immigrant's journey to the United States can even prove fatal, as evidenced by the recent discovery of 53 dead bodies inside a smuggler's truck, and by a recent report from a United Nations agency describing our southern border as the deadliest land crossing in the world during President Biden's first year in office; and

WHEREAS, at least 42 subjects on the terrorist watchlist have been arrested while attempting to cross the border illegally since January 2021, and an unknown number have crossed while evading detection, demonstrating that an insecure border is a pathway for terrorists to enter the United States; and

WHEREAS, President Biden's failure to protect our border has necessitated action by the State of Texas to ensure public safety and to defend against violations of its sovereignty and territorial integrity; and

WHEREAS, I, Greg Abbott, Governor of Texas, issued a disaster proclamation on May 31, 2021, which has been amended and renewed in each subsequent month effective through today, certifying under Section 418.014 of the Texas Government Code that the surge of individuals unlawfully crossing the Texas-Mexico border posed an ongoing and imminent threat of disaster for a number of Texas counties and for all state agencies affected by this disaster; and

WHEREAS, through Operation Lone Star, I have deployed thousands of brave men and women from the Texas National Guard and the Texas Department of Public Safety to secure the border, to enforce the laws of Texas, and to prevent, detect, and interdict transnational criminal behavior; and

WHEREAS, by employing a variety of strategies, Operation Lone Star has resulted in thousands of apprehensions and criminal arrests, along with the seizure of thousands of weapons, hundreds of millions of lethal doses of fentanyl, and other contraband; and

WHEREAS, the Biden Administration's decision to end Title 42 expulsions, which has been halted by a federal court, and to terminate the Remain-in-Mexico policy, will

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SECRETARY OF STATE
1 PM O'CLOCK
JUL 07 2022

invite the cartels to smuggle millions more illegal immigrants into Texas, as evidenced by the Biden Administration's projection that terminating Title 42 expulsions will result in as many as 18,000 immigrant apprehensions per day; and

WHEREAS, President Biden's border crisis hit a new record in May 2022, which saw the largest number of immigrants arrested or encountered along our southern border since U.S. Customs and Border Protection began keeping track in 2000, and these unprecedented numbers are overwhelming local communities across Texas; and

WHEREAS, President Biden's reckless refusal to secure the border will provide material support to the cartels, allow them to smuggle more dangerous people, drugs, and weapons into Texas, and embolden cartel gunmen to continue shooting at state and federal officials; and

WHEREAS, President Biden's failure to faithfully execute the immigration laws enacted by Congress confirms that he has abandoned the covenant, in Article IV, § 4 of the U.S. Constitution, that "[t]he United States . . . shall protect each [State in this Union] against Invasion," and thus has forced the State of Texas to build a border wall, deploy state military forces, and enter into agreements as described in Article I, § 10 of the U.S. Constitution to secure the State of Texas and repel the illegal immigration that funds the cartels; and

WHEREAS, in the Texas Disaster Act of 1975, the Legislature charged the Governor with the responsibility "for meeting . . . the dangers to the state and people presented by disasters" under Section 418.011 of the Texas Government Code, and expressly authorized the Governor to "issue executive orders . . . hav[ing] the force and effect of law" under Section 418.012; and

WHEREAS, the Governor can call on state military forces to enforce the law under Article IV, § 7 of the Texas Constitution and Sections 431.111 and 437.002 of the Texas Government Code; and

WHEREAS, an immigrant commits a federal crime under 8 U.S.C. § 1325(a)(1) by entering the United States between the ports of entry that have been designated as field offices by federal immigration officers; and

WHEREAS, the Supreme Court's opinion in *Arizona v. United States* specifically does not "address whether reasonable suspicion of illegal entry or another immigration crime would be a legitimate basis for prolonging a detention, or whether this too would be preempted by federal law," 567 U.S. 387, 414 (2012);

NOW, THEREFORE, I, Greg Abbott, Governor of Texas, by virtue of the power and authority vested in me by the Constitution and laws of the State of Texas, do hereby authorize and empower the Texas National Guard and the Texas Department of Public Safety to respond to this illegal immigration by apprehending immigrants who cross the border between ports of entry or commit other violations of federal law, and to return those illegal immigrants to the border at a port of entry.

This executive order shall remain in effect and in full force unless it is modified, amended, rescinded, or superseded by the governor. This executive order may also be amended by proclamation of the governor.

FILED IN THE OFFICE OF THE
SECRETARY OF STATE
1 PM O'CLOCK

JUL 07 2022

Given under my hand this the 7th day of July, 2022.

GREG ABBOTT
Governor

ATTESTED BY:

JOHN B. SCOTT
Secretary of State

FILED IN THE OFFICE OF THE SECRETARY OF STATE
1 PM O'CLOCK
JUL 07 2022

GOVERNOR GREG ABBOTT

November 16, 2022

The Honorable Joseph R. Biden, Jr.
President of the United States
The White House
1600 Pennsylvania Avenue NW
Washington, D.C. 20500

Dear President Biden:

The U.S. Constitution won ratification by promising the States, in Article IV, § 4, that the federal government "shall protect each of them against Invasion." By refusing to enforce the immigration laws enacted by Congress, including 8 U.S.C. § 1325(a)(1)'s criminal prohibition against aliens entering the United States between authorized ports of entry, your Administration has made clear that it will not honor that guarantee. The federal government's failure has forced me to invoke Article I, § 10, Clause 3 of the U.S. Constitution, thereby enabling the State of Texas to protect its own territory against invasion by the Mexican drug cartels.

Your inaction has led to catastrophic consequences. Under your watch, America is suffering the highest volume of illegal immigration in the history of our country. This past year, more than 2 million immigrants tried to enter the country illegally, coming from more than 100 countries across the globe. Worse yet, your failed border policies recently prompted a United Nations agency to declare that the border between the United States and Mexico is the deadliest land crossing in the world.

Texans are paying the price for your failure. Ranches are being ripped apart, and homes are vulnerable to intrusion. Our border communities are regularly disrupted by human traffickers and bailouts. Deadly fentanyl is crossing the porous border to such a degree that it is now the leading cause of death for citizens between the ages of 18 and 45.

By opening our border to this record-breaking level of illegal immigration, you and your Administration are in violation of Article IV, § 4 of the U.S. Constitution. Your sustained dereliction of duty compels Texas to invoke the powers reserved in Article I, § 10, Clause 3, which represents "an acknowledgement of the States' sovereign interest in protecting their borders." *Arizona v. United States*, 567 U.S. 387, 419 (2012) (Scalia, J., dissenting). Using that authority, Texas will escalate our efforts to repel and turn back any immigrant who seeks to enter our State at a border crossing that Congress has designated as illegal; to return to the border those who do cross illegally; and to arrest criminals who violate Texas law.

Know this: Article I, § 10, Clause 3 is not just excess verbiage. It reflects an understanding by our Founders, the authors of the Constitution, that some future President might abandon his obligation to safeguard the States from an extraordinary inflow of people who have no legal right of entry. They foresaw your failures. In the more than 240 years of our great nation, no Administration has done more than yours to place the States in "imminent Danger"—a direct result of your policy decisions and refusal to deliver on the Article IV, § 4 guarantee. In the absence of action by your Administration to secure the border, every act by Texas officials is taken pursuant to the authority that the Founders recognized in Article I, § 10, Clause 3.

All of this can be avoided, of course, if you will simply enforce the laws that are already on the books. Your Administration must end its catch-and-release policies, repel this unprecedented mass migration, and satisfy its constitutional obligation through faithful execution of the immigration laws enacted by Congress:

- You should aggressively prosecute the federal crimes of illegal entry and illegal reentry. *See* 8 U.S.C. § 1325, § 1326.

- You should comply with statutes mandating that various categories of aliens "shall" be detained. *See, e.g.*, 8 U.S.C. § 1225(b)(1)(B)(ii) & (iii)(IV) (aliens claiming asylum); *id.* § 1225(b)(2)(A) (aliens applying for admission); *id.* § 1226(c)(1) (criminal aliens); *id.* § 1231(a)(2) (aliens ordered removed); *id.* § 1222(a) (aliens who may carry disease).

- You should stop paroling aliens *en masse* in violation of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, which decrees that aliens applying for admission can be paroled into the United States "only on a case-by-case basis for urgent humanitarian reasons or significant public benefit." 8 U.S.C. § 1182(d)(5)(A).

- You should fully reinstate the Migrant Protection Protocols, such that aliens seeking admission remain in Mexico while proceedings unfold in the United States. *See* 8 U.S.C. § 1225(b)(2)(C).

- You should immediately resume construction of the border wall in Texas, using the billions of dollars Congress has appropriated for that purpose. *See* FY2021 DHS Appropriations Act § 210, Pub. L. 116-260, 134 Stat. 1182, 1456–57 (Dec. 27, 2020); FY2020 DHS Appropriations Act § 209, Pub. L. 116-93, 133 Stat. 2317, 2511–12 (Dec. 20, 2019).

Americans want an orderly immigration process that adheres to the laws enacted by the legislators they sent to Washington. In the words of Judge Oldham, however, you have "supplant[ed] the rule of law with the rule of say-so" while "tell[ing] Congress to pound sand." *Texas v. Biden*, 20 F.4th 928, 982, 1004 (5th Cir. 2021); *cf.* U.S. CONST. art. I, § 8, cl. 4 (empowering Congress "[t]o establish an uniform Rule of Naturalization").

Before you took office, the United States enjoyed some of the lowest illegal-immigration figures it had seen in decades. Your Administration gutted the policies that yielded those low numbers. You must reinstate the policies that you eliminated, or craft and implement new policies, in order to fulfill your constitutional duty to enforce federal immigration laws and protect the States against invasion.

Your silence in the face of our repeated pleas is deafening. Your refusal to even visit the border for a firsthand look at the chaos you have caused is damning. Two years of inaction on your part now leave Texas with no choice but to escalate our efforts to secure our State. Your open-border policies, which have catalyzed an unprecedented crisis of illegal immigration, are the sole cause of Texas having to invoke our constitutional authority to defend ourselves.

Sincerely,

Greg Abbott
Governor of Texas

GA:jsd

cc: The Honorable Merrick B. Garland, U.S. Attorney General
The Honorable Alejandro Mayorkas, U.S. Secretary of Homeland Security

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

UNITED STATES OF AMERICA, *PLAINTIFF,* V. THE STATE OF TEXAS; GREG ABBOTT IN HIS OFFICIAL CAPACITY AS GOVERNOR OF TEXAS; TEXAS DEPARTMENT OF PUBLIC SAFETY; STEVEN C. MCCRAW, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF TEXAS DEPARTMENT OF PUBLIC SAFETY, *DEFENDANTS.*	CASE NO. 1:24-CV-00008-DAE (LEAD CASE) CONSOLIDATED WITH 1:23-CV-1537-DAE

DECLARATION OF JASON CLARK

1. My name is Jason Clark. I am over the age of 18 and fully competent in all respects to make this declaration. I make this declaration based on my own personal and professional knowledge, as well as the information available to me in my positions in public service.

2. I am the Chief of Staff for the Texas Department of Criminal Justice ("TDCJ"). TDCJ is responsible for the care, custody, and rehabilitation of persons convicted of a felony offense in the State of Texas and incarcerated by the TDCJ. TDCJ is responsible for the care and custody of inmates or confinees in state prisons, state jails, and alternate detention facilities, and for the supervision of individuals released from prison on parole or mandatory supervision.

3. I am familiar with Texas's recently enacted law, SB 4, that is the subject of consolidated lawsuits captioned *United States v. Texas*, No. 1:24-cv-8 (W.D. Tex.), as well as trespass prosecutions and convictions under Operation Lone Star.

4. I have been employed with TDCJ since December 2006, and I have served in my current position since May 2018. Prior to that, I served as TDCJ's Deputy Chief of Staff from

November 2017 to April 2018; Director of Public Information from September 2013 to October 2017; and Public Information Officer from December 2006 to August 2013.

5. As a part of my duties as Chief of Staff, I assist in the oversight of operations and creation of policies concerning those persons confined in TDCJ facilities. This includes overseeing the Records Management Department of TDCJ, which provides research, insight, and recommendations for achieving efficiencies and consolidation of confinee and inmate records. This department also provides governance, support, and policy structure for all agency records; initiates and manages recordkeeping projects; and provides quality assurance reviews.

6. When TDCJ takes custody of a confinee or inmate who is suspected of being an alien, TDCJ informs U.S. Immigration and Customs Enforcement ("ICE"). ICE then conducts further investigation and may issue a detainer request to TDCJ to ensure that ICE can take custody of any such individual for removal proceedings when the confinee or inmate is scheduled to be released from TDCJ custody.

7. TDCJ maintains records of confinees and inmates in its custody in a database within its computer system. This database includes confinee and inmate identifying information, records of conviction and sentencing, and records of when a detainer is placed on a confinee or inmate in TDCJ custody, and when a detainer is rescinded. These records are kept in the usual course of TDCJ operations, and they are generally accurate and reliable. Only employees of TDCJ or, in limited circumstances, the Texas Board of Pardons and Paroles, can input or update the information in the database.

8. When ICE issues a detainer, that information is provided to TDCJ and entered into the agency's computer system and a physical copy is placed in the person's file.

9. As part of normal operations, TDCJ officials speak with ICE officials about

detainer requests. Further, after providing ICE officials current data, TDCJ cooperates with federal agencies to ensure they have access to aliens in TDCJ's custody. Currently, federal immigration officers, non-profit legal service organizations, and consular officials already request interviews and provide information to individuals confined and incarcerated in TDCJ facilities. They are routinely granted access to confined and incarcerated aliens. Nothing regarding SB 4 would change that policy moving forward.

10. TDCJ facilities have a law library and allow access to attorneys to ensure confined and incarcerated aliens have adequate legal information and access to counsel. Outside counsel and non-profit legal service organizations routinely enter TDCJ facilities to contact confined and incarcerated aliens and provide their services. They have the ability to meet in person at the state facility and have access to telephones. TDCJ provides authorized federal immigration forms to confinees and inmates who request them. During the intake process, TDCJ provides confined and incarcerated aliens a list of consular contacts in the state of Texas and allows them to contact and meet with consular officials. Confinees and inmates within TDCJ may also communicate with federal officials or their attorneys regarding immigration matters via mail.

11. In addition to materials, forms, and access to counsel, TDCJ provides confined and incarcerated aliens with electronic access (via Zoom, Teams, etc.) to any court hearing or interview and provides transportation if in-person attendance is required by federal immigration authorities.

12. TDCJ has not and will not interfere with confined and incarcerated aliens' ability to fully participate in federal immigration proceedings or state or federal court hearings. Aliens held in custody or serving a sentence under SB 4 will be able to apply for any federal immigration relief (including, but not limited to, asylum and Convention Against Torture claims), attend any required hearings, and meet with any federal immigration officers (including for credible-fear

interviews).

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.

Executed on this 7th day of February, 2024.

Jason Clark
Chief of Staff
Texas Department of Criminal Justice

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

UNITED STATES OF AMERICA, *PLAINTIFF,* V. THE STATE OF TEXAS; GREG ABBOTT IN HIS OFFICIAL CAPACITY AS GOVERNOR OF TEXAS; TEXAS DEPARTMENT OF PUBLIC SAFETY; STEVEN C. MCCRAW, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF TEXAS DEPARTMENT OF PUBLIC SAFETY, *DEFENDANTS.*	CASE NO. 1:24-CV-00008-DAE (LEAD CASE) CONSOLIDATED WITH 1:23-CV-1537-DAE

DECLARATION OF VICTOR ESCALON

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.

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 that includes Del Rio, Texas. I have served in this position for approximately four years. I am familiar with DPS operations that take place along the entire Texas border. I have served with DPS for a total of thirty years. I began working on Operation Lone Star, including arrests for criminal trespass, in March of 2021 and continue to work in that capacity.

3. DPS has responsibility to enforce the criminal laws of the State of Texas. I am personally familiar with the strategy DPS plans to deploy to enforce Texas's recently enacted law, SB 4, that is the subject of consolidated lawsuits captioned *United States v. Texas*, No. 1:24-cv-8 (W.D. Tex.), as well as the enforcement of state laws under Operation Lone Star.

4. DPS will prioritize enforcement of SB 4 in counties that are close to facilities operated by TDCJ and the State. DPS expects to house and process aliens detained under SB 4 primarily in State-owned facilities and does not anticipate a need for extensive use of county-owned jails.

5. DPS officers will have probable cause to make arrests under SB 4, Tex. Penal Code § 51.02, of aliens who are witnessed entering or re-entering Texas between ports of entry.

6. During Operation Lone Star, when criminal trespass cases have been enforced against aliens, DPS has generally avoided arresting unaccompanied minors or family units and has concentrated enforcement actions against single adults.

7. When DPS officers involved in Operation Lone Star have stopped unaccompanied minors or family units, they have turned them over to U.S. Border Patrol.

8. When aliens communicate a request for asylum or other immigration relief in the United States, DPS officers routinely respond by informing them of their opportunity to properly make such a request to the appropriate federal authorities after they have been arrested and processed.

9. DPS intends to monitor compliance with orders to return that are issued under SB 4, Tex. Code Crim. Proc. Art. 5B.002. When an order is due to be executed, it is DPS's intention to have an officer escort the alien to a port of entry.

10. Prior to escorting the alien, in most instances, DPS will contact Mexican immigration authorities to advise them of our movement of migrants to the port of entry.

11. DPS also intends to coordinate with personnel from the Office of Field Operations with U.S. Customs and Border Protection ("CBP") to inform them when aliens will be brought to ports of entry.

12. DPS intends to cooperate with CBP to assist them with answering requests made by foreign consulates for information concerning their citizens.

13. Should DPS become aware that a detained alien has a pending application for asylum or other relief with the federal government at the time of executing his order to return under SB 4, DPS intends to coordinate with federal immigration authorities before executing the order to return.

14. Throughout Operation Lone Star, Mexican law enforcement has usually been willing to cooperate with DPS. Texas enjoys a cooperative relationship with both federal Mexican immigration police and state police from Mexican border states that DPS expects to continue. DPS expects to work with Mexican authorities to request they allow entry of alien returnees.

15. If Mexican authorities do not accept the entrance of an alien subject to an order to return, the escorting DPS officer will deliver him to the American side of a port of entry and observe the alien go to the Mexican side. Upon witnessing the aliens cross to the Mexican side of the international bridge, the officer will consider the aliens to have complied with the return order and will cease monitoring the alien.

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 7th day of February 2024.

Victor Escalon
Regional Director
Texas Department of Public Safety

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

UNITED STATES OF AMERICA, *PLAINTIFF,* V. THE STATE OF TEXAS; GREG ABBOTT IN HIS OFFICIAL CAPACITY AS GOVERNOR OF TEXAS; TEXAS DEPARTMENT OF PUBLIC SAFETY; STEVEN C. MCCRAW, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF TEXAS DEPARTMENT OF PUBLIC SAFETY, *DEFENDANTS.*	CASE NO. 1:24-CV-00008-DAE (LEAD CASE) CONSOLIDATED WITH 1:23-CV-1537-DAE

DECLARATION OF WILLIAM NELSON BARNES

1. My name is William Nelson Barnes. I am the Project Director of the Border Prosecution Unit and an Assistant District Attorney for the 452nd Judicial District, which is located in Mason, McCulloch, Menard, Kimble, and Edwards Counties.

2. I have responsibility for the coordination, training, assistance, and facilitation of the Border Prosecution Unit efforts involving activities within the Operation Lane Star project. As the BPU Project Director one of my duties is to provide legal assistance and advisement to law enforcement personnel on provisions contained in the Texas Penal Code and Code of Criminal Procedure so that law enforcement actions can support appropriate prosecutions in our courts. Due to the nature of my employment, I am personally familiar with events related to border prosecution and Texas's newly enacted law, SB 4, that is the subject of consolidated lawsuits captioned *United States v. Texas*, No. 1:24-cv-8 (W.D. Tex.), as well as trespass prosecutions and convictions under Operation Lone Star.

3. Under the provisions of SB 4, Texas Penal Code Sec. 51.02 a person may be prosecuted for illegal entry if the following elements of the offense can be met: 1) the person must be an alien as defined by the statute, 2) must enter or attempt to enter the State from a foreign nation, 3) at any location other than a lawful port of entry. Further, to be lawfully arrested without a warrant for a misdemeanor crime not against the public peace, as is the case with Sec. 51.02, Chapter 14 of the Texas Code of Criminal Procedure provides that the offense take place in plain view of a law enforcement officer, which is most likely to occur in areas adjacent to the physical border of Texas with the Republic of Mexico.

4. To my knowledge, neither unaccompanied minors nor family units have been the subject of prosecution in criminal trespass cases brought under Operation Lone Star.

5. Aliens who are brought to a port of entry pursuant to an order to return and who have a legitimate legal basis for non-compliance would seemingly have a defense to have intentionally committed an offense under SB 4, Tex. Penal Code § 51.04 and would be subject to the discretion of prosecution authorities to not pursue charges if all of the elements the offense are not present.

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 7th day of February 2024.

William Nelson Barnes
Project Director
Border Prosecution Unit – Operation Lone Star