



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

April 18, 2022

U.S. Fish and Wildlife Service  
1849 C Street, NW  
Washington, DC 20240

To Director Williams:

The Attorney General of Texas submits the following comments in response to the U.S. Fish and Wildlife Service's (FWS) proposed rule to designate the prostrate milkweed (*Asclepias prostrata*), a plant species located in parts of Texas, as an endangered species and further designate critical habitat under the Endangered Species Act of 1973, as amended (Act).<sup>1</sup>

We recognize the value in protecting animal and plant species native to Texas as well as the general benefit of conservation efforts. But the decision to designate critical habitat requires more than merely determining that the prostrate milkweed species is at risk. The designation determination must also account for the potential implications to border security, which implicates national security, Texas's security and economy, and other public policy priorities, such as combatting human and drug trafficking, which are rampant in areas near the border.

The proposed designation potentially affects ongoing and future efforts to erect and establish deterrents to illegal border crossings, including but not limited to construction of a border barrier. Yet FWS fails to meaningfully account for these and other concerns related to border security. Further, recent environmental analyses by federal agencies have determined that the impact of border enforcement activities or

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<sup>1</sup> 87 Fed. Reg. 8509 (Feb. 15, 2022).

border barrier construction is of minimal or no significance to the prostrate milkweed, and therefore the designation is not needed to protect the species from either. At a minimum, the proposed rule prioritizes plant life over human life by failing to properly address critical border security implications.

### *FWS Fails to Consider Border Security*

FWS is required to consider “the economic impact, the impact on national security, and any other relevant impact” of designating an area a critical habitat.<sup>2</sup> More specifically, FWS must “identify any national security or other relevant impacts that . . . are contained in a particular area of proposed designation” and “consider the probable economic, national security, and other relevant impacts of the designation upon proposed or ongoing activities.”<sup>3</sup>

Although FWS mentions border security in its “Consideration of National Security Impacts,” FWS determines in a conclusory fashion that “[a]lthough two proposed units of critical habitat are located along the border, we do not anticipate that there will be an impact on national security or homeland security.”<sup>4</sup> FWS focuses instead on potential “habitat loss from border security development and enforcement activities.”<sup>5</sup> This analysis ignores both previous federal government studies demonstrating there will be no habitat loss. Further, it ignores FWS’s statutory duty to consider not just the impact of border security measures on prostrate milkweed, but the impact of a critical habitat designation on border security. Because FWS has not attempted any meaningful analysis as it relates to border security, Texas submits the following.

### *The Border Crisis*

The impact the proposed rule would have on national security is substantial.

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<sup>2</sup> 16 U.S.C. § 1533(b)(2).

<sup>3</sup> 50 C.F.R. § 17.90(a), (b).

<sup>4</sup> 87 Fed. Reg. 8528.

<sup>5</sup>*Id.* at 8514.

The crisis on Texas’s southern border remains ongoing. According to Homeland Security Secretary Alejandro Mayorkas, the federal government is “on pace to encounter more individuals on the southwest border than we have in the last 20 years.”<sup>6</sup> In February 2021 alone, there were more than 100,000 migrant encounters and Texas Deputy Border Chief Raul Ortiz has said that he “fully expect[s] our border patrol agents to encounter over a million people this year.”<sup>7</sup> Then, on May 4, 2021, the U.S. Customs and Border Protection Agency (CBP) reported 173,348 southwest border land encounters during March 2021 and 178,622 in April 2021, the latter exceeding the April 2019 immigration surge by 63.25%—with no sign of abatement.<sup>8</sup>

This trend has not only continued but also continues at a record-breaking pace. Now, in fiscal year 2022, almost 1 million encounters have occurred, and the number of encounters is substantially higher than last fiscal year.<sup>9</sup> In fiscal year 2021, from October to February, land encounters totaled 397,549 compared to 842,685 land encounters for the same period this fiscal year.<sup>10</sup> That is a 211% increase.<sup>11</sup>

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<sup>6</sup> U.S. DEP’T OF HOMELAND SEC., *Statement by Homeland Security Secretary Alejandro N. Mayorkas Regarding the Situation at the Southwest Border* (March 16, 2021), <https://www.dhs.gov/news/2021/03/16/statement-homeland-security-secretary-alejandro-n-mayorkas-regarding-situation>.

<sup>7</sup> Ted Hesson, *More than a million migrants expected at U.S.-Mexico border this year - U.S. official*, REUTERS (March 30, 2021), <https://www.reuters.com/article/us-usa-immigration-border/more-than-a-million-migrants-expected-at-u-s-mexico-border-this-year-u-s-official-idUSKBN2BM3FN>; U.S. CUSTOMS AND BORDER PROTECTION, *Southwest Land Border Encounters*, <https://www.cbp.gov/newsroom/stats/southwest-land-border-encounters> (last visited April 15, 2022).

<sup>8</sup> U.S. CUSTOMS AND BORDER PROTECTION, *CBP Announces April 2021 Operational Update* (May 11, 2021), <https://www.cbp.gov/newsroom/national-media-release/cbp-announces-april-2021-operational-update>; U.S. DEP’T OF HOMELAND SEC., FINAL EMERGENCY INTERIM REPORT CBP FAMILIES AND CHILDREN CARE PANEL (April 16, 2019), [https://www.dhs.gov/sites/default/files/publications/19\\_0416\\_hsac-emergency-interim-report.pdf](https://www.dhs.gov/sites/default/files/publications/19_0416_hsac-emergency-interim-report.pdf).

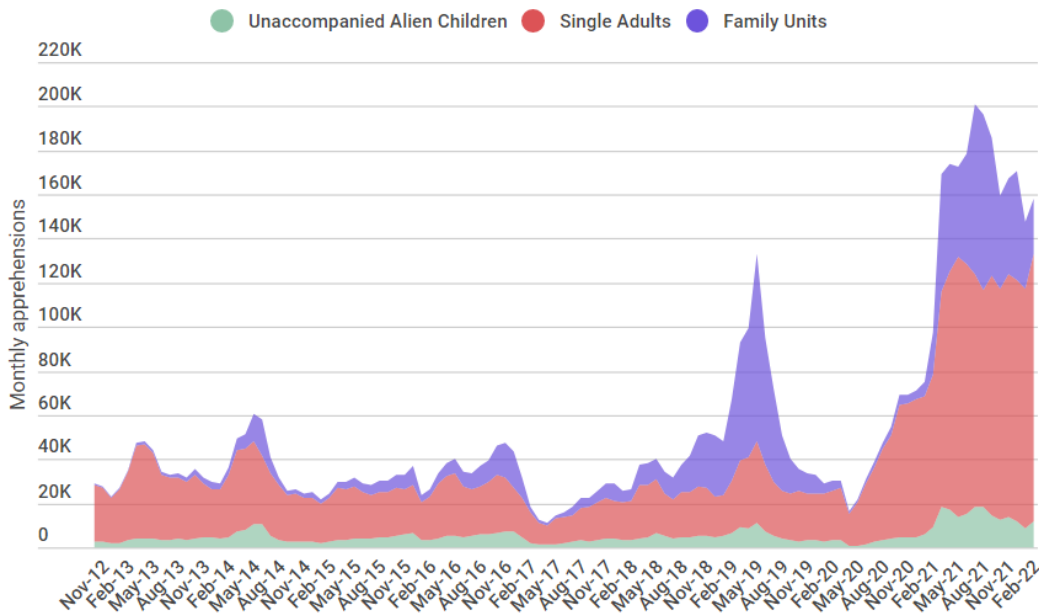
<sup>9</sup> *Southwest Land Border Encounters*, *supra* note 7.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

Per CBP’s data, the trend is not decreasing, but increasing, with no signs of slowing:

## Apprehensions at the Southwest Border



Border Patrol apprehensions of people illegally crossing the border between ports of entry.  
Source: U.S. Border and Customs Protection

This migrant surge has inflicted serious costs on Texas, as organized crime and drug cartels continue to prey on migrants and unaccompanied children through human and drug trafficking, violence, extortion, sexual assault, and exploitation. These crimes directly and disproportionately affect Texas and its border communities.

For example, drug cartels in Mexico are tragically “using helpless children as decoys to smuggle their members into the US” and “making a killing off the border crisis, jacking up their fees to smuggle the growing flood of people into the country—

and now ‘making more money on humans than they are on the drug side[.]’<sup>12</sup> “[T]he cartels also are further exploiting the disastrous situation by splitting up kids from their . . . parents, then having members pose as the children’s relatives to cross the border[.]”<sup>13</sup> As a former U.S. Marshal in El Paso explained, “Mexican drug cartels are taking advantage of the recent influx of migrants, using it as an opportunity to ‘make money’” because “it’s more cost effective to be involved in human smuggling [than] it is to be in drug trafficking.”<sup>14</sup> And “human smuggling often also turns into human trafficking[.]”<sup>15</sup>

Despite these troubling realities for Texas communities, the proposed rule does not address the fact that there is an ongoing and daily increasing crisis at the border. More than 100,000 illegal migrants are caught trespassing in the U.S. each month.<sup>16</sup> Just six months into fiscal year 2022, border agents will log almost 1 million encounters with illegal aliens at the U.S.-Mexico border.<sup>17</sup> As a result, border agents are expected to “exceed 2 million apprehensions total in the 2022 fiscal year,” exceeding the record 1.7 million apprehensions in fiscal year 2021.<sup>18</sup>

### *Starr and Zapata Counties*

In 2021 Governor Greg Abbott issued border-related disaster declarations for both Starr and Zapata Counties, due to the “surge of individuals unlawfully crossing

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<sup>12</sup> Gabrielle Fonrouge, *Mexican drug cartels using kids as decoys in to smuggle its members into US: sheriff*, NEW YORK POST (Mar. 22, 2021), <https://nypost.com/2021/03/22/mexican-drug-cartels-use-kids-as-decoys-to-smuggle-members-into-us/>.

<sup>13</sup> *Id.*

<sup>14</sup> Briana Chavez, *El Paso’s former U.S. Marshal says Mexican cartels ‘make money’ from migrant influx*, KVIA (Mar. 18, 2021), <https://kvia.com/news/border/2021/03/18/el-pasos-former-u-s-marshal-says-mexican-cartels-make-money-from-migrant-influx/>.

<sup>15</sup> *Id.*

<sup>16</sup> *Southwest Land Border Encounters*, *supra* note 7.

<sup>17</sup> Jordan Boyd, *Fiscal Year 2022 Border Encounters Will Hit 1 Million Right Before Peak Migration Season*, THE FEDERALIST (March 29, 2022), <https://thefederalist.com/2022/03/29/fiscal-year-2022-border-encounters-will-hit-1-million-right-before-peak-migration-season/>; *Southwest Land Border Encounters*, *supra* note 7.

<sup>18</sup> *Fiscal Year 2022 Border Encounters Will Hit 1 Million Right Before Peak Migration Season*, *supra* note 17.

the Texas-Mexico border” which posed an “ongoing and imminent threat of disaster” for those counties.<sup>19</sup> Zapata County officials also declared a local state of disaster under Texas Government Code section 418.108 relating to the border crisis experienced in their community. Governor Abbott’s disaster declaration remains in effect today.

CBP designates Starr County as part of the Rio Grande Valley Sector, where illegal alien apprehensions between January 2017 and August 2021 have increased over 421%, with dramatic spikes beginning in February 2021.<sup>20</sup> The Laredo Sector, which includes Zapata County, saw apprehensions double during that time period.<sup>21</sup>

Starr County in particular has seen a marked increase in border-related crimes since the first quarter of 2021, including a substantial increase in high-speed chases, drug seizures, and human smuggling.<sup>22</sup> Due to its shared border with Mexico, the community has a “notorious, decades-long reputation for narco-trafficking.”<sup>23</sup> Similarly, in Zapata County, the Sheriff noted the community previously experienced about one highway chase or vehicle bailout per week, but “[n]ow it’s once a day.”<sup>24</sup>

The economic cost to ranchers due to illegal alien traffic through their

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<sup>19</sup> Gov. Greg Abbott, PROCLAMATION BY THE GOVERNOR OF THE STATE OF TEXAS (May 31, 2021), [https://gov.texas.gov/uploads/files/press/DISASTER\\_border\\_security\\_IMAGE\\_05-31-2021.pdf](https://gov.texas.gov/uploads/files/press/DISASTER_border_security_IMAGE_05-31-2021.pdf).

<sup>20</sup> TEXAS DEP’T OF PUBLIC SAFETY, TEXAS BORDER SECURITY (September 2021), <https://www.dps.texas.gov/sites/default/files/documents/publicinformation/documents/bordersecebrief20210901.pdf>.

<sup>21</sup> *Id.*

<sup>22</sup> BORDER REPORT, *Car pursuits increase in Rio Grande City as illegal border crossings rise* (April 1, 2021), <https://www.borderreport.com/hot-topics/border-crime/car-pursuits-increase-in-rio-grande-city-as-illegal-border-crossings-rise/>. During the first quarter of 2021 Rio Grande City law enforcement experienced thirteen vehicle pursuits, the seizure of 517 pounds of drugs, and encounters with 416 undocumented aliens. This is compared with two vehicle pursuits and six arrests of undocumented people for the same period in 2020). *Id.*

<sup>23</sup> Debbie Nathan, *How DPS's Occupation of a Border Town May Have Crippled Its Economy*, THE AUSTIN CHRONICAL (Oct. 6, 2017), <https://www.austinchronicle.com/news/2017-10-06/how-dps-occupation-of-a-border-town-may-have-crippled-its-economy/>.

<sup>24</sup> John Burnett, *Human Smugglers Bypass Border Patrol, Bedeviling Sheriffs And Ranchers in South Texas*, NPR (April 24, 2021), <https://www.npr.org/2021/04/24/990150761/human-smugglers-bypass-border-patrol-bedeviling-sheriffs-and-ranchers-in-south-t>.

properties has also been substantial. Ranch owners in the nearby area cite costs in the tens of thousands of dollars to repair cut fences and gates destroyed by human smugglers transporting undocumented persons through their ranches.<sup>25</sup> These numbers are not unique.

The Department of Homeland Security (“DHS”) has previously recognized the importance of the construction of a southwest border wall. Among other things, DHS’s prior assessment concluded that “Walls Work,” that border walls are highly effective in deterring and preventing illegal immigration and illegal drug trafficking across the southwest border, and that the construction of border barriers on the southwest border led to a 90 percent reduction in border apprehensions in the Yuma region.<sup>26</sup>

Adequate border security must be maintained in these counties to deter human smuggling, human trafficking, and other criminal activities associated with a porous border. Any obstacle preventing Texas from engaging in border enforcement activities or building a border barrier injures Texas by promoting cartel activity and by increasing the number of illegal aliens crossing the border.

### *Humanitarian Impacts*

In addition to the above concerns raised, it is well established that open borders create and promote a humanitarian crisis in the form of human trafficking that extends beyond Texas’s borders. The border crisis has led to an explosion in human trafficking activity across the border. There is a well-documented and tragic connection between human trafficking in the Midwest and unlawful immigration from the southern border.<sup>27</sup>

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<sup>25</sup> *Id.* (noting that rancher Whit Jones III spent \$30,000 in a three-month period in 2021 to repair dozens of breaks in his fences).

<sup>26</sup> U.S. DEP’T OF HOMELAND SEC., *Walls Work* (Dec. 12, 2018), <https://www.dhs.gov/news/2018/12/12/walls-work>.

<sup>27</sup> *See generally* U.S. DEP’T OF STATE, *TRAFFICKING IN PERSONS REPORT* (20th ed., June 2020), <https://www.state.gov/wp-content/uploads/2020/06/2020-TIP-Report-Complete-062420-FINAL.pdf>; U.S. DEP’T OF JUSTICE, *U.S.-Mexico Bilateral Human Trafficking Enforcement Initiative*, <https://www.justice.gov/humantrafficking/special-initiatives#bilater>

Indeed, the data makes it readily apparent that trafficking on the southern border is a contributing factor to overall rates of human trafficking in the United States.<sup>28</sup> While the costs of combating human trafficking vary from state to state, Texas will inevitably carry much of these costs due to its extensive shared border with Mexico. For example, a report from 2016 concluded that Texas spends approximately \$6.6 billion in lifetime expenditures on minor and youth sex trafficking victims, and that traffickers exploit approximately \$600 million annually from victims of labor trafficking in Texas (i.e., lost wages), which necessarily results in corresponding lost tax revenue to Texas.<sup>29</sup>

One would hope that saving a person from being trafficked by allowing for sufficient border enforcement activities, in addition to implementing some sort of border barrier, would outweigh the designation of a plant species as endangered or habitat as critical, especially considering other federal agencies have concluded, in detailed reports outlined below, that the prostrate milkweed would not be threatened by such activity.

### *Previous Environmental Studies*

The federal government has already determined that the prostrate milkweed is not at risk should border enforcement activities continue or a border barrier be

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al (last visited April 15, 2021) (“Mexico is the country of origin of the largest number of foreign-born human trafficking victims identified in the United States.”); POLARIS PROJECT, FIGHTING HUMAN TRAFFICKING ACROSS THE U.S. – MEXICO BORDER (2018), <https://polarisproject.org/wp-content/uploads/2016/10/Consejo-NHTH-Statistics-2018.pdf>. (“Every day, powerful criminal networks and individual traffickers on both sides of the border recruit people for labor or sexual exploitation.”); UNITED NATIONS OFFICE ON DRUGS AND CRIME, GLOBAL REPORT ON TRAFFICKING IN PERSONS (2018), [https://www.unodc.org/documents/data-and-analysis/glotip/2018/GLOTiP\\_2018\\_BOOK\\_web\\_small.pdf](https://www.unodc.org/documents/data-and-analysis/glotip/2018/GLOTiP_2018_BOOK_web_small.pdf); *Southwest Land Border Encounters*, *supra* note 7.

<sup>28</sup> *Id.*

<sup>29</sup> Noël Busch-Armendariz, et al., *Human Trafficking by the Numbers: The Initial Benchmark of Prevalence and Economic Impact for Texas*, UNIVERSITY OF TEXAS AUSTIN (Dec. 2016), <https://repositories.lib.utexas.edu/bitstream/handle/2152/44597/idvsa-2016-human-trafficking-by-the-numbers.pdf?sequence=2%26isAllowed=y>.



built. At least two very thorough environmental impact analyses conducted by the CBP have concluded that construction activity in the counties listed in this proposed rule, such as roads or a border wall, would have minimal or no significant impact on the vegetation, including the prostrate milkweed.<sup>30</sup> These studies addressed both the building of roads as well as the construction of a border wall in the same geographic areas as those being considered here. Yet these environmental studies are seemingly being ignored by FWS, and now without clear reasoning or supportive data, the impact of border enforcement activities or a border wall are said to be potential threats of “high magnitude” to the prostrate milkweed.

Further, those disregarded studies concluded that such activity could actually benefit the surrounding vegetation, including the prostrate milkweed, because of reduced foot traffic as a result of border enforcement activities or a border barrier. Not only does the proposed rule in question fail to appropriately analyze the border security interests in Starr and Zapata counties, as well as Texas generally, it fails to consider the potential *damage* to the plant caused by the traffic generated by migrants and illegal immigration.

The prospect of thousands of migrants and undocumented immigrants trampling the vegetation and plant life while journeying north through Zapata and Starr Counties each year is no doubt potentially harmful to the sensitive environment surrounding prostrate milkweed. For example, in the past week Border Patrol agents encountered 10 large groups (defined by authorities as numbering 100 people or more) in the Rio Grande Valley sector alone.<sup>31</sup> The foot-traffic damage can even be

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<sup>30</sup> U.S. CUSTOMS AND BORDER PROTECTION, FINDING OF NO SIGNIFICANT IMPACT (FONSI) RIO GRANDE CITY STATION ROAD IMPROVEMENT PROJECT, RIO GRANDE CITY, TEXAS, RIO GRANDE VALLEY SECTOR (July 2020), [https://www.cbp.gov/sites/default/files/assets/documents/2020-Jul/EA\\_RGC\\_Roads\\_Draft\\_508\\_Version\\_reduced.pdf](https://www.cbp.gov/sites/default/files/assets/documents/2020-Jul/EA_RGC_Roads_Draft_508_Version_reduced.pdf); U.S. CUSTOMS AND BORDER PROTECTION, ENVIRONMENTAL STEWARDSHIP PLAN FOR THE PROPOSED BORDER WALL PROJECT U.S. BORDER PATROL RIO GRANDE VALLEY SECTOR, MCALLEN AND WESLACO STATIONS, TEXAS (June 2020), [https://www.cbp.gov/sites/default/files/assets/documents/2020-Apr/Final\\_RGV\\_LeveeWall\\_ESP\\_508.pdf](https://www.cbp.gov/sites/default/files/assets/documents/2020-Apr/Final_RGV_LeveeWall_ESP_508.pdf).

<sup>31</sup> M. Martinez and S. Chamberlain, *Border encounters soared to highest level under Biden*

seen in a recent video shared by Rio Grande Valley Chief Patrol Agent Brian Hastings.<sup>32</sup> The video shows a group of 202 illegal immigrants on foot.<sup>33</sup> Preventing foot traffic benefits the species by reducing trash and debris, trampling of vegetation, and creation of trails. In light of this, a border barrier or increased border monitoring by CBP or other federal agencies will actually enhance the preservation of the prostrate milkweed's habitat. The FWS proposal speculates without factual basis that "construction [of a border wall] would obliterate prostrate milkweed plants that occur within the construction footprint."<sup>34</sup> This conclusory analysis fails to consider the harmful impact to the very plant they seek to protect if this area of the southern border remains unsecured.

### *Economic Impacts*

Also significant are the economic impacts resulting from the above-mentioned border crisis. The substantial increase in the number of illegal aliens crossing the border has inflicted serious costs on Texas. The additional costs of housing, educating, and providing healthcare and other social services for trafficking victims, asylum seekers, or illegal aliens continue to financially burden Texas and its taxpayers.

The costs are extensive. For example, aliens paroled into the United States are eligible for subsidized driver's licenses. In addition, Texas spends significant amounts of money providing services to illegal aliens. Those services include education services and healthcare, as well as many other social services broadly available in Texas. Federal law requires Texas to include illegal aliens in some of these programs. The State funds multiple healthcare programs that cover illegal aliens. The provision of these services—utilized by illegal aliens—results in millions of dollars of

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*in March as Title 42 lift looms*, NEW YORK POST (April 15, 2022), <https://nypost.com/2022/04/15/migrants-cross-texas-border-by-hundreds-with-title-42-lift-looming/>.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> U.S. FISH AND WILDLIFE SERVICE, SPECIES STATUS ASSESSMENT REPORT FOR PROSTRATE MILKWEED (*ASCLEPIAS PROSTRATA* W.H. BLACKWELL), regulations.gov (Feb. 2020), <https://www.regulations.gov/document/FWS-R2-ES-2021-0041-0007>.

expenditures per year. These services include the Emergency Medicaid program, the Texas Family Violence Program, and the Texas Children’s Health Insurance Program.

In 2021, this cost was estimated at costing over \$850 million each year.<sup>35</sup> In a January 2021 lawsuit, Attorney General Paxton uncovered hundreds of millions of dollars that Texas taxpayers involuntarily spent on illegal aliens every year:

- Texans pay between \$579 million and \$717 million each year for public hospital districts to provide uncompensated care for illegal aliens.<sup>36</sup>
- Texans paid \$152 million to house illegal criminal aliens for just one year.<sup>37</sup>
- Texans pay between \$62 million and \$90 million to include illegal aliens in the state Emergency Medicaid program.<sup>38</sup>
- Texans paid more than \$1 million for The Family Violence Program to provide services to illegal aliens for one year.<sup>39</sup>
- Texans pay between \$30 million and \$38 million per year on perinatal coverage for illegal aliens through the Children’s Health Insurance Program.<sup>40</sup>
- Texans pay between \$31 million and \$63 million to educate unaccompanied alien children each year.<sup>41</sup>

Border crossings are anticipated to increase dramatically in 2022 with revocation of Title 42 and other actions being taken by the federal government to stop protecting the southern border.

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<sup>35</sup> Attorney General Ken Paxton, *AG Paxton: Illegal Immigration Costs Texas Taxpayers Over \$850 Million Each Year*, PRESS RELEASE (March 31, 2021), <https://www.texasattorneygeneral.gov/news/releases/ag-paxton-illegal-immigration-costs-texas-taxpayers-over-850-million-each-year>.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

Thus, any obstacle preventing Texas or limiting federal partners from engaging in border enforcement activities or building a border barrier financially injures Texas by, at a minimum, increasing the number of illegal aliens receiving social services at Texas's expense.

### *Conclusion*

Preventing Texas from engaging in border enforcement activities or building a border barrier impacts the State of Texas, local governments, public health and safety, and the communities themselves. These impacts are material and long-lasting. By implementing this rule, Texas is arguably prevented from implementing proven deterrence measures to protect its borders from illegal immigration.

The U.S. Fish and Wildlife Service's proposed rule to designate the prostrate milkweed as an endangered species, and to designate portions of the Texas border as critical habitat under the Act, would not only fail to protect the plant—according to the federal government's own multiple environmental impact analyses—but it would prevent Texas's efforts to address the border crisis that would do far more to preserve the plant's habitat. That makes the proposed rule counter-productive on its own terms.

After factoring into the equation the human and budgetary costs that would result from the designation, the conclusion should be inescapable: the prostrate milkweed should not be designated as an endangered species, and the Texas border habitat should not be designated as "critical habitat" under the Endangered Species Act.

Sincerely,



KEN PAXTON  
Attorney General of Texas