No. 23A607

In the Supreme Court of the United States

DEPARTMENT OF HOMELAND SECURITY, ET AL.,
Applicants,

v.

STATE OF TEXAS

THE STATE OF TEXAS'S RESPONSE IN OPPOSITION TO THE UNITED STATES'S APPLICATION TO VACATE INJUNCTION PENDING APPEAL ISSUED BY THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PARTIES TO THE PROCEEDING

Applicants (defendants-appellees below) are the United States Department of Homeland Security; Alejandro Mayorkas, Secretary, U.S. Department of Homeland Security; United States Customs and Border Protection; United States Border Patrol; Troy Miller, Acting Commissioner, U.S. Customs and Border Protection; Jason Owens, in his official capacity as Chief of the U.S. Border Patrol; and Juan Bernal, in his official capacity as Acting Chief Patrol Agent, Del Rio Sector, United States Border Patrol (collectively, "Defendants").

Respondent (plaintiff-appellant below) is the State of Texas.

RELATED PROCEEDINGS

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

Texas v. U.S. Dep't of Homeland Security, No. 2:23-cv-55 (Nov. 29, 2023)

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

Texas v. U.S. Dep't of Homeland Security, No. 23-50869 (Dec. 19, 2023)

INTRODUCTION

Defendants seek emergency relief pending appeal without making *any* argument that they did not destroy Texas's property, directly contrary to basic principles of Texas tort law. That maximalist view of federal authority is not new: At every stage of this litigation—in the district court, in the Fifth Circuit, and now in this Court—Defendants have claimed authority to destroy property that belongs to someone else based on their assurance that doing so is necessary to enforce federal immigration laws. Yet Defendants all but ignore the district court's factual findings demonstrating that the premise of their argument is wrong: "The evidence presented … amply demonstrates the utter failure of the Defendants to deter, prevent, and halt unlawful entry into the United States." App.47a. Indeed, given the district court's factual findings, Defendants may not "seek judicial blessing of practices that both directly contravene those same statutory obligations and require the destruction of the Plaintiff's property." *Id.* Suffice it to say, the Court is highly unlikely to grant review simply to relitigate the district court's factual findings.

Notwithstanding Defendants' "culpable and duplicitous conduct," App.25a, however, the district court declined to grant a preliminary injunction for a single reason: its belief that 5 U.S.C. §702 did not waive the federal government's immunity from suit, App.32a. Understandably, then, the parties' briefing on appeal to the Fifth Circuit focused largely on that issue. And the Fifth Circuit corrected that single error. As the leading treatise recognizes, §702's plain text means that it "applies to *any suit*" for non-monetary relief, which is why Defendants, in pressing for the opposite view, must spend several pages (30-32) reciting legislative history to imply limits found nowhere in the statute's text.

Perhaps having realized that their position on §702's waiver of sovereign immunity is manifestly *un*-certworthy, Defendants now shift their focus to preemption. And while Defendants criticize the Fifth Circuit (at 14, 24, 25) for treating this supposedly "foundational" issues with "brief" and "cursory" analysis, they neglect to mention that preemption made (at best) a cameo appearance in *their own* pleadings to the district court,

which focused instead on intergovernmental immunity. *See* ROA.993. Defendants' effort to re-formulate this case highlights why the application should be denied. Regardless, Defendants' preemption arguments again run headlong into the district court's factual findings.

But this Court could also deny the Application for a more basic reason. When Defendants sought emergency relief here, they did so (at 15) on the basis that the Fifth Circuit was not proceeding as quickly as they would like after they moved for expedited briefing and argument on appeal. Defendants had requested that any briefing be concluded by February 12, with oral argument to follow "as soon as possible." CA5 ECF 53 at 6. As it turns out, the Fifth Circuit gave them just what they asked for—and more. On January 2, that court ordered the parties to fully brief this appeal by January 30, with oral argument to follow on February 7. By any measure, the Court should deny the Application.

Statement of the Case

I. The District Court's Findings Regarding the Border Crisis

Texas borders Mexico for more than 1,200 miles. Every day, thousands of people—both U.S. citizens and otherwise—cross this border. Many such border crossings are lawful; indeed, the United States has created official ports of entry. Many people, however, ignore those entry ports and instead enter Texas where they are not authorized to do so. Entry at unauthorized places often involves extensive trespassing on private property and can be dangerous, for instance when it requires traversing rivers or deserts.

Following multiple hearings, the district court here found that the number of border crossings into Texas at unauthorized places has exploded. The "number of Border Patrol encounters with migrants illegally entering the country has swelled from a comparatively paltry 458,000 in 2020 to 1.7 million in 2021 and 2.4 million in 2022"—with Border Patrol "on track to meet or exceed those numbers in 2023." App.26a (citation omitted).

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.* Indeed, trafficking across the southern border 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://www.nytimes.com/2022/07/25/us/migrant-smuggling-evolution.html; *see also* App.26a (taking notice of this article). These cartels, which "have increasingly acquired a transnational dimension," are now 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). And "the infrastructure built by the cartels for human cargo can also be used to ship illegal substances, namely fentanyl." App.26a. "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.*

Border towns like Eagle Pass are at the "epicenter" of this crisis. *Id.* at 27a. According to Eagle Pass Mayor Rolando Salinas, Jr., the recent surge of border crossings is like "nothing that we've seen ever . . . to have so many people crossing in without consequence." Gaige Davila, *High Migration Through Texas Border Town of Eagle Pass Strains Resources*, NPR (Sept. 22, 2023), transcript at https://www.npr.org/2023/09/22/1201215460/high-migration-through-texas-border-town-of-eagle-pass-strains-resources. After roughly 14,000 people—about half of Eagle Pass's population—entered the city in less than two weeks, Mayor Salinas declared a state of disaster. ROA.151.

II. Operation Lone Star

Texas Governor Greg Abbott "launched Operation Lone Star in 2021 to aid Border Patrol in its core functions." App.27a. As part of this multi-front initiative, the Governor authorized the Texas Military Department ("TMD") to deploy c-wire fencing on Texas's own property and with the permission of landowners at hotspots like Eagle Pass. ROA.151-52. As the district court explained, "[t]he wire serves as a deterrent—an effective one at

that." App.27a. Indeed, "the wire was so successful that illegal border crossings dropped to less than a third of their previous levels." *Id.* The federal government also uses c-wire fencing to deter illegal crossings and route migrants to lawful ports of entry. ROA.673. In fact, it is undisputed that Texas regularly erects c-wire fencing at the border in *collaboration* with federal border-patrol agencies. ROA.668-69. "[S]tate agents have given concertina wire to federal agents to assist them in deploying wire fencing, and federal agents have given concertina wire to state agents to assist them in doing the same." ROA.672; *see also* ROA.670-73. "By all accounts, Border Patrol is grateful for the assistance of Texas law enforcement, and the evidence shows the parties work cooperatively across the state, including in El Paso and the Rio Grande Valley." App.27a.

As Eagle Pass began experiencing an unprecedented surge in crossings, however, the federal government flipflopped and began cutting Texas's fencing. Eyewitness observers reported that the cuttings "facilitate the surge of migrants into Eagle Pass." ROA.152-53. As the district court documented in detail, video evidence shows federal agents "cutting multiple holes in the concertina wire for no apparent purpose other than to allow migrants easier entrance further inland." App.28a. On more than 20 occasions between September 20 and October 10, 2023, TMD recorded Customs and Border Protection ("CBP") officials cutting Texas's fencing. ROA.140-43. When Texas officers tried to document this ongoing destruction, CBP agents told them to "back the f*** off," ROA.115 n.55, and claimed that Texas officers are "not authorized to take any pictures," ROA.249.

On October 26, 2023, two days after Texas filed this suit, photos show Defendants escalating matters by "trading bolt cutters for an industrial-strength telehandler forklift to dismantle Texas's border fence." ROA.235. TMD Officer Brian Cooney spotted several hundred individuals on Mexico's side of the Rio Grande. ROA.247. After the group crossed the river, federal officials used a forklift to pull Texas's fence out of the ground, suspending it aloft for approximately 20 minutes while over 300 people entered. *Id.* Border Patrol had boats in the water at the time, none of the people appeared to be in distress, and no call was made for a medical team. ROA.248. Officer Cooney took this picture of the scene, ROA.247:

Texas promptly sought an emergency TRO to stop this destruction. Just 20 minutes later, however, CBP officials used a forklift to repeatedly smash Texas's fence into the ground to allow dozens of people, most of whom had not yet left Mexico's riverbank, to enter the United States. ROA.278. No one was in distress or in need of medical attention. *Id.*

III. Proceedings in the District Court

Texas asserted claims for conversion and trespass, APA violations, and *ultra vires* conduct. ROA.14. It also sought a preliminary injunction. ROA.84. As just noted, while Defendants were using a forklift to tear Texas's fence out of the ground, Texas moved for

a TRO. ROA.234; 268.

The district court issued a TRO on October 30, 2023, concluding that Texas will likely prevail on its trespass-to-chattels claim, that ongoing interference with the State's proprietary interest caused irreparable harm, and that the equitable balance favored the State. ROA.285-91. The TRO enjoined Defendants from destroying Texas's fencing in the vicinity of Eagle Pass but carved out an exception, which Texas did not oppose, for "provid[ing] or obtain[ing] emergency medical aid." *Id.* at 285, 292, 736.

At a November 7, 2023, hearing, testimony confirmed that Defendants' fence cutting was not precipitated by medical exigency. Michael Banks, a Texas official, provided an eyewitness account of federal agents waving individuals through Texas's destroyed fencing without any inspection. They "were led through this hole and pointed a mile down the road and entrusted that they're going to just report there." ROA.1110. Nor was anyone discouraged from making the crossing. Federal agents patrolling the Rio Grande by boat "literally usher[ed] them" across. *Id.* Banks testified that when he confronted the deputy patrol agent on the scene, the agent was unable to explain his actions but nonetheless promised: "If you close the wire, I will f'ing cut it all; I will tie a strap to it and will rip it all out of here." *Id.*; *see also* App.28a (district court findings).

The TRO was extended, initially by order and then by party agreement, until November 29, 2023. ROA.797. The district court also ordered supplemental briefing and document production before another hearing. ROA.737.

On November 29, the district court made extensive findings supporting Texas. As relevant here, it concluded that: Texas has "direct proprietary interests" in its property, App.31a; Defendants' conceded "destruction of . . . property" that is not theirs cannot be justified based on "statutory duties they are so obviously derelict in enforcing" and that, indeed, Defendants "utter[ly]" ignore, *id.* at 47a; injunctive relief is "the only appropriate remedy" for Defendants' "continuing or future" interference with Texas's property interest, *id.* at 32a n.7; Texas will suffer irreparable harm absent a preliminary injunction,

given Defendants' "culpable and duplicitous conduct," *id.* at 25a, 53a; and the public interest favors an injunction because Defendants' destruction of Texas's property "provide[s] ample incentive" for drug smuggling and dangerous crossings, *id.* at 46a-47a, 53a. The court also found that "Border Patrol agents already possess access to both sides of the fence," thus negating any need to destroy Texas' property to perform their statutory duties, should they decide to do so. *Id.* at 43a.

The district court also noted the Defendants' "cynical arguments" and their "disingenuous[ness]" in "argu[ing] the wire hinders Border Patrol from performing its job, while also asserting the wire helps." *Id.* at 29a. The court further made credibility findings about the testifying federal officials, documenting their "totally uncorroborated" assertions and "evasive answers and demeanor." *Id.* at 28a n.4.[1]

Despite those detailed factual findings and conclusions of law, the district court determined that it was powerless to convert the TRO into a preliminary injunction. According to the district court, Congress's waiver of sovereign immunity in 5 U.S.C. §702 does not apply to such state-law causes of action. *Id.* at 32a. In reaching that conclusion, the district court acknowledged that its analysis may conflict with that of multiple circuit courts but concluded that those "decisions are not binding on this Court." *Id.* at 37a n.9.

As to Texas's APA claims, the court determined that the current record did not support a finding of an agency policy or final agency action. The court, however, acknowledged that fence cuttings had become "regular and frequent" since September 2023, "regardless of exigency." App.49a. Reviewing documents *in camera* that are presently unavailable to

[1] Contrary to Defendants' suggestion (at 5), Texas does not agree that "it can take 10 to 30 minutes to cut through Texas's" fencing. As the district court found, Defendants' witnesses were not credible. Texas, moreover, finds its quite difficult to believe that experienced federal officers could not quickly snip a few wires with bolt cutters if it were necessary. This issue is immaterial, however, because, *inter alia*, the district court found that "Border Patrol agents already have access to both sides of the fence." App.43a.

Texas, the court also highlighted "the fact of communications between lower- and higher-ranking DHS officers regarding wire-cutting in the Del Rio Section." App.49a. But while the court found that these circumstances "raise the possibility" of an unwritten policy, it declined to hold that Texas was likely to succeed on the merits because Texas could not as of yet "conclusively establish[]" the existence of such a policy. App.49a-50a. The court similarly held that Texas had "fall[en] short" of demonstrating final agency action. App.51a. And as to Texas's *ultra vires* claim, the court concluded—with little analysis—that there was not yet a showing of *ultra vires* conduct "at this juncture." App.34a.

IV. Appellate Proceedings

Texas immediately appealed and sought an emergency injunction pending appeal or, alternatively, an immediate administrative injunction. *State of Texas v. DHS*, No. 23-50869 (5th Cir. Dec. 4, 2023), ECF No. 25. A panel of the Fifth Circuit granted administrative relief on December 4, 2023. ROA.1005. On December 19, 2023, a motions panel issued an injunction pending appeal after receiving expedited briefing from the parties. App.2a.

The motions panel concluded "that the district court legally erred with respect to sovereign immunity" but agreed "that Texas has otherwise satisfied the factors under *Nken v. Holder*, 556 U.S. 418, 434 (2009)." App.2a. The panel thus ordered that "Defendants are ENJOINED during the pendency of this appeal from damaging, destroying, or otherwise interfering with Texas's c-wire fence in the vicinity of Eagle Pass, Texas, as indicated in Texas's complaint." *Id.* Like the district court's original TRO, however, the Fifth Circuit's injunction also provides an exception for medical emergencies: "As the parties have agreed, Defendants are permitted to cut or move the c-wire if necessary to address any medical emergency as specified in the TRO. *See* CA5.App. K at 4, 9-11 (Oct. 30, 2023)." *Id.* Despite previously consenting to an extension of the TRO in the district court, Defendants moved for expedited briefing and argument in the Fifth Circuit, asking for briefing to be completed

by February 12th with argument to come "as soon as possible" after that. ECF No. 53.[2] The motions panel granted Defendants' motion a few days later but indicated that the merits panel would set the expedited schedule. Defendants inexplicably rushed to seek emergency relief from this Court. The same day, the Fifth Circuit merits panel set a briefing schedule more expedited than the one Defendants had requested, with briefing to be completed by January 30th and oral argument to be held on February 7th. ECF Nos. 66-1, 70, & 75.

The next day, Justice Alito called for a response by January 9, 2024.

SUMMARY OF THE ARGUMENT

This Court should deny the Application. There is no basis for this Court's intervention, much less now. The Fifth Circuit has scheduled expedited consideration of this case, which will be briefed and argued in less than a month. And the notion that Defendants will be harmed by allowing the Fifth Circuit to resolve this appeal in the first instance is belied by the Defendants' own actions. Not only did Defendants agree to an extension of the TRO in the district court, but they waited until after the Fifth Circuit motions panel granted an injunction pending appeal to move to expedite the appeal. And after the motions panel granted Defendants' motion to expedite, Defendants came to this Court. Having received the very relief they sought from the Fifth Circuit, Defendants should not now be heard to complain about this case proceeding on an expedited basis in that court.

In any event, Defendants' arguments do not warrant relief. A court of appeals' decision to grant an injunction pending appeal is, like a decision to stay a district court's ruling, "entitled to great deference." *Garcia-Mir v. Smith*, 469 U.S. 1311, 1313 (1985) (Rehnquist, C.J., in chambers). This Court will vacate an injunction pending appeal only when an applicant can demonstrate (1) "a reasonable probability that this Court would eventually

[2] Before the Fifth Circuit, Defendants attempted to downplay this fact by claiming that their consent was reluctant and for a short time. Yet the district court's docket is clear: Following the November 21, 2023 hearing, the TRO was "extended to November 29, 2023 at 11:59p.m. on the consent of the parties."

grant review," (2) "a fair prospect that the Court would reverse," and (3) "that the applicant would likely suffer irreparable harm absent the stay." *Merrill v. Milligan*, 142 S.Ct. 879, 880 (2022) (Kavanaugh J., concurring in grant of applications for stays) (citing *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (per curiam)).

Although the failure to meet any one factor is fatal to an application, Defendants fail to meet all three. Indeed, Defendants all but ignore the district court's factual findings, and their merits argument—that Congress implicitly authorized them to destroy anyone's fence in more than 30,000 square miles of Texas, even when they already have access to the property—is not credible. The Fifth Circuit's injunction does not contradict this Court's cases; there is no circuit split; and Defendants cannot show that the district court's factual findings are clearly erroneous. The Court almost never grants review of, let alone reverses, fact-bound cases in which the only legal holding follows the circuit consensus. And although the Fifth Circuit's injunction will not harm any of the Defendants' lawful interests, both the district court and the Fifth Circuit motions panel agree that Texas will suffer significant, irreparable harm without one.

ARGUMENT

I. The Fifth Circuit Has Already Expedited This Case.

There is no immediate need for this Court's attention because the Fifth Circuit has already granted Defendants' motion to expedite the appeal. "Respect for the assessment of the Court of Appeals is especially warranted when that court is proceeding to adjudication on the merits with due expedition." *Doe v. Gonzales*, 546 U.S. 1301, 1308 (2005) (Ginsburg, J., in chambers). Here, merits briefing will be completed by the end of January, and the court of appeals has set this case for oral argument on February 7, 2024. There is therefore no "extraordinary" cause to "justify this Court's intervention in advance of the expeditious determination of the merits toward which the [Fifth] Circuit is swiftly proceeding." *Id.* at 1309.

There is special reason, moreover, why the Court should respect the Fifth Circuit's

decision here. After waiting three weeks to request expedited merits briefing (which they sought only after the motions panel ruled against them), Defendants finally asked the Fifth Circuit for such treatment—and the Fifth Circuit granted their request. Indeed, not only did the Fifth Circuit grant their request, it gave them *more* than they asked for. Defendants requested that all briefing be complete by February 12, 2024, with oral argument to be "as soon as possible after the close of briefing," which would mean oral argument during the first week in March 2024. ECF No. 53. Yet the merits panel ordered that all briefing be complete by January 30, 2024, with oral argument the first week of February. If Defendants required even greater promptness from the Fifth Circuit, they could have requested it. They did not. Having already received more than what they asked for, Defendants should not be heard to complain that this Court's immediate attention is needed.

II. This Court Should Not Disturb the Injunction Pending Appeal.

A. This Court Is Unlikely to Grant Review.

This narrow, fact-bound dispute is unlikely to warrant certiorari. The Fifth Circuit's injunction implicates one 4-mile stretch of the 1,951 miles of U.S.–Mexico border. And on the only legal question seriously in dispute, there is little reason to contravene the "[n]umerous federal circuits" that have adopted the same "plain-language reading of §702" adopted by the Fifth Circuit motions panel. App.9a. There is no circuit split regarding this question, and the Court is unlikely to disturb that uniform precedent.

Defendants charge the motions panel (at 16) with "contradict[ing] numerous decisions of this Court" and (at 17) creating a circuit split with the Ninth Circuit on a different issue—namely, intergovernmental immunity. But that entire argument ignores the district court's factual findings, which demonstrate that the premise of Defendants' argument—that they are acting pursuant to a federal statute—is false. Unsurprisingly, and as discussed further below, neither this Court nor the Ninth Circuit has ever held that immigration officials may destroy state property to sabotage—rather than carry out—their statutory duties. Seeking to escape that conclusion, Defendants press an alternative version of the facts. Yet this

Court is quite unlikely to grant certiorari to relitigate the district court's factual findings. That is especially true because those fact findings are not erroneous at all, much less clearly so. To the contrary, they are supported by eyewitness testimony and video evidence. Defendants' arguments, by contrast, rely on the "uncorroborated" assertions of their own "evasive" witnesses. App.28a. Especially given those findings, neither Texas's fencing nor the Fifth Circuit's injunction impedes Border Patrol from enforcing the law.

"A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings." Sup. Ct. R. 10. Here, moreover, the district court's factual findings are subject to double deference. "Where an intermediate court reviews, and affirms, a trial court's factual findings," as the Fifth Circuit did here, "this Court will not 'lightly overturn' the concurrent findings of the two lower courts." *Easley v. Cromartie*, 532 U.S. 234, 242 (2001) (citation omitted). The motions panel was correct to credit—especially for purposes of a short-term injunction—the district court's detailed findings, which are supported by extensive evidence following in-person evaluation.

Against this backdrop, Defendants cannot plausibly argue that the conflicts of authority on which they rely are fairly presented. That is true for several reasons.

First, Defendants cannot credibly argue that there is a conflict with this Court's precedent construing the scope of the waiver of sovereign immunity in 5 U.S.C. §702 based on the possibility of obtaining damages for past harm (at 28-30, 38-40) because the district court found that damages available in "separate statutes" were inadequate to redress Defendants' "continuing or future" interference with Texas's property interests. App.32a.

Second, the Supremacy Clause does not insulate Defendants' destruction of property, especially given the district court's finding that Defendants "cannot claim [that] the statutory duties they are so obviously derelict in enforcing . . . require the destruction of the Plaintiff's property." *Id.* at 47a. Defendants have claimed that their agents cut the wire to facilitate apprehension, inspection, and processing of migrants or to provide medical assistance. But the district court correctly discredited those claims as "disingenuous." *Id.*

at 29a; *see also id.* at 28a (describing Texas's video evidence); *id.* at 46a (documenting evidence showing how, on one occasion, almost 2,000 migrants crossed through Defendants' breaches without ever being processed); *id.* at 47a ("Any justifications resting on the Defendants' illusory and life-threatening 'inspection' and 'apprehension' practices, or lack thereof, fail."). Far from destroying Texas's property because it is "necessary" to fulfill their "charge[] [of] inspecting and apprehending" aliens (at 5, 19, 20, 36), Defendants do so "without restraint." ROA.1233. And video evidence shows that "[a]t no point are the migrants interviewed, questioned as to citizenship, or in any way hindered in their progress into the United States." App.28a, 46a. Defendants accordingly cannot "seek judicial blessing of practices that both directly contravene those same statutory obligations and require the destruction of the Plaintiff's property." *Id.* at 47a.[3]

Third, and relatedly, the district court's findings render Defendants' asserted conflict (at 16) with the Immigration and Nationality Act ("INA") illusory. Those findings refute Defendants' suggestion that the injunction "restrain[s] action" to "'enforce, implement, or otherwise carry out' the referenced sections of the INA." *Id.* (quoting *Garland v. Aleman Gonzalez*, 596 U.S. 543, 549-50 (2022)). The district court's factual findings—again, following extensive presentation of evidence by both Texas and Defendants—demonstrate that Defendants are not engaged in any such conduct. It may be embarrassing for Defendants that a federal court found them to be "seek[ing] to establish an unofficial and unlawful port of entry," App.46a, but Defendants "cannot claim the statutory duties they are so obviously derelict in enforcing as excuses to puncture the Plaintiff's attempts to shore up the Defendants' failing system." App.47a. As explained below, Texas's interests and the

[3] In a more confusing attempt to fight the district court's factual findings, Defendants suggest (at 21) that the appalling episode on September 20th was atypical. But asked how the situation on that day was "different from any other time," Defendants' witness admitted that "[i]t wouldn't be" and claimed that he would be similarly justified in cutting Texas's fence to wave thousands of migrants into Texas just to relieve congestion. ROA.1160.

INA provisions covered by 8 U.S.C. §1252(f)(1) are in harmony.

Moreover, the asserted conflict also ignores the district court's separate finding that c-wire fencing "serves as a deterrent—an effective one at that." App.27a. Defendants ignore this tension (at 10), asserting that somehow Texas's fencing is both ineffective at preventing entry yet too effective at preventing them from doing the job they are not committed to doing in Eagle Pass. But the district court found that, in other areas, "Border Patrol is grateful for the assistance of Texas law enforcement [in placing c-wire fencing], and the evidence shows the parties work cooperatively across the state, including in El Paso and the Rio Grande Valley." *Id.* Border Patrol itself uses c-wire to redirect aliens to safer, lawful ports of entry. *See* ROA.670. As the district court further recognized, then, Defendants' conduct is "creati[ng]" "the very emergencies the[y] assert make it necessary to cut the wire" by opening breaches at unauthorized points along the river *Id.* Those findings confirm that Defendants are *not* "carrying out" responsibilities under the INA. Given the highly deferential standard of review to which the district court's findings are entitled, it is unlikely that the Court will grant certiorari.

B. Texas Is Likely to Succeed on the Merits.

The Fifth Circuit was correct to grant an injunction pending appeal. Even now, Defendants make no effort to show that Texas is unlikely to succeed on the merits of its trespass or conversion claims. The only reason the district court did not grant a preliminary injunction was because it concluded that 5 U.S.C. §702 does not clearly waive sovereign immunity for such state-law torts. But as the motions panel explained, that was error, which Defendants replicate here (at 26-33). Every circuit court to address the question has concluded that §702's categorical waiver applies to state-law claims.[4]

[4] Texas is also likely to succeed on the merits of its APA and *ultra vires* claims, which are not currently before the Court due to the manner in which the United States has briefed its premature application.

Defendants argue that two additional legal principles independently preclude injunctive relief. *First*, Defendants contend (at 23-26) that inter-governmental immunity grants largely unconstrained license to destroy Texas's fencing, as well as anyone else's fencing within 25 miles of the border with Mexico—an area covering more than 30,000 square miles. *Second*, Defendants argue (at 33-35) that the INA prohibits certain injunctions, including this one. The Fifth Circuit motions panel correctly rejected those arguments, too.

On the remaining factors, Texas is also likely to prevail. The district court found that Texas will suffer irreparable harm in the form of loss of control and use of its property. As the motions panel held, there was no error, clear or otherwise, in that finding. Compensation for past injury, moreover, cannot adequately redress the prospect of continuing or future interference with property. And preventing future harm is the whole point of maintaining a fence. The equities also overwhelmingly favor Texas. As the district court and the motions panel explained, it is in the public interest to deter unlawful agency action and to respect property rights. It is also in the public interest to reduce the flow of deadly fentanyl; combat human trafficking; protect Texans from unlawful trespass and violent attacks by criminal cartels; and minimize the risks to people, both U.S. citizens and migrants, of drowning while making perilous journeys to and through illegal points of entry.

1. Texas is likely to succeed on its trespass-to-chattels claim.

In its TRO, the district court found that Texas was entitled to preliminary relief on its claim for trespass to chattels. The district court stood by that conclusion in its preliminary-injunction order. And Defendants have never argued that their pattern of destroying others' property anytime they deem it convenient is lawful under tort law. The only reason the district court did not convert its TRO into a preliminary injunction was because it mistakenly believed that a broad statutory waiver of sovereign immunity must not be read to cover this case. As the motions panel explained, that was legal error. Once that error is corrected, Defendants have no plausible argument against Texas's claim.

a. The district court explained in its detailed TRO opinion why Texas will likely prevail on its common-law claims. App.32a. But the district court mistakenly concluded that "the 1976 amendment to the [APA]" does not waive sovereign immunity here. *Id.* at 34a.

The waiver at issue provides:

> An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States.

5 U.S.C. §702. "Though codified in the APA, the waiver [in §702] applies to *any suit*, whether or not brought under the APA." RICHARD FALLON ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 902 (7th ed. 2015) (emphasis added). Section 702's text is clear—"[a]n action in" federal court "seeking relief other than money damages" means *any* action, whether under the APA, a different statute, or the common law. As the current U.S. Attorney General put it: "There is nothing in the language of the second sentence of 702 that restricts its waiver to [certain] suits." *Trudeau v. FTC*, 456 F.3d 178, 186 (D.C. Cir. 2006) (Garland, J.). The Fifth Circuit has also read this language to "generally waive[]" sovereign immunity. *Apter v. HHS*, 80 F.4th 579, 589 (5th Cir. 2023). "Section 702's plain terms waive sovereign immunity for 'any suit' seeking nonmonetary relief in federal court." App.9a.

Such a broad waiver plainly includes Texas's property claims. The motions panel therefore concluded that "Section 702 plainly waives immunity for Texas's trespass to chattels claim." *Id.* at 8a. "That claim was brought as '[a]n action' in federal court; it 'seek[s] relief other than monetary damages'; and it 'stat[es] a claim' that a federal agency's officials and employees 'acted or failed to act in an official capacity or under color of legal authority.'" *Id.* "Accordingly, Texas's claim 'shall not be dismissed nor relief therein be denied on the ground that it is against the United States.'" *Id.* at 8a-9a (quoting 5 U.S.C. §702). "The district court legally erred by ruling otherwise." *Id.* at 9a. There is "no

ambiguity" to resolve. *Id.*

Moreover, "[n]umerous federal circuits follow this plain-language reading of §702." *Id.* Circuit courts across the country agree that §702's waiver is broad and must be understood based on its plain terms. *See, e.g.*, *Apter*, 80 F.4th at 589-91 (rejecting an effort to narrow §702); *Blagojevich v. Gates*, 519 F.3d 370, 371-72 (7th Cir. 2008) ("Congress has waived sovereign immunity for most forms of prospective relief" because "§702 is a law of general application"); *Puerto Rico v. United States*, 490 F.3d 50, 57-58 (1st Cir. 2007) ("This waiver is for *all* equitable actions for specific relief against a Federal agency or officer acting in an official capacity" (quotation marks omitted)); *Trudeau*, 456 F.3d at 186; *see also Muniz-Muniz v. U.S. Border Patrol*, 741 F.3d 668, 672 (6th Cir. 2013); *Treasurer of N.J. v. U.S. Dep't of Treasury*, 684 F.3d 382, 400 (3d Cir. 2012); *Presbyterian Church (U.S.A.) v. United States*, 870 F.2d 518, 525 (9th Cir. 1989); *Red Lake Band of Chippewa Indians v. Barlow*, 846 F.2d 474, 476 (8th Cir. 1988); *B.K. Instrument, Inc. v. United States*, 715 F.2d 713, 724-25 (2d Cir. 1983).

Furthermore, as Defendants concede (at 32 & n.7), at least two circuit courts have squarely held that this broad waiver applies to state-law claims. *See Perry Cap. LLC v. Mnuchin*, 864 F.3d 591, 617-18, 620 (D.C. Cir. 2017); *Treasurer of N.J.*, 684 F.3d at 400 n.19. Now at the third stage of review in this case, Defendants *still* have never identified a single decision adopting their opposing position that § 702 impliedly precludes state tort claims.

Defendants also contend (at 28) that "[t]here is no occasion in this case to consider whether Section 702 waives the United States' sovereign immunity to suits arising under state law" generally because the Federal Tort Claims Act provides the exclusive vehicle for state tort claims specifically. But as the motions panel held, that argument has "no purchase in the language of the FTCA and has been rejected by . . . sister circuits." App.10a-11a (citations omitted).

Once again, Defendants' position parts ways with at least two circuits that have refused to hold that the FTCA implicitly precludes suits like this one merely because it authorizes

damages for torts. That argument fails because it "reads too much into congressional silence." *Michigan v. U.S. Army Corps. of Eng'rs*, 667 F.3d 765, 775 (7th Cir. 2011); *see also B.K.*, 715 F.2d at 727-28. Section 702 "requires evidence, in the form of either express language or fair implication, that Congress meant to forbid the relief that is sought." *Michigan*, 667 F.3d at 775. But the FTCA's silence on injunctive relief is unhelpful to Defendants because it concerns only *monetary* liability, which is not at issue here. Historical context, too, shows that §702 is designed to "strengthen th[e] accountability" already provided by the FTCA. H.R. Rep. 94-1656, 1976 WL 14066, at *4 (Sept. 22, 1976).

Defendants suggest (at 32 n.7) that those decisions were somehow abrogated by *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209 (2012). But there, this Court found that the federal government's sovereign immunity *was waived* under §702, notwithstanding the Quiet Title Act. As in that case, Texas here "is bringing a different claim, seeking different relief, from the kind the [FTCA] addresses." *Id.* at 222. That this suit and the FTCA deal with a "similar subject matter" (*i.e.*, torts) "is not itself sufficient" to "trigger a remedial statute's preclusive effect." *Id.* at 223. Damages for past property interference cannot adequately redress ongoing, willful destruction of fencing, which by design serves the important function of preventing collateral harm caused by unauthorized entry. And this Court has recognized that the "indispensable" right to exclude that America's founders held so dear is not up for forced sale *ad infinitum*. *Cedar Point Nursery v. Hassid*, 141 S.Ct. 2063, 2071 (2021). As the district court explained, "the only appropriate remedy would be injunctive relief." App.32a n.7.

In response, Defendants rely (at 29) on the concurring opinion in *El-Shifa Pharmaceutical Industries Co. v. United States*, 607 F.3d 836, 854 (D.C. Cir. 2010) (en banc) (Kavanaugh, J., concurring in the judgment). That reliance is misplaced. That opinion

does not state a holding of any court, and it relies on *In re Supreme Beef Processors, Inc.*, 468 F.3d 248 (5th Cir. 2006) (en banc), which addressed a different waiver of immunity, *id.* at 253-54 (discussing bankruptcy claims).

Defendants' reliance (at 30-31) on legislative history is likewise misplaced. "[T]he problems with legislative history are well-rehearsed," *Wooden v. United States*, 595 U.S. 360, 381 (2022) (Barrett, J., concurring in part and concurring in the judgment), and this Court has categorically refused to rely on it in the absence of ambiguous text, *see e.g.*, *Lamie v. U.S. Trustee*, 540 U.S. 526, 531 (2004). As the motions panel held, there is no ambiguity here. "Section 702 plainly waives immunity for Texas's trespass to chattels claim." App.8a. And in any event, the legislative record supports that plain-language reading: "[T]he House and Senate Reports' repeated declarations that Congress intended to waive immunity for 'any' and 'all' actions for equitable relief against an agency make clear that no [other] limitations were intended." *Trudeau*, 456 F.3d at 187 (citations omitted). Those reports posed three limits on §702's waiver: "First, the amendment only waives sovereign immunity for actions in a federal court; second, such actions must seek non-monetary relief; and third, it is 'applicable only to functions falling within the definition of "agency" in 5 U.S.C. section 701.'" *Treasurer of N.J.*, 684 F.3d at 400 (citation omitted). "But the House Report does not state that there is a fourth limitation limiting the waiver of sovereign immunity." *Id.*

b. Because the sole impediment to Texas prevailing in district court was the misapplication of "sovereign immunity against Texas's trespass to chattels claim," App.12a, the likelihood of Texas's success on the merits is beyond serious dispute. Texas law furnishes a cause of action for conversion for "the unlawful and wrongful exercise of dominion, ownership, or control by one person over the property of another, to the exclusion of the same rights by the owner." *Pan Am. Petroleum Corp. v. Long*, 340 F.2d 211, 219-20 (5th Cir. 1964). It also furnishes a cause of action for trespass to chattels for exercising dominion over the property of another in a way that causes "actual damage" or "deprives

the owner of its use for a substantial period of time." *Zapata v. Ford Motor Credit Co.*, 615 S.W.2d 198, 201 (Tex. 1981).

Texas holds a proprietary interest in its fencing. *See, e.g.*, *State v. Cemex Constr. Materials S., LLC*, 350 S.W.3d 396, 398, 409 (Tex. App.—El Paso 2011, judgm't vacated w.r.m.). Yet Defendants "deliberately and intentionally used [wire cutters] in making a cut to the [fence]." *Mountain States Tel. & Tel. Co. v. Vowell Constr. Co.*, 341 S.W.2d 148, 150 (Tex. 1960). "The [fencing] was lawfully in place" on state, municipal, or private land, *id.*, as Defendants stipulated for preliminary-injunction purposes, ROA.37. So, "[t]he molesting or severing of the [fencing] was a violation of a property right which gave rise to a cause of action regardless of negligence." *Mountain States*, 341 S.W.2d at 150. By cutting Texas's fencing, Defendants have destroyed its utility as a barrier. Never in this litigation have Defendants contested any of this—even after the district court found that Texas was likely to prevail.

Like the motions panel, this Court need only "briefly consider Texas's likelihood of success on that claim." App.12a. "In its TRO, the district court concluded that Texas had a strong likelihood of success because '[1] the concertina wire is state property; [2] Defendants have exercised dominion over that property absent any kind of exigency; and [3] they have continued to do so even after being put on notice of [Texas's] interest in the property.'" *Id.* Defendants admit that they destroy property that does not belong to them. Defendants also do not dispute that this amounts to an ongoing trespass to chattels or conversion of property under Texas law. The "bottom line" is whether federal law authorizes federal agents to perpetrate such ongoing, intentional torts. *Id.* at 46. It does not, as the district court concluded. Thus, "Texas has demonstrated a strong likelihood of success on the merits of its trespass to chattels claims." App.12a. Once the district court's misapplication of §702 is corrected, that court's own analysis—adopted by the Fifth Circuit—demonstrates that Texas is entitled to injunctive relief.

2. Texas is likely to succeed on the merits of its other claims that the Fifth Circuit never addressed and that the application conspicuously ignores.

Because the motions panel concluded that Texas was likely to succeed on its state-law claim, it never needed to reach Texas's alternative claims that Defendants violated the APA and acted *ultra vires*. App.12a & n.7. The application chooses not to address those claims at all. Because Texas is independently entitled to such relief because of these other claims, this Court is unlikely to grant certiorari on the issue raised in the application, and granting the application would be particularly inappropriate.

a. "All the officers of the government, from the highest to the lowest, are creatures of the law and are bound to obey it." *United States v. Lee*, 106 U.S. (16 Otto) 196, 220 (1882). Federal statutes permit judicial enforcement of that principle through the APA's bar on agency action that is "arbitrary [and] capricious," "not in accordance with law," or "in excess of statutory . . . authority." 5 U.S.C. §706(2)(A), (C). Injured parties may also seek specific relief via the *ultra vires* doctrine against "a federal officer acting in excess of his authority or under authority not validly conferred." *Larson v. Domestic & Foreign Com. Corp.*, 337 U.S. 682, 690-91 (1949). And Section 702 waives federal sovereign immunity from claims "that an agency or an officer or employee thereof acted or failed to act in an official capacity or under official color of legal authority." 5 U.S.C. §702.

Texas will likely succeed on its APA and *ultra vires* claims because Congress has not authorized Defendants to destroy private property for reasons having nothing to do with enforcing federal law. Congress empowered Defendants to set "national immigration enforcement policies and priorities"; "ensure the interdiction of persons and goods illegally entering or exiting the United States"; "detect, respond to, and interdict terrorists, drug smugglers and traffickers, human smugglers and traffickers, and other persons who may undermine the security of the United States"; "safeguard the borders of the United States"; and "enforce and administer all immigration laws." 6 U.S.C. §§202(5), 211(c)(2), (5), (6), (8); *see also id.* §211(e)(3) (listing duties of the Border Patrol, which "primar[il]y" include

"interdicting persons attempting to illegally enter or exit the United States or goods being illegally imported into or exported from the United States at a place other than a designated port of entry").

The district court's factual findings, however, demonstrate that Defendants are not doing any of those things. The findings specifically confirm that Defendants' actions could not be justified by medical exigencies or law-enforcement responsibilities. App.46a-48a. Despite claiming that they must destroy Texas's fencing to "apprehend" and "detain" aliens, the district court found "[n]o reasonable interpretation of these definitions can square with Border Patrol's conduct." *Id.* at 45a-46a. The district court thus rightly rejected Defendants' "cynical" and "disingenuous" contentions. *Id.* at 29a.

b. The district court nevertheless concluded that Texas had not "conclusively" proven the existence of a policy or final agency action. App.48a-52a. Of course, conclusive proof is never required at the preliminary-injunction stage, which is "by its very nature . . . not fixed or final or conclusive." *SEC v. First Fin. Grp.*, 645 F.2d 429, 435 n.8 (5th Cir. 1981) (citation omitted). Indeed, because "[t]he purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held," it follows that "a preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits. A party thus is not required to prove his case in full at a preliminary-injunction hearing." *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981). The district court, moreover, erred for two additional reasons.

First, at a minimum, the existence of a policy or final agency action is irrelevant to Texas's *ultra vires* claim because "virtually every statement an agency may make" suffices. *Apter*, 80 F.4th at 590 (citation omitted). That broad definition embraces Defendants' "guidance that supervisors in the Del Rio Sector have provided line agents regarding the wire." ROA.815. Such guidance is *ultra vires*. Congress directed Defendants to control and guard the border. As the district court found, Defendants' conduct "directly contravene[s]

those same statutory obligations." App.47a. The APA provides for judicial review of an *ultra vires* claim based on any agency action—it need not be final—resulting in an injury within the relevant zone of interests. *Apter*, 80 F.4th at 589-90 (citing 5 U.S.C. §702).

Second, Texas has in fact shown both the existence of final agency action and a policy. Final agency action (1) marks the consummation of the agency decisionmaking process and (2) determines legal rights or obligations. *See, e.g.*, *Bennett v. Spear,* 520 U.S. 154, 177-78 (1997). Guidance permitting destruction of Texas's fencing is final because it is not subject to further agency review and affects Texas's legal rights. And evidence showing Defendants' unabated practice of destruction, coupled with the fact that agency leadership still has not ordered the destruction to cease, App.49a, shows that Defendants *have* settled on a policy. Indeed, Defendants' own counsel at the preliminary-injunction hearing acknowledged a policy authorizing destruction of Texas's fencing absent medical exigency. Defendants' counsel agreed that "there's a policy, at least in" Eagle Pass. ROA.1243. And the district court identified examples of Defendants "reiterat[ing] the same policy in identical terms," App.49a n.14, and explained that "[r]egular and frequent occurrence of the incidents in question between September 20, 2023, and the entering of the TRO, regardless of exigency, and the fact of communications between lower- and higher-ranking DHS officers regarding wire-cutting in the Del Rio Sector raise the possibility that an unwritten 'policy, practice, or pattern' exists," *id.* at 49a-50a.

That Defendants (supposedly) have not committed their Eagle Pass policy to writing does not save it. "Though the agency has not dressed its decision with the conventional procedural accoutrements of finality, its own behavior thus belies the claim that its interpretation is not final." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 479 (2001); *see also FTC v. Standard Oil Co.*, 449 U.S. 232, 239 (1980). Courts consistently find that unwritten policies constitute final agency action regardless of whether they are committed to a formal writing or published in the Federal Register. *See, e.g.*, *Bd. of Locomotive Eng'rs & Trainmen v. FRRA*, 972 F.3d 83, 100 (D.C. Cir. 2020) (collecting cases explaining that

"[a]gency action generally need not be committed to writing to be final and judicially reviewable"); *see generally Dep't of Comm. v. New York*, 139 S.Ct. 2552, 2575 (2019) (noting that courts are "not required to exhibit a naiveté from which ordinary citizens are free"). Texas's evidence more than suffices at the preliminary-injunction stage.

C. Neither intergovernmental immunity nor 8 U.S.C. §1252(f)(1) precludes Texas's likelihood of success on the merits.

1. The Supremacy Clause is not an unlimited license to destroy private property.

Defendants also invoke (at 23-26) the Supremacy Clause. Before the district court, however, Defendants disavowed reliance on preemption generally and on immigration authority under *Arizona v. United States*, 567 U.S. 387 (2012), in particular. ROA.1082. Defendants insisted that this case is "better" classed under the intergovernmental-immunity heading. ROA.1082. As the motions panel correctly held, however, Defendants' assertion of intergovernmental immunity is untenable. And insofar as Defendants seek to resurrect preemption more generally, the Supremacy Clause does not help them.

a. Federal agents within a State are generally subject to state law—including criminal law, *United States ex rel. Drury v. Lewis*, 200 U.S. 1, 3, 7-8 (1906); tort law, *Johnson v. Maryland*, 254 U.S. 51, 56 (1920); property laws, *Wilkie v. Robbins*, 551 U.S. 537, 560 (2007); and traffic laws, *Hall v. Virginia*, 105 S.E. 551, 552-53 (Va. 1921); *North Carolina v. Ivory*, 906 F.2d 999, 1001-02 (4th Cir. 1990); *Sanchez v. United States*, 803 F. Supp. 2d 1066, 1070-71 (C.D. Cal. 2011). Intergovernmental immunity's exception to this general rule applies only where a State (1) "regulate[s] the United States directly" or (2) "discriminat[es] against the Federal Government or those with whom it deals." *United States v. Washington*, 596 U.S. 832, 838-39 (2022).

As the motions panel held, Defendants cannot claim governmental immunity because this Court's precedent "clarif[ies] that the intergovernmental immunity doctrine only prohibits state laws 'that *either* regulat[e] the United States directly *or* discriminat[e]

against the Federal Government or those with whom it deals.'" App.11a (quoting *Washington*, 596 U.S. at 838-39). Here, "Texas is neither directly regulating the Border Patrol nor discriminating against the federal government." *Id.* Instead, Texas asserts its own "rights [as] an ordinary proprietor" under state tort law. *Fort Leavenworth R.R. Co. v. Lowe*, 114 U.S. 525, 527 (1885). By invoking that proprietary interest, Texas is not "regulat[ing]" anyone. *Washington*, 596 U.S. at 838. It is exercising its own property rights "just as a private company might." *Am. Trucking Ass'ns v. City of L.A.*, 569 U.S. 641, 649-50 (2013); *see also Dep't of Revenue of Ky. v. Kentucky*, 553 U.S. 328, 339-40 (2008). And as Defendants now appear to concede (at 26), generally applicable tort principles in no way "singl[e] out the Federal Government for unfavorable treatment." *Washington*, 596 U.S. at 839.

Despite recognizing (at 24) that this Court's latest statement on intergovernmental immunity is *Washington*, Defendants studiously eschew its two-part test and fault the Fifth Circuit (at 25) for following it. That is because *Washington* repudiates their argument that state law can never "retard" federal operations in view of the Supremacy Clause. *Id.* at 838-39 (describing how the doctrine walked back from *McCulloch*'s sweeping statements). Defendants' theory of intergovernmental immunity—*i.e.*, that it precludes the application of state law "without restraint," ROA.1233—"has been thoroughly repudiated by modern intergovernmental immunity caselaw." *South Carolina v. Baker*, 485 U.S. 505, 520 (1988). To the extent Texas tort law "indirectly increases costs for the Federal Government," it lawfully "imposes those costs in a neutral, nondiscriminatory way." *Washington*, 596 U.S. at 839.

b. Shifting gears, Defendants invoke preemption generally. But they insisted to the district court that this case is "better" classed under the intergovernmental-immunity heading. ROA.1082. Regardless, general preemption principles do not help them.

Under the Supremacy Clause, laws passed within the scope of Congress's enumerated powers may preempt state laws that conflict with federal mandates. No one disagrees. But

preemption cases like *Johnson v. Maryland*, 254 U.S. 51 (1920), are irrelevant here because Congress has never declared that property rights vanish at the border or that they exist solely "at the discretion, the behest, and the choice, and the desires of" federal officials. ROA.1233. The Fifth Circuit certainly did not "flout[] the Supremacy Clause," as Defendants argue (at 26). Instead, it merely respected our system of federalism, in which agents of a federal government vested with limited and enumerated powers must often operate within state governments of unenumerated powers.[5]

The only provision that is even arguably relevant—8 U.S.C. §1357(a)(3)—authorizes federal agents, acting without a warrant, "within a distance of twenty-five miles from [the border] to have access to private lands, but not dwellings, for the purpose of patrolling the border to prevent the illegal entry of aliens into the United States." That statute authorizes federal officials to act without a warrant, but it says nothing about destroying private property. Defendants' contrary arguments, for which there is no split of authority, are uniformly misguided.

For one, the district court found that "Border Patrol agents already possess access to both sides of the fence." App.6a, 43a. For that reason, there is no need to destroy Texas's property at all. Yet according to Defendants (at 9), it is "undisputed" that "they may cut locks or remove barriers if necessary to access private lands adjoining the border." The problem with that assertion lies in the word "necessary": Texas and Defendants do not agree on the range of circumstances it describes. Defendants admit (at 18) that they may destroy Texas's property only "when exigencies arise." While Texas recognizes that the

[5] Despite citing *Johnson* repeatedly (at 3, 24, 26), Defendants exhibit no awareness of how it undercuts their carte blanche theory of federal supremacy. Defendants claim (at 23) that "[i]t is a foundational constitutional principle that the federal government is not bound by the laws or policies of any particular State." *Johnson* said the opposite: "Of course an employee of the United States does not secure a general immunity from state law while acting in the course of his employment." 254 U.S. at 56. It even held out tort liability for negligence "under the common law of a state" as an example. *Id.*

common law recognized a limited privilege to trespass to render life-saving aid, Defendants seek authority to destroy fencing even when there is no exigency at all, on the apparent theory that an exigency might someday arise. But it is always possible that an emergency could leave insufficient time to destroy a fence. Accordingly, Defendants' theory, if accepted, could be used to justify destroying any fence within 25 miles of an international border anywhere in the United States. That authority is far from undisputed.

To be sure, Defendants complain (at 11) that they do not have enough boats to cover the area—as if the United States of America does not have the ability to send more boats. Nothing in §1357(a)(3), moreover, says that federal officers can destroy private property when those officials have access to the property merely because it is inconvenient for them to reposition their own equipment. Nor does this argument have a limiting principle. Again, can Defendants destroy every fence in a 30,000-square-mile area based on the chance that one day it may be more convenient to cross over unobstructed land (rather than just better positioning their own vessels and vehicles)? Congress must speak clearly before it authorizes federal agents to preemptively destroy every fence in an area roughly the size of South Carolina. *Cf. West Virginia v. EPA*, 142 S.Ct. 2587, 2608-09 (2022). Moreover, Defendants' argument (at 18 n.4) that such remarkable power over private property is somehow "inherent in Border Patrol's more general authorities" would turn administrative law on its head. "Administrative agencies are creatures of statute. They accordingly possess only the authority that Congress has provided." *Nat'l Fed. of Indep. Bus. v. Dep't of Labor*, 595 U.S. 109, 117 (2022).

But even if §1357(a)(3) did implicitly authorize such an extraordinary amount of destruction, Defendants are not destroying property "to prevent the illegal entry of aliens into the United States." To the contrary, the evidence shows that their policy is not designed to prevent illegal entry at all but rather is "encouraging [people] to come." ROA.1318. Defendants have repeatedly and deliberately breached Texas's fencing where there was no medical or law-enforcement need. While watching more than three thousand people cross

the Rio Grande illegally, they vowed to keep the fence open "[u]ntil they're all in." *Id.* at 109. And they have permitted people—who may well be U.S. citizens engaged in drug trafficking (or worse)—to walk past the fence "without a single question or even a hello from a Border Patrol agent." *Id.* at 1226. None of this is plausibly authorized by §1357(a)(3).

The district court was therefore correct that merely waving those crossing the border deeper into the United States without attempting to repel or apprehend them is not enforcing the immigration laws. *See, e.g.*, App.47a. Defendants must: "deter and prevent the illegal entry of terrorists, terrorist weapons, persons, and contraband," 6 U.S.C. §211(e)(3)(B); "detect" and "ensure the interdiction of persons … illegally entering or exiting the United States," *id.* §211(c)(2), (c)(5); administer "the inspection, processing, and admission of" aliens, *id.* §211(c)(8)(A); and manage a national detention and removal program, *see, e.g., id.* §202(1)-(3); *id.* §211(c)(2), (5), (6), (8); *id.* §211(e)(3)(A)-(B); *id.* §251; *id.* §255. Waving people in is none of those things.

Considering the facts as found by the district court, Defendants are wrong to suggest (at 16-17) that the injunction pending appeal here conflicts with the Ninth Circuit's decision in *Geo Group, Inc. v. Newsom*, 50 F.4th 745 (2022) (en banc). Defendants (at 17) read *Geo Group* to say that "state law may not be invoked to regulate the federal government's implementation of the immigration laws." Yet *Geo Group* is inapposite because the district court here found that Defendants are *not* implementing immigration authority. App.5a. Defendants disagree with the district court's factual findings. But given those findings, which this Court has no grounds to second guess, there is no split of authority.

2. The injunctive-relief bar in §1252(f)(1) does not apply.

Defendants' appeal (at 33-35) to the jurisdictional bar in the INA, 8 U.S.C. §1252(f)(1), likewise fails. Lower federal courts—"regardless of the nature of the action or claim or of the identity of the party or parties bringing the action"—lack "jurisdiction or authority to enjoin or restrain the operation" of certain provisions in Title 8 governing inspection, apprehension, and removal of noncitizens. *Id.* Yet Defendants agreed to extend the TRO, a

telltale signal that even they harbor doubts about §1252(f)(1)'s applicability. *See, e.g.*, ROA.25a ("Following the virtual conference [on November 21, 2023], the Court ordered that the TRO be extended to November 29, 2023, at 11:59 p.m. on consent of the parties.").[6]

In any case, cutting Texas's fencing to wave thousands of people into Texas has nothing to do with inspection, apprehension, or removal. The district court's findings demonstrate more that Defendants' actions are so far removed from what Congress authorized that they have nothing to do with Defendants' statutory authority. The motions panel thus correctly rejected Defendants' argument that injunctive relief was barred by 8 U.S.C. §1252(f)(1). "To cut Texas's c-wire, Defendants did not rely on any of the statutes covered [in §1252(f)(1)]. Instead, they relied on 8 U.S.C. §§1103(a)(3) and 1357(a)(3), neither of which [is] covered." App.11a. Although Section 1103(a)(3) empowers the Homeland Security Secretary to implement various immigration provisions; it says nothing about destroying property, let alone doing so outside of any plausible grant of authority. And as explained above, §1357(a)(3) entitles Defendants only to "access" certain property, which they can do without destroying Texas's property.

Defendants argue (at 35) that Texas's fencing "impedes agents' ability to inspect under Section 1225 to determine whether the migrants are inadmissible, present a security risk, are seeking asylum or other humanitarian protection, or belong in a particular immigration-law pathway." But that is the sort of "cynical" and "disingenuous" argument that the district court considered and rejected. App.29a. Defendants ignore the district court's finding that their actions have nothing to do with inspection, apprehension, or detention. *See, e.g.*, *id.* at

[6] Section §1252(f)(1) does not apply here. Even if it did, however, because §1252(f)(1) does not go to subject matter jurisdiction, *see, e.g.*, *Biden v. Texas*, 597 U.S. 785, 798 (2022), a party may waive its applicability in a particular case, including by agreeing to a court order contrary to the statute's terms. At the very least, §1252(f)(1) authorized the district court to make factual findings that would support this Court's issuance of a preliminary injunction. For the reasons explained herein, Texas is entitled to such an injunction.

5a (explaining that the district court "rejected as a factual matter Defendants' claim that the Border Patrol's actions were intended to 'inspect, apprehend, and process' incoming aliens"). Far from seeking an order that would restrain the performance of these obligations, Texas would like nothing more than for Defendants to do their job.

The Court should also reject Defendants' implicit suggestion (at 34) that Congress immunized any action—no matter how pretextual a district court finds their actions or how widely outside of what Congress directed—that was purportedly taken under color of INA authority. That theory is limitless. And it is not the one endorsed by Chief Judge Sutton's separate writing in *Arizona v. Biden*, 40 F.4th 375 (6th Cir. 2022).

Chief Judge Sutton wrote to explain his view that "§ 1252(f)(1) has the same force even when the National Government allegedly enforces the relevant statutes unlawfully." 40 F.4th at 394 (concurring opinion). Even if that reading were correct, Defendants would still have to connect the operation of a putatively invalid injunction to a statutory provision singled out for special protection in §1252(f)(1). The relevant enforcement authorities in *Arizona v. Biden*, for example, "require[d] the [Department of Homeland Security] to take custody of certain criminal noncitizens—when they are released from state prison" and to "remove noncitizens within 90 days of receiving final orders of removal." *Id.* 381 (citing 8 U.S.C. §§1226(c)(1) and 1231(a)(1)(A)). The district court had enjoined "Guidance" from the Secretary that "prioritize[d] enforcement with respect to noncitizens who pose a threat to national security, public safety, and border security." *Id.* at 380. As Chief Judge Sutton explained, this guidance "represent[ed] the Department's effort at implementing §§1226(c)(1) and 1231(a)(1)(A) by prioritizing the use of scarce resources." *Id.* at 394. Because that prioritization, lawful or not, is connected to "the operation of" covered provisions, §1252(f)(1) deprived the district court of jurisdiction to forbid implementation of the guidance.

Defendants' fence cuttings could not be more different. Texas never sought to enjoin Defendants from carrying out their responsibilities under a covered provision of the INA

(or *any* provision of the INA for that matter) based on differing understandings of what those responsibilities entail. Instead, it sought an order to protect its own property interests under Texas tort law. That kind of order—i.e., one permitting Defendants to apprehend aliens to their hearts' content but barring them from wantonly destroying property in the process—would have, at most, a "collateral effect" on Defendants' enforcement of immigrations laws. *Aleman Gonzalez*, 596 U.S. at553 n.4.

In reality, though, it's even easier than that because the district court found that Defendants' actions have nothing to do with their enforcement authority at all. Cutting Texas's fencing is not about allocating scarce resources to facilitate inspection (§1225) or the apprehension or detention of noncitizens (§1226). Nor do the fence cuttings reflect mere "unlawful" enforcement of the relevant statutes. *Arizona*, 40 F.4th at 394 (Sutton, C.J., concurring). They are not even simple *nonenforcement*. Rather, they constitute an outright tort against the State of Texas. Said another way, if cutting Texas's fence to wave thousands of people into the interior of the country relates to "the operations of the provisions" of these statutes, then §1252(f)(1) would also "insulate" the "disgruntled CBP officer [who] might find it convenient to assault TMD soldiers based on his opinion that they make his job harder." ROA.646. This Court has rightly warned against that extreme view. *See Aleman Gonzalez*, 596 U.S. at 553 n.4.

D. The equities do not favor vacating the injunction pending appeal.

Having determined that Texas was likely to succeed on the merits of its trespass-to-chattels claim, the motions panel also correctly determined that the remaining *Nken* factors support an injunction pending appeal. The same reasoning supports leaving the injunction pending appeal in place.

There was "no error, clear or otherwise, in [the] finding" that Texas would suffer irreparable harm from the "loss of control and use of its private property." App.12a. "The district court found that Defendants' employees have repeatedly damaged, destroyed, and exercised dominion over state property and showed that they intend to prevent Texas from

maintaining operational control over its own property." *Id.* (cleaned up). And the district court, after making extensive findings of fact, correctly concluded that "compensation for past injury cannot adequately redress the prospect of continuing or future harm for which the only appropriate remedy would be injunctive relief." *Id.* at 12a-13a. "When a trespass is continuous such that stopping it would require a 'multiplicity of suits,' an injunction is justified." *Id.* at 13a (quoting *Donovan v. Pa. Co.*, 199 U.S. 279, 304-05 (1905)). Because Texas sought to stop a "continuing trespass to land," "irreparable injury has been shown and injunctive relief is appropriate." *Id.*

Defendants are wrong in asserting (at 39-40) that this continuing-trespass theory of harm applies only to trespass to land, and not also to Texas's trespass-to-chattels claim. Although "the remedy of damages will normally be sufficient to meet the plaintiff's needs" to redress the conversion of property, "there are many situations in which the comparative efficacy of injunction and of the applicable alternative remedies requires careful appraisal." RESTATEMENT (SECOND) OF TORTS 938 cmt. B; *see also* 2 JOSEPH STORY, EQUITY COMMENTARIES ON EQUITY JURISPRUDENCE §§924–26 (5th ed. 1849). Defendants state (at 40) that this case concerns "damage to a commercial product for which money is adequate compensation." But as the district court found, "compensation for past injury cannot adequately redress the prospect of continuing or future harm for which the only appropriate remedy would be injunctive relief." App.32a. *See, e.g.*, *Register.com, Inc. v. Verio Inc.*, 356 F.3d 393, 404 (2d Cir. 2004) (affirming grant of preliminary injunctive relief to halt ongoing trespass to chattels); *Hadley v. Dep't of Corrs.*, 840 N.E.2d 748, 756 (Ill. App. Ct. 2004) (holding that plaintiff would "suffer irreparable injury without the injunction" against an administrative rule that wrongly deprived inmates of $2 fee because "without an injunction, plaintiff and other indigent inmates will suffer the same small two-dollar injury over and over again"). No one is forced to allow the federal government to continuously destroy their property—let alone a *fence*, the point of which is to prevent future harm. This case is not just about the monetary price of wire; it is about preventing

continuing threats to public safety.

The balance of the equities and the public interest, which "merge when United States is [the] opposing party," App.13a (citing *Nken*, 556 U.S. at 435), likewise weigh heavily in favor of an injunction. "There is generally no public interest in the perpetuation of unlawful agency action," and there is "substantial public interest in having governmental agencies abide by the federal laws that govern their existence and operations." *Id.* at 13a-14a; *see also, e.g.*, *League of Women Voters of U.S. v. Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016). "The district court found that the Border Patrol exceeded its authority by cutting Texas's c-wire fence for purposes other than a medical emergency, inspection, or detention," and the public interest favors "clear protections for property rights from government intrusion and control." App.14a. Accordingly, the motions panel "f[ound] no abuse of discretion in the district court's weighing of the public interest prong." *Id.* As the district court cataloged, the balance of equities and public interest favor an injunction because of the significant—and, indeed, largely undisputed—value of Texas's fencing in safeguarding the public interest. *Id.* at 46a-47a. Defendants cannot show error, let alone clear error.

Nor, given the district court's extensive analysis, can Defendants meaningfully dispute that equity favors Texas. They maintain (at 36) that the injunction "interfer[es] with Border Patrol agents' implementation of the INA." But the district court's order rejects that factual assertion, finding that "Border Patrol agents already possess access to both sides of the fence . . . to the river and bank by boat and to the further-inland side of the fence by road." App.43a. Moreover, as the motions panel explained, the district court found that Defendants have cut "Texas's c-wire fence for purposes other than a medical emergency, inspection, or detention." App.14a. Although Defendants are more circumspect to this Court, federal officers have asserted authority to cut Texas's fence "without restraint," ROA.1233, and video evidence shows that people entering through these cuts are not "interviewed, questioned as to citizenship, or in any way hindered in their progress into the United States," App.28a, 46a. The district court found that "[n]o reasonable interpretation"

of Defendants' statutory duties "can square with Border Patrol's conduct." *Id.* at 46a.

Defendants argue (at 10) that one of their employees reported seeing "no indication that the wire … has effectively deterred" border crossing. The district court, however, heard that evidence and disagreed with it, finding that "[t]he wire serves as a deterrent—an effective one at that." App.27a. That is perhaps why Defendants use the fencing too. ROA.849.

Defendants also (at 36) gesture toward the dangers of unlawful river crossings, even though the district court found that "the very emergencies the Defendants assert make it necessary to cut the wire are of their own creation." App.28a. As the district court explained:

> Any rational observer could not help but wonder why the Defendants do not just allow migrants to access the country at a port of entry. If agents are going to allow migrants to enter the country, and indeed facilitate their doing so, why make them undertake the dangerous task of crossing the river?

Id.

And again, the motions panel explained that the district court found as a factual matter that "Border Patrol agents already possess access to both sides of the fence," thus further confirming that it is not necessary to destroy Texas's property. App.6a. It is thus Defendants, not Texas, who are putting people in danger. As the district court found, any "risk to human life" that Defendants invoke (at 5) is of the Defendants' own creation, and vacating the injunction pending appeal will needlessly endanger public safety.

Finally, Defendants' reference (at 37-38) to foreign relations with Mexico is unavailing. For one, this argument confirms that Defendants have a fence-cutting policy; it defies credulity that the United States would let individual border officers conduct international diplomacy via on-the-spot judgments. Regardless, this Court's "precedents, old and new, make clear that concerns of national security and foreign relations do not warrant abdication of the judicial role." *Holder v. Humanitarian L. Project*, 561 U.S. 1, 34 (2010). That is particularly so where, as here, Defendants are acting beyond their authority. *Cf.*

Medellin v. Texas, 552 U.S. 491 (2008).

Because the motions panel agreed that preventing unlawful agency action serves the public interest, it did not reach Texas's alternative basis with respect to deterring illegal immigration and the introduction of drugs and weapons. But those aims are plainly in the public interest as well. "[T]he 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). Texas's fencing deters illegal entries and activities, including human trafficking, drug running, and weapons smuggling. The district court correctly explained that "[d]eterring unlawful activity, including illegal entry, is in the public interest." ROA.290. Yet as the district court also found, Defendants are flouting their duties at the border, enticing people to "undertake the dangerous task of crossing the river," and causing "irreparable harm" to Texas. App.28a, 53a.

CONCLUSION

This Court should deny the Application.

Respectfully submitted.

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