No. 23A____

IN THE SUPREME COURT OF THE UNITED STATES

DEPARTMENT OF HOMELAND SECURITY, ET AL.,
APPLICANTS

v.

STATE OF TEXAS

APPLICATION TO VACATE THE INJUNCTION PENDING APPEAL
ENTERED BY THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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PARTIES TO THE PROCEEDING

Applicants (defendants-appellees below) are U.S. Department of Homeland Security; U.S. Customs and Border Protection (CBP); U.S. Border Patrol; Alejandro N. Mayorkas, Secretary of Homeland Security; Troy A. Miller, Senior Official Performing the Duties of Commissioner, CBP; Jason Owens, Chief of the U.S. Border Patrol; and Juan Bernal, Acting Chief Patrol Agent, Del Rio Sector U.S. Border Patrol.

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

RELATED PROCEEDINGS

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

Texas v. U.S. Dep't of Homeland Security, No. 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)

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Pursuant to Rule 23 of the Rules of this Court and the All Writs Act, 28 U.S.C. 1651, the Solicitor General, on behalf of applicants United States Department of Homeland Security, et al., respectfully applies for vacatur of the injunction pending appeal issued on December 19, 2023, by the United States Court of Appeals for the Fifth Circuit (App., infra, 1a-19a).

This case concerns Texas's attempts to invoke its state tort law to enjoin federally authorized activities of Border Patrol agents at the border along a 29-mile stretch of the Rio Grande. Texas sued the United States, claiming that federal Border Patrol agents in Eagle Pass were committing conversion and trespass to chattels under Texas law when, in the course of performing their federal duties, they disturbed rolls of razor wire fencing that

Texas placed near the bank of the river. The district court denied a preliminary injunction, but the Fifth Circuit issued an injunction pending appeal that (subject to only a narrow exception) prohibits Border Patrol agents from cutting or moving Texas's wire barriers that physically block agents from accessing the international border and reaching migrants who have already entered U.S. territory. That injunction is manifestly wrong.

Federal law unambiguously grants Border Patrol agents the authority, without a warrant, to access private land within 25 miles of the international border, 8 U.S.C. 1357(a)(3), as well as to "interrogate" and "arrest" anyone "who in [their] presence or view is entering or attempting to enter the United States in violation of any law" and is likely to abscond, 8 U.S.C. 1357(a)(1)-(2). Federal law further "deem[s]" those who are present in the United States without having been admitted or paroled "applicant[s] for admission" with certain statutory rights, 8 U.S.C. 1225(a)(1); provides for federal officials to "inspect[]" such applicants, 8 U.S.C. 1225(a)(3); and authorizes federal agents to "arrest[] and detain[]" noncitizens "pending a [removal] decision," 8 U.S.C. 1226(a).

Under the Supremacy Clause, state law cannot be applied to restrain those federal agents from carrying out their federally authorized activities. That conclusion follows from centuries of this Court's precedent: Maryland could not tax the Bank of the United States (McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316

(1819)), or enforce its driver's license laws against federal Post Office workers delivering mail (Johnson v. Maryland, 254 U.S. 51 (1920)); California could not bring criminal charges against a Deputy U.S. Marshal for his actions to protect a Supreme Court Justice (In re Neagle, 135 U.S. 1, 75 (1890)); and Arizona could not superimpose its own approval process on a congressionally authorized dam-construction project (Arizona v. California, 283 U.S. 423 (1931)). So too here: Texas cannot use state tort law to restrain federal Border Patrol agents carrying out their federal duties.

The court of appeals' contrary ruling inverts the Supremacy Clause by requiring federal law to yield to Texas law. If accepted, the court's rationale would leave the United States at the mercy of States that could seek to force the federal government to conform the implementation of federal immigration law to varying state-law regimes. For example, California recently enacted a prohibition against private detention facilities that would have barred the federal government from contracting with private entities to operate immigration detention centers. See Geo Group, Inc. v. Newsom, 50 F.4th 745, 750 (9th Cir. 2022) (en banc). In conflict with the Fifth Circuit's decision here, the en banc Ninth Circuit correctly held that the Supremacy Clause prohibits such interference with the federal government's operations. Id. at 758.

The court of appeals' injunction also suffers from other flaws. As the district court correctly concluded (App., infra, 32a-39a), the United States has not waived its sovereign immunity from state tort claims seeking injunctive relief. The court of appeals relied on the waiver of sovereign immunity in the Administrative Procedure Act (APA), but that statute does not permit state tort law to be used as a basis for seeking injunctive relief against the United States. See, e.g., El-Shifa Pharm. Indus. Co. v. United States, 607 F.3d 836, 854 (D.C. Cir. 2010) (en banc) (Kavanaugh, J., concurring in the judgment). Rather, 5 U.S.C. 702 makes clear that litigants may not invoke the APA to "end-run" the carefully calibrated limits that Congress crafted in the Federal Tort Claims Act (FTCA), which waives sovereign immunity from state-law tort suits but authorizes only damages claims and contains exceptions Congress deemed necessary to protect federal interests. See Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak, 567 U.S. 209, 216 (2012).

Finally, the injunction violates 8 U.S.C. 1252(f)(1), which provides that lower courts generally lack "jurisdiction or authority to enjoin or restrain the operation" of certain provisions of the Immigration and Nationality Act (INA) -- including 8 U.S.C. 1225, which provides for the inspection of noncitizens in the United States regardless of whether they arrive through a port of entry. See Garland v. Aleman Gonzalez, 596 U.S. 543, 551 (2022).

The court of appeals' injunction not only is legally erroneous, but also has serious on-the-ground consequences that warrant this Court's intervention. Like other law-enforcement officers, Border Patrol agents operating under difficult circumstances at the border must make context-dependent, sometimes split-second decisions about how to enforce federal immigration laws while maintaining public safety. But the injunction prohibits agents from passing through or moving physical obstacles erected by the State that prevent access to the very border they are charged with patrolling and the individuals they are charged with apprehending and inspecting. And it removes a key form of officer discretion to prevent the development of deadly situations, including by mitigating the serious risks of drowning and death from hypothermia or heat exposure. While Texas and the court of appeals believed a narrow exception permitting agents to cut the wire in case of extant medical emergencies would leave federal agents free to address life-threatening conditions, they ignored the uncontested evidence that it can take 10 to 30 minutes to cut through Texas's dense layers of razor wire; by the time a medical emergency is apparent, it may be too late to render life-saving aid.

Balanced against the impairment of federal law enforcement and risk to human life, the court of appeals cited as Texas's harm only the price of wire and the cost of closing a gap created by Border Patrol agents. App., infra, 12a-13a. But such monetary harms are not the sort of irreparable injury that justifies in-

junctive relief, particularly given that Texas has never even attempted to seek compensation through the statutory means Congress has established to address property damage caused by the federal government. And even apart from the legal insufficiency of Texas's showing of property injury, the equities overwhelmingly favor vacatur of the injunction.

STATEMENT

A. Statutory Background

The Secretary of Homeland Security has "the power and duty to control and guard the boundaries and borders of the United States against the illegal entry of aliens." 8 U.S.C. 1103(a)(5).[1] The Secretary may "establish such regulations" and "perform such other acts as he deems necessary for carrying out his authority under" the INA. 8 U.S.C. 1103(a)(3).

U.S. Customs and Border Protection (CBP), an agency within the Department of Homeland Security, is charged with "enforc[ing] and administer[ing] all immigration laws," including "the inspection, processing, and admission of persons who seek to enter" the United States and "the detection, interdiction, removal * * * and transfer of persons unlawfully entering * * * the United States." 6 U.S.C. 211(c)(8). U.S. Border Patrol is "the law enforcement office of [CBP] with primary responsibility for in-

[1] Federal law refers to foreign nationals as "aliens." The Department of Homeland Security typically refers to such persons as noncitizens. See Barton v. Barr, 140 S. Ct. 1442, 1446 n.2 (2020).

terdicting persons attempting to illegally enter * * * the United States" and for "deter[ring] and prevent[ing] the illegal entry of terrorists, terrorist weapons, persons, and contraband." 6 U.S.C. 211(e)(3)(A)-(B).

Congress has provided that a noncitizen "present in the United States who has not been admitted or who arrives in the United States (whether or not at a designated port of arrival * * *)" is "deemed * * * an applicant for admission." 8 U.S.C. 1225(a)(1). The INA authorizes immigration officers to "inspect[]" all such applicants. 8 U.S.C. 1225(a)(3); see also 8 U.S.C. 1226 (authorizing apprehension and detention). Border Patrol agents have authority, without a warrant, "to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States" and "to arrest any alien who in his presence or view is entering or attempting to enter the United States in violation of any law" where the individual is likely to abscond. 8 U.S.C. 1357(a)(1)-(2). And Congress has specifically directed that "within a distance of twenty-five miles from any" external boundary to the United States, Border Patrol agents shall -- again without a warrant -- "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." 8 U.S.C. 1357(a)(3).[2]

[2] "[P]atrolling the border to prevent the illegal entry of aliens into the United States * * * means conducting such activities as are customary, or reasonable and necessary, to prevent

Congress has also set out the specific statutory procedures under which noncitizens may be removed or permitted to depart. See 8 U.S.C. 1225(a)(4) (withdrawal), 1229a (removal), 1225(b)(1)(A) (expedited removal), 1229c (voluntary departure). With limited exceptions, Congress has also specified that noncitizens may apply for asylum, whether or not they arrive at a designated port of arrival. 8 U.S.C. 1225(a)(1), (b)(1)(A)(ii), 1158(a). Inadmissible noncitizens may be detained pending removal. 8 U.S.C. 1225(b)(1), 1226. Certain noncitizens may also be subject to federal criminal prosecution. See, e.g., 8 U.S.C. 1325, 1326. Contrary to the district court's belief (App., infra, 43a), however, Border Patrol agents have no authority to physically force noncitizens who have entered the United States immediately back across the border. To the contrary, under Congress's design, even "an alien who tries to enter the country illegally is treated as an 'applicant for admission'" with certain statutory rights. DHS v. Thuraissigiam, 140 S. Ct. 1959, 1982 (2020) (quoting 8 U.S.C. 1225(a)(1)).

B. Factual Background

The border between the United States and Mexico along the southern boundary of Texas lies in the Rio Grande River. See Treaty of Peace, Friendship, Limits, and Settlement with the Republic of Mexico, Feb. 2, 1848, 9 Stat. 922. In order to deter

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the illegal entry of aliens into the United States." 8 C.F.R. 287.1(c).

illegal entry and intercept individuals attempting to unlawfully enter, Border Patrol agents patrol areas between ports of entry, including along the 245-mile stretch of border along the Rio Grande in the Del Rio sector, which includes Eagle Pass. D. Ct. Doc. 23-2 (BeMiller Decl.) ¶¶ 3-4 (Oct. 30, 2023); see 11/7/23 Tr. 186 (1600 agents in Del Rio sector). Agents apprehend noncitizens unlawfully crossing the river, process and inspect them, and in appropriate circumstances place them in removal proceedings. BeMiller Decl. ¶ 4.

CBP has long advised its agents to coordinate with private landowners when encountering locks, fences, and other barriers to reaching the border. BeMiller Decl. ¶ 6. It is undisputed, however, that under 8 U.S.C. 1357(a)(3), Border Patrol agents may cut locks or remove barriers if necessary to access private lands adjoining the border. App., infra, 41a-42a. Indeed, in district court proceedings, Texas's witness conceded that Border Patrol agents are "allowed to cut locks on gates" if "in their judgment they feel it necessary" to apprehend a migrant. 11/7/23 Tr. 111.

In response to increased border crossings, Texas has placed rolls of concertina wire (a type of coiled razor wire) in numerous locations, including as relevant here along a 29-mile stretch of the riverbank in Eagle Pass, much of which is private land. D. Ct. Doc. 1 (Compl.) 11 (Oct. 24, 2023); see D. Ct. Doc. 53-1, at 4 (Nov. 29, 2023) (wire deployment in Del Rio sector began in June 2023). The wire is located on the U.S. side of the Rio Grande

and has been placed on the riverbank and across gates that provide access to the river. BeMiller Decl. ¶ 11. Because the wire is on the U.S. side of the Rio Grande, noncitizens approaching it from the river are already in the United States. BeMiller Decl. ¶¶ 8-9. Texas has also piled dirt on both sides of gates that provide access to the river, further impeding Border Patrol's access to the international border. See 11/7/23 Tr. 145; D. Ct. Doc. 53-1, at 4-6.

Texas's placement of the wire near the riverbank in Eagle Pass has proved particularly problematic for Border Patrol agents. At that location, the river can be between four to six feet deep, with strong currents. See 11/7/23 Tr. 123. The embankment on the U.S. side of the river is steep and slick when wet, making it difficult to move along the bank laterally beside the wire. Id. at 123-126. And for a four-mile stretch, there are no access points or breaks in the wire that would allow Border Patrol agents to reach noncitizens on the other side. Id. at 107-108. Yet despite the danger that the wire presents, Border Patrol has seen "no indication" that the wire in this location has effectively deterred noncitizens from crossing into the United States. Id. at 193.

By preventing Border Patrol agents from reaching noncitizens who have already entered the United States, Texas's barriers in Eagle Pass impede agents' ability to apprehend and inspect migrants under federal law. See BeMiller Decl. ¶¶ 12, 15; 11/7/23 Tr. 188-

189; see also 11/7/23 Tr. 145 (wire impedes access to migrants, increases response time in emergencies, and causes injury to Border Patrol agents); D. Ct. Doc. 53-1, at 7 (wire "[i]nhibits agents from effectively and efficiently apprehending" migrants, who "are exposed to the elements for hours while waiting on the riverbank"); id. at 22 (wire "resulted in a decrease in border patrol mobility in the area" and "increased safety risk to agents and migrants").

The wire can also obstruct Border Patrol from providing emergency assistance to migrants in the river or on the riverbank. See, e.g., 11/7/23 Tr. 166 (describing incident where wire was moved because "a paraplegic individual was brought across the river by his brother" and they "could not make it up the river bank"); D. Ct. Doc. 53-1, at 54 (agent saw an "unconscious subject floating on top of the water" but was "unable to retrieve or render aid to the subject due to the concertina wire barrier placed along the riverbank"). Border Patrol has only a few boats in the area, each of which can carry only three to six additional passengers, and which can take approximately ten minutes to travel one-and-a-half to two miles upriver from the city boat ramp, in addition to any launch-related delays. 11/7/23 Tr. 129-131; see id. at 147 (testimony that Texas has "put a chain around the gate to access the boat ramp," which can "dramatically increase[]" response time).

Accordingly, consistent with longstanding practice regarding barriers to border-adjacent lands, Border Patrol agents sometimes cut or move the concertina wire to perform their duties. Federal

agents have endeavored to cooperate with state law enforcement whenever possible. See, e.g., D. Ct. Doc. 53-1, at 1-10 (Border Patrol presentation to Texas Department of Public Safety (DPS)); id. at 14 (Border Patrol email advising agents to "[c]ontinue to remain professional with our partners"); id. at 15, 18; (noting that supervisors should be alerted when wire is cut so they can "make proper notifications," including GPS coordinates, description, and time); 11/7/23 Tr. 170 (describing notifications to Texas after wire is cut); D. Ct. Doc. 53-1, at 24 (Border Patrol email describing Texas notifying Border Patrol of migrants in dangerous situation on riverside, where agents cut the wire and processed the migrants "without incident"). But even though Texas personnel themselves cut the wire to address "medical emergencies" and "make arrests" when migrants engage in violent conduct, 11/7/23 Tr. 109, Texas personnel have threatened to arrest Border Patrol agents who cut the wire, see D. Ct. Doc. 53-1 at 4, 34.

C. Proceedings Below

On October 24, 2023, Texas filed a complaint in the Western District of Texas asserting, as relevant here, state tort claims for conversion and trespass to chattels.[3] See Compl. 23-25. On October 30, 2023, the district court entered an ex parte temporary

[3] Texas also asserted claims under the Administrative Procedure Act, as well as claims seeking nonstatutory review of allegedly ultra vires action. See Compl. 25-28. The district court rejected those claims, App., infra, 48a-53a, and the court of appeals did not rely on them in granting the injunction pending appeal, id. at 12a n.7.

restraining order enjoining applicants from "removing the [wire] [in Eagle Pass] from its present location" except in the event of "any medical emergency that most[] likely results in serious bodily injury or death to a person, absent any boats or other life-saving apparatus available to avoid such medical emergencies prior to reaching the concertina wire." D. Ct. Doc. 9, at 4, 11.

On November 29, 2023, after extending the temporary restraining order, the district court entered an opinion and order denying Texas's motion for a preliminary injunction. See App., infra, 20a-53a. The court made clear that it disagreed with how federal agents perform their functions under federal immigration law. See, e.g., id. at 25a. It nevertheless determined that Texas was not entitled to preliminary injunctive relief. It explained that the United States has not waived its sovereign immunity from state-law tort claims seeking injunctive relief. See id. at 32a-39a. The court therefore did not reach the United States' further argument that under the Supremacy Clause, state tort law cannot be a basis for enjoining the activities of federal law enforcement. It also did not reach the government's argument that 8 U.S.C. 1252(f)(1) would bar the injunction Texas sought.

Texas appealed, and on December 4, 2023, it sought an emergency injunction pending appeal. Hours later, and without waiting for a response from the government, the court of appeals entered a one-sentence "administrative stay," C.A. Doc. 38-2, at 1 (Dec. 4, 2023), which the parties informed the court that they understood

to operate as an injunction with the same geographic scope and medical-emergency exception as the expired temporary restraining order, C.A. Doc. 40 (Dec. 4, 2023). The government filed its opposition to the motion for an injunction pending appeal on December 6, 2023. C.A. Doc. 45.

Nearly two weeks later, on December 19, 2023, the court of appeals entered an injunction pending appeal. App., infra, 1a-19a. The injunction bars the government from "damaging, destroying, or otherwise interfering with Texas's c[oncertina]-wire fence in the vicinity of Eagle Pass, Texas," other than "if necessary to address any medical emergency as specified in the [temporary restraining order]." Id. at 14a. As relevant here, the court of appeals indicated that, contrary to the conclusion reached by the district court, 5 U.S.C. 702 waives the United States' sovereign immunity for state tort claims seeking injunctive relief. See App., infra, 8a-11a. In a single paragraph, the court of appeals then rejected the United States' arguments under the Supremacy Clause, stating that "Texas is exercising its rights only as a proprietor" and "is neither directly regulating the Border Patrol nor discriminating against the federal government." Id. at 11a. In a similarly brief paragraph, the court rejected the government's argument that 8 U.S.C. 1252(f)(1) bars the injunctive relief Texas sought, concluding that the government "did not rely on any of the statutes covered by the INA bar" when it cut the wire. App., infra, 11a. Finally, the court found that Texas would face ir-

reparable injury "in the form of loss of control and use of its private property," given the court's conclusion that the Border Patrol had committed a "continuing trespass." Id. at 12a-13a (citation omitted). Discounting the United States' concerns about impediments to federal law enforcement and risks to human life, the court invoked a district court finding that Border Patrol "cut[] Texas's c[oncertina]-wire fence for purposes other than a medical emergency, inspection[,] or detention." Id. at 14a.

On December 21, 2023, the United States moved to expedite proceedings in the court of appeals, requesting a briefing schedule to conclude by February 12, 2024. See C.A. Doc. 53. A motions panel of the court of appeals granted expedition on December 28, 2023, C.A. Doc. 66, but did not adopt the briefing schedule proposed by the United States and instead deferred selection of a briefing schedule and argument date to the merits panel, which has not yet acted.

ARGUMENT

An applicant seeking relief from an injunction pending appeal must establish (1) "a reasonable probability that this Court would eventually grant review," (2) "a fair prospect that the Court would reverse," and (3) "that the [government] would likely suffer irreparable harm" and "the equities" otherwise support relief. Merrill v. Milligan, 142 S. Ct. 879, 880 (2022) (Kavanaugh, J., concurring); see Hollingsworth v. Perry, 558 U.S. 183, 190 (2010) (per curiam). Those requirements are satisfied here.

I. THIS COURT WOULD LIKELY GRANT REVIEW IF THE COURT OF APPEALS REVERSES THE DISTRICT COURT'S DENIAL OF A PRELIMINARY INJUNCTION

This Court's review would be warranted if the court of appeals directed the entry of preliminary injunctive relief in the form issued by the motions panel. As discussed below, that injunction contradicts numerous decisions of this Court: on the Supremacy Clause, it defies an unbroken line of precedent dating back to McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 436 (1819), and extending through United States v. Washington, 596 U.S. 832, 838-839 (2022); on sovereign immunity, it is irreconcilable with this Court's decision in Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak, 567 U.S. 209, 216 (2012), which holds that 5 U.S.C. 702 may not be used to end-run limitations contained in separate statutes that provide Congress's consent to suit; and on 8 U.S.C. 1252(f)(1), it is inconsistent with this Court's decision in Garland v. Aleman Gonzalez, 596 U.S. 543, 549-550 (2022), which recognizes that the INA forbids injunctions that restrain action that "in the government's view" serves to "enforce, implement, or otherwise carry out" the referenced sections of the INA -- regardless of whether the court considers the government to be carrying out those sections as "properly interpreted." Id. at 550-552.

Any one of those questions could independently justify this Court's review; taken together, the case for review is clear. And the Fifth Circuit's ruling here conflicts with the Ninth Circuit's recent en banc decision in Geo Group, Inc. v. Newsom, 50 F.4th 745

(2022), which held that state law may not be invoked to regulate the federal government's implementation of the immigration laws. Id. at 758. Particularly given the significant impediments that the injunction erects to Border Patrol agents' access to the very international border they are charged by federal law with protecting, and to their ability to enforce federal law and address emergencies, see p. 36, infra, injunctive relief entered in this case would plainly warrant this Court's review.

II. THE GOVERNMENT IS LIKELY TO SUCCEED ON THE MERITS

There is more than a "fair prospect that the Court would reverse" if it granted review. Merrill, 142 S. Ct. at 880 (Kavanaugh, J., concurring). Federal law authorizes Border Patrol's conduct; the Supremacy Clause and the government's sovereign immunity prohibit Texas from seeking to enjoin that conduct under state tort law; and, in any case, injunctive relief is barred by 8 U.S.C. 1252(f)(1).

A. Federal Law Authorizes Border Patrol Agents To Cut Or Move Texas's Concertina Wire Where They Find It Necessary To Perform Their Functions Under Federal Law

Congress has granted applicants "the power and duty to control and guard the boundaries and borders of the United States against the illegal entry of [noncitizens]" and to "perform such other acts as * * * necessary for carrying out [t]his authority." 8 U.S.C. 1103(a)(3), (5). Congress provides for immigration officers to inspect all applicants for admission, 8 U.S.C. 1225, and it has granted Border Patrol authority to "access * * * private

lands" within 25 miles of the international border "for the purpose of patrolling the border to prevent the illegal entry of aliens," 8 U.S.C. 1357(a)(3), as well as to interrogate and arrest certain noncitizens suspected of unlawfully crossing the border, 8 U.S.C. 1357(a)(1)-(2).[4]

Congress granted officers specific authority to access private lands because "the refusal of some property owners along the border to allow patrol officers access" to their land was "endanger[ing] the national security" and "affect[ing] the sovereign right of the United States to protect its own boundaries against the entry of [noncitizens], including those of the most dangerous classes." H.R. Rep. No. 82-1377, 82d Cong., 2d. Sess. 1360 (1952); see also 98 Cong. Rec. 1420 (Feb. 26, 1952) (statement of Rep. Fisher) (opposing legislation because it would authorize agents "to break down a gate or a fence or anything else in order to carry out their functions of patrolling the border"). As the district court recognized, "DHS has long made use" of Section 1357(a)(3) "to move or cut privately owned fencing within 25 miles of the international border when exigencies arise." App., infra, 41a.

[4] Even apart from specific statutes, the authority to cut or move wires blocking access to the border and migrants who have entered the United States would have been inherent in Border Patrol's more general authorities. When it enacted Section 1357(a)(3), Congress recognized that the statute was a "positive legislative enactment authoriz[ing] specifically that which must always have been of necessity implied from the time the border patrol was first created." H.R. Rep. No. 82-1377, 82d Cong., 2d. Sess. 1360 (1952).

Because the concertina wire coils Texas has erected stand between Border Patrol agents and the border and the noncitizens along the border they are charged with inspecting and apprehending -- thus physically obstructing agents from fulfilling their responsibilities under federal law -- agents cut or move the wire in some circumstances. See BeMiller Decl. ¶ 16. Such actions are plainly authorized by 8 U.S.C. 1357(a)(3), under which Congress "unquestionably meant these officers to exercise" their "normal patrol activities" and responsibilities to protect the national security. H.R. Rep. No. 82-1377, at 1360. Indeed, if federal officials cannot cut concertina wire to access noncitizens on private land by the border, it would follow that any jurisdiction opposed to immigration enforcement -- or even any individual property owner -- could enclose a large area in order to impede federal agents from enforcing the INA. That result has no plausible basis in law, and unsurprisingly, both Texas and the district court acknowledged that Border Patrol agents can cut the wire to access migrants in some circumstances. See 11/7/23 Tr. 111; App., infra, 27a.

Despite such acknowledgements, the court of appeals invoked the district court's conclusion that "Border Patrol exceeded its authority by cutting Texas's c[oncertina]-wire fence for purposes other than a medical emergency, inspection, or detention." App., infra, 14a; see id. at 28a. Even if that conclusion were supported by the record, it would not alter the scope of the activities that

federal law does authorize -- including, as discussed above, the authority to disturb barriers within 25 miles of the border, without a warrant, when Border Patrol agents conclude it is necessary to carry out their duties. A belief that agents had on occasion cut through Texas's wire barriers for purposes other than the execution of federal immigration law would not mean that all cutting is done for such reasons. And it plainly would not justify the court of appeals' injunction, which is not limited to purportedly unauthorized activities but instead bars all cutting or moving of the wire, subject only to a narrow exception for extant medical emergencies.

In any event, the district court's suggestion that federal officials cut through Texas's wire for unauthorized purposes is belied by the considerable record evidence (both pre-dating and post-dating Texas's complaint) that Border Patrol agents cut the wire when necessary to their patrol of the border, to facilitate apprehension, inspection, and processing of migrants, and to provide assistance.[5]

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[5] See, e.g., 11/7/23 Tr. 187; BeMiller Decl. ¶¶ 16, 18; D. Ct. Doc. 53-1, at 14-15 (June 2023 Border Patrol email noting that "[i]f migrants have made landfall * * * we are required to respond and establish citizenship," and noting that Texas is aware of Border Patrol's "obligation to respond and take subjects into our custody"); id. at 24 (July 2023 email describing situation where wire was cut and migrants were "processed without incident"); id. at 28 (wire cut "for a group which included small children"); id. at 29 (wire cut "to free a mother and 2 kids"); id. at 33 (July 2023 email regarding Border Patrol agent advising Texas officials "that I needed to bring those subjects up to the tents as they have already made illegal entry and we are obligated by law to apprehend them").

The lower courts ignored that evidence and focused instead on a video from September 20, 2023, which they characterized as Border Patrol cutting through wire "for no apparent purpose other than to allow migrants easier entrance further inland," stating that in the video exhibit, the migrants "were never 'interviewed, questioned as to citizenship, or in any way hindered in their progress into the United States,'" and that Border Patrol left the migrants to "walk as much as a mile or more" to a processing center without supervision. App., infra, 5a (quoting the district court). But the record contained testimony that Border Patrol agents were "staged at various points" to "keep directing" migrants who had entered through the cut wire that day to a "staging area" for "processing." 11/7/23 Tr. 169-170. The migrants were not free to leave during their transit to the processing site. And while a Texas officer's count of migrants entering exceeded Border Patrol's figure of migrants processed, Texas's witness conceded he did not "actually see any" migrants "making a break from the group that was traveling in this line." Id. at 113.

The lower courts' view that cutting the wire did not occur to facilitate Border Patrol's inspection, apprehension, and processing responsibilities could only be based on the courts' own cramped understanding of what those responsibilities permissibly entail, rather than the judgment and experience of the agents. And that characterization likewise runs afoul of the "presumption

of regularity" that "supports the official acts of public officers." United States v. Chemical Foundation, 272 U.S. 1, 14 (1926).

Given the difficult circumstances along the riverbank that day, including the significant outnumbering of Border Patrol agents, see 11/7/23 Tr. 149; the distance to the Border Patrol's temporary processing center; the limited marine resources, see id. at 129 (describing four boats in the area, each of which can carry only a handful of passengers); and the dangerous conditions in the area, see id. at 123-124 (describing river "60 to 80 yards" wide, "four to six feet deep," with "strong currents" on the day in question, and a "very steep" riverbank along which "migrants were sliding back down into the river and being swept away"), Border Patrol agents' exercise of discretion regarding the means of enabling the apprehension, inspection, and processing of noncitizens in no way suggests that they cut wire for impermissible purposes. And to the extent the court of appeals meant to adopt the district court's view that Border Patrol could instead have "take[n] steps to turn migrants * * * back across the border into Mexico," App., infra, 43a, that would only compound its error. Once migrants are "located 'in the United States,'" DHS "cannot unilaterally return" applicants for admission "to Mexico." Biden v. Texas, 597 U.S. 785, 806 (2022).[6]

[6] In Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 155 (1993), on which the district court relied (App., infra, 43a), vessels illegally transporting passengers from Haiti were intercepted "'only beyond the territorial sea of the United States,'" and thus the case did not involve migrants who had crossed the border. Sale,

B. The United States Cannot Be Enjoined On The Basis Of State Tort Law

It is a foundational constitutional principle that the federal government is not bound by the laws or policies of any particular State in its enactment and implementation of federal law. That principle is reflected in the multiple legal barriers to this suit. Most basically, it is embodied in the well-established and deeply rooted principle that under the Supremacy Clause, state laws cannot control the activities of federal agents acting under federal authority. And consistent with that fundamental aspect of the Supremacy Clause, there is no waiver by Congress of the United States' sovereign immunity that would subject it to state tort suits seeking injunctive relief. Under either principle, the court of appeals' injunction was impermissible.

1. Under The Supremacy Clause, States Cannot Control Or Impede The Federal Government's Execution Of Federal Law

Because federal law plainly authorizes Border Patrol agents to access land near the border in order to execute their responsibilities, the Supremacy Clause forecloses Texas's attempt to use

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509 U.S. at 158 (citation omitted). The reports of "turn backs" the district court cited (App., infra, 44a-45a) involved noncitizens who voluntarily turned back after crossing the border. See CBP, Press Release (June 1, 2023), https://perma.cc/B8HP-9N32 (describing agents "apprehend[ing] four of the swimmers" who had crossed the maritime boundary line "with the other two being able to turn back south into Mexico"); see also 6 U.S.C. 223(a)(9) (defining "turn back" to mean "an unlawful border crosser who, after making an unlawful entry into the United States, responds to United States enforcement efforts by returning promptly to the country from which such crosser entered").

its tort law to impede and control those federal law-enforcement agents. The court of appeals' contrary ruling casually rejected foundational Supremacy Clause principles with only cursory analysis.

1. The Supremacy Clause makes federal law "the supreme Law of the Land," U.S. Const. Art. VI, Cl. 2, and it has been firmly established for over two centuries that a State has no power "to retard, impede, burden, or in any manner control the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the national government." McCulloch, 17 U.S. (4 Wheat.) at 436; see, e.g., Mayo v. United States, 319 U.S. 441, 445 (1943) (holding that "activities of the Federal Government are free from regulation by any state"). As this Court recently reiterated, the Supremacy Clause "prohibit[s] States from interfering with or controlling the operations of the Federal Government." United States v. Washington, 596 U.S. 832, 838 (2022).

That prohibition extends to "even the most unquestionable and most universally applicable of state laws, such as those concerning murder," which "will not be allowed to control the conduct of a[n] [official] of the United States acting under and in pursuance of the laws of the United States." Johnson v. Maryland, 254 U.S. 51, 57 (1920) (citing In re Neagle, 135 U.S. 1, 60 (1890)); see, e.g., Ohio v. Thomas, 173 U.S. 276, 283 (1899) ("When discharging [their] duties under federal authority pursuant to and by virtue of valid Federal laws, [Federal officers] are not subject to arrest or other

liability under the laws of the State in which their duties are performed."); Arizona v. California, 283 U.S. 423, 451 (1931) ("The United States may perform its functions without conforming to the police regulations of a State."). Because the conduct about which Texas complains is authorized by federal law, it may not be enjoined on the basis of state law.

This understanding of the federal government's Supremacy Clause immunity from state regulation also follows from principles of federal preemption, including the rule that "state laws are preempted when they conflict with federal law." Arizona v. United States, 567 U.S. 387, 399 (2012). The Supremacy Clause mandates such preemption where compliance with both state and federal law "is a physical impossibility," as well as where "the challenged state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Ibid. (internal quotation marks and citations omitted). Preemption principles underscore that a State may not interpose its tort laws "as an obstacle to the accomplishment and execution" of federal agents' enforcement of federal law. Id. at 406 (internal quotation marks and citations omitted).

2. Rather than engage with those well-established authorities, the court of appeals summarily rejected the federal government's Supremacy Clause arguments in a brief paragraph. See App., infra, 11a. The court stated only that "Texas is neither directly regulating the Border Patrol nor discriminating against the fed-

eral government." Ibid. But Texas's invocation of state tort law and the injunction Texas obtained do directly regulate the federal government by barring Border Patrol agents from moving or cutting the wire in the course of carrying out their duties. And the fact that Texas's tort laws do not expressly refer to or discriminate against the United States is irrelevant, for the Supremacy Clause shields the United States from "even the * * * most universally applicable of state laws." Johnson, 254 U.S. at 56.

Consistent with that rule, the en banc Ninth Circuit recently rejected California's attempt to invoke a "generally applicable" state law to prohibit the use of private immigration detention centers, even though the law applied to federal contractors rather than to the federal government itself. Geo Group, 50 F.4th at 760. If the Fifth Circuit were correct that the Supremacy Clause does not preclude Texas's state-law suit here, the Ninth Circuit was mistaken, and California and every other State would be equally free to curtail the operations of federal law enforcement by enacting or invoking state laws that speak in general terms -- a result directly at odds with the Supremacy Clause's "core promise." Id. at 758.

2. The APA Does Not Waive The United States' Sovereign Immunity For State Tort Claims

Wholly independent of the fundamental and established principles of the Supremacy Clause, the court of appeals erred in

concluding that the United States waived its sovereign immunity for state tort claims.

"The basic rule of federal sovereign immunity is that the United States cannot be sued at all without the consent of Congress." Block v. North Dakota, 461 U.S. 273, 287 (1983). A waiver of sovereign immunity must be "strictly construed, in terms of its scope, in favor of the sovereign," Lane v. Pena, 518 U.S. 187, 192 (1996), and Congress must "provide[] 'clear and unambiguous' authorization" to permit state law to regulate federal activities, Goodyear Atomic Corp. v. Miller, 486 U.S. 174, 180 (1988) (citation omitted). Indeed, as this Court has recognized, "it is one thing to provide a method by which a citizen may be compensated for a wrong done him by the Government. It is a far different matter to permit a court to exercise its compulsive powers to restrain the Government from acting, or to compel it to act." Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 704 (1949).

The court of appeals nevertheless purported to find a waiver of sovereign immunity for injunctive relief for state tort claims in 5 U.S.C. 702. App., infra, 8a-11a. That provision waives sovereign immunity for "[a]n 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." 5 U.S.C. 702. As the district court recognized, whatever the scope of that waiver with respect to claims against the federal govern-

ment arising under federal law, it should not lightly be construed to subject the federal government to suit based on state common law. App., infra, 38a. That is especially so because an injunctive suit arising solely under state law could not properly be brought against the federal government in federal court; instead, 28 U.S.C. 1331 -- the basis for jurisdiction over APA and most other suits against the federal government -- provides jurisdiction only over suits arising under federal laws.

There is no occasion in this case to consider whether Section 702 waives the United States' sovereign immunity to suits arising under state law as a general matter, for Section 702 itself makes clear that it does not do so for claims based on state tort law given the separate statutory authorization -- and corresponding limits -- to obtain tort-based remedies in the FTCA. Section 702 provides that it does not "confer[] authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought." 5 U.S.C. 702. As this Court has explained, in those circumstances, the APA's sovereign-immunity "waiver does not apply," thereby "prevent[ing] plaintiffs from exploiting the APA's waiver to evade limitations on suit contained in other statutes." Match-E-Nash-She-Wish, 567 U.S. at 215.

Texas's suit is precisely the type of evasion that this Court disapproved. The FTCA provides "the exclusive remedy for most claims against Government employees arising out of their official

conduct." Hui v. Castaneda, 559 U.S. 799, 806 (2010). It permits only money damages, not prospective relief, see 28 U.S.C. 1346(b), and it places discretionary functions and actions authorized by statute beyond the reach of state tort law, see 28 U.S.C. 2680(a). Congress thus "dealt in particularity with" state tort-law claims and "'intended a specified remedy' -- including its exceptions -- to be exclusive." Match-E-Be-Nash-She-Wish, 567 U.S. at 216 (citation omitted). Under those circumstances "the APA does not undo the judgment" Congress exercised in enacting the FTCA. Ibid. See El-Shifa Pharm. Indus. Co. v. United States, 607 F.3d 836, 854 (D.C. Cir. 2010) (en banc) (Kavanaugh, J., concurring in the judgment) (noting that while the FTCA "expressly borrow[s] (or permit[s]) state tort causes of action against the United States in certain carefully defined circumstances * * * [,] the APA does not borrow state law or permit state law to be used as a basis for seeking injunctive or declaratory relief against the United States"). The APA thus does not encompass state tort-law claims, and Texas cannot invoke Section 702 to obtain injunctive relief that Congress has not provided in the FTCA and without regard to the exceptions Congress included in the FTCA.

Numerous courts have reached a similar conclusion in holding that the APA "does not waive sovereign immunity for claims that arise out of a contract and that seek specific performance of the contract as relief," in light of the provision of a damages remedy in the Tucker Act and Little Tucker Act. Robbins v. U.S. Bureau

of Land Mgmt., 438 F.3d 1074, 1082 (10th Cir. 2006); see Up State Fed. Credit Union v. Walker, 198 F.3d 372, 375 (2d Cir. 1999); Tucson Airport Auth. v. Gen. Dynamics Corp., 136 F.3d 641, 646 (9th Cir. 1998); Coggeshall Dev. Corp. v. Diamond, 884 F.2d 1, 3 (1st Cir. 1989); Sea-Land Serv., Inc. v. Brown, 600 F.2d 429, 432-433 (3d Cir. 1979); see also Bowen v. Massachusetts, 487 U.S. 879, 921 (1988) (Scalia, J., dissenting) ("It is settled that sovereign immunity bars a suit against the United States for specific performance of a contract * * * and that this bar was not disturbed by the 1976 amendment to § 702."). As those courts have recognized, the provision of money damages "'impliedly forbid[s]' federal courts from ordering declaratory or injunctive relief." Robbins, 438 F.3d at 1082. The reasoning of those decisions applies equally to tort claims and the FTCA.

Section 702's history further confirms the point. In enacting the 1976 amendments to the APA, Congress adopted a proposal advanced by the Administrative Conference of the United States. H.R. Rep. No. 94-1656, 94th Cong., 2d Sess. 23-25 (1976); S. Rep. No. 94-996, 94th Cong., 2d Sess. 22-24 (1976). The Administrative Conference explained that its "recommendation [was] phrased as not to effect an implied repeal or amendment of any prohibition, limitation, or restriction of review contained in existing statutes, such as * * * the Federal Tort Claims Act * * * in which Congress has conditionally consented to suit." Sovereign Immunity: Hearing on S. 3568 Before the Subcomm. on Administrative

Practice & Procedure of the Senate Comm. on the Judiciary, 91st Cong., 2d Sess. 138-139 (1970).

As originally introduced in the Senate, the legislation would have withheld authority to grant relief only if another statute "forbids the relief which is sought," rather than if it "expressly or impliedly" does so, as the Administrative Conference had proposed. S. Rep. No. 94-996 at 12, 26; H.R. Rep. No. 94-1656, at 13, 27; see S. 3568, 91st Cong. (1970). On behalf of the Department of Justice, Assistant Attorney General Scalia urged Congress to restore the broader "expressly or impliedly" language. S. Rep. No. 94-996, at 26-27; H.R. Rep. No. 94-1656, at 27-28. As he explained, "existing statutes have been enacted against the backdrop of sovereign immunity," and so "in most if not all cases where statutory remedies already exist, these remedies will be exclusive." H.R. Rep. No. 94-1656, at 28; S. Rep. No. 94-996, at 27. That result, he concluded, is "simply an accurate reflection of the legislative intent in these particular areas in which the Congress has focused on the issue of relief," and it would be "unwise to upset these specific determinations." H.R. Rep. No. 94-1656, at 28; S. Rep. No. 94-996, at 27. Congress heeded this request and amended the provision to conform to the Administrative Conference's proposal. S. Rep. No. 94-996, at 12; H.R. Rep. No. 94-1656, at 13. Thus, as the House and Senate committees both explained, "the partial abolition of sovereign immunity brought about by this bill does not change existing limitations on specific

relief, if any, derived from statutes dealing with such matters as * * * tort claims." H.R. Rep. No. 94-1656, at 13; S. Rep. No. 94-996, at 12.

The court of appeals' contrary analysis does not withstand scrutiny. The court claimed that "[n]umerous federal circuits" have adopted its reading of Section 702. App., infra, 9a & n.5. But only one of the cases cited involved a state-law claim. See Treasurer of N.J. v. U.S. Dep't of Treasury, 684 F.3d 382, 400 n.19 (3d Cir. 2012). And although that court concluded in a two-sentence footnote that Section 702 extends to state-law tort claims, it went on to hold that the application of state law to the federal government would violate the Supremacy Clause, see id. at 409-412, -- a conclusion that also resolves this case, see pp. 23-26, supra.[7]

[7] The remaining cases the court of appeals cited involved federal-law claims. See, e.g., Trudeau v. FTC, 456 F.3d 178, 190 (D.C. Cir. 2006) (claim that federal agency exceeded its authority and violated the Constitution); Delano Farms Co. v. California Table Grape Comm'n, 655 F.3d 1337, 1344 (Fed. Cir. 2011) (federal statutory claim). In a case not cited by the court of appeals, the D.C. Circuit concluded that Section 702 waives immunity for certain claims asserting a breach of fiduciary duty under state law, see Perry Capital LLC v. Mnuchin, 864 F.3d 591, 620 (D.C. Cir. 2017), but it did so in a single paragraph that did not engage with any of the above analysis. It instead relied on its earlier decision in Trudeau, which involved only federal claims, as well as its decision in U.S. Info. Agency v. Krc, 989 F.2d 1211 (D.C. Cir. 1993), which did not make clear the source of the substantive law underlying the plaintiff's tort claims, and which (as noted p. 33, infra) pre-dated this Court's decision in Match-E-Be-Nash-She-Wish.

The court of appeals' analysis was equally deficient in addressing the effect of the FTCA specifically. The court noted that two circuits have rejected similar arguments, see App., infra, 10a-11a (citing Michigan v. U.S. Army Corps of Engineers, 667 F.3d 765, 775 (7th Cir. 2011), and U.S. Info. Agency v. Krc, 989 F.2d 1211, 1216 (D.C. Cir. 1993)), but those decisions pre-dated this Court's decision in Match-E-Be-Nash-She-Wish, which makes clear that where a separate federal statute "specifically authorizes" a type of action against the federal government, subject to exceptions, "a plaintiff cannot use the APA to end-run the [federal statute's] limitations." 567 U.S. at 216. The court of appeals did not even cite this Court's decision -- let alone explain why it does not govern here.

C. The Court Of Appeals Lacked Authority To Enjoin Or Restrain Enforcement Of The INA

Under 8 U.S.C. 1252(f)(1), with certain inapplicable exceptions, lower courts lack "jurisdiction or authority to enjoin or restrain the operation" of 8 U.S.C. 1221-1231 -- the provisions of the INA "governing the inspection, apprehension, examination, and removal of aliens." Aleman Gonzalez, 596 U.S. at 549-550. Those provisions include Section 1225, which provides for the inspection of noncitizens, and Section 1226, which authorizes their apprehension and detention.

This Court has explained that Section 1252(f)(1) "prohibits lower courts from entering injunctions that order federal offi-

cials to take or to refrain from taking actions to enforce, implement, or otherwise carry out the specified statutory provisions." Aleman Gonzalez, 596 U.S. at 550. So long as an order enjoins or restrains action that "in the government's view" serves to "enforce, implement, or otherwise carry out" the referenced sections of the INA, it is impermissible -- regardless of whether the court considers the government to be carrying out those sections as "properly interpreted." Id. at 550-552; accord, e.g., Arizona v. Biden, 40 F.4th 375, 394 (6th Cir. 2022) (Sutton, J., concurring) (explaining that Section "1252(f)(1) has the same force even when the National Government allegedly enforces the relevant statutes unlawfully," as it otherwise "would not be much of a prohibition"). Because the injunction requires the government to "refrain from actions that (* * * in the Government's view) are allowed" by Sections 1225 and 1226, it "interfere[s] with the Government's efforts to operate" those provisions, Aleman Gonzalez, 596 U.S. at 551, and is therefore barred by Section 1252(f)(1). See, e.g., Biden v. Texas, 597 U.S. at 797 (lower-court order enjoining DHS's Migrant Protection Protocols "violated" Section 1252(f)(1)).

The court of appeals incorrectly viewed the injunction as causing only a "collateral effect on the operation" of Sections 1225 and 1226, on the theory that the government relied on other provisions in support of its authority to cut the wire to reach migrants. App., infra, 11a (quoting Aleman Gonzalez, 596 U.S. at

553 n.4). But the inability to reach migrants on U.S. soil directly 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, see 8 U.S.C. 1225(b)(1)(A)(i) and (b)(2)(A), and to apprehend and detain them as appropriate under Section 1226, see 8 U.S.C. 1226(a) and (c).

The other provisions on which the government relied simply provide additional support for the particular way the government may perform those functions. See 8 U.S.C. 1103(a)(3) (authorizing the Secretary to establish regulations and "perform such other acts as he deems necessary for carrying out his authority"); 8 U.S.C 1357(a)(3) (allowing the government to access private lands within 25 miles of the border). When taking those actions, the agents are discharging their responsibilities under Sections 1225 and 1226, which "no one disputes * * * [are] among the provisions the 'operation' of which cannot be 'enjoined or restrained' under § 1252(f)(1)." Aleman Gonzalez, 596 U.S. at 551. That other provisions also support the government's authority to cut or move the wire in carrying out its responsibilities under Sections 1225 and 1226 does not alter that conclusion or render the effect on the operation of those statutes any less direct.

III. THE EQUITIES OVERWHELMINGLY FAVOR VACATUR OF THE INJUNCTION

The remaining factors this Court considers in determining whether to grant an application for relief pending review or appeal

likewise overwhelmingly favor vacatur of the injunction pending appeal. First, the injunction flouts the Supremacy Clause, upending our constitutional structure and causing irreparable harm per se to the United States. See Maryland v. King, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers) ("[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury.") (brackets in original, citation omitted). And the injunction also contravenes the statutory bar to injunctive relief in 8 U.S.C. 1252(f)(1), thereby broadly interfering with Border Patrol agents' implementation of the INA.

Indeed, the injunction directly interferes with the government's enforcement of federal law by reinforcing the literal barriers Texas has erected that bar access by Border Patrol agents to the border they are charged with patrolling and the migrants they are charged with apprehending and inspecting, who might require the agents' assistance in dangerous circumstances. Congress enacted 8 U.S.C. 1357(a)(3) to ensure that Border Patrol agents could not be hindered in this way.

The injunction also presents a serious risk to human life. Although the injunction contains a limited exception allowing agents to cut the wire to respond to a medical emergency, the court of appeals ignored that by the time a medical emergency (such as drowning) is in progress, it may be too late for Border Patrol to prevent death or serious injury. See 11/7/23 Tr. 132 (undisputed

testimony that it can take 10 to 30 minutes to cut through Texas's layers of razor wire). The Rio Grande is an unpredictable river with varying depths and powerful currents, id. at 121, 123, which is why Border Patrol agents seek to "be as proactive as possible" when they "anticipate an emergency may arise." Id. at 122; see id. at 128 (describing situation where "it was only a matter of time before more people were going to be swept away"). The risk of death along this stretch of the river is very real, especially for vulnerable populations such as children. See D. Ct. Doc. 53-1, at 51-56 (discussing a child who drowned on November 11, 2023, and noting that an agent saw an "unconscious subject floating on top of the water" but was "unable to retrieve or render aid to the subject due to the concertina wire barrier placed along the riverbank"). Even if the court of appeals issues a decision on appeal on an expedited basis, absent intervention from this Court it is likely that the injunction will remain in effect through at least late spring, if not far later. And each day the injunction remains in place, it interferes with Border Patrol's access to the border and migrants congregating there and compounds the risk that agents will be hindered in carrying out their duties and barred from preventing the development of situations at the border resulting in injury and death.

Nor are the harms to the United States and the public interest solely domestic. Mexico has repeatedly lodged official complaints about Texas's placement of the concertina wire. See Government of

Mexico, Information Note No. 04 (July 14, 2023), https://perma.cc/V72L-GTXE; Government of Mexico, Information Note No. 05 (July 26, 2023), https://perma.cc/F932-U9T9 (expressing concern over "alleged human rights violations"). By limiting Border Patrol agents' ability to offer emergency assistance to individuals in the United States, the injunction negatively affects U.S. foreign relations. Cf. Arizona, 567 U.S. at 395 (noting that "[i]mmigration policy" can affect "diplomatic relations for the entire nation," as "[p]erceived mistreatment of aliens in the United States may lead to harmful reciprocal treatment of American citizens abroad").

On the other side of the ledger, Texas failed to demonstrate irreparable harm, much less harm sufficient to warrant the entry of an injunction pending appeal. Although Texas has asserted numerous theories of harm -- including purported immigration-related consequences that are not cognizable in this suit against the federal government, see United States v. Texas, 599 U.S. 670, 677-678 (2023) -- the court of appeals relied exclusively on the theory that the United States was causing property damage to the concertina wire. App., infra, 12a-13a. But to address that asserted harm, Texas could seek compensation under 19 U.S.C. 1630(a), which authorizes the Secretary to settle "claim[s] for damage to, or loss of, privately owned property caused by an investigative or law enforcement officer * * * who is employed by [CBP] and acting within the scope of his or her employment" for up to $50,000,

provided the claim "cannot be settled" under the FTCA. See 38 Op. Att'y Gen. 515, 517 (1936) (explaining that "it has been the uniform practice * * * to consider and determine claims submitted by municipalities and other state agencies" under a similar statute regarding "privately owned property"). Alternatively, Texas could try to seek compensation under the FTCA, to the extent the agents' actions do not fall within that statute's exceptions. See D. Ct. Doc. 27-1, at 16 (Nov. 5, 2023) (Texas acknowledging it may pursue relief under the FTCA). But Texas has never even attempted to use those statutory means to seek redress for the harms it asserts here -- financial injuries that are the paradigmatic example of harms that do not warrant extraordinary injunctive relief.

The court of appeals nevertheless believed that injunctive relief was necessary because the United States is engaged in a "continuing trespass." App., infra, 13a. The authorities on which it relied, however, exclusively involved trespass to land. See Donovan v. Pennsylvania Co., 199 U.S. 279 (1905); Rojas-Adams Corp. of Del. v. Young, 13 F.2d 988 (5th Cir. 1926); Beathard Joint Venture v. W. Houston Airport Corp., 72 S.W.3d 426, 430 (Tex. App. 2002). Equitable remedies are often available for claims involving real property even when unavailable with respect to other property. See, e.g., Hillman v. Loga, 697 F.3d 299, 304 n.8 (5th Cir. 2012) (noting specific performance as available remedy for breach of real estate contract because parcels of real estate are unique); see also Restatement (Second) of Torts 938 cmt. c (1979) (con-

trasting "continuing trespass to land" with "conversion of wheat by a financially responsible defendant"). Those principles have no application to this case, which concerns damage to a commercial product for which money is adequate compensation.

Ultimately, however, even if Texas had shown irreparable injury to some degree, any such injury pales in comparison to the harms shown by the United States. See Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 23 (2008) (explaining that "even if plaintiffs have shown irreparable injury" to marine wildlife, it would be "outweighed by the public interest and the Navy's interest in effective, realistic training of its sailors," and that "[a] proper consideration of these factors alone requires denial of the requested injunctive relief"). This Court should therefore vacate the injunction pending appeal.

CONCLUSION

This Court should vacate the injunction pending appeal entered by the United States Court of Appeals for the Fifth Circuit

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General

JANUARY 2024

APPENDIX

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
December 19, 2023
Lyle W. Cayce
Clerk

No. 23-50869

STATE OF TEXAS,

Plaintiff—Appellant,

versus

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*; JUAN BERNAL, *in his official capacity as Acting Chief Patrol Agent, Del Rio Sector United States Border Patrol*,

Defendants—Appellees.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 2:23-CV-55

Before HAYNES, WILLETT, and DUNCAN, *Circuit Judges*.

No. 23-50869

STUART KYLE DUNCAN, *Circuit Judge*:[1]

PUBLISHED ORDER

Texas seeks an injunction pending appeal to prevent the United States Border Patrol from cutting, destroying, or otherwise interfering with concertina wire ("c-wire") Texas has constructed along more than 29 miles of municipal and private land in the Eagle Pass sector of our southern border. The district court granted Texas a temporary restraining order, after which it held hearings, heard testimony from multiple witnesses, and received copious documentary evidence. Despite making numerous fact findings supporting Texas's claims, the district court ruled that the United States' sovereign immunity had not been waived under 5 U.S.C. § 702 and that the court was therefore barred from converting the TRO into a preliminary injunction. Texas immediately appealed and sought an emergency injunction pending appeal. The panel granted a temporary administrative stay while considering the parties' submissions.

Concluding that the district court legally erred with respect to sovereign immunity and that Texas has otherwise satisfied the factors under *Nken v. Holder*, 556 U.S. 418, 434 (2009), we GRANT Texas's request for an injunction pending appeal. Accordingly, 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. 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* App. K at 4, 9–11 (Oct. 30, 2023).

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[1] JUDGE HAYNES would send this case to a merits panel as an expedited appeal and would grant an administrative stay for a brief period of time, deferring the question of the stay pending appeal to the oral argument merits panel which receives this case.

I. Facts and Proceedings

We briefly summarize the procedural history and the district court's relevant fact findings. *See generally* App. P at 6–10.

A.

Along the 1,200 miles of the Rio Grande forming the border between Texas and Mexico, there are 29 official points of entry into the United States. To guard the "vast stretches of land between" those points, Congress created the Border Patrol, whose objective is to "deter illegal entry into the United States." In recent years, illegal crossings have increased dramatically. "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." Unsurprisingly, the situation has been exploited by drug cartels, who have made "an incredibly lucrative enterprise" out of trafficking human beings and illegal drugs like fentanyl, which "is frequently encountered in vast quantities at the border."

In 2021, Texas launched Operation Lone Star to aid the Border Patrol through allocation of state resources. The activity in question here is Texas's "laying of concertina wire along several sections of [the] riverfront." The c-wire serves as a "deterrent—an effective one at that," causing illegal crossings to drop precipitously. "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."

There has been conflict in the Eagle Pass area, however. Maverick County and Eagle Pass are "the epicenter of the present migrant influx: nearly a quarter of migrant entries into the United States happen there." Border Patrol has set up a temporary processing center in Maverick County on private land close to the Rio Grande. By September 2023, Texas had

installed over 29 miles of c-wire in this area. Both the Border Patrol and Texas agree that the c-wire must be cut in the event of an emergency, such as the threat of a migrant's drowning or suffering heat exhaustion. "The problem arises when Border Patrol agents cut the wire without prior notification to [Texas] for reasons other than emergencies."

B.

On October 24, 2023, Texas sued Defendants[2] in federal court alleging common law conversion, common law trespass to chattels, and violations under the Administrative Procedure Act ("APA"). Among other relief, Texas sought a preliminary injunction based on its trespass to chattels claim. Three days later, Texas sought a TRO. The following day, Texas filed a notice with the district court alleging that "the Defendants, knowing a motion for a TRO had already been filed, used a forklift to seize concertina wire and smash it to the ground." The court granted an emergency TRO on October 30, 2023, barring Defendants "from interfering with [Texas's] concertina wire except for medical emergencies." Over the ensuing month, the court held two hearings on Texas's motion for a preliminary injunction; heard testimony from multiple witnesses; and received thousands of pages of evidence (including five videos) as a result of expedited discovery. The court also twice extended the TRO.

Although the court would ultimately deny a preliminary injunction on sovereign immunity grounds, the court made numerous fact findings supporting Texas's trespass to chattels claim. As a general matter, the court

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[2] Defendants are the U.S. Department of Homeland Security and its Secretary, Alejandro Mayorkas; U.S. Customs and Border Protection; U.S. Border Patrol; Troy Miller, Acting Commissioner of U.S. Customs and Border Protection; Jason Owens, Chief of the U.S. Border Patrol; and Juan Bernal, Acting Chief Patrol Agent, Del Rio Sector U.S. Border Patrol.

rejected Defendants' claims that the Border Patrol was justified in cutting the c-wire: (1) to inspect, apprehend, and detain illegal aliens; and (2) to prevent or address medical emergencies. To the contrary, the court found that the Border Patrol cut the c-wire "for no apparent purpose other than to allow migrants easier entrance further inland."

While noting it was "aware of at least fourteen incidents of wire cutting," the court focused on a September 20 incident that was captured on video and was, in the court's view, "most illustrative."[3] In that incident, Border Patrol agents cut two additional holes in the c-wire 15 feet away from an existing hole and installed "a climbing rope for migrants." Meanwhile, a Border Patrol boat "passively observ[ed] a stream of migrants" crossing the river who were never "interviewed, questioned as to citizenship, or in any way hindered in their progress into the United States." Instead, after letting the migrants through, the Border Patrol sent them to "walk as much as a mile or more" with no supervision in hopes they would proceed to the nearest immigration processing center.

The court first rejected as a factual matter Defendants' claim that the Border Patrol's actions were intended to "inspect, apprehend, and process" incoming aliens.[4] The court found no alien was "inspected" at all. Moreover, if agents intended to inspect, they could have done so without doing anything

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[3] Because the video was not yet publicly available, the court included still photos from the video as an appendix to its opinion. We have included the same photos as an appendix to this order.

[4] *See* 6 U.S.C. § 211(c)(8)(B) (setting out Commissioner's responsibility for "the detection, interdiction, removal, departure from the United States, short-term detention, and transfer of persons unlawfully entering, or who have recently unlawfully entered, the United States"); 8 U.S.C. § 1357(a) (authorizing agents, "within a distance of twenty-five miles from any . . . external boundary [of the United States] 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").

to the wire. As the court noted, "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." Nor was wire-cutting necessary to "apprehend" or "process" aliens. Indeed, no one was "apprehended" or placed in "custody"—as the court found, aliens coming through the holes were merely waived along in the "hope that [they] will flow in an orderly manner . . . to the nearest processing center." Moreover, agents let "some 4,555 migrants [in] during [the September 20] incident, but only 2,680 presented themselves for processing." Accordingly, the court found that "[n]o reasonable interpretation of the[] definitions [of 'apprehension' or 'detention'] can square with Border Patrol's conduct."

The court also rejected Defendants' argument that wire-cutting was generally necessary to prevent "medical emergencies." To be sure, the court (and the parties) recognized that "injury, drowning, dehydration, and fatigue are real and common perils in this area of the border," and so "medical emergencies justify cutting or moving [Texas's] fence." But the court rejected the notion that medical emergencies could justify any and all destruction of the c-wire. "While an ongoing medical emergency can justify opening the fence, the end of that exigency ends the justification." So, for example, "cutting the wire to address a single individual's display of distress does not justify leaving the fence open for a crowd of dozens or hundreds to pass through." The court also rejected Defendants' argument that cutting the c-wire could be justified because it would assist in the "prevention of possible future exigencies."

Despite these findings, the district court nonetheless denied Texas's request for a preliminary injunction. The court recognized that 5 U.S.C. § 702 generally waives the United States' sovereign immunity for claims for non-monetary relief based on an agency official's act or failure to act. Nonetheless, the court reasoned that § 702 does not "unequivocally"

encompass injunctive relief under common law conversion or trespass to chattels claims. Additionally, the court found that, "at this early stage of the case," Texas had not shown the c-wire cutting resulted from final agency action. Finally, the court found that there was "insufficient evidence at this juncture" to support Texas's *ultra vires* claim under 5 U.S.C.§ 706(2)(C).

Texas immediately appealed, seeking an emergency injunction pending appeal or a temporary administrative stay while the panel considered its motion. The panel granted an administrative stay. Defendants have since filed an opposition to Texas's request and Texas has filed a reply in support.

II. Standard of Review

"[W]e consider four factors in deciding whether the grant a stay pending appeal: (1) whether [Texas] has made a strong showing that [it] is likely to succeed on the merits; (2) whether [Texas] will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *SEC v. Barton*, 79 F.4th 573, 581 (5th Cir. 2023) (quoting *Nken*, 556 U.S. at 434). When the United States is the opposing party, the third and fourth requirements merge. *Nken*, 556 U.S. at 435.

III. Discussion

A.

We begin with Texas's likelihood of success on the merits of its common law trespass to chattels claim. For purposes of the TRO, the district court concluded Texas was likely to prevail on this claim. But the court nonetheless denied Texas's requested preliminary injunction because it concluded that 5 U.S.C. § 702 did not clearly waive sovereign immunity for claims of this sort. We disagree.

The federal government and its agencies are immune from suits, even by states, unless Congress clearly consents by waiving sovereign immunity. *See FDIC v. Meyer*, 510 U.S. 471, 475 (1994); *California v. Arizona*, 440 U.S. 59, 61–62 (1979). Any waiver must be clear and ambiguities are construed strictly in favor of immunity. *La. Dep't of Env't Quality v. EPA*, 730 F.3d 446, 448–49 (5th Cir. 2013).

Section 702 of the APA provides in relevant part:

> 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 or that the United States is an indispensable party.

5 U.S.C. § 702. We have explained that § 702 "generally waives" sovereign immunity, *Apter v. HHS*, 80 F.4th 579, 589 (5th Cir. 2023), including for "suits seeking nonmonetary relief through nonstatutory judicial review of agency action." *Geyen v. Marsh*, 775 F.2d 1303, 1307 (5th Cir. 1985); *see also Doe v. United States*, 853 F.3d 792, 798–99 (5th Cir. 2017) (explaining that § 702 "broaden[s] the avenues for judicial review of agency action by eliminating the defense of sovereign immunity" in suits seeking nonmonetary relief).

Section 702 plainly waives immunity for Texas's trespass to chattels claim. 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." Accordingly, Texas's claim "shall not be dismissed nor relief therein be denied on the ground that it is against the

United States." 5 U.S.C. § 702. The district court legally erred by ruling otherwise.

Instead of relying on Section 702's plain terms, the district court read the provision strictly to preclude an immunity waiver. The court would have required a Fifth Circuit or Supreme Court decision explicitly reading "an action" in § 702 to include state or common law trespass to chattels claims. This misapplies the principle that courts should construe ambiguities strictly in favor of sovereign immunity, however. *See Sebelius v. Cloer*, 569 U.S. 369, 380–81 (2013). That principle does not apply here because there is no ambiguity. Section 702's plain terms waive sovereign immunity for "any suit" seeking nonmonetary relief in federal court. RICHARD FALLON ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 902 (7th ed. 2015).

Numerous federal circuits follow this plain-language reading of § 702.[5] For example, the D.C. Circuit has "repeatedly . . . rejected" the argument that § 702's waiver applies only to actions arising under the APA. *Trudeau v. FTC*, 456 F.3d 178, 186 (D.C. Cir. 2006) ("There is nothing in the language of the second sentence of § 702 that restricts its waiver to suits brought under the APA."). That court explained that § 702's "clear purpose" was to "elimina[te] the sovereign immunity defense in *all* equitable actions for specific relief against a Federal agency or officer acting in an

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[5] *See, e.g.*, *Delano Farms Co. v. Ca. Table Grape Comm'n*, 655 F.3d 1337, 1344 (Fed. Cir. 2011); *Veterans for Common Sense v. Shinseki*, 644 F.3d 845, 866 (9th Cir. 2011); *Michigan v. U.S. Army Corps of Eng'rs*, 667 F.3d 765, 775 (7th Cir. 2011); *Blagojevich v. Gates*, 519 F.3d 370, 371–72 (7th Cir. 2008); *Puerto Rico v. United States*, 490 F.3d 50, 57–58 (1st Cir. 2007); *Muniz-Muniz v. U.S. Border Patrol*, 741 F.3d 668, 672 (6th Cir. 2013); *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).

official capacity." *Ibid.* (quoting *Sea-Land Serv., Inc. v. Alaska R.R.*, 659 F.2d 243, 244 (D.C. Cir. 1981)). Similarly, the Third Circuit has explained that "the waiver of sovereign immunity in section 702 extends to *all nonmonetary claims against federal agencies and their officers*, regardless of whether or not the cases seek review of 'agency action' or 'final agency action.'" *Treasurer of N.J. v. U.S. Dep't of Treasury*, 684 F.3d 382, 397 (3d Cir. 2012) (emphasis added). Applying that principle, the court ruled the § 702 waiver applied to New Jersey's claims against the U.S. Treasury under the state's unclaimed property acts. *Id.* at 389–90, 400 n.19. In sum, the district court erred in interpreting § 702, which by its plain terms waives the United States' sovereign immunity for Texas's trespass to chattels claim.[6]

Defendants do not meaningfully engage with the plain language of § 702 or with the precedents applying it. Instead, they raise alternative arguments in support of the district court's denial of a preliminary injunction. All are unavailing.

First, Defendants argue that the Federal Tort Claims Act is the exclusive remedy for all state tort actions, regardless of the remedy they seek. We disagree. Defendants offer little support for this argument, which finds no purchase in the language of the FTCA and has been rejected by our sister

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[6] Our circuit does not appear to have addressed this § 702 issue directly. However, in *Alabama-Coushatta Tribe of Texas v. United States*, 757 F.3d 484 (5th Cir. 2014), we favorably cited both the D.C. Circuit's *Trudeau* decision, as well as the 7th Circuit's *Michigan v. U.S. Army Corps of Engineers* decision, both of which adopt a plain-language reading of § 702. *See Alabama-Coushatta*, 757 F.3d at 489. Additionally, we noted in *Alabama-Coushatta* that part of the *first* sentence of § 702 (waiving immunity where a person is "adversely affected or aggrieved by agency action within the meaning of a relevant statute") applies "when judicial review is sought pursuant to a statutory or non-statutory cause of action that arises completely apart from the general provisions of the APA." *Ibid.* That view is entirely consistent with reading the second sentence of § 702 to waive immunity for any nonmonetary claim, state or federal, as our sister circuits do.

circuits. *See Michigan v. U.S. Army Corps of Eng'rs*, 667 F.3d at 775 (rejecting argument that "the FTCA implicitly prohibits injunctive relief in tort suits against the United States" as "read[ing] too much into congressional silence"); *see also U.S. Info. Agency v. Krc*, 989 F.2d 1211, 1216 (D.C. Cir. 1993) (FTCA does not "impliedly forbid[] specific relief for tortious interference with prospective employment opportunities").

Next, Defendants argue that they enjoy intergovernmental immunity against Texas's claims. We again disagree. Defendants have no intergovernmental immunity because Texas is exercising its rights only as a proprietor, and, as the district court found, Texas is neither directly regulating the Border Patrol nor discriminating against the federal government. *See United States v. Washington*, 596 U.S. 832, 838–39 (2022) (clarifying 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") (citations and internal quotation marks omitted).

Finally, Defendants argue they enjoy jurisdictional immunity under the Immigration and Nationality Act ("INA"). They are again mistaken. The INA bars lower courts from issuing injunctions against certain immigration statutes, specifically 8 U.S.C. §§ 1221–1232. *See* 8 U.S.C. § 1252(f)(1). That bar does not apply here, however. To cut Texas's c-wire, Defendants did not rely on any of the statutes covered by the INA bar. Instead, they relied on 8 U.S.C. §§ 1103(a)(3) and 1357(a)(3), neither of which are covered. Accordingly, an injunction against the Defendants would, at most, have only a "collateral effect on the operation" of the covered statutes, which is permissible. *See Garland v. Aleman Gonzalez*, 596 U.S. 543, 553 n.4 (2022).

Having concluded Defendants do not enjoy sovereign immunity against Texas's trespass to chattels claim, we briefly consider Texas's likelihood of success on that claim. 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." On appeal, Texas reasserts its likelihood of success on that claim. Defendants do not brief this issue and have thus waived any argument. *Bailey v. Shell W. E&P, Inc.*, 609 F.3d 710, 722 (5th Cir. 2010). We therefore agree with the district court that Texas has demonstrated a strong likelihood of success on the merits of its trespass to chattels claims.[7]

B.

We next consider whether Texas has shown it would be irreparably injured absent a stay. The district court found Texas would suffer irreparable harm "in the form of loss of control and use of its private property." We see no error, clear or otherwise, in this finding. *See Jiao v. Xu*, 28 F.4th 591, 598 (5th Cir. 2022).

The district court found that Defendants' employees have repeatedly "damage[d], destroy[ed], and exercis[ed] dominion over state property" and "show[ed] that they intend to prevent [Texas] from 'maintaining operational control over its own property.'" Accordingly, the court concluded that "compensation for past injury cannot adequately redress the prospect of continuing or future harm for which the only appropriate remedy would be

[7] Because we decide Texas is likely to succeed on this claim, we need not decide whether Texas is also likely to succeed on its APA claims that Defendants have acted arbitrarily and capriciously and, alternatively, that Defendants have acted *ultra vires*. We express no opinion on those claims.

injunctive relief." The district court was correct. When a trespass is continuous such that stopping it would require a "multiplicity of suits," an injunction is justified. *See, e.g.*, *Donovan v. Pa. Co.*, 199 U.S. 279, 304–05 (1905) (where a case involves "a continuing trespass," equitable relief is necessary to "avoid[] a multiplicity of suits" and "the inadequacy of a legal remedy . . . is quite apparent"); *see also Rojas-Adam Corp. of Del. v. Young*, 13 F.2d 988, 989–90 (5th Cir. 1926); *Beathard Joint Venture v. W. Hous. Airport Corp.*, 72 S.W.3d 426, 432 (Tex. App.—Texarkana 2002, no pet.) (applying Texas law). In other words, where a tort claim seeks to stop a "continuing trespass to land," as Texas's does, irreparable injury has been shown and injunctive relief is appropriate. *See* RESTATEMENT (SECOND) OF TORTS § 938 cmt. c (1979).[8]

C.

Finally, we turn to the public interest prong. *See Nken*, 556 U.S. at 435 (third and fourth prongs merge when United States is opposing party). The district court, incorporating its TRO opinion by reference, focused its public interest analysis on two distinct bases: preventing unlawful agency action and deterring illegal immigration. Agreeing that the first ground plainly serves the public interest and weighs in Texas's favor, we need not consider the second. *See Daniels Health Scis., L.L.C. v. Vascular Health Scis., L.L.C.*, 710 F.3d 579, 585 (5th Cir. 2013).

"There is generally no public interest in the perpetuation of unlawful agency action." *Louisiana v. Biden*, 55 F.4th 1017, 1035 (5th Cir. 2022)

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[8] *See also* 42 Am. Jur. 2d *Injunctions* § 109 (2023) (explaining that "prevention of a multiplicity of suits is universally recognized as a ground for equitable intervention by injunction, and especially is this so in the case of trespasses. . . . even when each act of trespass is trivial or the damage is trifling and despite the fact that no single trespass causes irreparable injury").

(citation omitted). And there is "substantial public interest in having governmental agencies abide by the federal laws that govern their existence and operations." *Texas v. United States*, 40 F.4th 205, 229 (5th Cir. 2022) (citation and quotations omitted). 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. Moreover, the public interest supports clear protections for property rights from government intrusion and control.[9] Accordingly, we find no abuse of discretion in the district court's weighing of the public interest prong.

IV. Conclusion

Because Texas has carried its burden under the *Nken* factors, we GRANT its request for an injunction pending appeal. Accordingly, 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. 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* App. K at 4, 9–11 (Oct. 30, 2023).

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[9] *See Chi., B. & Q.R. Co. v. City of Chicago*, 166 U.S. 226, 235–36 (1897) ("Due protection of the rights of property has been regarded as a vital principle of republican institutions."); *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922); *Minard Run Oil Co. v. U.S. Forest Serv.*, 670 F.3d 236, 257 (3d Cir. 2011); *Apple Inc. v. Samsung Elec. Co., Ltd.*, 809 F.3d 633, 647 (Fed. Cir. 2015).

No. 23-50869

APPENDIX

No. 23-50869

No. 23-50869

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No. 23-50869

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
DEL RIO DIVISION

THE STATE OF TEXAS,	§	
	§	
Plaintiff	§	
	§	**Civil Action No.**
v.	§	**DR-23-CV-00055-AM**
	§	
U.S. DEPARTMENT OF HOMELAND SECURITY; ALEJANDRO MAYORKAS, in his official capacity as Secretary of the U.S. Department of Homeland Security; U.S. CUSTOMS & BORDER PROTECTION; U.S. BORDER PATROL; TROY A. MILLER, in his official capacity as Acting Commissioner for U.S. Customs & 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 U.S. Border Patrol,	§	
	§	
Defendants.	§	

MEMORANDUM OPINION AND ORDER

Pending before the Court is the State of Texas's (the "Plaintiff") Motion for a Preliminary Injunction or Stay of Agency Action (the "Motion") against the United States Department of Homeland Security ("DHS"); Alejandro Mayorkas, in his official capacity as Secretary of DHS ("Mayorkas"); United States Customs and Border Protection ("CBP"); United States Border Patrol ("BP"); Troy A. Miller, in his official capacity as Acting Commissioner for CBP ("Miller"); Jason Owens, in his official capacity as Chief of BP ("Owens"); and Juan Bernal, in his official capacity as Acting Chief Patrol Agent of the Del Rio Sector of BP ("Bernal") (collectively, the

"Defendants"). (ECF No. 3-1.) Upon careful consideration of the record and relevant law, the Court **DENIES** the motion for preliminary injunctive relief.

I. BACKGROUND

A. Procedural Background

On October 24, 2023, the Plaintiff commenced this civil action against the Defendants. (ECF No. 1.) According to the Plaintiff, the Defendants are destroying its property by cutting the concertina wire ("c-wire" or "wire") fence the Plaintiff constructed near the U.S.-Mexico border. (*Id.* at 3-4.) The Plaintiff claims that this property destruction is intended to allow migrants to enter the country illegally. (*Id.* at 1-4.) The Plaintiff raises numerous claims against the Defendants, including common law conversion, common law trespass to chattels, and several violations under the Administrative Procedure Act ("APA"). (*Id.* at 23-28.) The Plaintiff seeks the following: preliminary and permanent injunctive relief to enjoin the Defendants from seizing or destroying the Plaintiff's property; a stay of agency action under 5 U.S.C. § 705; a declaration that the Defendants' actions are unlawful; and costs. (*Id.* at 28-29.) Together with the Complaint, the Plaintiff filed a motion for preliminary injunctive relief, which is presently before the Court. (ECF No. 3-1.)

Three days later, on October 27, 2023, the Plaintiff filed a Motion for a Temporary Restraining Order ("TRO"). (ECF No. 5.) One day later, the Plaintiff filed a Notice of Escalating Property Damage in Support of its Emergency Motion for a TRO. (ECF No. 8.) The Plaintiff alleged that the Defendants, knowing a motion for a TRO had already been filed, used a forklift to seize concertina wire and smash it to the ground. (*Id.*) The Court, considering the motion for a TRO *ex parte* and on an expedited basis, granted the request on October 30, 2023, which forbade the Defendants from interfering with the Plaintiff's concertina wire except for medical

emergencies. (ECF No. 9 at 4, 11.) Following the TRO, the Defendants filed an opposition to the motion. (ECF No. 23-1.) Thereafter, the Plaintiff filed a reply in support of its request for a preliminary injunction. (ECF No. 27-1.)

The parties appeared before the Court on November 7, 2023 for an initial hearing on the motion for preliminary injunction. The Court heard testimony from the Plaintiff's witness, Michael Banks, Border Czar for the State of Texas, and from the Defendants' witnesses, Mario Trevino, Deputy Patrol Agent in Charge for the U.S. Border Patrol at the Eagle Pass South Station, and David S. BeMiller, Chief of Law Enforcement Operations at U.S. Border Patrol Headquarters. The Court also considered extensive arguments from the parties. On November 9, 2023, the Court extended the TRO for an additional 14 days to fully consider the parties' arguments and evidence. (ECF No. 33.) The Court then ordered that a second preliminary injunction hearing should be held, that the parties provide supplemental briefs on the APA claims, that the parties define various legal terms, and that the parties provide all documents and communications related to the cutting of the Plaintiff's c-wire and any other border barriers. (*Id.*)

On November 14, 2023, the Defendants filed a Motion to Modify the Court's November 9, 2023 Order. (ECF No. 38.) The Defendants explained they would not be able to fully comply with the Court's order for production given the breadth of the order and the limited amount of time remaining before the next hearing, which the parties consented to have on mutually agreeable days between November 20 and November 29, 2023. (ECF Nos. 36, 38.) The Defendants proposed limiting the Court's discovery to seven custodians likely to have responsive documents to the Court's order. (ECF Nos. 38 at 4; 38-1 at 4.) These custodians included the Chief Patrol Agent and Deputy Patrol Agent of the Del Rio Sector, the Patrol Agents in Charge and Deputy Patrol Agents in Charge of the Eagle Pass North and Eagle Pass South Stations, and the Chief of Law

Enforcement Operations. (ECF No. 38-1 at 4.) According to the Defendants, a targeted search of these seven individuals yielded over 310,000 emails and documents. (ECF No. 38 at 4.) Thus, the Defendants also requested that they be permitted to produce only responsive documents from the search described in paragraphs 11, 12, and 15 of the Courey Declaration. (*Id.* at 4-5.)

On November 15, 2023, the Court denied in part and granted in part the Defendants' motion to modify. (ECF No. 39.) Specifically, the Court ordered that its November 9, 2023 Order not be modified except to limit document production to the period between March 6, 2021, and November 9, 2023. (*Id.*) The parties had until November 21, 2023 to produce the documents as modified. (*Id.*) The Court also set the second preliminary injunction hearing for November 27, 2023. In a separate order, the Court set a virtual conference for November 21, 2023 regarding document production, the TRO, and the second preliminary injunction hearing. (ECF No. 41.)

Before the virtual conference, the Defendants reported that they reviewed more than 6,000 documents pulled from a search of the seven identified custodians' electronic records to include the modified period. (ECF No. 43 at 6.) From the pool, the Defendants produced approximately 1,182 documents and five videos, asserting they attempted to maintain appropriate controls to safeguard privileges and other necessary redactions and withholdings. (*Id.*) They stated these documents reflect that the c-wire "inhibits Border Patrol's ability to patrol the border and inspect, apprehend, and process migrants in this four-mile stretch of the border, and the ways in which Border Patrol has coordinated with Texas about the wire in this area." (*Id.* at 7.) They further stated that while Border Patrol and the Texas Department of Public Safety ("DPS") have coordinated concerning the c-wire, the documents reflect that the "relationship has deteriorated over time, driven at least in part by at least one instance in which Texas DPS personnel threatened

to criminally charge Border Patrol for cutting the wire and DPS efforts to impede Border Patrol access to certain areas." (*Id.* at 8.)

Following the virtual conference, the Court ordered that the TRO be extended to November 29, 2023, at 11:59 p.m. on consent of the parties. (ECF No. 46 at 1.) The Court further ordered that the Defendants had until the morning of the second preliminary injunction hearing to produce the outstanding documents as previously ordered. (*Id.* at 2.) On November 26, 2023, the Defendants submitted additional documents to the Court for its review. The Plaintiff also submitted documents to the Court on November 21 and November 27, 2023. The Court held the second preliminary injunction hearing on November 27, 2023.

The Court now considers the Plaintiff's Motion for Preliminary Injunction. (ECF No. 3-1.) For purposes of clarifying the record, the Court makes its factual and legal determinations below based on the following: the Plaintiff's Complaint (ECF No. 1); the Plaintiff's Motion for Preliminary Injunction (and the appended declarations and exhibits) (ECF No. 5-1); the Plaintiff's Notice of Escalating Property Damage (and the appended declaration) (ECF No. 8); the Court's TRO entered on October 30, 2023 (ECF No. 9); the Plaintiff's video exhibits submitted on October 30, 2023 (ECF No. 10); the Defendants' Opposition to the Preliminary Injunction (and the appended declarations and exhibits) (ECF No. 23-1); the Plaintiff's Notice of Filing of Amended Declaration of Manuel Perez (ECF No. 26); the Plaintiff's Reply in Support of the Preliminary Injunction (and the appended declarations and exhibits) (ECF No. 27-1); the arguments, testimony, and evidence presented at hearings before the Court on November 7 and November 27, 2023; the Defendants' document production submitted to the Court *ex parte* and for *in camera* review on November 21, November 26, and November 29, 2023; and the Plaintiff's document production submitted to the Court *ex parte* and for *in camera* review on November 21 and

November 27, 2023.[1] The Court also considers the Defendants' Supplemental Brief filed on November 21, 2023, and the Plaintiff's Supplemental Brief filed on November 27, 2023. (ECF Nos. 47, 48.)

B. Factual Background

The U.S.-Mexico border presents a unique challenge that is equal parts puzzling to outsiders and frustrating to locals. The immigration system at the heart of it all, dysfunctional and flawed as it is, would work if properly implemented. Instead, the status quo is a harmful mixture of political rancor, ego, and economic and geopolitical realities that serves no one. So destructive is its nature that the nation cannot help but be transfixed by, but simultaneously unable to correct, the present condition. What follows here is but another chapter in this unfolding tragedy. The law may be on the side of the Defendants and compel a resolution in their favor today, but it does not excuse their culpable and duplicitous conduct.

i. The Border – A Brief Synopsis

Much of the 1,200-mile run of the Rio Grande River separating Texas and Mexico presents a bucolic setting, rolling from ranches to pecan orchards and back again. Twenty-nine official ports of entry dot the landscape, but much of the focus in this matter, and the border debate more broadly, is the vast stretches of land between. To guard this area, Congress created Border Patrol. Its principal statutory objective, in the words of the Defendants, "is to deter illegal entry into the United States and to intercept individuals who are attempting to unlawfully enter the United States." (ECF No. 23-1 at 13.) Border Patrol agents are empowered to apprehend noncitizens

[1] The Court is cognizant of the general nature of contents of the documents and is not relying on any particular document in this order.

unlawfully entering the country, process them, inspect them for asylum or related claims, and in appropriate circumstances, place them in removal proceedings. (*Id.* at 13–14.)

In recent years, the character of the situation facing Border Patrol agents has changed significantly. 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. (ECF No. 3-1 at 9–10 (citing internal DHS figures).) Border Patrol is on track to meet or exceed those numbers in 2023. (*Id.* at 10.) As expected, organized criminal organizations take advantage of these large numbers. *The New York Times* reported that conveying all those people to the doorstep of the United States has become an incredibly lucrative enterprise for the major Mexican drug cartels. (*Id*. at 10–12.) However, the infrastructure built by the cartels for human cargo can also be used to ship illegal substances, namely fentanyl. (*Id.* at 11.) 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.*)

Migrant numbers increased apparently in response to softened political rhetoric. To prepare those additional migrants for parole, Border Patrol devoted increasing portions of its manpower to processing. (ECF No. 37 at 63, 64.) For this purpose, the Defendants set up a temporary processing center on private land in Maverick County, Texas close to the Rio Grande River. (*Id.* at 143–45, 163–65, 200, 223 (discussing the processing center and its location).) As it became known that additional migrants were being allowed entry into the country, more appeared at the border, requiring still more agents to be pulled from deterrence and apprehension to processing. (ECF No. 37 at 63, 64.) This became a cycle in which the gaps in law enforcement at the border grew wider even as more illegal entries occurred. (*Id.*)

ii. Operation Lone Star and the Concertina Wire

The Plaintiff launched Operation Lone Star in 2021 to aid Border Patrol in its core functions. (ECF No. 3-1 at 14.) Through that initiative, the Plaintiff allocated resources in an attempt to stem the deteriorating conditions at the border. (*Id.*; ECF No. 37 at 62–64.) The activity subject to dispute here is the Plaintiff's laying of concertina wire along several sections of riverfront. The wire serves as a deterrent—an effective one at that. The Court heard testimony that in other border sectors, the wire was so successful that illegal border crossings dropped to less than a third of their previous levels. (ECF No. 37 at 71–74.) 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. (*Id.* at 71–75.) The Eagle Pass area, though, is another matter.

Eagle Pass, and Maverick County generally, is the epicenter of the present migrant influx: nearly a quarter of migrant entries into the United States happen there. (ECF No. 3-1 at 18–19.) Naturally, the Plaintiff's efforts under Operation Lone Star flowed there as well. Just over 29 miles of concertina wire was installed in Maverick County by September 2023. (ECF No. 37 at 76.)

Of course, the installed wire creates a barrier between crossing migrants and law enforcement personnel, meaning that it must be cut in the event of an emergency, such as a drowning or heat exhaustion. The Plaintiff does not contest this. In fact, the Plaintiff itself cuts the wire from time to time to provide first aid or render treatment. (*Id.* at 79–80.) The problem arises when Border Patrol agents cut the wire without prior notification to the Plaintiff for reasons other than emergencies.

Plaintiff's Exhibit 10 neatly displays this issue.[2] In the video, Border Patrol agents are cutting a hole in the wire to allow a group of migrants to climb up from the riverbank. However, another hole already exists in the wire, less than 15 feet away, through which migrants can be seen passing. After completing the second hole and installing a climbing rope for migrants, agents then proceed to further damage the wire in that area and cut a third hole further down. Meanwhile, in the background, a Border Patrol boat can be seen situated in the middle of the river, passively observing a stream of migrants as they make the hazardous journey from Mexico, across the river, and then up the bank on the American side. At no point are the migrants interviewed, questioned as to citizenship, or in any way hindered in their progress into the United States.[3]

Border Patrol agents can be seen cutting multiple holes in the concertina wire for no apparent purpose other than to allow migrants easier entrance further inland.[4] 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? Would it not be easier, and safer, to receive them at a port of entry? In short, the very emergencies the Defendants assert make it necessary to cut the wire are of their own creation.

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[2] Because the video is not yet publicly available, the Court includes herewith still images taken from the video as Appendix A. Those images provide a visual representation of key moments that factor heavily in the Court's analysis.

[3] It is important to note that the Court is aware of at least fourteen incidents of wire cutting. (ECF No. 3-2 at 10–13, 23–28; ECF No. 8-1.) However, the Court will focus on the September 20 incident, as shown in Plaintiff's Exhibit 10, because it is most illustrative for analysis purposes. The Court is aware of one additional wire cutting incident that took place after the TRO was issued, but the Court is satisfied that a sufficient emergency existed to justify the action.

[4] The evidence suggests that on the day Plaintiff's Exhibit 10 was filmed, several migrants attempting to cross the river had been swept away. (ECF No. 37 at 127–28.) Accordingly, the wire was cut to rescue the individuals situated on the riverbank who had already entered the country, given the muddy and slippery conditions. (*Id.* at 132–33.) However, this assertion, made by Agent Mario Trevino, is totally uncorroborated by the condition of the migrants seen on the video. Regardless, Agent Trevino's testimony is not lent great weight by the Court given his evasive answers and demeanor.

Making matters worse are the cynical arguments of the Defendants in this case. During the second preliminary injunction hearing, counsel for the Defendants argued that although no Border Patrol agent can be seen making any sort of effort to physically restrain them, the migrants are in fact in custody because their path is bounded on both sides by wire and fence. It is disingenuous to argue the wire hinders Border Patrol from performing its job, while also asserting the wire helps. But regardless, the Court heard testimony that some 4,555 migrants entered during this incident, but only 2,680 presented themselves for processing that day at the Eagle Pass South Border Patrol Station. (ECF No. 37 at 113, 147–48.)[5] This information was provided to Banks by an unidentified Texas National Guardsman. (*Id.* at 113.) The Defendants do not contest the final processing number, only the number of entries on that day, though they do so without their own contrary evidence. (*Id.* at 148.)

II. STANDARD OF REVIEW

A preliminary injunction is an "extraordinary and drastic remedy," which is never awarded as a right. *Munaf v. Geren*, 553 U.S. 674, 689–90 (2008); *accord Pham v. Blaylock*, 712 F. App'x 360, 363 (5th Cir. 2017); *Miss. Power & Light Co. v. United Gas Pipe Line Co.*, 760 F.2d 618, 621 (5th Cir. 1985). Its purpose is to preserve the relative positions of the parties until a trial on the merits can be held. *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981); *Texas v. United States*, 809 F.3d 134, 187 n.205 (5th Cir. 2015). A preliminary injunction is warranted only when a movant can show (1) a substantial likelihood of success on the merits; (2) substantial injury to the moving party if the injunction is not granted; (3) that the injury outweighs any harm that will result if the injunction is granted; and (4) that granting the injunction will not disserve the public interest. *All. for Hippocratic Med. v. FDA*, 78 F.4th 210, 242 (5th Cir. 2023); Fed. R. Civ. P. 65.

[5] Importantly, the Defendants raised concerns about the actions of the Plaintiff and its agents, suggesting the cooperative portrait the Plaintiff paints may not be entirely accurate.

When the United States is the opposing party to a preliminary injunction, the third and fourth requirements merge. *Nken v. Holder*, 556 U.S. 418, 435 (2009). The party seeking the injunction must clearly carry the burden of persuasion on all four requirements. *Munaf*, 553 U.S. at 689-90; *Karaha Bodas Co. v. Negara*, 335 F.3d 357, 363 (5th Cir. 2003). Thus, "the decision to grant a preliminary injunction is to be treated as the exception rather than the rule." *Karaha Bodas Co.*, 335 F.3d at 363–64 (quoting *Miss. Power & Light Co.*, 760 F.2d at 621).

III. JURISDICTIONAL ISSUES

A. Standing

To establish standing, a plaintiff must show an injury in fact caused by a defendant and redressable by a court order. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). The Plaintiff complains of three types of injuries caused by the Defendants' cutting or moving the fence: (1) harm to the fence; (2) harm from increased crime; and (3) increased state expenditures on healthcare, social services, public education, incarceration, and its driver's license program. (ECF No. 3-1 at 12-13, 40-41, 43; ECF No. 27 at 16-19.)

The Defendants do not challenge the Plaintiff's proprietary interest in the integrity of the fence. (*See* ECF No. 23-1 at 14 n.3.) They also admit that they did, in fact, cause the asserted harm to the fence. (*Id.* at 15.) Instead, the Defendants argue that states have "no cognizable interest in how the federal government exercises its enforcement discretion." (*Id.* at 38-39 (citing *United States v. Texas*, 143 S. Ct. 1964, 1970-71 (2023).) In that case, the Supreme Court held that states generally lack standing to assert "attenuated" injuries in the form of "indirect effects" of federal policies on "state revenues or state spending" derived from an alleged federal failure to make arrests or bring prosecutions. *Texas*, 143 S. Ct. at 1972 n.3, 1973-76.

In addition, citing *Haaland v. Brackeen*, 143 S. Ct. 1609, 1640 (2023), the Defendants argue that the Plaintiff cannot assert claims on behalf of its citizens. (ECF No. 23-1 at 39.) *Haaland* found that states lacked standing to challenge a statute's rule governing child custody disputes based on a state's abstract "promise to its citizens" and indirect recordkeeping costs that were not "fairly traceable" to the federal policy. *Haaland*, 143 S. Ct. at 1640-41. The Defendants argue that the Plaintiff cannot claim standing based on an alleged rise in crime affecting the Plaintiff's citizens—such as drug smuggling, human trafficking, terrorist infiltration, and cartel activities (*see* ECF No. 3-1 at 7-8)—that the Defendants claim is similarly difficult to trace to their cutting or moving the fence. (ECF No. 23-1 at 39.)

While *Texas* and *Haaland* cast significant doubt on whether the Plaintiff can claim indirect increased expenditures or a rise in crime as bases for standing, they do not address direct physical damage to a state's property by agents of the federal government.[6] Here, the Plaintiff has direct proprietary interests in seeking to prevent or minimize damage to its fence caused by the Defendants' affirmative acts and to protect the Plaintiff's control and intended use thereof. The asserted harm is particularized, concrete, and directly traceable to the Defendants' conduct. *See Lujan*, 504 U.S. at 560. It also satisfies the APA's additional "zone of interests" standing requirement. *See Texas v. United State*s, 50 F.4th 498, 521 (5th Cir. 2022) (holding the requirement is satisfied if a claim is "arguably within the zone of interests to be protected or regulated by the statute" and the test is "not especially demanding."). The APA expressly covers

[6] The Plaintiff suggests that this case could fall within one of the potential exceptions contemplated in *Texas*, *see* 143 S. Ct. at 1973-74, thereby establishing standing based on indirect state expenditures. (ECF No. 37 at 25.) The Plaintiff cited *Texas v. United States* as an example of adequate standing derived in this manner. Because the Court finds the injury-in-fact prong of standing analysis satisfied by direct harm to the Plaintiff's property, the Court need not further examine this argument at this time. 809 F.3d 134 (5th Cir. 2015).

"sanctions" affecting a plaintiff, defined as an agency's "destruction, taking, seizure, or withholding of property." 5 U.S.C. § 551.

The only question is whether the relief the Plaintiff seeks can redress such injuries. That, of course, depends on whether such relief is available in the first place. While an award of monetary damages under the Federal Tort Claims Act ("FTCA") could perhaps redress past property damage, as the Defendants suggest (*see* ECF No. 23 at 21-22, 38), the Plaintiff does not seek that remedy. (*See* ECF No. 1.)[7] Absent other jurisdictional issues, the Court must therefore review the availability of injunctive relief or a stay of agency action and potential barriers thereto.[8]

B. Sovereign Immunity for Plaintiff's Common Law Claims

In Counts One and Two of this suit, the Plaintiff asserts common law claims for conversion and trespass to chattels. (ECF No. 1 at 23-25.) When the Court granted the Plaintiff's *ex parte* motion for a TRO, it did so under the trespass to chattels claim. However, at the time, sovereign immunity was not considered. (*See* ECF No. 9 at 4.) For the reasons stated below, sovereign immunity presents a jurisdictional barrier to the Plaintiff's request for injunctive relief under its state law claims. That said, the Plaintiff may have alternative state law relief for the damage the Defendants have previously caused to its concertina wire.

The Supreme Court has long recognized that "[i]t is axiomatic that the United States may not be sued without its consent and that the existence of consent is a prerequisite for jurisdiction." *United States v. Mitchell*, 463 U.S. 206, 212 (1983) (citing *United States v. Sherwood*, 312 U.S.

[7] The Court recognizes 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.

[8] The Court pauses here to address the matter of jurisdiction. There is no dispute the Court holds jurisdiction over the Plaintiff's APA claims, but also asserted are various state law claims. The Court may maintain supplemental jurisdiction over the state law claim if it is so related to the other claim(s) that it forms part of the same case or controversy. 28 U.S.C. § 1367. Here, it is clear the state law claims are so bound up with the APA claims as to be part of the same case or controversy. Accordingly, the Court has the ability to, and does, exercise supplemental jurisdiction. Likewise, any issue not discussed in this order would not be outcome determinative at this stage of litigation.

584, 586 (1941)); *accord FDIC v. Meyer*, 510 U.S. 471, 475 (1994) ("Absent a waiver, sovereign immunity shields the Federal Government and its agencies from suit."); *Loeffler v. Frank*, 486 U.S. 549, 554 (1988); *Price v. United States*, 174 U.S. 373, 375-76 (1899) ("It is an axiom of our jurisprudence. The Government is not liable to suit unless it consents thereto, and its liability in suit cannot be extended beyond the plain language of the statute authorizing it."); *see also La. Dep't of Envtl. Quality v. United States EPA*, 730 F.3d 446, 448-49 (5th Cir. 2013). The exemption of the United States from being sued without its consent, known as "sovereign immunity," extends to a suit by a State. *California v. Arizona*, 440 U.S. 59, 61-62 (1979) (quoting *Kansas v. United States*, 204 U.S. 331, 342 (1907)) ("It does not follow that because a State may be sued by the United States without its consent, therefore the United States may be sued by a State without its consent. Public policy forbids that conclusion."); *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 781-82 (1991); *Minnesota v. United States*, 305 U.S. 382, 387 (1939).

Only Congress can establish how the United States and its governing agencies can consent to be sued. *Gonzalez v. Blue Cross Blue Shield Ass'n*, 62 F.4th 891, 899 (5th Cir. 2023); *La. Dep't of Envtl. Quality*, 730 F.3d at 449 (citing *Mitchell*, 463 U.S. at 215-16) ("An agency cannot waive the federal government's immunity when Congress hasn't."). Moreover, the terms of consent to be sued may not be inferred or implied and must be unequivocally expressed in statutory text to define a court's jurisdiction. *United States v. White Mt. Apache Tribe*, 537 U.S. 465, 472 (2003); *United States v. Bormes*, 568 U.S. 6, 9 (2012); *Gonzalez*, 62 F.4th at 899. Further, a waiver of sovereign immunity and the conditions therein "must be construed strictly in favor of the sovereign." *La. Dep't of Envtl. Quality*, 730 F.3d at 449.

Congress has enacted legislation to create several exceptions to sovereign immunity. At issue in this preliminary injunction is the 1976 amendment to the Administrative and Procedures Act, passed under 5 U.S.C. § 702 ("Section 702"), which provides:

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. 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 or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: Provided, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought. 5 U.S.C. § 702.

Section 702 has thus "waived sovereign immunity for suits seeking nonmonetary relief through nonstatutory judicial review of agency action." *Geyen v. Marsh*, 775 F.2d 1303, 1307 (5th Cir. 1985). "The intended effect of the amendment was to broaden the avenues for judicial review of agency action by eliminating the defense of sovereign immunity in cases covered by the amendment." *Doe v. United States*, 853 F.3d 792, 798-99 (5th Cir. 2017) (internal citations omitted).

Under Fifth Circuit precedent, Section 702 waives immunity for two distinct types of claims. *See Ala.-Coushatta Tribe of Tex. v. United States*, 757 F.3d 484, 489 (5th Cir. 2014). First, it waives immunity for claims where a "person suffer[s] legal wrong because of agency action." *Id.* (citing § 702). "This type of waiver applies when judicial review is sought pursuant only to the general provisions of the APA." *Id.* Second, Section 702 waives immunity for claims where a person is "adversely affected or aggrieved by agency action within the meaning of a relevant

statute." *Id.* (citing § 702). "This type of waiver applies when judicial review is sought pursuant to a statutory or non-statutory cause of action that arises completely apart from the general provisions of the APA." *Id.* (citing *Sheehan v. Army & Air Force Exch. Serv.*, 619 F.2d 1132, 1139 (5th Cir. 1980); *Trudeau v. FTC*, 456 F.3d 178, 187 (D.C. Cir. 2006)). Under this second type, there does not need to be final agency action; only "agency action" as defined by 5 U.S.C. § 551(13) is required. *Id.* (citing *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 882 (1990)). Because the Plaintiff's common law claims are separate and apart from those brought under the APA, they would not fall under the first type of waiver and could only be considered under the second type of waiver.

In the Motion for Preliminary Injunction, the Plaintiff asserts that Section 702 generally waives the United States's immunity from a suit "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." (ECF No. 3-1 at 40.) They further assert, "[the] Defendants have waived sovereign immunity for *ultra vires* claims under the APA via the 1976 amendment to Section 702, which 'waived sovereign immunity for suits seeking nonmonetary relief through nonstatutory judicial review of agency action.'" (*Id.* (quoting *Geyen*, 775 F.2d at 1307).) The Motion for Preliminary Injunction did not, however, explicitly contend that Section 702's waiver of sovereign immunity applies to the state law claims of conversion and trespass to chattels. (*See generally* ECF Nos. 1, 3-1.)

In response to the Motion, the Defendants contend that the Plaintiff cannot assert its state law claims of conversion and trespass to chattels because Congress has not waived the United States's sovereign immunity for such claims. (ECF No. 23-1 at 20.) The Defendants note that the Plaintiff invokes Section 702's waiver of sovereign immunity for actions in federal court "seeking

relief other than money damages," but states no binding precedent that Section 702 covers its state law claims. (*Id.* at 21.)

In reply, the Plaintiff again relies on the statutory text of Section 702 and asserts that the waiver of sovereign immunity applies to "any action seeking relief other than money damages." (ECF No. 27-1 at 10.) In support of this theory, the Plaintiff asserts that the "plain 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." (*Id.* (citing § 702) (emphasis in original).) The Plaintiff relies on the D.C. Circuit's review of Section 702 and supposes that the D.C. Circuit held the waiver extends to "any action" seeking non-monetary relief. (*Id.* at 10-11 (citing *Trudeau*, 456 F.3d at 187).) The Plaintiff also cites a Supreme Court decision where instead of establishing that Section 702 can never apply to state law claims the Supreme Court held the waiver did not apply because the equitable lien sought constituted a claim for money damages. (*Id.* at 11 (citing *Department of Army v. Blue Fox, Inc*. 525 U.S. 255, 263 (1999).)

In supplemental briefing, the Plaintiff asserts that the Defendants have not cited any case that finds the Plaintiff is barred from the state law injunctive relief they seek. (ECF No. 48 at 11.) The Plaintiff also claims that a finding for the Defendants would create a circuit split with at least three other circuits. (*Id.* (citing *Perry Capital LLC v. Mnuchin*, 864 F.3d 591, 620 (D.C. Cir. 2017); *Michigan v. U.S. Army Corps of Eng'rs*, 667 F.3d 765, 775 (7th Cir. 2011); and *B.K. Instrument, Inc. v. United States*, 715 F.2d 713, 727 (2d Cir. 1983).)

After an extensive review of the relevant law, the Court has not identified any case or legal authority that finds Congress unequivocally consented to suit for injunctive relief under common law conversion or trespass to chattels causes of action. The Fifth Circuit has also never recognized the availability of such a claim. Nor has any other circuit court. Absent binding precedent, the

Plaintiff instead relies on a D.C. Circuit case that held Section 702's waiver of sovereign immunity permits "nonstatutory" actions.[9] *Trudeau*, 456 F.3d at 187.

This argument is unavailing for several reasons. The D.C. Circuit did not hold that Section 702 waives sovereign immunity for common law claims of conversion or trespass to chattels. *See id.* Instead, the plaintiff in *Trudeau* initially raised claims against the Federal Trade Commission ("FTC") for exceeding its statutory authority under 15 U.S.C. § 46(f) and violations of the First Amendment, but the non-statutory actions derived from the plaintiff's statutory and First Amendment claims. *Id.* at 190 ("[Plainitff] contends that his § 46(f) claim falls within the core of the doctrine of non-statutory review because the issuance of a false and misleading press release exceeds the FTC's authority to disseminate information in the public interest.") (internal quotations omitted); *see also* Brief for Appellants at 33, *Trudeau*, 456 F.3d 178 (No. 05-5365) (asserting "it is well-established the First Amendment itself provides a means for plaintiffs to seek 'equitable relief to remedy agency violations' thereof.") Although not explicitly stated, the non-statutory claims the D.C. Circuit recognized seem to present as *ultra vires* claims, as opposed to separate or independent common law causes of action for conversion and trespass to chattels. *See Trudeau*, 456 F.3d at 190 (holding "[t]here certainly is no question that nonstatutory review 'is intended to be of extremely limited scope,' [*Griffith v. Fed. Lab. Rel. Auth.*, 842 F.2d 487, 493 (D.C. Cir. 1988)], and hence represents a more difficult course for [plaintiff] than would review under the APA (assuming final agency action) for acts 'in excess of statutory . . . authority,' 5 U.S.C. § 706(2)(C)."). And notably, the *Trudeau* case was considered under a motion to dismiss posture, not a preliminary injunction posture as in this case. *See generally id.*

[9] To the extent that *Trudeau* supports the Plaintiff's position, the D.C. Circuit, as well as the Second and Seventh Circuits, are not binding on this Court.

The Plaintiff also contends that the absence of cited precedent barring their state law claims supports the waiver of sovereign immunity. Notwithstanding that the burden is squarely on the Plaintiff, the fact that a court has not barred such claims does not then mean that Congress has authorized them. It could imply the very opposite—that the sovereign immunity doctrine is so imposing that a plaintiff would not seek such equitable relief against the United States. More likely, however, it indicates that a separate, appropriate remedy already exists. *See, e.g.*, *Blue Fox, Inc*., 525 U.S. at 263-64. Indeed, in *Blue Fox*, cited by the Plaintiff, the Supreme Court denied the equitable lien sought because it constituted a claim for money damages. *Id.*

In order to find that sovereign immunity is waived for the Plaintiff's common law claims, the Court would have to conclude that the language in Section 702 unequivocally expresses Congress's consent to *all* non-monetary actions arising outside the APA. Statutory construction presumes Congress did not intend for Section 702's waiver to be so over-inclusive. Had Congress intended to include common law claims for conversion or trespass to chattels or other state law claims under Section 702, it could have so stated. To accept the Plaintiff's proposition would so broaden the scope of the APA that sovereign immunity would be effectively negated for state law causes of action seeking equitable relief. To the extent there is any ambiguity in the application or statutory interpretation of Section 702, the Court is reminded that "a waiver of the Government's sovereign immunity will be strictly construed, in terms of its scope, in favor of the sovereign." *Lane v. Peña*, 518 U.S. 187, 192 (1996). Thus, the Court finds that the Plaintiff's common law claims do not overcome sovereign immunity.

Although the Plaintiff did not raise the issue, the Defendants recognized that the FTCA "'waives the United States' sovereign immunity from tort suits' in certain circumstances, and is 'the exclusive remedy for compensation for a federal employee's tortious acts committed in the

scope of employment.'" (ECF No. 23-1 at 21-22 (quoting *McGuire v. Turnbo*, 137 F.3d 321, 324 (5th Cir. 1998); *Dickson v. United States*, 11 F.4th 308, 312 (5th Cir. 2021).) The record here shows that Border Patrol has been known to cut the fences and locked gates of private ranch owners to perform immigration duties. As most of the land near our southern border is privately owned, this relationship with Border Patrol has existed out of necessity for decades. In instances where Border Patrol causes harm to private property, such as damaging fencing and allowing livestock to escape, they will often *ex post* restore a rancher by repairing the property or through financial compensation. Such a cooperative relationship suggests that Border Patrol, and the federal government at large, acknowledge its duty to respect private property. So, too, could such a relationship between the Plaintiff and the Defendants exist. Thus, although the Plaintiff's common law claims seeking injunctive under conversion and trespass to chattels are unlikely to succeed, it is conceivable that the Plaintiff could pursue money damages for prior harm to its fence. The Court is not ruling on what would be appropriate for future potential harm; it only references prior harm.

IV. ANALYSIS

A. Likelihood of Success on the Merits

i. The Defendants' Conduct

a. The Defendants' Justifications

While the Plaintiff bears the burden on a motion for preliminary injunctive relief, the Court will first consider the Defendants' own explanations for their conduct before turning to the Plaintiff's allegations. The Defendants offer two justifications for their series of decisions to cut or move the Plaintiff's fence: (1) to discharge their statutory obligation to inspect, apprehend, and

detain individuals unlawfully entering the United States; and (2) to prevent or address medical emergencies. (*See* ECF No. 23-1 at 15.)

1. Inspection, Apprehension, and Processing

The federal government "has broad, undoubted power over the subject of immigration and the status of [noncitizens]," which "rests, in part, on the National Government's constitutional power to 'establish an [sic] uniform Rule of Naturalization' and its inherent power as sovereign to control and conduct relations with foreign nations." *Arizona v. United States*, 567 U.S. 387, 394-95 (2012). To that end, Congress has specified who may be admitted to the United States, *see, e.g.*, 8 U.S.C. § 1182, criminalized unlawful entry and reentry, *see id.* §§ 1325, 1326, and determined who may be removed and under what conditions, *see id.* §§ 1182, 1225-1227; *Arizona*, 567 U.S. at 395-96.

Congress entrusted DHS with the "power and duty to control and guard the boundaries and borders of the United States against the illegal entry of [noncitizens]." 8 U.S.C. § 1103(a)(5). Congress has charged the Secretary of Homeland Security to "establish such regulations" and "perform such other acts as he deems necessary for carrying out his authority under [8 U.S.C. §§ 1101-1537]." *Id.* § 1103(a)(3). That includes "authoriz[ing] any employee . . . to perform or exercise any of the powers, privileges, or duties conferred [by the Immigration and Nationality Act (INA)]." *Id.* § 1103(a)(4). Those employees authorized by the Secretary to enforce the INA are known as immigration officers. 8 U.S.C. § 1101(a)(18).

U.S. Customs and Border Protection ("CBP"), in coordination with other federal agencies, bears responsibility to "enforce and administer all immigration laws," including "the inspection . . . and admission of persons who seek to enter" the United States and "the detection, interdiction, removal . . . and transfer of persons unlawfully entering . . . the United States." 6 U.S.C. §

211(c)(8). U.S. Border Patrol is "the law enforcement office of [CBP] with primary responsibility for interdicting persons attempting to illegally enter . . . the United States" and for "deter[ring] and prevent[ing] the illegal entry of terrorists, . . . persons, and contraband." *Id.* § 211(e)(3)(A)-(B). Individual immigration officers, including Border Patrol agents, "interrogate any [noncitizen] or person believed to be [a noncitizen] as to his right to be or remain in the United States" and may "arrest any [noncitizen] who in his presence or view is entering or attempting to enter the United States in violation of any law." 8 U.S.C. § 1357(a)(1)-(2).

Before Congress enacted § 1357(a)(3), Border Patrol's "activities . . . in certain areas [were] seriously impaired by the refusal of some property owners along the border to allow patrol officers access to extensive border areas in order to prevent such illegal entries." H.R. Rep. No. 82-1377, 1952 U.S.C.C.A.N. 1358, 1360. In response, Congress authorized agents to "access . . . private lands" without a warrant within 25 miles of an external border "for the purposes of patrolling the border to prevent the illegal entry of [noncitizens] into the United States." 8 U.S.C. § 1357(a)(3). Congress intended that Border Patrol agents should "conduct[ ] such activities as are customary, or reasonable and necessary, to prevent the illegal entry of aliens into the United States." 8 C.F.R. § 287.1(c); *see* H.R. Rep. No. 82-1377, 1952 U.S.C.C.A.N. at 1360 (Section 1357(a)(3) "adequately authorize[s] immigration officers to continue their normal patrol activities, concerning which Congress has been well informed during the past 48 years, and which authority it unquestionably meant these officers to exercise.").

DHS has long made use of this provision to move or cut privately owned fencing within 25 miles of the international border when exigencies arise. Border Patrol guidance dating back to the 1980s has advised Border Patrol Agents to work with private landowners where the agents encounter locked gates prohibiting access to the border. (ECF No. 23-2 at 3.) While Border Patrol

guidance requires that agents take steps to work with the owner to gain access, it acknowledges that the agent may cut locks or fencing that prohibits access to the border. (*Id.*) When they must do so, Border Patrol guidance instructs agents to take steps to close gates, make available repairs to fencing, and take other steps to ameliorate any damage. (*See id.*)

Here, the Defendants claim that the appearance of any migrants at the Rio Grande qualifies as a situation requiring agents to cut the Plaintiff's fence. The Defendants argue that "[n]oncitizens who have already crossed the international boundary into the United States stand on a different legal footing from those who have not." (ECF No. 23-1 at 12.) Disregarding that entering the United States by crossing the river other than at an official port of entry is a federal crime, *see* 8 U.S.C. § 1325, the Defendants note that a person "present in the United States who has not been admitted or who arrives in the United States (whether or not at a designated port of arrival . . .)" is "deemed . . . an applicant for admission." *Id.* § 1225(a)(1).[10] Claiming that "[n]o immigration statute that Congress has enacted authorizes Border Patrol agents to simply push noncitizens already present in the United States back to Mexico," (ECF No. 23-1 at 13), the Defendants maintain that they must assist anyone who has unlawfully crossed the border to advance further into the United States for immigration processing after this initial "inspection."

In short, the Defendants claim their hands are tied. They have a statutory duty to "inspect," so they claim they must cut or move the Plaintiff's fence to get to the river. Once at the river, they claim they have no authority to direct illegal entrants to return to Mexico, so they must cut or move

[10] The nation's immigration system is separate from its criminal justice system. An individual who enters the United States by unlawful means may freely apply for a change in his or her immigration status while serving time in federal prison. At the Rio Grande, Border Patrol agents can and should both process those they encounter as "applicants for admission" and arrest them for criminal conduct. As discussed below, Border Patrol agents may also simply direct such individuals to return to the far side of the river.

the Plaintiff's fence to help such individuals proceed further into the United States. These claims fail to recognize the dual civil and criminal nature of the immigration statutes.

The Defendants first argue that the mere act of laying eyes on migrants as they wade through the Rio Grande, as seen in Plaintiff's Exhibit 10, qualifies as the beginning of a drawn-out inspection process. As noted above, this inspection process involves: no warning against criminal violation of immigration law; no attempt to prevent the same; no direction to enter at a lawful port of entry; no questioning; no document requests; and no search for drugs or weapons. (*See* Plaintiff's Ex. 10; ECF No. 37 at 84–85.) According to the Defendants, pure visual observation justifies cutting or moving the Plaintiff's fence to access the river.

This rests on two false and misguided propositions. First, Border Patrol agents already possess access to both sides of the fence by which to accomplish this extraordinarily superficial, hands-off "inspection": to the river and bank by boat and to the further-inland side of the fence by road. (*See, e.g.*, Plaintiff's Ex. 10; ECF No. 37 at 82.) The fence may conceivably slow Border Patrol agents' ability to respond to medical emergencies, as discussed below, but the evidence and testimony presented so far has not conclusively established that any delay would materially impede inspection practices of the kind described above.

Second, "an alien who is detained shortly after unlawful entry cannot be said to have 'effected an entry.' Like an alien detained after arriving at a port of entry, an alien like respondent is 'on the threshold.'" *DHS v. Thuraissigiam*, 140 S. Ct. 1959, 1982–83 (2020) (citations omitted); *see also Leng May Ma v. Barber*, 357 U.S. 185, 186–87 (1958). Federal officials can and historically do take steps to turn migrants on the threshold back across the border into Mexico. *See, e.g.*, *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 163 (1993) (finding that aliens could be repatriated "without giving them any opportunity to establish their qualifications as refugees").

The Defendants' view of immigration enforcement would "create a perverse incentive to enter at an unlawful rather than a lawful location," which is why the Supreme Court rejected it for a migrant who managed to "mak[e] it 25 yards into U.S. territory before he was caught." *Thuraissigiam*, 140 S. Ct. at 1982.[11]

Border Patrol itself assesses agents' performance based on the number of migrants repelled, and thousands of migrants have, in fact, been "turned back" after crossing the Rio Grande. (ECF No. 37 at 66, 104.) The Defendants recently boasted their agents' authority to "turn back" migrants on the threshold of the international boundary. *See* Press Release, U.S. Customs & Border Protection (June 1, 2023), https://www.cbp.gov/newsroom/local-media-release/us-border-patrol-urges-migrants-not-endanger-their-lives-swimming (describing an incident on May 25, 2023, where Border Patrol agents were able to "turn [aliens] back south into Mexico" even after they "cross[ed] the maritime boundary line"). Publicly available records show that the Defendants regularly track incidents of successful "turn-backs" at the Border, including more than 5,000 "TBS"—*i.e.*, "Turn Back South"—between October 2018 and March 2020. *See* USBP FOIA Documents at 22, 25, 30, 128-29, 136-54, available at https://int.nyt.com/data/documenttools/border-patrol-fence-breach/b9addab9d72a6a2a/full.pdf (embedded in Zolan Kanno-Youngs, *Armed Mexicans Were Smuggled in to Guard Border Wall,*

[11] The Defendants argue that *Thuraissigiam* is inapposite for the proposition that a noncitizen who manages to cross the border has not really effected entry into the United States. (*See* ECF No. 47 at 21 n.5.) The Ninth Circuit there had held that a noncitizen had a constitutional Due Process right to more process than what Congress set out in § 1225(b)(1)(B)(ii), (v). The Supreme Court rejected that conclusion, holding that "the procedure authorized by Congress" is sufficient for "due process as far as [a noncitizen] denied entry is concerned." 140 S. Ct. at 1982. The Supreme Court also noted that such a noncitizen "has . . . those rights regarding admission that Congress provided by statute," *Id.* at 1983 (cleaned up). Like the Ninth Circuit in *Thuraissigiam*, the Defendants here seek to add to the requirements of the immigration statutes. This Court refuses to ignore Supreme Court precedent and follow the Ninth Circuit's example of inventing a novel barrier to immigration enforcement where none exists. Doing so "would undermine the 'sovereign prerogative' of governing admission to this country and create a perverse incentive to enter at an unlawful rather than a lawful location." *Id.* Those who enter the United States unlawfully do possess certain due process rights; the right to continue into the United States rather than be stopped at the border is not among them.

Whistle-Blowers Say, N.Y. TIMES (Dec. 7, 2020), https://www.nytimes.com/2020/12/07/us/politics/border-wall-mexico.html).

The Defendants cannot justify cutting or moving the Plaintiff's fence whenever and wherever they find convenient based on a supposed need to access the river by both boat and foot so they may passively observe migrants crossing. Nor can they do so when the Defendants fail to direct migrants attempting to unlawfully enter the United States to return back across the border per longstanding, Supreme Court-sanctioned practice.

The Defendants next claim that they must cut or move the Plaintiff's fence to allow migrants to proceed toward a further-inland processing center. (ECF No. 37 at 198.) Once they pass through the fence, Border Patrol agents orally direct persons whom they have just witnessed illegally entering the United States to walk as much as a mile or more—with vanishingly little if any further supervision or direction—and present themselves at the nearest immigration processing center. (ECF No. 37 at 83–85, 112–13, 115–16, 147–48, 169–170.) Notably, the Defendants concede that their hope that the aliens will flow in an orderly manner from the breach they created in the Plaintiff's fence to the nearest processing center relies on the Plaintiff's fence along the route.[12] The Defendants claim that easing migrants' path toward the processing center in this manner is necessary to "apprehend" and "detain" the migrants.

Border Patrol itself has defined "apprehension" as "the physical control or temporary detainment of a person who is not lawfully in the United States which may or may not result in an arrest." Customs & Border Protection, *Nationwide Enforcement Encounters: Title 8 Enforcement Actions and Title 42 Expulsions Fiscal Year 2024*, https://perma.cc/YWE2-B6UZ. It has defined "detention" as "[r]estraint from freedom of movement." CBP, *National Standards on Transport,*

[12] *See* forthcoming transcript of November 27, 2023 hearing. The Court has access to an audio recording of this hearing.

Escort, Detention, and Search at 28 (Oct. 2015), https://perma.cc/6KRP-2XTH. No reasonable interpretation of these definitions can square with Border Patrol's conduct. Visual observation is not physical control. Opening fences does not restrain freedom of movement. Blind trust that migrants who have just been seen criminally violating one boundary will respect barriers along the road toward a processing center constitutes neither "apprehension" nor "detention." No unfair cynicism is required to suspect that some such migrants likely commit other crimes (*e.g.*, drug smuggling, human trafficking, etc.) during this process, providing ample incentive for the individuals posing the greatest public danger to flee rather than deliver themselves to the Defendants.[13] To the extent migrants who fear no additional criminal or immigration consequence because of the Defendants' broader immigration policies, practices, and public statements elect to declare themselves at a processing center, their decision to do so can hardly be attributed to any acts to restrict their freedom of movement by the Defendants.

The Defendants cannot justify their wire-cutting based on purported "apprehension" and "detention" of migrants after they cross through the fence in the face of testimony of both parties strongly suggesting neither occurs without migrants' willing cooperation. (ECF No. 37 at 112, 115–116, 169–170). By ignoring the blatant criminal context of where, when, and how these "applicants for admission" enter the United States, the Defendants apparently seek to establish an unofficial and unlawful port of entry stretching from wherever they open a hole through the Plaintiff's fence to the makeshift processing center they established on private land a mile or more away. The Defendants even appear to seek gates in the Plaintiff's fence that the Defendants can control to facilitate this initiative. (*See id.* at 107-108, 114.) Establishing such a system at a

[13] As noted above, the Plaintiff's fact witness claimed that during one incident, its personnel observed 4,555 migrants enter through holes the Defendants created while only 2,680 presented themselves for processing. (ECF No. 37 at 113, 147-48.)

particularly dangerous stretch of the river creates a perverse incentive for aliens to attempt to cross at that location, begetting life-threatening crises for aliens and agents both.

The evidence presented amply demonstrates the utter failure of the Defendants to deter, prevent, and halt unlawful entry into the United States. The 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. Nor may they seek judicial blessing of practices that both directly contravene those same statutory obligations and require the destruction of the Plaintiff's property. Any justifications resting on the Defendants' illusory and life-threatening "inspection" and "apprehension" practices, or lack thereof, fail.

2. Medical Emergencies

At times, agents rescue individuals who have crossed into the United States illegally and who are in distress in or near the banks of the Rio Grande River. (ECF No. 23-2 at 4–5). These routine rescues, life-saving measures, and other such urgent care, often provided at grave risk to agents' safety, are a noble and legitimate part of Border Patrol operations. Injury, drowning, dehydration, and fatigue are real and common perils in this area of the border, particularly in the context of changing water levels and regular triple-digit heat. (*Id.*) The parties agree that medical emergencies justify cutting or moving the Plaintiff's fence. (ECF No. 37 at 28, 79; ECF No. 23-1 at 15). The Court endorses this agreement.

However, evidence suggests that these exceptional circumstances can be used to swallow a rule against wire-cutting such as the one the Court entered in the TRO. (*See, e.g.*, ECF No. 37 at 81.) While an ongoing medical emergency can justify opening the fence, the end of that exigency ends the justification. As a hypothetical example, cutting the wire to address a single individual's display of distress does not justify leaving the fence open for a crowd of dozens or hundreds to

pass through. In addition, an emergency that can be just as adequately addressed by less destructive means, such as by reaching one or more individuals by boat rather than on foot, does not justify opening the fence at all. Moreover, given the greater potential for abuse, prevention of possible future exigencies rests on far more dubious grounds as a justification for destroying the use of private property than the need to address actual, ongoing crises. Further, the question of whether a situation rises to the level of an emergency is an objective inquiry of a reasonable person's judgment, not the subjective determination of a particular agent. With those qualifications, the Court accepts medical emergencies as a narrow, partial justification for the Defendants' conduct.

b. Plaintiff's Allegation of a Policy, Practice, or Pattern

The Plaintiff alleges that the Defendants' series of acts interfering with its wire fence represent a "a policy, practice, or pattern of seizing, damaging, and destroying Texas's personal property by cutting, severing, and tearing its concertina wire fence to introduce breaches, gaps, or holes in the barrier." (ECF No. 3-1 at 27.) The Plaintiff alleges that the Defendants "have authorized their officials or agents to engage in this conduct anytime an alien has managed to illegally cross the international border in the Rio Grande to process that alien in the United States—even where migrants are in no apparent distress or when any legitimate exigency has dissipated." (*Id.*) The Plaintiff suggests that orders to cut the Plaintiff's wire are largely implemented by Border Patrol supervisors, rather than lower-level agents, who allegedly often refuse to destroy or damage the Plaintiff's border infrastructure. (*Id.*; *see also* ECF No. 37 at 139–140, 150.)

The Plaintiff argues that the sheer volume and regularity of similar incidents, together with repeated public statements from DHS itself, demonstrates an institutional policy, practice, or pattern of sanctioning Border Patrol agents' cutting or moving the fence even absent exigent

circumstances. (ECF No. 27-1 at 16–17.)[14] The Defendants deny that any such alleged pattern reflects an intentional policy handed down by DHS or Border Patrol leadership. (ECF No. 47-1 at 16–18; *see* ECF No. 23-2 at 5; ECF No. 37 at 138, 186–87.)

The problem appears unique to the Del Rio sector. The testimony and evidence of both parties suggest that, by and large, Border Patrol agents have not cut the Plaintiff's wire except when faced with exigent circumstances in the El Paso and Rio Grande Valley Sectors. (ECF No. 47-1 at 16–18 (citing ECF No. 37 at 80, 96).) The Defendants argue that this disproves the notion that there is an agency-wide directive requiring or authorizing agents to cut the wire when they observe any unlawful border crossing. (*Id.* (citing ECF No. 37 at 80, 96).) The Defendants admit that supervisors in the Del Rio Sector have provided "guidance" to agents along the following lines: "(a) if there are no exigent circumstances, the agents should call a supervisor before any wire-cutting; and (b) if a supervisor is unavailable or exigent circumstances exist, the agents should use their judgment in determining how best to apprehend noncitizens or provide medical assistance." (*Id.* (citing ECF No. 37 at 137–41).) The Defendants emphasize that in both cases, agents have discretion to assess the situation and exercise their judgment whether to cut the wire. (*Id.* (citing ECF No. 23-2 at 6; ECF No. 37 at 110-11).)

Regular 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

[14] The Plaintiff provides the following examples of the Defendants' public statements, each of which is consistent with the Defendants' position in this litigation: On June 30, 2023, a spokesperson for CBP justified federal officials' cutting Texas's fence as "consistent w/ federal law" simply because "[t]he individuals had already crossed the Rio Grande from Mexico [and] were on U.S. soil." (*See* ECF No. 3-1 at 22 (citing CBP statement).) On October 24, 2023, in response to inquiries about this lawsuit concerning Defendants' destruction of state property, a DHS spokesperson said: "Border Patrol agents have a responsibility under federal law to take those who have crossed onto U.S. soil without authorization into custody for processing." (*See* ECF No. 5 at 6 n.1 (citing DHS statement).) The Defendants reiterated the same policy in identical terms in statements to numerous news outlets after this Court granted a TRO. (*See* ECF No. 27-1 at 16-17.)

possibility that an unwritten "policy, practice, or pattern" exists. However, the Court cannot find, on this procedural posture, that the evidence the Court has reviewed thus far conclusively establishes or disproves the existence of such an institutional "policy, practice, or pattern." Such a determination would require further review of evidence and likely additional investigation.

ii. APA (Final Agency Action)

The Plaintiff asserts that the Defendants' interference with its c-wire is a final agency action and thus reviewable under the APA. (ECF No. 3-1 at 29.) The APA empowers courts to review only "final agency action." 5 U.S.C. § 704; *see also Lujan*, 497 U.S. at 885 ("When, as here, review is sought not pursuant to specific authorization in the substantive statute, but only under the general review provisions of the APA, the 'agency action' in question must be 'final agency action.'"). Absent a final agency action, a court lacks subject matter jurisdiction to consider a claim brought under the APA. *See Peoples Nat'l Bank v. Off. of the Comptroller of the Currency of the U.S.*, 362 F.3d 333, 336 (5th Cir. 2004); *accord Sierra Club v. Peterson*, 228 F.3d 559, 562 (5th Cir. 2000) ("Absent a specific and final agency action, we lack jurisdiction to consider a challenge to agency conduct.").

An agency action is final when two conditions are satisfied. *See Bennett v. Spear*, 520 U.S. 154, 177-78 (1997). First, the action "must mark the 'consummation' of the agency's decisionmaking process." *Id.* Second, "the action must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'" *Id.* at 178 (quoting *Port of Boston Marine Terminal Assn. v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71 (1970)). Although this analysis is "flexible" and "pragmatic," courts take great care not to confuse final agency action with tentative or interlocutory agency actions, or broader programmatic decisions. *Lujan*, 497 U.S. at 891; *see also Peterson*, 228 F.3d at 562. The APA does not authorize courts to

supervise "day-to-day agency management," *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 67 (2004), and thus, courts must reject invitations to find final agency action in an agency's "continuing (and thus constantly changing) operations." *Lujan*, 497 U.S. at 890.

As the party seeking preliminary injunctive relief, the Plaintiff bears the burden of showing a substantial likelihood that it will succeed on the merits of its APA claim, which requires final agency action. *Clark v. Pichard*, 812 F.2d 991, 993 (5th Cir. 1987) (discussing the standard for obtaining injunctive relief). Here, the Plaintiff alleges that the Defendants' interference with its concertina wire constitutes such a final action. (ECF No. 1 at 27.) Specifically, it asserts that "[s]ince September 20, 2023, federal agents have developed and implemented a policy, pattern, or practice of destroying Texas's concertina wire to encourage and assist thousands of aliens to illegally cross the Rio Grande and enter Texas." (*Id.* at 3.) The question, then, is whether the evidence presented thus far creates a substantial likelihood that the Plaintiff will ultimately establish the existence of final agency action.

At the November 7, 2023, hearing, the Court heard evidence from CBP officials involved in the decisions to cut or manipulate Texas's concertina wire. After the hearing, the Court took a step it rarely takes at this stage of injunction litigation and ordered the parties to produce additional documents regarding Texas's placement of the concertina wire and the Defendants' subsequent interference with it. (ECF No. 9.) The parties provided as much discovery as narrow time constraints allowed, and thereafter, the Court reviewed thousands of pages of emails, reports, and other documents. These documents shed further light on the events referenced at the November 7, 2023 hearing. But even viewed alongside the evidence presented at the hearing,[15] they fall short of demonstrating the existence of a final agency action.

[15] The Court continues to review the numerous documents provided by the parties and may supplement the factual findings in this Order in light of new information discovered through this review process.

Having considered the evidence presented at the November 7, 2023 hearing, the post-hearing document production, and the arguments of counsel, the Court finds that the Plaintiff has not, at this preliminary stage, shown a substantial likelihood that it will establish the existence of a final agency action. Of course, the Court does not suggest that the Plaintiff *cannot* establish final agency action when this case proceeds to be heard on the merits. As the Defendants note, the documents within the federal government's possession that mention the Plaintiff's concertina wire potentially number in the millions. (ECF No. 43 at 2.) Discovery may produce information that sheds new light on the nature of the directives to cut or otherwise interfere with the Plaintiff's concertina wire. But at this early stage of the case, the Court finds insufficient evidence of final agency action. Absent such final agency action, the Court need not address the Plaintiff's claims that the Defendants are engaging in arbitrary and capricious action or exceeding their statutory authority.

iii. APA (Ultra Vires)

The Plaintiff correctly asserts that final agency action need not exist for the Court to address its non-statutory *ultra vires* claim. (ECF No. 48 at 13 n.7.) The Fifth Circuit recognizes that courts "may have jurisdiction to review an *ultra vires* agency decision under one of the exceptions to the final agency action rule." *Exxon Chemicals Am. v. Chao*, 298 F.3d 464, 467 n.2 (5th Cir. 2002); *see also Apter v. Dep't of Health & Hum. Servs.*, 80 F.4th 579, 589 (5th Cir. 2023) (noting that for *ultra vires* claims, agency action complained of "need not be final").

To prevail on its *ultra vires* claim, the Plaintiff must show that an agency had "no colorable basis" for the challenged actions. *Fla. Dep't of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 682 (1982). This standard sets a high bar for plaintiffs bringing *ultra vires* claims. *See Trudeau*, 456 F.3d at 190. "[A] state officer may be said to act *ultra vires* only when he acts 'without any

authority whatever.'" *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 102 (1984). "There certainly is no question that nonstatutory review 'is intended to be of extremely limited scope.'" *Trudeau*, 456 F.3d at 190 (quoting *Griffith*, 842 F.2d at 493). Thus, plaintiffs bringing *ultra vires* claims face a higher burden than they do for traditional APA claims. *See id.* ("[*Ultra vires*] hence represents a more difficult course for Trudeau than would review under the APA (assuming final agency action) for acts 'in excess of statutory . . . authority.'") (quoting 5 U.S.C. § 706(2)(C)). Here, based on the evidence presented at the November 7, 2023 hearing and the documents submitted thereafter, the Court finds that there is insufficient evidence at this juncture to support a substantial likelihood of success on the Plaintiff's *ultra vires* claim.

B. Irreparable Harm and Public Interest

The possible harm suffered by the Plaintiff in the form of loss of control and use of its private property continues to satisfy the irreparable harm prong of preliminary-injunction analysis. (*See* ECF No. 9 at 7-8; *see also* above discussion of potential redressability for past violation of the Plaintiff's property under the FTCA.) The public interest calculation reflected in the Court's TRO decision stands. (*See id.* at 9-10.)

V. CONCLUSION

Accordingly, it is **ORDERED** that the Plaintiff's Motion for a Preliminary Injunction Order or Stay of Agency Action (ECF No. 3-1) is **DENIED**.

SIGNED and ENTERED on this 29th day of November 2023.

ALIA MOSES
Chief United States District Judge