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.

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