IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
MCALLEN DIVISION

THE GENERAL LAND OFFICE OF THE STATE OF TEXAS, and GEORGE P. BUSH, in his official capacity as Commissioner of the Texas General Land Office, Plaintiffs, v. JOSEPH R. BIDEN, JR., in his official capacity as President of the United States of America, *et al.*, Defendants.	Civil Action No. 7:21-cv-00272
THE STATE OF MISSOURI, and THE STATE OF TEXAS, Plaintiffs, v. JOSEPH R. BIDEN, JR., in his official capacity as President of the United States of America, *et al.*, Defendants.	Civil Action No. 7:21-cv-00420 (formerly 6:21-cv-00052)

BRIEF OF IMMIGRATION REFORM LAW INSTITUTE AS *AMICUS CURIAE* IN OPPOSITION TO THE DEFENDANTS' MOTION TO DISMISS THE GLO PLAINTIFFS' AMENDED COMPLAINT

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INTRODUCTION

1. The Executive actions challenged by the General Land Office ("GLO") Plaintiffs—the Presidential Proclamation ordering the Department of Homeland Security ("DHS") to "pause work on each construction project on the southern border wall" and the resulting DHS Plan to terminate border wall construction contracts and redirect the appropriated funds—show the administration to be at war with the laws it is charged with administering. It is at war not only with the requirements of the law, which it refuses to follow, but with the law's purposes. This case calls upon this Court to declare that the executive branch is bound by the laws enacted by Congress.

2. DHS's refusal to comply with Congress's border-wall appropriations frustrate Congress's purpose in appropriating these funds, to the point of reversing the result Congress intended. In the face of Congress's purpose of stopping unlawful border crossing with a barrier that has been up to 90% effective, DHS's termination of border-wall construction ensures the continuation of the unlawful border-crossing that would have otherwise been stopped. This reversal of Congress's purpose abundantly shows that these policies, to use the language of the Supreme Court, are extreme enough to amount to an abdication of the agency's statutory responsibilities, and thus to be a violation of the Executive's constitutional duty to take care that the laws be faithfully executed.

3. Because the GLO Plaintiffs have set forth a more than plausible Take Care claim in their amended complaint and because DHS's actions are the antithesis of the Executive's duty to take care that the laws be faithfully executed, this Court should deny Defendants' motion to dismiss the GLO Plaintiffs' Take Care claim.

ARGUMENT

I. GLO Plaintiffs Raise a Plausible and Meritorious Take Care Claim

4. The Court should deny Defendants' motion to dismiss the GLO Plaintiffs' Take Care claim. The Take Care Clause provides that the President "shall take care that the laws be faithfully executed." U.S. Const. art. II, § 3. Under separation-of-powers principles, it falls to Congress to make the laws, to the Executive to enforce the laws faithfully, and to the judiciary to interpret the laws. Under that division of authority, this Court should roundly reject Defendants' active refusal to expend appropriated funds for actual border wall construction as directed by Congress.

5. To be sure, there is less than an abundance of judicial precedent providing guidance on how to apply the Take Care Clause. Importantly, however, the Supreme Court has suggested that nonenforcement of the law may run afoul of the Take Care Clause "where it could justifiably be found that the agency has 'consciously and expressly adopted a general policy' that is so extreme as to amount to an abdication of its statutory responsibilities." *Heckler v. Chaney*, 470 U.S. 821, 833 n.4 (1985) (quoting *Adams v. Richardson*, 480 F.2d 1159, 1162 (D.C. Cir. 1973) (en banc)).[1]

[1] The Supreme Court indicated a willingness to address the Take Care Clause when it granted *certiorari* in *United States v. Texas*, 577 U.S. 1101 (2016), and ordered the parties to brief "[w]hether the [Deferred Action for Parents of Americans and Lawful Permanent Residents] Guidance violates the Take Care Clause of the Constitution, Art. II, § 3." The Fifth Circuit had declined to address the question. *See Texas v. United States*, 809 F.3d 134, 146 n.3 (5th Cir. 2015) (as revised). The Supreme Court affirmed that decision by an equally divided Court. *See United States v. Texas*, 136 S. Ct. 2271 (2016).

6. Recently, the Fifth Circuit explained how the Take Care Clause is a limit on executive powers and precludes the executive branch from suspending or dispensing with the law. *See Texas v. Biden ("Texas MPP")*, 20 F.4th 928, 980-82 (5th Cir. 2021). The D.C. Circuit has also held that the Take Care Clause "does not permit the President to refrain from executing laws duly enacted by the Congress as those laws are construed by the judiciary." *Nat'l Treasury Employees Union v. Nixon*, 492 F.2d 587, 604 (D.C. Cir. 1974). That court further observed that "the judicial branch of the Federal Government has the constitutional duty of requiring the executive branch to remain within the limits stated by the legislative branch." *Id.*; *see also Kendall v. United States ex rel. Stokes*, 37 U.S. 524, 613 (1838) (rejecting suggestion that the Take Care Clause vested the President with the power to dispense with laws and that recognizing such a power "would be clothing the President with a power entirely to control the legislation of [C]ongress"). In addition, another judge of this Court recently addressed the Take Care Clause and ruled that the executive branch, including its agencies, "must exercise any discretion accorded to it by statute in the manner which Congress has prescribed" and "may not dispense with a clear congressional mandate under the guise of exercising 'discretion.'" *Texas v. United States*, 2021 U.S. Dist. LEXIS 156642, *138-39 (S.D. Tex. Aug. 19, 2021)*; see also Texas v. United States*, 524 F. Supp. 3d 598, 649 (S.D. Tex. 2021) (holding that the executive's inherent authority over immigration "does not include the authority to 'suspend' or 'dispense with' Congress's exercise of legislative Powers in enacting immigration laws") (quoting *United States v. Midwest Oil Co.*, 236 U.S. 459, 505 (1915) (Day, J., dissenting), *Escoe v. Zerbst*, 295 U.S. 490, 493 (1935)).

7. Under these principles, the executive's failure here faithfully to execute the laws enacted by Congress is glaring. After stating its policy difference with Congress (claiming that wall construction "is not a serious policy solution" and is "a waste of money," Proclamation 10142 of January 20, 2021, 86 Fed. Reg. 7225 (Jan. 27, 2021)), and offering no other justification, the administration has refused to use Congress's appropriated funds to build border walls. And that evidently conscious policy of refusal, extreme in itself, has the extreme effect of frustrating Congress's purposes in passing the law. One obvious congressional purpose—the building of border walls—is simply blocked by DHS's actions taken in furtherance of the Proclamation.

8. Further, by refusing to expend the funds on border wall construction as appropriated, the administration is accomplishing the opposite of a more substantive result intended by Congress: the vast reduction—by up to 90 percent—of illegal border crossings where border walls would be built. *See* Dkt. 34 at ¶¶ 51-55 (discussing effectiveness of border walls); *see also* § 209(b)(1)(A) of Pub. L. No. 116-93, Div. D, 133 Stat. 2512 (limiting funds only to barrier designs that are operationally effective "as of the date of enactment of the Consolidated Appropriations Act, 2017 (Public Law 115-31), *such as currently deployed steel bollard designs* …") (emphasis added).

9. DHS's termination of construction contracts and refusal to spend designated funds on new border wall construction projects also frustrate Congress's broader goal of securing the nation's borders. Congress has charged the Secretary of DHS with 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). Further evidence of

Congress's purpose of securing the border against illegal entry are the statutorily mandated detentions of aliens who attempt to cross the border surreptitiously. *See Texas MPP*, 20 F.4th at 993-96 (explaining that aliens who attempt to enter the United States must be either detained, returned to contiguous territory, or paroled only on a case-by-case basis for humanitarian reasons).

10. As the GLO Plaintiffs allege, DHS has concluded that border walls work and are extremely effective at stopping illegal aliens from crossing the border. Dkt. 34 at ¶¶ 1, 51-55. Yet in the face of its own assessment of the effectiveness of a border wall, not to mention the statutory mandates set forth above, DHS refuses to execute—indeed, effectively suspends—the laws passed by Congress aimed at securing the border and controlling illegal entry by aliens. Instead of taking proven and funded measures to secure the border, DHS is taking actions that are resulting in chaos at the border, and thus signally frustrating the purposes of Congress throughout immigration law.

11. DHS's actions therefore support no mere garden-variety claim of a failure to "take Care that the Laws be faithfully executed," U.S. CONST. art. II, § 3, but constitute active opposition to those laws that offends the Take Care Clause in a way that may be unprecedented. It is one thing to fail to enforce a law as fully as a party would like, or to enforce it according to a construction of its meaning that a party disputes; it is quite another thing, through non-enforcement, to make the law useless in attaining its intended purposes, and instead create the very situation the law was passed to prevent. In doing so, the conscious, express policy of non-enforcement here is easily "extreme" enough to amount to "abdication" and a true failure to take care. *Heckler*, 470 U.S. at 833 n.4.

12. Defendants try to argue that this case "turns on the meaning of the relevant statutes" and has no constitutional dimension. Dkt. 36 at ¶ 112. But any case arising under the Take Care Clause will necessarily involve assessing the scope of discretion left to the executive branch by a statute enacted by Congress. Here, Congress directed the executive branch to expend specified funds on border wall construction and left no discretion in spending those funds to the agency. Thus, this case is unlike *Mississippi v. Johnson*, where the Court held that the judiciary has no authority to direct the exercise of executive or political discretion by the President. *See* 71 U.S. 475, 499 (1867). Instead, like in *Kendall*, Congress specified how the appropriated funds must be spent, and therefore this case involves a judicially enforceable statutory duty (or what the *Mississippi* Court would call a "ministerial duty"). *See id.* (discussing the ministerial duty reviewed in *Kendall*).

13. Finally, the Court should also reject Defendants' suggestion that any judicial inquiry into the Executive's duty to take care that the laws be faithfully executed would somehow fail to show the due respect to a co-equal branch of government. Dkt. 36 at ¶ 113. No party has asked the Court to direct the President to exercise his unfettered executive power in any particular way. Instead, the GLO Plaintiffs seek injunctive and declaratory relief holding the President and other Defendants to clear statutory mandates. It is the Court's duty to adjudicate such disputes and decide whether Executive actions comply with the relevant statutory requirements. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 614 (1952) ("It is not a pleasant judicial duty to find that the President has exceeded his powers and still less so when his purposes were dictated by

concern for the Nation's well-being….") (Frankfurter, J., concurring). As Justice Jackson stated in *Youngstown*:

> With all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law, and that the law be made by parliamentary deliberations.
>
> Such institutions may be destined to pass away. But it is the duty of the Court to be last, not first, to give them up.

Id. at 655 (Jackson, J., concurring). Justice Jackson put *Youngstown* within a "judicial tradition" beginning with Chief Justice Coke's admonishing his sovereign that "[the King] is under God and the Law." *Id.* at 655 n.27 (interior quotation marks omitted). By framing the Take Care Clause as a duty, the Framers rejected the idea that the Executive should be vested with the power to suspend or dispense with laws enacted by Congress, and this Court has not only the authority under the Constitution to decide this question, but the duty to do so. *See Nat'l Treasury Employees Union*, 492 F.2d at 604 ("[T]he judicial branch of the Federal Government has the constitutional duty of requiring the executive branch to remain within the limits stated by the legislative branch.").

II. The Take Care Clause Supplies a Cause of Action

14. Unconstitutional agency action or inaction violates the Administrative Procedure Act ("APA"), *see* 5 U.S.C. § 706, and can be enjoined on that basis. Violations of the Take Care Clause, however, are actionable independently of the APA, and this Court can enjoin the Defendants' violations of their Take Care obligations under its inherent equitable powers. *See Armstrong v. Exceptional Child Center, Inc.*, 575 U.S. 320, 327-28 (2015) (discussing "a long history of judicial review of illegal executive action, tracing

back to England"); *Davis v. Passman*, 442 U.S. 228, 241-44 (1979) (holding that the Constitution itself, coupled with 28 U.S.C. § 1331, provides a cause of action to challenge federal officials who violate the Constitution). The Constitution, moreover, permits anyone with standing to raise equitable claims (and injunctive relief) against federal officers who act unconstitutionally. *Larson v. Domestic & Foreign Comm. Corp.*, 337 U.S. 682, 698-99 (1949); *cf. Ex parte Young*, 209 U.S. 123 (1908). Thus, even if the GLO Plaintiffs' claims fail under the APA, the Take Care Clause provides an independent cause of action to challenge the Executive's actions blocking the construction of the border wall.

CONCLUSION

15. For the foregoing reasons, the Court should deny the Defendants' motion to dismiss.

Respectfully submitted on February 3, 2022,

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CERTIFICATE OF SERVICE

I hereby certify that on February 3, 2021, a true and accurate copy of the foregoing document was filed electronically (via CM/ECF) and served on all counsel of record.

/s/ Matt Crapo
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