No. 23-50632

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States of America,

Plaintiff-Appellee,

v.

Greg Abbott, in his capacity as Governor of the State of Texas; State of Texas,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

EN BANC BRIEF FOR *AMICUS CURIAE* IMMIGRATION REFORM LAW INSTITUTE IN SUPPORT OF APPELLANTS

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SUPPLEMENTAL STATEMENT OF INTERESTED PERSONS

Pursuant to Fifth Circuit Rule 28.2.1 and Fed. R. App. P. 26.1, *amicus curiae* Immigration Reform Law Institute makes the following disclosures:

1) For non-governmental corporate parties please list all parent corporations: None.

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock: None.

3) The following entity has an interest in the outcome of this case: Immigration Reform Law Institute.

DATED: February 23, 2024

Respectfully submitted,

/s/ Matt Crapo

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INTEREST OF *AMICI CURIAE*[1]

The Immigration Reform Law Institute ("IRLI") is a non-profit 501(c)(3) public interest law firm dedicated to litigating immigration-related cases on behalf of, and in the interests of, United States citizens, and also to assisting courts in understanding and accurately applying federal immigration law. For more than twenty years the Board of Immigration Appeals has solicited supplementary briefing, drafted by IRLI staff, from the Federation for American Immigration Reform, of which IRLI is a supporting organization. IRLI has litigated or filed *amicus curiae* briefs in a wide variety of cases, including *Trump v. Hawaii*, 138 S. Ct. 2392 (2018); *United States v. Texas*, 599 U.S. 670 (2023); *Ariz. Dream Act Coalition v. Brewer*, 855 F.3d 957 (9th Cir. 2017); *Wash. All. Tech Workers v. U.S. Dep't Homeland Security*, 50 F.4th 164 (D.C. Cir. 2022); and *Matter of Silva-Trevino*, 26 I. & N. Dec. 826 (B.I.A. 2016).

[1] All parties have consented in writing to the filing of IRLI's *amicus curiae* brief. No counsel for a party in this case authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

INTRODUCTION

Texas's deployment of a marine floating barrier in a short stretch of the Rio Grande is in response to the federal government's ongoing abdication of its duty to protect States from invasion and to take care that the nation's immigration laws are faithfully executed. Since January 20, 2021, the Biden administration has purposely facilitated mass illegal entries into this country. It has temporarily paused all removals, gutted immigration enforcement guidelines, terminated the Migrant Protection Protocols (colloquially known as the "Remain in Mexico policy"), halted all border wall construction projects, reinstated "catch and release" at the border, weakened asylum requirements, and adopted mass parole programs. The abdication of both this administration's statutory duty to secure the border and its constitutional obligation to protect the States from invasion resulted in an estimated 5.5 million illegal aliens' crossing the border from inauguration day in 2021 through fiscal year 2022. *FAIR Analysis: 5.5 Million Illegal Aliens Have Crossed our Borders Since Biden Took Office—How is Secretary Mayorkas Still Employed?*, available at: https://www.fairus.org/press-releases/border-security/fair-analysis-55-million-illegal-aliens-have-crossed-our-borders (last visited Feb. 20, 2024). The number of encounters has only increased since. In fiscal year 2023 alone, Customs and Border Protection ("CBP") encountered over 3.2 million aliens, including nearly 2.5 million at the southwest border, with more than half of

those encounters, or nearly 1.4 million, being in Texas alone. CBP, *Nationwide Encounters*, available at: https://www.cbp.gov/newsroom/stats/nationwide-encounters (last visited Feb. 20, 2024). Over 85 percent of aliens encountered on the southern border are released into the United States. Fox News, *Mayorkas tells Border Patrol agents that 'above 85%' of illegal immigrants released into US: sources*, available at: https://www.foxnews.com/politics/mayorkas-tells-border-patrol-agents-illegal-immigrants-released-into-us-sources (last visited Feb. 20, 2024).

In response to this unprecedented border crisis and in the absence of any meaningful federal action to secure the border, Governor Abbott issued Executive Order GA-41 on July 7, 2022, in which he invoked the State of Texas's inherent right, as recognized by Article I, § 10, of the United States Constitution, to "secure the State of Texas and repel the illegal immigration that funds the cartels."[2] ROA 1704. Governor Abbott authorized State officials "to respond to this illegal immigration by apprehending immigrants who cross the border between ports of entry or commit other violations of federal law, and to return those illegal

[2] Two months later, on September 21, 2022, Governor Abbott issued Executive Order No. GA-42, in which he designated certain Mexican drug cartels as foreign terrorist organizations. Available at: https://gov.texas.gov/uploads/files/press/EO-GA-42_Mexican_cartels_foreign_terrorist_orgs_IMAGE_09-21-2022.pdf (last visited Feb. 19, 2024).

immigrants to the border at a port of entry." *Id.* On June 8, 2023, Governor Abbott announced plans to deploy "marine floating barriers" in the Rio Grande to "mak[e] it more difficult to cross the Rio Grande and reach the Texas side of the southern border." ROA 966 (internal quote omitted). One such marine floating barrier has been constructed in the Rio Grande "roughly two miles downstream of the International Bridge II in Eagle Pass," Texas. ROA 967.

The district court issued a preliminary injunction directing the State of Texas to remove the existing barrier near Eagle Pass and prohibiting the construction of any new floating barriers. ROA 1005-06. The district court erred in concluding that the government is likely to succeed on the merits, because federal statutes regulating navigable waterways cannot constrain Texas's exercise of its sovereign self-defense power to repel an invasion. The Court should vacate the district court's preliminary injunction because Article 1, § 10, cl. 3, of the Constitution explicitly recognizes that Texas retains its inherent authority to exercise war powers in the event of an invasion, and in doing so is not subject to the control of Congress.

ARGUMENT

As Texas persuasively argues in its supplemental en banc brief, the Rivers and Harbors Act ("RHA") should be read narrowly to avoid serious constitutional issues. Appellants' Supp. Br. at 39-42. If, however, such issues cannot be avoided,

and the RHA and a State's valid invocation of its direct power under the Constitution are held to conflict, it is the former that should give way. Under Article I, section 10, of the Constitution ("the State Self-Defense Clause"), Congress's regulation of navigable waterways cannot block a State's valid invocation of its sovereign power, "without the consent of Congress," to "engage in War" if "actually invaded." To decide otherwise would read "without the consent of Congress" out of the State Self-Defense Clause.

I. The Various States Retained Their Inherent Right to Self-Defense Upon Admission to the Union.

"When the original States declared their independence, they claimed the powers inherent in sovereignty—in the words of the Declaration of Independence, the authority 'to do all . . . Acts and Things which Independent States may of right do.'" *Murphy v. Nat'l Collegiate Athletic Ass'n*, 584 U.S. 453, 470 (2018) (quoting Declaration of Independence ¶ 32). Inherent in the sovereignty of an independent State, "and essential to self-preservation," is the power "to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe." *Nishimura Ekiu v. United States*, 142 U.S. 651, 659 (1892).

When it came to invasion, however, the original States, though they entered the Union with the understanding that the federal government would be responsible for the common defense of the new nation, did not cede their own inherent right to

self-defense. Rather, the Constitution explicitly recognizes that right in the State Self-Defense Clause, which reads (emphasis added):

> *No State shall, without the Consent of Congress*, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or *engage in War, unless actually invaded*, or in such imminent Danger as will not admit of delay.

U.S. Const. art. I, § 10. A corresponding constitutional provision, sometimes referred to as "the Invasion Clause," requires the federal government to protect each state from invasion. U.S. Const. art. IV, § 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion").

These two constitutional provisions, read together with the reservation of state powers in the Tenth Amendment,[3] show that the people conferred upon the federal government the primary responsibility to protect each State against invasion, but that the States *retained* their respective sovereign prerogatives to "engage in War" if "actually invaded." Thus, the Founders foresaw the possibility that the federal government might not fulfill its obligation to protect the States from invasion and explicitly recognized the States' inherent, retained power to defend themselves. Providently, the State Self-Defense Clause ensures that "the

[3] The Tenth Amendment reads: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Constitution . . . is not a suicide pact." *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1963).

The Constitution, therefore, "limited but did not abolish the sovereign powers of the States, which retained 'a residuary and inviolable sovereignty.'" *Murphy*, 584 U.S. at 470 (quoting The Federalist No. 39, p. 245 (C. Rossiter ed. 1961)). "[B]oth the Federal Government and the States wield sovereign powers, and that is why our system of government is said to be one of 'dual sovereignty.'" *Id.* (quoting *Gregory v. Ashcroft*, 501 U. S. 452, 457 (1991)). Thus, at the very least, if the federal government fails to protect a State from invasion, the various States, as recognized by the State Self-Defense Clause, retain their inherent authority to engage in war. *See Young v. Hawaii*, 992 F.3d 765, 815 (9th Cir. 2021) (citing the prohibition in the State Self-Defense Clause as "corresponding[]" to the federal government's duty to defend against invasion), *vacated and remanded on other grounds*, 142 S. Ct. 2895 (2022).

II. Texas's Exercise of Its Retained, Sovereign Prerogative to Repel an Invasion is Nonjusticiable.

The Court should vacate the preliminary injunction because this case calls for the Court to resolve nonjusticiable questions. The questions of whether an invasion has occurred within the meaning of the State Self-Defense Clause and what measures a State may take in response to such an invasion are both committed to the political branches of the various States.

The parties agree, and the district court concluded, that whether an invasion has occurred is a nonjusticiable political question. ROA 996-97. The district court erred, however, in determining that the Constitution always commits this question to the political branches of the *federal government*. *Id.* at 996-98. Rather, the State Self-Defense Clause commits this determination to the various States, which retained their respective sovereign powers to "engage in War" in the event of an actual invasion *without* the consent of Congress.

In *Baker v. Carr*, the Supreme Court set forth the political question standard as follows:

> It is apparent that several formulations which vary slightly according to the settings in which the questions arise may describe a political question, although each has one or more elements which identify it as essentially a function of the separation of powers. Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

369 U.S. 186, 217 (1962).

Under this standard, as several courts of appeals have held, the question of whether an invasion has occurred within the meaning of the Invasion Clause is

nonjusticiable and committed to the political branches of the federal government. For example, the Ninth Circuit has held that "to determine that the United States has been 'invaded' when the political branches have made no such determination would disregard the constitutional duties that are the specific responsibility of other branches of government, and would result in the Court making an ineffective non-judicial policy decision." *California v. United States*, 104 F.3d 1086, 1091 (9th Cir. 1997). And the Third Circuit (quoting *Baker, supra*) has held this question nonjusticiable because of "'a textually demonstrable constitutional commitment of the issue to a coordinate political department,' and 'a lack of judicially discoverable and manageable standards for resolving it.'" *New Jersey v. United States*, 91 F.3d 463, 468-470 (3d Cir. 1996). *See also Chiles v. United States*, 874 F. Supp. 1334, 1342-1344 (S.D. Fla. 1994) (finding the invasion question nonjusticiable because of a lack of judicially discoverable and manageable standards for resolving it), *aff'd* 69 F.3d 1094, 1097 (11th Cir. 1995) (citing *Baker* generally). In short, the Invasion Clause in Article IV of the Constitution, because it places responsibility to protect against invasion on the federal government, and because there are no workable judicial standards to resolve whether an invasion has occurred, commits that question to the policy making (or political) branches of the federal government, not the judicial branch.

But, just as Article IV, § 4, of the Constitution commits the question of whether an invasion has occurred to the political branches of the *federal* government, the State Self-Defense Clause, at least within broad limits not reached here, commits the same question *to the States*. The district court, very erroneously, construed IRLI's *amicus* brief below as suggesting that the question of whether an invasion has occurred was committed "to the policy making (or political) branches *of the federal government*" in this case. ROA 998 (referring to "Texas's amici" and citing Dkt. # 33 at 9) (emphasis by D. Ct.). But, as noted above, the Constitution, at least for purposes of the State Self-Defense Clause, commits this determination to the various States, which retained their inherent authority to engage in war in the case of an actual invasion. And they do not retain it subject to the oversight of Congress, but rather even without its consent. To read the Clause as committing this decision to the federal government would read the phrase "without the consent of Congress" out of that provision.

The States' invocation of the Self-Defense Clause is subject only to the limited review of whether the invocation is in "good faith." *Sterling v. Constantin*, 287 U.S. 378, 400 (1932). There is no question that Texas has met that minimum standard. Governor Abbott issued Executive Order GA-41, in which he invoked the State of Texas's inherent right to self-defense, as recognized by Article I, § 10, of the United States Constitution, to "secure the State of Texas and repel the illegal

immigration that funds the cartels." ROA 1704. Governor Abbott has also asserted Texas's right under the State Self-Defense Clause to "protect its own territory against invasion by the Mexican drug cartels." ROA 57.

The term "invasion," as used in the Self-Defense Clause, is not limited to hostile state actors. First, the ordinary meaning of "invade" is not limited to actions by foreign states. "Ordinarily courts do not construe words used in the Constitution so as to give them a meaning more narrow than one which they had in the common parlance of the times in which the Constitution was written." *United States v. S.-E. Underwriters Ass'n*, 322 U.S. 533, 539 (1944), *superseded by statute on other grounds*. In a dictionary widely known when the Constitution was ratified, "invasion" was defined, without limitation to state action, as "[h]ostile entrance upon the rights or possessions of another; hostile encroachment." Samuel Johnson, *Dictionary of the English Language*, 1773 (4th folio ed.). "Encroachment," in turn, was defined as "[t]o advance into the territories or rights of another." *Id.*

In light of this broad understanding of the terms used in the Self-Defense Clause, there is no reason to conclude that it applies only to hostilities by foreign states and not to those by non-state actors such as cartels or gangs. Indeed, historically, the State of Texas has exercised its self-defense powers against non-state actors. For example, in 1859, the governor of Texas authorized "an improvised expedition of state-funded Texas Rangers to counter" a Tejano

militancy led by Juan Nepomuceno Cortina. Maj. Nathan Jennings, *The Army's Rio Grand Campaign of 1859: A Total Force Case Study*, Infantry Magazine, p. 36, Vol. 107, No. 2, April-June 2018, available at: https://www.moore.army.mil/infantry/magazine/issues/2018/Apr-Jun/PDF/APR-JUN18_mag.pdf (last visited Feb. 20, 2024). Cortina has been described as a "son of a respected Mexican ranching family" and also "the head of a band of desperadoes" who "was making life and property in the Brownsville area unsafe." William John Hughes, *"Rip" Ford, Texan: the Public Life and Services of John Salmon Ford, 1836-1883*, a Dissertation in History, pp. 228 (June 1958), available at: https://ttu-ir.tdl.org/items/26ee077d-4668-4526-8f3f-a816921c7f55 (last visited Feb. 20, 2024). The Governor "distrusted the dispersed U.S. Army garrisons to respond quickly," Jennings, at 36, and dispatched John S. Ford, with the rank of major, to lead a company of Texas Rangers with orders "to protect the western frontier against Cortinas and his band and to arrest them if possible." Hughes, at 230. Eventually, the U.S. Army consolidated its dispersed garrisons and joined forces with the Texas Rangers to combat Cortina's gang. Jennings, at 36.

In addition, on February 7, 2022, the then-Attorney General of Arizona, Mark Brnovich, issued an opinion in which he concluded that the well-documented and persistent violence and lawlessness caused by cartels and gangs at Arizona's border "can satisfy the definition of 'actually invaded' and 'invasion' under the

U.S. Constitution." Brnovich, A.G. Opinion, No. I22-001, Re: The Federal Government's Duty to Protect the States and the States' Sovereign Power of Self Defense when Invaded, Feb. 7, 2022, at 3, available at: https://www.azag.gov/sites/default/files/2022-02/I22_001b.pdf (last visited Feb. 20, 2024). General Brnovich found that "[t]here is nothing in federal constitutional or statutory law authorizing the federal executive to thwart States from ensuring on-the-ground safety and an orderly border within the State's own territory. Nor is there any conflict with this and the orderly conduct of immigration policy by the federal executive." *Id.* at 3-4.

In short, because the Constitution commits the question of whether an invasion has occurred to the policy-making branches of the State of Texas, and because Governor Abbott's invocation of the State's inherent and retained authority to defend itself was made in good faith, the State's invocation of its right to self-defense is nonjusticiable.

Similarly, what actions constitute a permissible exercise of the war power is also, at least within broad limits, nonjusticiable and is committed by the Constitution to any State that has been invaded. As the Supreme Court has recognized, "'[t]he power to wage war is the power to wage war successfully.'" *Lichter v. United States*, 334 U. S. 742, 780 (1948) (quoting address by C. Hughes, War Powers Under the Constitution (Sept. 5, 1917)). Though it is for an invaded

State to decide, the greater power to "engage in War" granted in the Constitution would unquestionably include the lesser power to build a floating marine barrier to prevent or deter the entry of foreign nationals from around the world who pay the cartels to smuggle them into the country, and thereby at once prevent the criminal acts of the cartels, reduce their material support, and diminish the human flood in which they conceal their further criminal activities, such as drug smuggling. *See*, *e.g.*, *Posadas de Puerto Rico Assocs. v. Tourism Co.*, 478 U.S. 328, 345-46 (1986) (holding under this principle that the greater power to ban gambling casinos includes the lesser power to ban their advertising); *Lichter*, 334 U.S. at 778-79 ("[T]he exercise of broad discretion as to methods to be employed may be essential to an effective use of its war powers by Congress.").

As the district court acknowledged, Texas deployed the marine floating barrier near Eagle Pass to "mak[e] it more difficult to cross the Rio Grande and reach the Texas side of the southern border." ROA 966 (internal quote omitted).[4]

[4] In addition to building the floating marine barrier at issue in this case, Texas has taken several other measures to repel the invasion. For example, Texas deployed concertina wire along the Rio Grande to "prevent, detour, and interdict transnational criminal activity and illegal migration." FoxNews, *Texas installs miles of concertina wire along border near Rio Grande* (June 8, 2022), available at: https://www.foxnews.com/us/texas-installs-miles-concertina-wire-border-rio-grande (last visited Feb. 20, 2024). Texas also enacted Senate Bill 4, S.B. 4, 88th Leg., 4th C.S. (2023), which criminalizes illegal entry and reentry into the State from a foreign nation to deter illegal border crossings. Press Release, *Governor Abbott Signs Historic Border Security Measures in Brownsville*, available at: https://gov.texas.gov/news/post/governor-abbott-signs-historic-border-security-

Texas's construction of the floating marine barrier is a practical self-defense measure. Inasmuch as Texas has the inherent power to "engage in War" in response to an actual invasion, U.S. Const., art. I, § 10, cl. 3, it has the lesser-included power to build barriers to entry in order to deter or prevent encroachment on its border. As a war measure, this one is humane and notably restrained, but it remains a war measure adopted in good faith. As such, whether it is an appropriate means of advancing war aims is not for the judiciary to second-guess.

In sum, under the State Self-Defense Clause, the various States reserved and did not surrender their respective inherent sovereign prerogatives to engage in war in the event of an actual invasion. What constitutes an actual invasion is committed to the respective States, and neither this question nor the question of what means of waging war are appropriate is amenable to judicial resolution. This Court should hold that whether an invasion of Texas has occurred and whether Texas has chosen an appropriate means to engage in war are both nonjusticiable political questions, to be decided by Texas. And, because Texas's determinations are nonjusticiable, it is not for this Court to second-guess their validity under the Constitution.

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measures-in-brownsville (last visited Feb. 20, 2024) (denouncing the Biden administration's "deliberate inaction" on the border and proclaiming that SB4 and other laws "will help stop the tidal wave of illegal entry into Texas").

III. Generally Applicable Regulations Established by Congress Cannot Constrain Texas's Constitutional Power to Repel an Invasion.

The district court determined that by constructing the floating marine barrier in the Rio Grande without federal permission, Texas has violated the RHA. ROA 988-93. But to accept the district court's determination that Texas violated the RHA, even where Texas has validly invoked its right to self-defense in response to an actual invasion, would be to write out the phrase "without the consent of Congress" from the State Self-Defense Clause.

Lichter is instructive. There, the Supreme Court quoted President Lincoln's reflection on the power of Congress to pass a Conscription Act as follows:

> The Constitution gives Congress the power [to raise and support armies], but it does not prescribe the mode, or expressly declare who shall prescribe it. In such case Congress must prescribe the mode, or relinquish the power. There is no alternative . . . . The power is given fully, completely, unconditionally. It is not a power to raise armies if State authorities consent; nor if the men to compose the armies are entirely willing; but it is a power to raise and support armies given to Congress by the Constitution, without an "if."

Lichter, 334 U.S. at 756 n.4 (quoting 9 Nicolay and Hay, Works of Abraham Lincoln 75-77 (1894)). Likewise, there is no "if" in the State Self-Defense Clause pertaining to Congress or any political branch of the federal government, no condition allowing Congress to control the States in exercising their inherent war-making power. On the contrary, the Constitution recognizes that the various States may exercise this power even *without the consent of Congress*.

Because the Constitution thus broadly dispenses with any need for approval by Congress, Congress's otherwise-applicable laws cannot be applied to the detriment of a State's method of repelling an invasion. Impermissibly, such applications would effectuate Congress's *disapproval* of these measures. Thus, that State war powers, if validly invoked, may be exercised without congressional consent disposes of any statutory argument based on the RHA. To hold otherwise would be to abrogate the phrase "without the consent of Congress" in the State Self-Defense Clause.

In addition, the Constitution should be read to dispense with any need for approval, such as the RHA requires, by an agency to which Congress has delegated such authority in a statute. If Congress itself lacks the power to disapprove of a valid state war measure, it also lacks the power to delegate authority to disapprove of it to an agency. Insofar as the RHA requires Texas to receive federal permission for its barriers, RHA § 10, 33 U.S.C. § 403, that requirement is unconstitutional as applied to Texas's valid, chosen means of waging war. Far from needing this federal consent under the State Self-Defense Clause, Texas may employ its chosen means even over the objection of Congress itself, let alone the Army Corps of Engineers.

The district court described Texas's retained right to wage war in self-defense under the State Self-Defense Clause, "subject to no oversight," as

"breathtaking." ROA 999; *see also id.* at note 29 (suggesting that the Governor's power would exceed that of the President under this reading). But the district court failed to recognize that the Governor's actions are constrained both by political considerations and by the Texas legislature. And, as Texas points out, while other States "may choose to allocate their self-defense power differently," Texas has seen fit to vest this power in the Governor. Appellants' Opening Br. at 36. Instead of breathtaking, it is rather unremarkable that such inherent self-defense power is retained by each of the fellow States of the Union and may be invoked or exercised by the appropriate state actor in response to an actual invasion.

Also, in determining that Texas lacks the authority to act in self-defense without the consent of Congress, the district court stressed that the Constitution commits the regulation of immigration and the admission of aliens exclusively to Congress. ROA 996-97. But aliens who surreptitiously cross into the United States with the assistance of the cartels are not acting in compliance with Congress's immigration laws nor seeking lawful admission. Instead, such aliens are violating Congress's immigration laws. *See* 8 U.S.C. § 1182(a)(6)(A)(i) (making any alien present in the United States without being admitted or paroled, or who arrives in the United States at any time or place other than as designated by the Attorney General, inadmissible); *id.* § 1227(a)(1)(B) (making any alien who is present in the United States in violation of law deportable); *id.* § 1325 (making it unlawful for an

alien to enter or attempt to enter the United States at any time or place other than as designated by immigration officers). Therefore, Texas's actions to prevent such aliens from crossing the Rio Grande are in furtherance of the purposes of federal immigration law, and as such are not preempted. *See*, *e.g.*, *Kansas v. Garcia*, 140 S. Ct. 791, 806-07 (2020) (holding that State laws that overlap to some degree with federal immigration laws are not preempted where it is possible to comply with both laws and federal interests are not frustrated).

Far from frustrating federal purposes, Texas's actions are in complete alignment with Congress's goal of preventing unlawful immigration. Congress has directed the Secretary of Homeland Security to "take all actions the Secretary determines necessary and appropriate to achieve and maintain operational control over the entire international land and maritime borders of the United States …." § 2(a), Secure Fence Act of 2006, Pub. L. 109-367, 120 Stat. 2638 (Oct. 26, 2006). Congress defined "operational control" to mean "the prevention of *all unlawful entries into the United States*, including entries by terrorists, other unlawful aliens, instruments of terrorism, narcotics, and other contraband." *Id.* § 2(b) (emphasis added). Texas's actions to prevent unlawful entries into the United States are therefore fully aligned with Congress's purposes and goals, and thus, pursuant to *Garcia*, not preempted.

Finally, whether Texas is bound by Congress's general rules and regulations, and whether the RHA or the Immigration and Nationality Act ("INA") binds or preempts Texas's marine defenses, is also decidable by the more specific provision over the more general canon. The RHA is a general law governing navigable waterways such as (arguably) the Rio Grande. The INA is a general law governing immigration. In contrast, the State Self-Defense Clause deals with the specific circumstance of a State's exercising its war power in the event of an invasion. Ordinarily, specific terms prevail over general terms. "However inclusive may be the general language of a statute, it will not be held to apply to a matter specifically dealt with in another part of the same enactment." *Fourco Glass Co. v. Transmirra Products Corp.*, 353 U.S. 222, 228 (1957) (citations omitted). The same principle should be used to resolve conflict between two constitutional provisions. *C.f.*, *United States v. Estate of Romani*, 523 U.S. 517, 532 (1998) (holding that a later, more specific statute governs); *Morton v. Mancari*, 417 U.S. 535, 550-51 (1974) (holding that a general statute will not repeal by implication a more specific one unless there is "clear intention otherwise").

It is, of course, impossible for a statute to preempt a constitutional provision, since the only laws that are, along with the Constitution itself, "the supreme Law of the Land" are those "made in Pursuance" of the Constitution. U.S. Const. art. VI, cl. 2. To the extent that a federal statute conflicts with the Constitution, as

would be necessary somehow to preempt it, it is not a constitutional statute and cannot preempt anything, let alone the constitutional provision with which it conflicts. Thus, States' exercises of their authority under the State Self-Defense Clause are not preempted by either the RHA or the INA. Rather, as with statutes,

> [t]he courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective. "When there are two acts upon the same subject, the rule is to give effect to both if possible."

Mancari, 417 U.S. at 551 (quoting *United States v. Borden Co.*, 308 U.S. 188, 198 (1939)). The RHA, the INA, and the State Self-Defense Clause, all being the supreme law of the land, should all be given effect, and that is accomplished by the displacement of the RHA and the INA only in narrow situations where the State Self-Defense Clause is validly invoked. And, as shown above, the validity of an invocation of the Clause, at least within broad parameters, is not to be decided by the courts, but is a nonjusticiable political question committed to the States.

In sum, even if the Court were to decide that Texas's actions conflict with the terms of the RHA or the INA, Texas retains its inherent authority to take those actions under the State Self-Defense Clause. As long as Texas validly takes these actions to repel an actual invasion, as it has, the Constitution recognizes its authority to take them without the federal consent required by the RHA. Because Texas's valid invocation of its retained inherent authority under the State Self-

Defense Clause, and its valid choice of means of defense, takes precedence over Congress's otherwise-applicable law, the federal government cannot show any substantial likelihood of success on the merits of this action.

CONCLUSION

For the forgoing reasons, the Court should reverse and vacate the district court's preliminary injunction.

DATED: February 23, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on February 23, 2024, I electronically filed the foregoing *amicus* brief with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

/s/ Matt Crapo
Matt A. Crapo

CERTIFICATE OF COMPLIANCE

The foregoing brief complies with Fed. R. App. P. 29(a)(5) because it contains 5,174 words, as measured by Microsoft Word software, which is fewer than one-half of the 13,000 word limit for a party's principal brief under Fed. R. App. P. 32(a)(7)(B). The brief also complies with the typeface and style requirements of Fed. R. App. P. 32(a)(5) & 32(a)(6) because it has been prepared in a proportionally spaced, Roman-style typeface of 14 points or more.

DATED: February 23, 2024

Respectfully submitted,

/s/ Matt Crapo
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