

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

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| <p>STATE OF TEXAS,</p> <p><i>Plaintiff,</i></p> <p>v.</p> <p>UNITED STATES DEPARTMENT OF<br/>HOMELAND SECURITY, <i>et al.,</i></p> <p><i>Defendants.</i></p> | <p>Case No. 2:23-cv-00055-AM<br/>Hon. Alia Moses</p> |
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**BRIEF OF *AMICUS CURIAE* IMMIGRATION REFORM LAW INSTITUTE  
IN SUPPORT OF PLAINTIFF'S OPPOSITION TO  
DEFENDANTS' MOTION TO DISMISS**

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**IDENTITY AND INTEREST OF *AMICUS CURIAE*<sup>1</sup>**

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*, 579 U.S. 547 (2016); *Ariz. Dream Act Coalition v. Brewer*, 855 F.3d 9857 (9th Cir. 2017); *Wash. All. Tech Workers v. U.S. Dep’t of Homeland Security*, 50 F.4th 164 (D.C. Cir. 2022); and *Matter of Silva-Trevino*, 26 I. & N. Dec. 826 (B.I.A. 2016).

**INTRODUCTION**

The crisis at the southwest border began on January 20, 2021, when newly sworn-in President Biden signed several executive orders rescinding policies that had led to the safest and most secure border in American history. Defendants have paused all removals, stopped construction of the border wall, replaced the successful Migrant Protection Protocols (aka “Remain in Mexico”) with catch-and-release, abused the parole statute, and otherwise failed to achieve the objectives of Congress in the Immigration and Nationality Act (“INA”), 8 U.S. C. §§ 1101, *et seq.* In other words, Defendants have purposefully facilitated illegal entries on a massive scale, creating the worst immigration crisis in our nation’s history.

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<sup>1</sup> 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.

Defendants have both failed to implement the law as provided in the INA and shirked their constitutional obligation to protect the States from invasion. U.S. Const. Art. IV § 4<sup>2</sup>. As Plaintiff explained, Defendants' abdication of these duties "has allowed millions of aliens to illegally cross into Texas and the United States in Record numbers." ECF 1 at ¶ 2. In fact, a recent report from the House Committee on Homeland Security reflects that 2023 was the "worst year at America's borders *ever*," with U.S. Customs and Broder Protection ("CBP") encountering 40% more aliens in fiscal year 2023 than in fiscal year 2021. U.S. House of Representatives, Committee on Homeland Security, Majority, *Factsheet: FY23 Numbers Show Worst Year at America's Borders-Ever*, Oct. 26, 2023, <https://homeland.house.gov/2023/10/26/factsheet-final-fy23-numbers-show-worst-year-at-americas-borders-ever/> (last visited April 26, 2024) (emphasis added). Among those attempting illegal entry are known terrorists, gang members, and convicted criminals. *Id.* Cartels and other criminal organizations have seized this opportunity to import enough fentanyl into the United States "to kill more than 6 billion people." *Id.* A current search of CBP encounter tracker shows over six hundred thousand encounters on the Texas-Mexico border thus far in FY 2024. CBP, *Nationwide Encounters*, available at: <https://www.cbp.gov/newsroom/stats/nationwide-encounters> (last visited Apr. 26, 2024).

Faced with "[t]he Biden Administration's abdication of its duty to secure the border[.]" ECF 1 at ¶ 2, "Governor [Abbott] . . . declared a border security disaster in 2021 and launched Operation Lone Star, which utilizes multiple state agencies, including the Texas Military Department ('TMD'), to fill dangerous gaps left by the Biden Administration's failure to secure

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<sup>2</sup> "The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence."

the U.S.-Mexico border.” ECF 1 at ¶ 4. As part of this operation, “TMD . . . purchased and deployed concertina wire fencing . . . to deter and slow illegal crossings at hot spots along the southern border—including in Eagle Pass, Texas, located in the U.S. Border Patrol’s Del Rio Sector.” *Id.* at ¶ 5.

The present suit was initiated by Texas after Defendants began destroying and removing the concertina wire fencing. Texas alleged common law claims of conversion and trespass to chattels, as well as violations of the Administrative Procedure Act (“APA”), and sought injunctive relief to protect its property, a stay of agency action under the APA, and declaratory relief stating that Defendants’ actions are unlawful. ECF 1 at ¶¶ 61–101. Presently before the Court is Defendants’ Motion to Dismiss. ECF 102.

### **ARGUMENT**

Defendants’ arguments all fail for the same reason—Defendants have intentionally refused to follow the immigration laws enacted by Congress in the INA in pursuit of their own, diametrically-opposed immigration policy goals. This pursuit has led to the worst border crisis in American history, and has caused states such as Texas to take action to protect their citizens.

First, Texas’s use of concertina wire (“c-wire”) fencing on private property to protect its southern border does not violate the Supremacy Clause of the U.S. Constitution. No preemptive force attaches to mere enforcement priorities of the executive branch, especially where, as here, the enforcement priorities themselves violate federal law. Nor is the use of the c-wire fencing preempted because it makes compliance with both state and federal law impossible or creates an obstacle to the full purposes of Congress. On the contrary, Texas’s installation of wire fencing does not prevent anyone from complying with both state law and the INA, and it achieves the same federal statutory purpose as other federally authorized border walls and barriers—preventing the



entry of illegal aliens into the United States. As a sovereign, Texas has inherent authority to protect its borders by pursuing the very congressional objective Defendants have abandoned. Indeed, as recognized in Article I, § 10, Clause 3, of the U.S. Constitution, Texas has retained its sovereign authority to defend itself against invasion, and in exercising that authority directly under the Constitution, as it is doing here, it is certainly not subject to preemption by executive policies.

Second, and for similar reasons, Defendants' destruction of Texas' c-wire fencing is *ultra vires* agency action under the APA. 5 U.S.C. § 702. Defendants claim to be acting in accordance with the INA, ECF 102 at 16-19, but the facts established by this Court show the opposite to be true. For these reasons, this Court should DENY Defendants' motion to dismiss.

**I. TEXAS'S USE OF CONCERTINA WIRE FENCING DOES NOT VIOLATE THE SUPREMACY CLAUSE.**

As Texas points out, Defendants not only failed to raise preemption as a defense in any prior briefing before this Court, but "they previously disavowed [it] at the preliminary-injunction stage." ECF 104-1 at 22. But even if Defendants could make such an argument, they would not succeed.

The Supremacy Clause of the U.S. Constitution provides that "the Laws of the United States . . . shall be the supreme Law of the Land . . . Laws of any State to the contrary notwithstanding." U.S. Const., Art. VI, cl. 2. Thus, where state law conflicts with federal law, the state law must yield. *See Arizona v. United States*, 567 U.S. 387, 399 (2012) ("The Supremacy Clause provides a clear rule . . . Congress has the power to preempt state law."). Accordingly, where "the clear and manifest purpose of Congress," *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947), is that federal law be supreme, state laws that conflict with such federal enactments are preempted. Regardless of whether "[p]re-emption . . . is explicitly stated in the statute's language or implicitly contained in its structure and purpose," *Fid. Fed. Sav. & Loan*

*Ass'n v. de la Cuesta*, 458 U.S. 141, 152-53 (1982), Congress's preemptive purpose is found in the federal statute itself. *CSX Transp. v. Easterwood*, 507 U.S. 658, 664 (1993).

There are two types of implied conflict preemption relevant here. The first is "conflict-impossibility preemption," *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963), which arises where "compliance with both federal and state regulations is a physical impossibility" *Arizona*, 567 U.S. at 399. The second is "conflict-obstacle preemption" (or simply "obstacle preemption"), *Florida Lime*, 373 U.S. at 142-43, "where the challenged state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Arizona*, 567 U.S. at 399.

This Court has already recognized that there is no conflict between the INA and Texas's use of c-wire fencing to protect private property from invading illegal aliens. There is no conflict-impossibility preemption because, as this court found, border patrol personnel have access to the land on both sides of Texas's fence, thus enabling them to inspect, apprehend, and process aliens illegally entering the United States without violating Texas's property rights. ECF 57 at 24. In fact, this Court's most recent findings of fact are that the fence does not cause any such impediment, and that the evidence submitted showed very little inspection, apprehension, or processing even occurring. ECF 98 at 21-22.

The purpose of federal immigration law is operational control of the border, defined as the achievement of zero unlawful entries.<sup>3</sup> It is Texas's c-wire that furthers this congressional

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<sup>3</sup> "Operational Control" has been defined by Congress as "the prevention of all unlawful entries into the United States, including by terrorists, other unlawful aliens, instruments of terrorism, narcotics, and other contraband." Secure Fence Act of 2006, 109 P.L. 367, 120 Stat. 2638, 2639; 8 U.S.C. § 1101, *note*; 8 U.S.C. § 1701, *note*.

objective, whereas Defendants’ policies subvert it. Accordingly, Defendants’ preemption arguments must fail.

**A. TEXAS’S C-WIRE FENCE PRESENTS NO OBSTACLE TO CONGRESS’S PURPOSES AND OBJECTIVES.**

In reviewing whether Texas’s actions are implicitly preempted by the INA, this court’s “primary function is to determine whether, under the circumstances of this particular case, [state] law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). Here, the c-wire installed by Texas is no such obstacle.

First, preemption is predicated on properly enacted federal laws, not executive enforcement policies that are subject to change with every new presidential administration. Because preemption is based on the properly enacted laws of the legislature, executive agencies cannot claim preemption when their conduct is not authorized by federal law. As the Supreme Court has explained, “the *purpose of Congress* is the ultimate touchstone in every preemption case.” *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (emphasis added) (quotation marks and citations omitted). It is thus not surprising that the Supreme Court has consistently stated that preemption analysis is “informed by *examining the federal statute* as a whole and identifying its purpose and intended effects.” *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 374 n.8 (2000) (emphasis added). *See also Kansas v. Garcia*, 140 S. Ct. 791, 801 (2020) (“[T]he federal restrictions or rights that are said to conflict with state law *must stem from either the Constitution itself or a valid statute enacted by Congress*. There is no federal preemption *in vacuo*, without a constitutional text, federal statute, or treaty made under the authority of the United States.”) (emphasis added) (citation and quotation marks omitted); *Murphy v. NCAA*, 138 S. Ct. 1461, 1481 (2018) (explaining that “every

form of preemption is *based on a federal law* that regulates the conduct of private actors, not the States.”) (emphasis added).

Because “all preemption arguments[] must be grounded ‘in the text and structure of the statute at issue[,]’” *Kansas*, 140 S. Ct. at 804 (quoting *CSX Transp.*, 507 U. S. at 664), “the possibility that federal enforcement priorities might be upset is not enough to provide a basis for preemption. The Supremacy Clause gives priority to ‘the Laws of the United States,’ not the . . . enforcement priorities or preferences of federal officers.” *Id.* at 807 (quoting U.S. Const. Art. VI, cl. 2.). Thus, it is not enough for Defendants to argue that Texas’s attempts to secure the border conflict with this administration’s non-enforcement immigration policy. They must show that Texas is acting in contravention of the purposes and objectives of Congress, as is not possible here, since it is Texas that has taken up the congressional objective of border protection that Defendants have cast aside.

In the INA, Congress provided the Secretary of Homeland Security 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) (emphasis added). As relevant here, one such power provided to carry out this duty is the ability to “access to private lands . . . 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) (emphasis added). Defendants simultaneously ignore these clear statutory commands and argue that Texas is interfering with their ability to follow them. They cannot have it both ways. The INA gives them their authority to access private lands for the purpose of preventing, not facilitating, illegal entry. *Id.* Removing Texas’s border barriers to allow migrants to flow freely into the interior of the United States is an unlawful policy that lacks preemptive force.

Nor are Defendants' actions necessary to carry out their statutory duty to inspect, apprehend, and detain illegal aliens. *See generally* 8 U.S.C. § 1225. This Court correctly rejected Defendants' justifications that cutting Texas's fence was necessary "(1) to inspect, apprehend, and detain illegal aliens; and (2) to prevent or address medical emergencies." ECF 57 at 20-21. In fact, this Court determined that there was no evidence that the fence was cut for any such valid purpose and instead found that it was cut "for no apparent purpose other than to allow migrants easier entrance further inland." ECF 57 at 9. Despite Defendants' arguments to the contrary, this Court found:

No reasonable interpretation of [inspect, apprehend, or process] can square with Border Patrol's conduct. Visual observation is not physical control. Opening fences does not restrain freedom of movement. Blind trust that migrants who have just been seen criminally violating one boundary will respect barriers along the road toward a processing center constitutes neither "apprehension" nor "detention."

ECF 57 at 27. Further evidence showed that

[d]efendants apparently seek to establish an unofficial and unlawful port of entry stretching from wherever they open a hold through the Plaintiff's fence to the makeshift processing center they established on private land a mile or more away. The Defendants even appear to seek gates in the Plaintiff's fence that the Defendants can control to facilitate this initiative. Establishing such a system at a particularly dangerous stretch of the river creates a perverse incentive for aliens to attempt to cross at that location, begetting life-threatening crises for aliens and agents both.

*Id. See also id.* at 9 (finding that, in addition to cutting holes in the fencing to allow illegal aliens entry, the evidence showed Border Patrol "passively observing a stream of migrants as they make the hazardous journey from Mexico, across the river, and then up the bank on the American side. *At no point* are the migrants interviewed, questioned as to citizenship, or in any way hindered in their progress into the United States.>").

Indeed, all evidence points to Defendants’ “utter failure” to fulfill their statutory duties. ECF 57 at 28. Accordingly, they “cannot claim the statutory duties they are so obviously derelict in enforcing as excuses to puncture the Plaintiff’s attempts to shore up the Defendants’ failing system. Nor may they seek judicial blessing of practices that both directly contravene those same statutory obligations and require the destruction of [Texas’s fencing.]” *Id.*

Second, Defendants’ preemption arguments fail because Texas’s c-wire fencing, far from “stand[ing] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,” *Hines*, 312 U.S. at 67, assists in accomplishing statutory objectives. In fact, not only do immigration officers have access to both sides of Texas’s fence, but the c-wire fencing *further*s the objectives of Congress by deterring and preventing illegal aliens from entering the United States. ECF 57 at 8 (explaining that “[t]he wire serves as a deterrent—an effective one at that. The Court heard testimony that in other border sectors, the wire was so successful that illegal border crossings dropped to less than a third of their previous levels. By all accounts, Border Patrol is grateful for the assistance of Texas law enforcement, and the evidence shows the parties work cooperatively across the state[.]”).

Certainly, if Texas’s c-wire fencing achieved a purpose contrary to Congress’s objective—for example, if Texas were facilitating illegal immigration—then its state policy would likely be preempted by the INA. That is because, as the Supreme Court has repeatedly explained, preemption is triggered when a “state policy may produce a result *inconsistent with the objective of the federal statute.*” *Rice*, 331 U.S. at 230 (emphasis added) (citation omitted). As explained, Texas’s c-wire fencing does not produce a result inconsistent with the objectives of the INA. Indeed, it comports with the objectives of the INA by preventing illegal aliens from entering the

country without being inspected, apprehended, and processed. The INA can hardly obstacle-preempt Texas from producing the same result that the INA is designed to achieve.

Indeed, states' power to act congruently with Congress in protecting their borders flows from their sovereignty. "As a sovereign, [a state] has the inherent power to exclude persons from its territory, subject only to those limitations expressed in the Constitution or constitutionally imposed by Congress." *Arizona*, 567 U.S. at 417 (Scalia, J., dissenting). As Justice Scalia noted, "two of the Constitution's provisions were designed to enable the States to prevent 'the intrusion of obnoxious aliens through other States.'" *Id.* at 418 (quoting Letter from James Madison to Edmund Randolph (Aug. 27, 1782), in 1 Writings of James Madison 226 (G. Hunt ed. 1900); accord *The Federalist* No. 42, pp. 269-71 (C. Rossiter ed. 1961) (J. Madison)). First, "the Constitution's Privileges and Immunities Clause" was made applicable to "[t]he *Citizens* of each State." *Id.* (quoting U.S. Const. Art. IV, § 2, cl. 1) (emphasis original). Second, the Constitution "authoriz[ed] the general government to establish a uniform rule of naturalization throughout the United States[.]" to ensure that the low citizenship standards of one state did not "serve as a gateway for the entry of 'obnoxious aliens' into other States." *Id.* (quoting *The Federalist* No. 42, *supra*, at 271; Art. I, § 8, cl. 4). Thus, as Justice Scalia explained, "the naturalization power was given to Congress not to abrogate the States' power to exclude those they did not want, but to vindicate it." *Id.*

In fact, history shows that "the States enacted numerous laws restricting the immigration of certain classes of aliens[.] . . . State laws not only provided for the removal of unwanted immigrants but also imposed penalties on unlawfully present aliens who aided their immigration." *Id.* at 419. Because states are sovereigns, they are "*entitled* to have '[their] own immigration policy'—including a more rigorous enforcement policy—so long as that does not conflict with

federal law.” *Id.* at 427 (emphasis original). Texas’s use of wire fencing to protect its border does not conflict with federal law, but rather executes Texas’s own inherent power to defend its territory.

Furthermore, Article 1, § 10, cl. 3, of the Constitution (“the State Self-Defense Clause”) 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. *Id.* (“No State shall, without the consent of Congress, . . . engage in War, unless actually invaded . . .”). On July 7, 2022, Governor Abbott invoked the State Self-Defense Clause in order to “secure the State of Texas and repel the illegal immigration that funds the cartels.”<sup>4</sup> Defensive barriers such as the c-wire fencing at issue here are paradigmatically war measures, and as such are a direct exercise of Texas’s constitutional power of self-defense. In taking such measures, Texas may act “without the consent of Congress,” U.S. Const., Art. 1, § 10, cl. 3, and thus is not subject to its control, let alone that of executive agencies. It is therefore quite impossible for mere executive enforcement policies—or, as in this case, non-enforcement policies—to preempt Texas’s c-wire fencing.

#### **B. THERE IS NO CONFLICT IN THE METHOD OF ENFORCEMENT.**

To avoid preemption, it is not enough that state objectives be consistent with congressional objectives. A state law may be preempted despite consistent objectives where there is a conflict between state and federal methods of enforcement. “Conflict in technique can be fully as disruptive to the system Congress erected as conflict in overt policy.” *Motor Coach Employees v. Lockridge*, 403 U.S. 274, 287 (1971). Here, however, there is no such conflict in technique. Rather, the state

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<sup>4</sup> Executive Order No. GA-41, relating to returning illegal immigrants to the border, is available at: <https://gov.texas.gov/uploads/files/press/EO-GA-41.pdf> (last visited Sept. 26, 2023). 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-GA42\\_Mexican\\_cartels\\_foreign\\_terrorist\\_orgs\\_IMAGE\\_09-21-2022.pdf](https://gov.texas.gov/uploads/files/press/EO-GA42_Mexican_cartels_foreign_terrorist_orgs_IMAGE_09-21-2022.pdf) (last visited Sept. 26, 2023).



is carrying out congressional objectives that the executive is not pursuing by means of any technique.

The presence of an actual conflict between methods of enforcement is required to establish that a state action is obstacle preempted. For example, in *Arizona*, the Supreme Court held that Congress’s abstention from criminal penalties for illegal alien employment implicitly preempted Arizona from imposing such penalties. *Arizona*, 567 U.S. at 406 (“Although § 5(C) attempts to achieve one of the same goals as federal law—the deterrence of unlawful employment—it involves a conflict in the method of enforcement. . . . Congress decided it would be inappropriate to impose criminal penalties on aliens who seek or engage in unauthorized employment. It follows that a state law to the contrary is an obstacle to the regulatory system Congress chose.”).

There is no such conflict here. Congress has authorized the exact enforcement method Texas uses to maintain operational control—border barriers. Indeed, review of the U.S. Customs and Border Protection website shows the extensive use of border barriers along almost all of the southern border, save for large portions of the Texas border. U.S. Customs and Border Protection: Border Security, Border Wall System, available at <https://www.cbp.gov/border-security/along-us-borders/border-wall-system> (last visited January 9, 2024).

Furthermore, the use of border barriers has been authorized by Congress. A 2017 Executive Order issued “[i]n accordance with existing law, including the Secure Fence Act and IIRIRA,” called for the “plan[ing], design, and construct[ion of] a physical wall along the southern border using appropriate materials and technology to *most effectively achieve complete operational control of the southern border.*” (emphasis added) Executive Order: Border Security and Immigration Enforcement Improvements, Jan. 5, 2017, available at: <https://trumpwhitehouse.archives.gov/presidential-actions/executive-order-border-security->

immigration-enforcement-improvements/. As the order itself notes, Congress’s objective is operational control of the border, that is, the prevention of all illegal immigration, which can be achieved through the use of border barriers. *E.g.*, 8 U.S.C. §§ 1101 *note*, 1701 *note*. In fact, as a 2017 report from the office of the inspector general at the Department of Homeland Security reflected, border barriers are an effective method of preventing illegal immigration. Immigration Reform Law Institute, Investigative Report, December 14, 2023, available at: [chrome-extension://efaidnbmnnnibpcajpcgclefindmkaj/https://irli.org/wp-content/uploads/2023/12/Border-Wall-Study.Completed.Final\\_Final.pdf](chrome-extension://efaidnbmnnnibpcajpcgclefindmkaj/https://irli.org/wp-content/uploads/2023/12/Border-Wall-Study.Completed.Final_Final.pdf).

As explained, a conflict between a state law and federal discretionary enforcement priorities is not a conflict between laws. The nonenforcement policies of the current executive branch are not the same as statutory enforcement methods or techniques—let alone the equivalent of Congress’s “clear and manifest purpose.” *Rice*, 331 U.S. at 230. Indeed, the Supreme Court considered and unanimously rejected this theory of implied preemption in *Arizona*. In that case, the United States had challenged a “show your papers” law enacted in Arizona which required state officials to inquire about the immigration status of certain arrestees. The Supreme Court was unanimous in holding that there was no implied preemption under the Supremacy Clause without a showing that the “show your papers” law actually “creates a conflict with federal law.” *Arizona*, 567 U.S. at 415. Justice Alito’s concurrence explained:

The United States suggests that a state law may be pre-empted, not because it conflicts with a federal statute or regulation, but because it is inconsistent with a federal agency’s current enforcement priorities. Those priorities, however, are not law. They are nothing more than an agency policy. I am aware of no decision of this Court recognizing that mere policy can have pre-emptive force . . . . If § 2(B) were pre-empted at the present time because it is out of sync with the Federal Government’s current priorities, would it be unpreempted at some time in the future if the agency’s priorities changed?

*Arizona*, 567 U.S. at 445 (internal citation omitted), accord *Kansas*, 140 S. Ct. at 807. The same is true in this case. Even if Defendants wish to reduce compliance with federal law through non-enforcement policies, that alone does not preempt the states, under their inherent authority, from pursuing the scorned congressional objective by taking action to reduce illegal immigration themselves.

## II. BECAUSE DEFENDANTS' ACTIONS ARE *ULTRA VIRES*, SOVEREIGN IMMUNITY IS NOT APPLICABLE.

Throughout this litigation, Defendants have maintained that no court has jurisdiction over Texas' state law claims because the United States has not waived its sovereign immunity. ECF No. 23-1 at 20, ECF No. 102 at 13-16. That immunity, however, is not unbounded; it does not protect Defendants when they exceed the authority granted them by Congress. “[T]his *ultra vires* exception to the sovereign immunity bar,” is applied by “[b]oth the United States Supreme Court and the Fifth Circuit” “where a federal officer’s actions are alleged to be outside the scope of their authority.” *Missouri v. Biden*, 662 F. Supp. 3d 626, 667 (W.D. La. 2023). “Where the exception applies, a plaintiff need not demonstrate a waiver of sovereign immunity.” *Id.*

“[A]n agency literally has no power to act . . . unless and until Congress confers power upon it.” *Dep’t of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1921 (2020) (quoting *City of Arlington v. FCC*, 569 U.S. 290, 317 (2013) (Roberts, C.J., dissenting)). See also *id.* (“When an agency exercises power beyond the bounds of its authority, it acts unlawfully.”). As Justice Scalia explained, “the question a court faces when confronted with an agency’s interpretation of a statute it administers is always, simply, *whether the agency has stayed within the bounds of its statutory authority.*” *City of Arlington*, 569 U.S. at 97 (emphasis original). Because the power and manner of action “for agencies charged with administering congressional

statutes . . . are authoritatively prescribed by Congress . . . when they act improperly, no less than when they act beyond their jurisdiction, what they do is *ultra vires*.” *Id.* Thus, “the question . . . is always whether the agency has gone beyond what Congress has permitted it to do[.]” *Id.* at 297-98.

To succeed on this claim, Texas “must allege facts sufficient to establish that the officer was acting ‘without any authority whatever,’ or without any ‘colorable basis for the exercise of authority.’” *Danos v. Jones*, 652 F.3d 577, 583 (5th Cir. 2011) (citing *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 101 n.11 (1984)). Accordingly, “[u]nder the common-law *ultra vires* doctrine, then, a strong merits argument is needed to overcome sovereign immunity—even at the pleading stage.” *Apter v. HHS*, 80 F. 4th 579, 588 (5th Cir. 2023).

Thus, a plaintiff asserting an *ultra vires* claim such as that brought by Texas “must identify some agency action affecting him in a specific way . . . . Second, the plaintiff must show that he has [been] . . . adversely affected or aggrieved by that action . . . .” *Apter*, 80 F.4th at 589 (internal citations omitted). Importantly, “nonfinal action is still action,” and thus “[t]here is no requirement of finality for the [sovereign immunity] waiver to apply.” *Id.* at 591 (internal quotation marks omitted). Generally, agency action “is defined broadly enough to include virtually every statement an agency may make[.]” *Louisiana v. United States EPA*, No. 2:23-cv-000692, 2024 U.S. Dist. LEXIS 12124, at \*67 (W.D. La. Jan. 23, 2024) (citing *Avoyelles Sportsmen’s League, Inc. v. Marsh*, 715 F. 2d 897, 908 (5th Cir. 1983)). In this case, the agency action Texas challenges is CBP’s cutting and removal of its c-wire fencing. This unauthorized agency action directly and purposely harms Texas in two ways—first through the destruction of its property, and second by allowing massive illegal entries into the United States.

First, Defendants mistakenly claim that the INA “authorizes Border patrol agents to cut or move concertina wire to carry out their duties.” ECF No. 102 at 16. While true that the INA does authorize “access to private lands[,]” that access is limited to “patrolling the border to *prevent the illegal entry of aliens* into the United States.” 8 U.S.C. § 1357(a)(3) (emphasis added). In other words, Congress authorized access to private property in order to prevent alien entries, not to facilitate them. Defendants’ removing the c-wire and “passively observ[ing] migrants crossing,” ECF No. 57 at 26, into Texas cannot be squared with Defendants’ statutory duty to prevent such crossings, especially where Defendants themselves have acknowledged the effectiveness of Texas’s c-wire in “detering, redirecting, and slowing illegal entry.” *State of Texas v. Dep’t of Homeland Sec., et al.*, No. 23-50869 (5th Cir.), ECF No. 162 at 28. This Court has also recognized that the “wire serves as a deterrent—an effective one at that.” ECF 57 at 8. Defendants also allege that their actions are authorized because they have the power to inspect, apprehend, and detain aliens present in the United States. ECF No. 102 at 17 (citing 8 U.S.C. §§ 1225(a)(3), 1226). As explained in Section I above, however, Defendants are not carrying out these duties. The undisputed findings of this Court are that there is “[n]o reasonable interpretation” of Defendants’ statutory obligations to inspect, apprehend, and detain illegal aliens that “can square with Border Patrol’s conduct.” ECF 57 at 27.

Therefore, Texas has alleged more than “a dispute over statutory interpretation” and is not asking this court “to ‘police’ the ‘purity’ of hypothetical agency actions.” *Louisiana v. United States EPA*, No. 2:23-cv-00692, 2024 U.S. Dist. LEXIS 12124, at \*65 (W.D. La. Jan. 23, 2024) (quoting *Kirby Corp v. Pena*, 109 F.3d 258, 269 (5th Cir. 1997) and *Sanderson Farms, Inc. v. NLRB*, 651 F. App’x 294, 298 (5th Cir. 2016)). Defendants have flouted their statutory duties and replaced Congress’s properly enacted immigration policy with their own contrary agenda. As

Texas explained to the Fifth Circuit, Defendants’ “arguments rest on upsetting the district court’s plainly correct (and certainly not clearly erroneous) factual findings that Defendants are *not* doing their job when they wantonly destroy state property.” *State of Texas v. Dep’t of Homeland Sec., et al.*, No. 23-50869 (5th Cir), ECF No. 162 at 25 (emphasis original). Indeed, “Defendants’ witnesses conceded that they were not apprehending the individuals who illegally crossed the border because they were not in [federal] custody but were free to roam[,]” supporting this “court’s earlier finding that Defendants’ ‘inspection’ and ‘apprehension’ practices, or lack thereof, were ‘illusory,’ that aliens were not ‘in custody,’ and that Border Patrol can be seen making [no] effort to physically restrain them.” *Id.* at 27 (alterations original). Defendants’ *ultra vires* actions cannot be shielded by sovereign immunity.

**CONCLUSION**

For the foregoing reasons, Defendants’ motion to dismiss should be DENIED.

Dated: May 13, 2024

Respectfully submitted,

/s/ Gina M. D’Andrea  
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**CERTIFICATE OF SERVICE**

I hereby certify that on May 13, 2024, a true and accurate copy of the foregoing document was filed electronically via CM/ECF and served on all counsel of record.

/s/ Gina M. D'Andrea

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