

No. 23A607

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IN THE SUPREME COURT OF THE UNITED STATES

DEPARTMENT OF HOMELAND SECURITY, ET AL.,  
APPLICANTS

v.

STATE OF TEXAS

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SECOND SUPPLEMENTAL MEMORANDUM  
REGARDING EMERGENCY APPLICATION TO VACATE  
THE INJUNCTION PENDING APPEAL

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The government respectfully files this second supplemental memorandum to alert the Court to further factual developments that highlight the need for vacatur of the court of appeals' injunction. The developments are described in the appended declaration of Robert Danley, the Lead Field Coordinator and incoming Chief Patrol Agent for the Del Rio Sector of the U.S. Border Patrol, U.S. Customs and Border Protection. App., infra, 1a-4a.

1. On January 12, 2024, at approximately 9:00 p.m., Mexican officials advised Border Patrol of two migrants in distress on the U.S. side of the river in the area near the Shelby Park boat ramp. App., infra, 2a. Mexican officials also informed Border Patrol that three migrants -- one woman and two children -- had drowned at approximately 8:00 p.m. in the same area. Ibid. An Acting

Supervisory Border Patrol Agent went to the Shelby Park entrance gate and informed the guardsmen from the Texas National Guard stationed there of the drowned migrants and the migrants in distress. Ibid. Speaking through the closed gate, the guardsmen refused to let the Acting Supervisor enter because they had been ordered not to allow Border Patrol access to the park. Id. at 2a-3a. The Acting Supervisor requested to speak with the guardsmen's supervisor to relay the seriousness of the situation. Id. at 3a. The guardsmen at the gate called the Texas National Guard Staff Sergeant on speakerphone. Ibid. The Border Patrol Acting Supervisor again explained the situation, but the Staff Sergeant likewise denied the Acting Supervisor access, conveying that Border Patrol was not permitted to enter the area "even in emergency situations." Ibid. Instead, the Staff Sergeant sent Texas guardsmen to investigate. Ibid.

The following day, Mexican officials confirmed to Border Patrol that the two migrants who Mexican officials had reported were in distress on the U.S. side had attempted to return to Mexico and were rescued by a Mexican government airboat while suffering from hypothermia. App., infra, 3a. Mexican officials also confirmed that they had recovered the bodies of the three drowned migrants and had rescued two additional migrants who had attempted to cross that night. Ibid.

2. Those events underscore that Texas is firm in its continued efforts to exercise complete control of the border and land

adjacent to it on this 2.5-mile stretch of the Rio Grande and to block Border Patrol's access to the border even in emergency circumstances. It is impossible to say what might have happened if Border Patrol had had its former access to the area -- including through its surveillance trucks that assisted in monitoring the area. App., infra, 3a-4a. At the very least, however, Border Patrol would have had the opportunity to take any available steps to fulfill its responsibilities and assist its counterparts in the Mexican government with undertaking the rescue mission. Texas made that impossible.

The government is aware that Texas has issued a statement regarding the events, indicating that its National Guard apprehended two migrants on January 12 and turned one migrant over to the Texas Department of Public Safety and the other to Emergency Medical Services in light of "initial hypothermic conditions." See Texas Military Department, UPDATE: TMD Investigation into Migrant Drownings (Jan. 14, 2024), <https://perma.cc/8NE2-PYXQ>. To the extent the complete circumstances surrounding Texas's account of an apprehension of two migrants are uncertain in the time allowed to assess them, that reflects the confusion and communication problems that occur when Texas seeks to substitute its own law-enforcement personnel for Border Patrol. But at least one thing about the events is clear: Texas's statement acknowledges that "Border Patrol specifically requested access to the park to secure two additional migrants" near the boat ramp on U.S. soil and does

not deny that Texas refused to grant Border Patrol access to the park. Ibid.

3. Texas responded to the government's First Supplemental Memorandum in this Court by restoring Border Patrol's access to the Shelby Park boat ramp for purpose of patrolling on the river. See Resp. 4; App., infra, 4a. But Texas did not dispute that it is attempting to block Border Patrol's access to the land adjacent to the 2.5-mile stretch of the Rio Grande shown on the map appended to the government's First Supplemental Memorandum. See First Supp. Mem. App. 9a. Border Patrol is now aware of a single agent who this morning was able to drive some way through the south end of the 2.5-mile stretch, though he was stopped and questioned by a member of the Texas National Guard. App., infra, 4a. Given the steps Texas has taken to block Border Patrol from entering the area, it is unclear whether -- or for how long -- any other Border Patrol agents may be able to use that route. Ibid. Regardless of the continually shifting circumstances on the ground Texas has created by altering the status quo that existed when the court of appeals issued its injunction, Texas has continued to impede Border Patrol's ability to access the border.

When it issued its opinion, the district court proceeded on the assumption that Border Patrol had "access to both sides of the [concertina wire] fence," Appl. App. 43a, as Texas has repeatedly reiterated, see Opp. 7, & n.1, 26, 33, 34. Although the boat ramp now enables Border Patrol to patrol along the river, at least

during daylight hours, see First Supp. Mem. App. 5a, Texas is impeding Border Patrol agents from accessing the land on the other side of the concertina wire for patrolling, deploying surveillance trucks, and responding to emergencies. And the events described above illustrate why that is profoundly problematic: Even when there is an ongoing emergency of the type that the court of appeals expressly excluded from the injunction, Texas stands in the way of Border Patrol patrolling the border, identifying and reaching any migrants in distress, securing those migrants, and even accessing any wire that it may need to cut or move to fulfill its responsibilities. And Texas's interposition of its National Guard also complicates and interferes with this Nation's communications with Mexican officials and the response by U.S. law enforcement to such communications.

4. The government is taking various actions to seek to regain the full access it had long exercised before January 11 to the land adjacent to the 2.5-mile stretch of the Rio Grande. Those broader issues of access are not presented here, and the government is not asking this Court to resolve them or to adjudicate any factual disputes about recent events. Rather, the government's Application in this Court simply seeks to vacate the Fifth Circuit's injunction that bars Border Patrol agents from cutting or moving Texas's concertina wire coils when they find it necessary to access the border or migrants there. Vacating that injunction remains necessary to restore Border Patrol's full access to the

border. Indeed, vacatur is even more important now, given that the injunction appears to bar Border Patrol from cutting or moving the new wire barriers that Texas has since erected to block access to much more than the riverbank. See Appl. App. 14a. And Texas's recent actions vividly illustrate the untenable legal and practical implications of that injunction, which rests on the Fifth Circuit's holding that Texas may use state-erected barriers and state tort law to prevent federal officials from performing their federally assigned functions at the border. This Court should vacate the injunction pending appeal.

Respectfully submitted.

ELIZABETH B. PRELOGAR  
Solicitor General

JANUARY 2024

APPENDIX

Declaration of Robert Danley.....1a

**IN THE SUPREME COURT OF THE UNITED STATES**

DEPARTMENT OF HOMELAND  
SECURITY, ET AL.,

*Applicants,*

v.

THE STATE OF TEXAS

No. 23A607

**DECLARATION OF ROBERT DANLEY**

I, Robert Danley, pursuant to 28 U.S.C § 1746, and based on my personal knowledge and information made known to me in the course of my employment, hereby declare as follows relating to the above-captioned matter.

1. I am currently the Lead Field Coordinator, U.S. Customs and Border Protection (CBP) for the Del Rio area of responsibility and have held this position since December 19, 2023. I was recently selected as the Chief Patrol Agent, Del Rio Sector, United States Border Patrol (USBP), CBP. I began my career with CBP in December 2000, in Brackettville, Texas, and have held various leadership positions at the USBP Headquarters (HQ), Sector, and Station levels. For example, some of the positions I have held are the Chief Patrol Agent in Detroit Sector; Acting Deputy Chief, Law Enforcement Operational Programs, USBP HQ; Associate Chief, Specialty Programs, Law Enforcement Operations Directorate, USBP HQ; and Supervisory Border Patrol Agent/Course Development Instructor, USBP Academy. Further, I am the two-time recipient of the U.S. Customs and Border Protection Commissioner's Award for Mission Integration and for Partner and Stakeholder Engagement. I received the Secretary, Department of Homeland Security (DHS) Meritorious Service Silver Medal for Leadership in

2020 and the DHS Homeland Security Investigations' Detroit Partner of the Year in 2023. I earned a Bachelor of Science degree in Justice Studies from Northern Arizona University.

2. In my capacity as Lead Field Coordinator and as Chief Patrol Agent of Del Rio Sector, my responsibilities include directly supervising all operations in the Del Rio Sector area of responsibility including Eagle Pass, Texas.

3. I write this to update the court on events that occurred since I filed my declaration.

4. This declaration is based upon my personal knowledge and information provided to me in the course of my official duties.

5. On January 12, 2024, at approximately 9:00 p.m. Central Time, a representative from Mexico's National Institute of Migration contacted Del Rio Sector personnel and advised of two migrants who were in distress on the U.S. side of the river in the area around the Shelby Park Boat Ramp. At this time, the representative from Mexico's National Institute of Migration also informed the Del Rio Sector of a drowning that occurred earlier in the evening of one woman and two children at approximately 8:00 p.m. Central Time, which occurred in the same area around the Shelby Park Boat Ramp. This information was relayed to an Acting Supervisory Border Patrol Agent from Eagle Pass Station for action.

6. The Acting Border Patrol Supervisor responded to the Shelby Park entrance gate, which was closed upon his arrival. From the outside of the gate, the Acting Border Patrol Supervisor advised three guardsmen from the Texas National Guard (TNG) through the gate that three migrants drowned earlier in the evening and two were in distress on the U.S. side of the river. The gate remained closed during the conversation, and the TNG guardsmen advised the Acting Supervisory Border Patrol Agent through the gate that they had been ordered not to let

Border Patrol in through the gate or give Border Patrol access to Shelby Park. Thereafter, the Acting Border Patrol Supervisor requested to speak to the TNG supervisor. The TNG guardsmen at the gate called a TNG Staff Sergeant on his cell phone from the gate and placed the Staff Sergeant on speakerphone. The Acting Border Patrol Supervisor relayed the information that three migrants drowned earlier that evening and two were in distress on the U.S. side of the river to the Staff Sergeant over speakerphone. The Staff Sergeant conveyed that Border Patrol was not allowed to enter, even in emergency situations, but TNG would send a guardsman to look into the situation.

7. On January 13, 2024, the day after the incident occurred, the representative from Mexico's National Institute of Migration confirmed to the Del Rio Sector that a total of seven migrants comprised of two separate groups had attempted to cross on the night of January 12th. The first of the two separate groups, the representative said, included the three migrants who had drowned (a mother and two children), plus another two migrants who were rescued by Mexico's National Institute for Migration for a total of five individuals. Mexican officials were able to recover the bodies of the drowned mother and two children. As reported by the representative of Mexico's National Institute for Migration, the migrants in the second group were two adult males and were the migrants that Border Patrol was attempting to reach the prior evening. As conveyed by the representative of Mexico's National Institute for Migration, those two migrants were on the U.S. side of the river then attempted to return to Mexico when they were rescued by a Mexican government airboat and safely returned to Mexico where they were suffering from hypothermia.

8. Border Patrol was unable to visually monitor the Shelby Park area during the evening of the incidents on January 12, 2024, because, as of January 10, 2024, TNG has blocked

Border Patrol from placing mobile video surveillance inside the Shelby Park area. Starting on January 13, 2024, Texas allowed Border Patrol access to the boat ramp in the Shelby Park area, but it has done so only with restrictions such as requiring information about each individual Border Patrol agent entering the area and has reiterated that this access is limited to use of the boat ramp. Border Patrol also has access through the gate of Port of Entry 2 for the purpose of securing equipment under the Port of Entry. On the morning of January 15, 2024, a Border Patrol agent was able to drive his truck onto an access road within the approximately 2.5-mile area after entering from the south end of that 2.5-mile area. That agent was stopped and questioned by a member of the TNG. Given the fluid nature of the situation, I do not know whether an agent will again be able to drive up that road.

9. I declare, under the penalty of perjury, that the foregoing is true and correct to the best of my knowledge.

Executed on January 15, 2024.

**ROBERT B  
DANLEY** Digitally signed by  
ROBERT B DANLEY  
Date: 2024.01.15  
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ROBERT DANLEY