UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. THE STATE OF TEXAS and GREG ABBOTT, in his official capacity as Governor of the State of Texas, Defendants.	Case No. 3:21-cv-173

UNITED STATES OF AMERICA'S EMERGENCY MOTION FOR A TEMPORARY RESTRAINING ORDER OR PRELIMINARY INJUNCTION

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INTRODUCTION

The United States seeks a temporary restraining order or a preliminary injunction enjoining the enforcement of Texas Governor's Executive Order No. GA-37, titled "Relating to the transportation of migrants during the COVID-19 disaster." The executive order, which was "effective immediately" upon its July 28, 2021 issuance, limits the transportation of certain migrants in the State of Texas and threatens to significantly disrupt federal immigration operations in Texas at a critical time when the United States is facing a once-in-a-century pandemic as well as a significant influx of noncitizens. If not enjoined, the executive order will immediately and irreparably harm the United States and the noncitizens in its custody.

In our constitutional system, a State has no right to regulate the federal government's operations. But the executive order seeks to do just that. Ostensibly necessitated by "President Biden's [purported] refusal to enforce [the immigration] laws" as well as his purported "failure to enforce" an order issued by Centers for Disease Control and Prevention (CDC) under Title 42 of the U.S. Code prohibiting the introduction of certain noncitizens into the United States, the Texas executive order prohibits the transportation—by anyone other than a federal, state, or local law-enforcement officials—of noncitizens "who have been detained by [the U.S. Customs and Border Protection] for crossing the border illegally or who would have been subject to expulsion under the Title 42 order." Order at 1, 2.

This restriction on the transportation of noncitizens would severely disrupt federal immigration operations. The federal government deploys a variety of non-law enforcement officers to transport noncitizens. It also relies extensively on contractors, grantees, and nongovernmental organization (NGO) partners to move noncitizens. U.S. Immigration and Customs Enforcement (ICE) spends over $200 million annually on contracts with private providers and county governments in Texas for transportation services, covering over 8,000 miles per day—money specifically allocated by Congress for this purpose. And in this fiscal year to date, the U.S. Border Patrol's contractors in just one of the four Texas Border Patrol sectors have transported approximately 120,000 noncitizens.

Further, NGOs—with whom the federal government partners to ensure the safe and orderly release of noncitizens and to relieve congestion in border facilities—also need to transport the noncitizens released to them. In light of the pandemic, U.S. Customs and Border Protection (CBP) closely coordinates with NGOs when releasing noncitizens. NGOs perform the critical role of promptly conducting COVID-19 testing and offering safe placement for isolation and quarantine consistent with public-health mitigation measures. NGOs also help to facilitate onward travel of noncitizens, frequently through ground transportation by bus or rail, to other destinations in Texas and throughout the United States, where these individuals are required to appear in immigration court for removal proceedings or to report to ICE offices for further processing.

Finally, the executive order harms the work of the Office of Refugee Resettlement (ORR) within the U.S. Department of Health and Human Services' (HHS) and the children in its custody. ORR is charged by Congress with the responsibility of caring for and placing unaccompanied noncitizen children and ensuring the wellbeing of this particularly vulnerable population. It relies heavily on contractors and grantees to transport such children between ORR's facilities (a vast majority of which are in Texas), to sponsors who care for the children, or to medical providers for needed healthcare.

In seeking to restrict the federal government's transportation of noncitizens in Texas, the executive order stands as an obstacle to the federal government's enforcement of the immigration laws and jeopardizes the health and safety of noncitizens in the federal government's care and custody. Because it interferes with the United States' "broad, undoubted power over the subject of immigration," *Arizona v. United States*, 567 U.S. 387, 394 (2012), the executive order violates the Supremacy Clause of the U.S. Constitution. The executive order also purports to authorize the Texas Department of Public Safety (DPS) to determine whether individuals are "subject to expulsion under the Title 42 order" and to take action against those transporting such individuals based on that determination. Order at 2. But the power to determine whether an individual is "subject to expulsion under the Title 42 order" is reserved exclusively to the federal government. Accordingly, the executive order is preempted by federal law for that reason as well.

Finally, the executive order is invalid under the doctrine of intergovernmental immunity, which prevents a State from regulating federal operations, including operations of contractors, grantees and other partners in their performance of delegated federal functions. Even assuming a nexus between the executive order's stated purpose of protecting the "health and safety of Texans" and the chosen enforcement tool, the order impermissibly seeks to regulate, impede, and frustrate the "movement[s] of migrants under the Biden Administration." Order at 2.

Unless enjoined, the executive order will cause the federal government immediate and irreparable harm. The massive federal immigration operations in Texas depend heavily on the ability of the federal government and its contractors, grantees, and partners to transport noncitizens, whether in federal custody or following release, which is now directly prohibited by the executive order. Indeed, the executive order grants broad powers to DPS to stop any vehicle "upon reasonable suspicion of a violation" of the order's directive and to reroute such a vehicle back to its point of origin or a port of entry. Order at 2. It also authorizes DPS to impound a vehicle for violating the directive or for refusing to be rerouted. The executive order thus can be expected to cause confrontations between DPS and federal personnel, contractors, and partners moving noncitizens, an important immigration function. Accordingly, this Court should promptly issue a temporary restraining order or a preliminary injunction to prevent irreparable harm to the United States, which is also in the public interest.

BACKGROUND

I. The Texas Executive Order

On July 28, 2021, the Texas Governor issued Executive Order No. GA-37, entitled "Relating to the transportation of migrants during the COVID-19 disaster." The executive order purports to mandate—"effective immediately"—that "[n]o person, other than a federal, state, or local law-enforcement official, shall provide ground transportation to a group of migrants who have been detained by CBP for crossing the border illegally or who would have been subject to expulsion under the Title 42 order." Order at 2 ¶ 1. But the executive order does not define "law-enforcement official." *Id.* The executive order also directs DPS "to stop any vehicle upon reasonable suspicion

of a violation" of this prohibition and "to reroute such a vehicle back to its point of origin or a port of entry if a violation is confirmed." *Id.* ¶ 2. Finally, the executive order authorizes DPS to impound vehicles. *Id.* ¶ 3.

II. Movement of Noncitizens Within the Federal Immigration System

The ability to transport migrants throughout Texas is crucial to the operations of the federal immigration system. "Federal governance of immigration and alien status is extensive and complex." *Arizona*, 567 U.S. 387, 395. "Congress has specified categories of aliens who may not be admitted to the United States." *Id.* (citing 8 U.S.C. § 1182). "Congress has specified which aliens may be removed from the United States and the procedures for doing so." *Id.* "Federal officials, as an initial matter, must decide whether it makes sense to pursue removal at all. If removal proceedings commence, aliens may seek asylum and other discretionary relief allowing them to remain in the country or at least to leave without formal removal." *Id.* at 396 (citing 8 U.S.C. § 1229a(c)(4); § 1158 (asylum), § 1229b (cancellation of removal), and § 1229c (voluntary departure)). Implementing this "extensive and complex" regime requires that the federal government be free to transport noncitizens.

If noncitizens can be transported in Texas only by law-enforcement officials, the federal immigration system will be severely impacted. Noncitizens must be transported for a variety of practical and legal reasons. For example, unaccompanied children need to be transferred promptly from CBP custody to ORR facilities or be transported to appropriately vetted sponsors, who are typically family members. *See* Declaration of Jallyn Sualog ("Sualog Decl.") ¶¶ 10, 12; Declaration of Russell Hott ("Hott Decl.") ¶ 11. Noncitizens released from jails and prisons need to be transported to CBP facilities for final disposition and removal. *See* Declaration of Brian S. Hastings ("Hastings Decl.") ¶ 22. Noncitizens need to be transferred between government or private facilities for a variety of reasons. *See id.* ¶¶ 23, 27; Sualog Decl. ¶ 11. And noncitizens released by CBP need independent transportation to their ultimate destinations. *See* Hastings Decl. ¶ 25.

In order to ensure that the immigration system runs smoothly, the federal government relies on countless people to provide transport—many, if not most, of whom are not law-enforcement

officers. They may be non-law-enforcement federal employees, federal contractors, federal grantees, or NGO partners. For example, in just one sector, CBP contractors transported approximately 120,000 migrants released from CBP custody or transferred to the custody of another agency this fiscal year alone. *See* Hastings Decl. ¶ 15. During the same time period, Immigration and Customs Enforcement's main transportation contractor has transported over 97,000 noncitizens. *See* Hott Decl. ¶ 18. CPB regularly coordinates closely with NGOs for the safe release of noncitizens, and NGOs facilitate transport of those noncitizens to bus stations, where they board commercial busses for their ultimate destinations. *See* Hastings Decl. ¶ 25. And the ORR relies on federal contractors and grantees to transfer unaccompanied children between facilities, and to reunite unaccompanied children with their sponsors. *See* Sualog Decl. ¶¶ 11–12.

Limiting the ability to transport noncitizens only by law-enforcement officials would have dire effects on the federal immigration system, hampering the federal government's ability to transport migrants and impeding its ability to fulfill its legal obligations. *See* Hastings Decl. ¶ 21; Sualog Decl. ¶ 10. It will increase the number of people and the length of stay in government facilities, which will in turn increase the risk of COVID-19 transmission. *See* Hastings Decl. ¶ 21; Sualog Decl. ¶ 13. It will hinder noncitizens' access to healthcare. *See* Hott Decl. ¶ 19; Hastings Decl. ¶¶ 19, 26. It will prevent many noncitizens from leaving Texas, and will impede noncitizens from "report[ing] to ICE offices throughout the country or even to appear before immigration courts." Hastings Decl. ¶ 25. And it may require the federal government to repurpose law-enforcement officials from their border-enforcement duties, which will have negative effects on border security and other critical law-enforcement functions. *See id.* ¶ 28.

III. Other Relevant Federal Law

One federal law that requires the federal government to have unimpeded ability to move noncitizens is the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA), 8 U.S.C. § 1232, which Congress enacted to combat child trafficking and provided for the care of unaccompanied children during the pendency of their immigration proceedings. *See*

also 6 U.S.C. § 279(a). Under the TVPRA, unaccompanied children from noncontiguous countries, as well as those children from contiguous countries who are trafficking victims, have a fear of returning to his or her country of nationality due to a credible fear of persecution, or cannot make an independent decision to voluntarily depart the United States, must be transferred to ORR's custody within 72 hours after being identified as an unaccompanied child, except in special circumstances. 8 U.S.C. § 1232(a)(4), (b)(3). Once transferred, the child must be promptly placed in the "least restrictive setting that is in the best interest of the child," subject to considerations of whether the child is a danger to self or others. *Id.* § 1232(c)(2)(A). ORR also assesses whether there is a suitable sponsor for the child so that he or she may be released from ORR custody as quickly as is safe and appropriate. A vast majority of unaccompanied children in ORR's custody are ultimately released to a sponsor during the pendency of their immigration proceedings.

Another relevant federal law is section 265 of Title 42 of the United States Code, which authorizes CDC to suspend the introduction into the United States of persons determined by the CDC to increase the danger of the spread of a communicable disease. In light of the COVID-19 pandemic, CDC exercised its Title 42 authority to issue an order in March 2020 temporarily prohibiting the introduction into the country of certain noncitizens traveling from Canada and Mexico. *See* 85 Fed. Reg. 17,060 (Mar. 26, 2020). The March 2020 order authorized the expulsion of certain noncitizens to the country from which they entered the United States, their country of origin, or another location as quickly as practicable. *Id.* at 17,067. In October 2020, CDC issued a new Title 42 order to replace the March 2020 order (as amended and extended). *See* 85 Fed. Reg. 65,806 (Oct. 16, 2020). Customs officers within Department of Homeland Security (DHS) are charged with applying the Title 42 orders. On July 16, 2021, CDC issued an order excepting unaccompanied noncitizen children from the October Order. *See* 86 Fed. Reg. 38717 (July 16, 2021). The preamble to the executive order states that it is necessitated by President Biden's purportedly "failure to enforce the Title 42 order." Order at 1.

STANDARD OF REVIEW

Courts may enter a temporary restraining order or a preliminary injunction as a means of preventing harm to the movant before the court can fully adjudicate the claims in dispute. Fed. R. Civ. P. 65(a), (b). "The standard for granting either a TRO or a preliminary injunction is the same." *Moore v. Kempthorne*, 464 F. Supp. 2d 519, 525 (E.D. Va. 2006) (citation omitted); *see also May v. Wells Fargo Home Mortg.*, Case No. 3:12-cv-4597, 2013 WL 2367769, at *1 (N.D. Tex. May 30, 2013) ("A TRO is simply a highly accelerated and temporary form of preliminary injunctive relief, and requires the party seeking such relief to establish the same four elements for obtaining a preliminary injunction." (citation omitted)).

The movant seeking either form of relief bears the burden to establish that (1) it is likely to succeed on the merits of its case; (2) it is likely to suffer irreparable harm in the absence of injunctive relief; (3) the balance of the equities tips in its favor; and (4) an injunction would be in the public interest. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008); *see also Bluefield Water Ass'n v. City of Starkville*, 577 F.3d 250, 252–53 (5th Cir. 2009). When the Government is a party, the last two factors merge. *See Nken v. Holder*, 556 U.S. 418, 435 (2009).

ARGUMENT

The United States satisfies all requirements necessary for a TRO and preliminary injunction. Under settled principles of constitutional law, the United States has "a substantial likelihood that [it] will prevail on the merits." *Bluefield*, 577 F.3d at 252–53. Public health, safety, and the Federal Government's ability to manage immigration "will suffer irreparable injury if the injunction is not granted." *Id.* The "threatened injury" to the sovereign interests of the United States and the chaos that the executive order will unleash on the immigration system outweighs the purported harm to Texas.

I. THE UNITED STATES IS LIKELY TO SUCCEED ON THE MERITS

A. The Executive Order Is Preempted By Federal Law

"The Government of the United States has broad, undoubted power over the subject of immigration and the status of aliens." *Arizona*, 567 U.S. at 394. The "power to restrict, limit,

[and] regulate . . . aliens as a distinct group is not an equal and continuously existing concurrent power of state and nation [;]. . . whatever power a state may have is subordinate to supreme national law." *Hines v. Davidowitz*, 312 U.S. 52, 68 (1941). This exclusive allocation of immigration authority to the federal government reflects both its inseparability from conduct of foreign policy and the paramount importance of preserving the federal government's ability to speak "with one voice" in dealing with other nations. *Arizona*, 567 U.S. at 409; *see also Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 424 (2003); *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 381 (2000). "Immigration policy can affect trade, investment, tourism, and diplomatic relations for the entire Nation, as well as the perceptions and expectations of aliens in this country who seek the full protection of its laws." *Arizona*, 567 U.S. at 395. Even "[p]erceived mistreatment of aliens in the United States may lead to harmful reciprocal treatment of American citizens abroad." *Id.*

Cognizant of these significant national interests, Congress in the INA has "established a 'comprehensive federal statutory scheme for regulation of immigration and naturalization' and set 'the terms and conditions of admission to the country and the subsequent treatment of aliens lawfully in the country.'" *Chamber of Com. of U.S. v. Whiting*, 563 U.S. 582, 587 (2011) (quoting *DeCanas v. Bica*, 424 U.S. 351, 353, 359 (1976)). The INA does not preempt "every state enactment which in any way deals with aliens," and "local regulation[s]" affecting aliens do not exceed state authority based on "some purely speculative and indirect impact on immigration." *DeCanas*, 424 U.S. at 355. But even a regulation in an area of traditional state authority is preempted if it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Arizona*, 567 U.S. at 399 (quoting *Hines*, 312 U.S. at 67).

The executive order is invalid because it stands as an obstacle to the enforcement of federal immigration law. Where Congress has the power to enact legislation, it has the power to preempt state law. *See Arizona*, 567 U.S. at 399; *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991). Courts recognize three types of preemption: express preemption, field preemption, and conflict preemption. Under the doctrine of conflict preemption, "state laws are preempted when they conflict with federal law." *Arizona*, 567 U.S. at 399. "This includes cases where 'compliance with both federal

and state regulations is a physical impossibility,' and those instances where the challenged state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Id.* (quoting *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963) and *Hines*, 312 U.S. at 67); *see also Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1288, 1297 (2016). Under the doctrine of "obstacle preemption," whether a state regulation poses "a sufficient obstacle is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects." *Crosby*, 530 U.S. at 373. The Court must examine and consider the federal scheme, including those elements expressed and implied. *Id.* "If the purpose of the act cannot otherwise be accomplished—if its operation within its chosen field else must be frustrated and its provisions be refused their natural effect—the state law must yield to the regulation of Congress within the sphere of its delegated power." *Id.* at 373 (quoting *Savage v. Jones*, 225 U.S. 501, 533 (1912)); *see also Witty v. Delta Air Lines, Inc.*, 366 F.3d 380, 384 (5th Cir. 2004) (recognizing that state laws that "interfere[] with the achievement of federal objectives" are invalid under the doctrine of obstacle preemption).

The executive order is obstacle preempted because it directly and impermissibly interferes with the achievement of statutorily authorized federal objectives in at least two ways. First, the executive order obstructs federal officials' ability to lawfully release and transport noncitizens. The INA gives the Executive Branch broad discretion to release noncitizens from custody through various mechanisms including parole under 8 U.S.C. § 1182(d)(5) and conditional release from under § 1226(a)(2)(B).[1] *See also, e.g.*, 8 U.S.C. § 1229c (authorizing the Secretary to release

[1] To underscore the immigration officials' broad discretion, Congress also made clear that such release is not subject to judicial review. *See* 8 U.S.C. § 1226(e) ("The [Secretary of DHS's] discretionary judgment regarding the application of [Section 1226] shall not be subject to review. No court may set aside any action or decision by the Attorney General under this section regarding the detention or release of any alien or the grant, revocation, or denial of bond or parole."); §1252(a)(2)(B)(ii) ("[N]o court shall have jurisdiction to review ... any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security."); *see also Loa-Herrera v. Trominski*, 231 F.3d 984, 990 (5th Cir. 2000) (explaining the release decisions are not subject to judicial review, including challenges to "the manner in which

removable noncitizens for as long as 120 days, in exchange for the noncitizen's commitment to depart voluntarily); *Dada v. Mukasey,* 554 U.S. 1, 10–11 (2008). Other aspects of immigration law affirmatively *require* the transfer of certain noncitizens between federal agencies within prescribed periods of time. For example, the TVPRA generally requires that an unaccompanied noncitizen child be transferred to ORR within 72 hours after a determination has been made that the minor is a noncitizen unaccompanied child. Hastings Decl. ¶ 21; 8 U.S.C. § 1232(b)(3).[2] That is, an unaccompanied child must be transferred from DHS facilities to ORR facilities. Sualog Decl. ¶ 10. But unless enjoined, the executive order will be an obstacle to this congressionally mandated federal directive because there will be no way for unaccompanied children to reach ORR in the first place—much less within the required timeframe. *See* Hastings Decl. ¶¶ 20, 21.

Additionally, and as explained at length above, in order to maintain the operations of the federal immigration system, immigration officials must routinely—and indeed, constantly—either transport or arrange for transport of noncitizens between locations. For example, noncitizens released from jail must be transported to CBP facilities for final disposition and removal, Hastings Decl. ¶ 22, and others need to be transferred between government or private facilities for a variety of reasons, *see id.* ¶¶ 23, 27; Sualog Decl. ¶ 11.

The executive order is preempted because it "results in interference with Federal Government functions"—and here specifically, with federal law enforcement. *Gartrell Constr. Inc. v. Aubry*, 940 F.2d 437, 438 (9th Cir. 1991) (invalidating statute that purported to preclude a contractor from performing services on a federal construction project without first obtaining a license from the state); *cf. Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 347 (2001) ("[T]the relationship between a federal agency and the entity it regulates is inherently federal in character

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that discretionary judgment is exercised, and whether the procedural apparatus supplied satisfies regulatory, statutory, and constitutional constraints").

[2] There are other constraints on the timing of a noncitizen child's transfer. Pursuant to the terms of the Flores Settlement Agreement, which has governed the care and custody of children in immigration custody since 1997, CBP must release noncitizen children accompanied by a parent or legal guardian (family units) to the parent within three days of apprehension, or place the family in a non-secure licensed facility. 8 U.S.C. § 1232(b)(3).

because the relationship originates from, is governed by, and terminates according to federal law"). The executive order makes it more difficult for the federal government to transport noncitizens in its desired manner. *See, e.g.*, *Arizona*, 567 U.S. at 402, 406 (finding preempted a state law that conflicted with the "method of enforcement" of immigration laws available to the United States through the INA and thus "diminish[ed] the Federal Government's control over enforcement and detract[ed] from the integrated scheme of regulation created by Congress"). Forcing federal law-enforcement officers—who are exempted from the executive order—to handle noncitizen transportation would have serious consequences for border operations and national security. Hastings Decl. ¶ 28; Hott Decl. ¶ 8 ("It is important that ICE focuses its finite law enforcement resources on its public safety mission and targeted enforcement operations"); *see id* ¶¶ 7, 20, 23.

The executive order is also preempted because it puts federal partners in the untenable position of either following federal instructions—risking penalty under the order, including impoundment of their vehicles—or complying with the executive order and declining to perform their designated federal functions. The order thus erects an impermissible conflict, making it problematic for the federal government to work with its chosen partners to transport noncitizens in the manner it deems appropriate. *See Arizona*, 567 U.S. at 406. Noncitizens released by CBP may also need independent transportation to their ultimate destinations and some will need transportation to appear at a later date for further immigration proceedings at a specified location. *See* Hastings Decl. ¶ 25. For example, a noncitizen may be released subject to a requirement to appear before an immigration authority at a certain date and time, *see, e.g.*, 8 U.S.C. § 1229(a)(G)(i), and the noncitizen must be able to get to the location. The terms of the executive order are so broad that they would cover such a noncitizen's attempt to reach the immigration authority, further impeding the operation of the federal immigration scheme. Hastings Decl. ¶ 25. These types of transfers are required by numerous statutes and rules. *See, e.g.*, 8 U.S.C. § 1229a(c)(4); § 1158 (asylum), § 1229b (cancellation of removal), and § 1229c (voluntary departure).

Second, the executive order is separately preempted by federal law because it authorizes state officials to make certain federal law determinations that are reserved to the federal government. In *Arizona*, the Supreme Court invalidated a provision of a state law authorizing state officers, "without a warrant, [to] arrest a person if the officer has probable cause to believe . . . [the person] has committed any public offense that makes [him] removable from the United States." 567 U.S. at 407 (quoting Ariz. Rev. Stat. Ann. § 13–3883(A)(5)). Emphasizing that the challenged "state authority could be exercised without any input from the Federal Government about whether an arrest is warranted in a particular case"—which "would allow the State to achieve its own immigration policy"—the Court noted that "[t]he result could be unnecessary harassment of some aliens (for instance, a veteran, college student, or someone assisting with a criminal investigation) who federal officials determine should not be removed." *Id.* at 408. The Court reasoned that "[b]y authorizing state officers to decide whether an alien should be detained for being removable, [the provision in question] violates the principle that the removal process is entrusted to the discretion of the Federal Government." *Id.* at 409. *Arizona* accordingly invalidated the provision as running afoul of the well-established precepts of obstacle preemption. *Id.* at 410 (by authorizing state officials to exceed authorities conveyed by the INA, the provision "creates an obstacle to the full purposes and objectives of Congress").

Similarly, in *Villas at Parkside Partners v. City of Farmers Branch*, 726 F.3d 524, 536–37 (5th Cir. 2013), the Fifth Circuit held "that because the power to classify non-citizens is reserved exclusively to the federal government," a Texas locality's ordinance that required local building inspectors to conduct their own "unlawful presence" inquiries was preempted by federal law. The ordinance in question prohibited, among other things, both noncitizens and landlords alike from entering into a lease for an apartment or single-family residence unless the prospective tenant first obtained a "license"—which, for all persons not citizens or nationals of the United States, in turn required a local official to purport to verify "with the federal government whether the occupant is an alien lawfully present in the United States." *Id.* at 526 (citation omitted).

In holding that the ordinance was preempted, the Fifth Circuit specifically rejected the locality's argument that the ordinance "relie[d] entirely on the federal determination of lawful or unlawful presence," noting that "even a determinative federal answer on this question—which … would be impossible to obtain—would not bring the Ordinance's arrest procedures into compliance with federal law." *Id.* at 535. The court also held that a separate provision allowing for landlords and prospective tenants to obtain judicial review from a state court on the question of the tenant's legal status could not save the ordinance. As the Fifth Circuit explained:

> Whereas the Supreme Court has made clear that there are "significant complexities involved in [making] . . . the determination whether a person is removable," and the decision is "entrusted to the discretion of the Federal Government," . . . the Ordinance allows state courts to assess the legality of a non-citizen's presence absent a "preclusive" federal determination, opening the door to conflicting state and federal rulings on the question.

Id. at 536 (quoting *Arizona,* 567 U.S. at 409).

Thus, notwithstanding that the ordinance purported to implement the substantive standards of federal law, the Fifth Circuit held that it impermissibly arrogated to state authorities the ability to determine a noncitizen's legal status—a determination that is within the sole authority and discretion of the federal government. *Id.* ("The federal government alone, however, has the power to classify non-citizens.") (citing *Arizona,*567 U.S. at 407–08, and *DeCanas,* 424 U.S. at 354); *see also id.* at 532 (holding that the ordinance improperly "reaches non-citizens who may not have lawful status but face no federal exclusion from rental housing, and exposes those non-citizens to arrests, detentions, and prosecutions based on [state officials'] assessment of 'unlawful presence.' The Ordinance . . . puts local officials in the impermissible position of arresting and detaining persons based on their immigration status without federal direction and supervision."); *Plyler v. Doe*, 457 U.S. 202, 236 (1982) (Blackmun, J., concurring) ("[T]he structure of the immigration statutes makes it impossible for the State to determine which aliens are entitled to residence, and which eventually will be deported."). 8 U.S.C. § 1229a(a)(3); *see also* 8 U.S.C. § 1229a(a)(3) (setting

out the "sole and exclusive procedure for determining whether an alien may be admitted to the United States or, if the alien has been so admitted, removed from the United States").

Here, where the executive order does not even purport to rely on any federal assessment or determination of whether a given noncitizen "would have been subject to expulsion under the Title 42 order," *Arizona* and *Villas at Parkside Partners* apply *a fortiori* and require invalidation of the executive order. Order at 2. From the face of the order, the Texas Governor directs the Texas Department of Public Safety to "reroute … back to its point of origin or a port of entry" any vehicle containing "migrants who have been detained by CBP for crossing the border illegally" or who—in *Texas's* view—"would have been subject to expulsion under the Title 42 Order." *Id.* But as the binding authority of *Villas at Parkside Partners* makes clear, the determination of which noncitizens are within the terms of the Title 42 order, and thus subject to its consequences, is within the exclusive purview of the federal Executive branch. By arrogating this authority to itself, Texas is putting its "local officials in the impermissible position" of imposing consequences on noncitizens "based on their immigration status without federal direction and supervision." *Villas at Parkside Partners*, 726 F.3d at 532 (citing *Arizona*, 567 U.S.at 406–07). Accordingly, the Executive Order must be invalidated on this independent ground as well.

B. The Executive Order Violates Intergovernmental Immunity

The executive order also violates intergovernmental immunity, which arises from the Supremacy Clause and reflects the fact that "states have no power … to retard, impede, burden, or in any manner control the operations of the constitutional laws enacted by [C]ongress to carry into effect the powers vested in the national government." *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 317 (1819). As recently as last year, the Supreme Court reaffirmed that "the Constitution guarantees 'the entire independence of the General Government from any control by the respective States,'" and reiterated that States can neither "control the operations of the constitutional laws enacted by Congress," nor impede the Executive Branch's "execution of those laws." *Trump v. Vance*, 140 S. Ct. 2412, 2425 (2020) (quoting *Farmers & Mechanics Sav. Bank of Minneapolis v. Minnesota*, 232 U.S. 516, 521 (1914) & *M'Culloch*, 17 U.S. at 436), *remanded*, 480 F. Supp. 3d

460 (S.D.N.Y. 2020). So the "activities of the Federal Government are free from regulation by any state." *Mayo v. United States*, 319 U.S. 441, 445 (1943); *Arizona v. California*, 283 U.S. 423, 451 (1931) ("The United States may perform its functions without conforming to the police regulations of a state."); *Union Pac. R.R. Co. v. Peniston*, 85 U.S. (18 Wall.) 5, 36–37 (1873) (a state tax on federal operations "is a direct obstruction to the exercise of Federal powers"); *United States v. City of Arcata*, 629 F.3d 986, 991 (9th Cir. 2010) (recognizing that a regulation violates the doctrine of intergovernmental immunity if it "seek[s] to directly regulate the conduct of agents of the federal government"); *see also Vance*, 140 S. Ct. at 2442–43 & n.5 (Alito, J., dissenting) (collecting cases showing that "two centuries of case law prohibit the States from taxing, regulating, or otherwise interfering with the lawful work of federal agencies, instrumentalities, and officers"). Simply put, "under the intergovernmental immunity component of the Supremacy Clause to the United States Constitution, states may not directly regulate the Federal Government's operations or property." *Blackburn v. United States*, 100 F.3d 1426, 1435 (9th Cir. 1996).

But that is exactly what the Texas executive order is designed to do. It evidently seeks to regulate "the admittance and movement[s] of migrants under the Biden Administration" and is meant to remediate President Biden's purported failure to enforce federal immigration laws. Order, at 2. It seeks to directly regulate non-law-enforcement federal officials in the performance of their duties, and thus, plainly violates the doctrine of intergovernmental immunity. *Id.* To the extent the executive order purports to regulate or interfere with *any* federal official performing official duties, it is invalid.[3] The Constitution does not allow one State's regulations to hamstring

[3] Since the phrase "law-enforcement official" is vague and ambiguous, the Court should avoid the constitutional issue altogether by interpreting Texas's Executive Order as exempting *all* federal officials, contractors, and other non-governmental partners. "The canon of constitutional avoidance comes into play only when, after the application of ordinary textual analysis, the statute is found to be susceptible of more than one construction; and the canon functions as *a means* of *choosing between them.*" *Clark v. Martinez*, 543 U.S. 371, 385 (2005). "'[W]here a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter.'" *Jones v. United States*, 526 U.S. 227, 239 (1999) (quoting *U.S. ex rel. Atty. Gen. v. Delaware & Hudson Co.*, 213 U.S. 366, 408 (1909)), *dismissing Habeas Corpus*, *Logan v. Kallis*, 2019 WL

federal operations and jeopardize the security of the nation. *Johnson v. Maryland*, 254 U.S. 51, 56–57 (1920) (holding that state laws cannot "control the conduct of" individuals "acting under and in pursuance of the laws of the United States"). And the purported necessity of such measures to address issues of public health or safety is not relevant to the analysis because the constitutional question is not "[w]hether state law is better or worse" at protecting these interests, but "whether the state regulates federal activity." *Boeing Co. v. Movassaghi*, 768 F.3d 832, 839 (9th Cir. 2014). The consequences would be catastrophic if the federal government were forced to reroute law-enforcement personnel from their current mission to "engage in transportation activities that normally could be performed by contractors." Hastings Decl. ¶ 28. Among other things, it would increase processing times and decrease enforcement at checkpoints, ultimately "decreasing border security enforcement" and "increasing threats to national security." *Id.* "If ICE is forced to divert resources from the interior to perform transportation responsibilities, it will result in ICE not enforcing criminal and immigration laws against criminal migrants and fugitives will remain at large." Hott Decl. ¶ 7.

It makes no difference that the federal government relies heavily on federal contractors, grantees, and NGO partners to move noncitizens. *See* Hastings Decl. ¶¶ 19–28. "For purposes of intergovernmental immunity, federal contractors are treated the same as the federal government itself." *United States v. California*, 921 F.3d 865, 882 n.7 (9th Cir. 2019), *cert. denied,* 141 S. Ct. 124 (2020); *Boeing*, 768 F.3d at 840 (holding unconstitutional a state law that "directly interfere[d] with the functions of the federal government" by "mandat[ing] the ways in which [a contractor] renders services that the federal government hired [it] to perform"); *GEO Grp., Inc. v. City of Tacoma*, Case No. 3:18-cv-05233, 2019 WL 5963112, at *5 (W.D. Wash. Nov. 13, 2019) ("The intergovernmental immunity doctrine . . . appl[ies] to federal contractors insofar as the challenged law 'regulate[s] what the federal contractors [have] to do or how they [do] it pursuant to their contracts.'") (quoting *Boeing Co.*, 768 F.3d at 839). In *Johnson v. Maryland,* the Supreme Court

355520 (C.D. Ill. Jan. 29, 2019).

held that even licensing requirements of general applicability may be invalid when they limit the federal government's choice of contractor, explaining that the question in such licensing cases "is whether the State can interrupt the acts of the general government itself," and concluding that the answer was plainly no. 254 U.S. at 55. And in *Leslie Miller, Inc. v. Arkansas,* the Supreme Court struck down an Arkansas licensing as it applied to Government contractors, explaining that the requirement "does not merely touch the Government servants remotely by a general rule of conduct; *it lays hold of them in their specific attempt to obey orders*." 352 U.S. 187, 190 (1956) (emphasis added). The executive order extends even beyond the regulations that the Supreme Court struck down in *Johnson* and *Leslie Miller*. It targets a distinctly federal function: the transportation of noncitizens who, in the state's view, have a particular immigration status under federal law—transportation that is overwhelmingly performed by those who deal with the federal government. And it does not merely restrict the federal government's choice of contractors to transport noncitizens; it eliminates the possibility of such choice by prohibiting *anyone* other than law-enforcement personnel from transporting noncitizens.

If states could regulate—or outright ban—federal officials and partners from performing their duties on behalf of the United States, the federal government would grind to a halt. Just as a State cannot prevent a federal "contractor [ ] supplying a military post with provisions" from "making purchases within any State, or from transporting the provisions to the place at which the troops were stationed," *Osborn v. Bank of U.S.*, 22 U.S. (9 Wheat.) 738, 867 (1824) (Marshall, C.J.), neither can a State prevent federal officials or their nongovernmental partners from transporting noncitizens to destinations determined by the federal government. The executive order is invalid on its face and this Court should enjoin it in its entirety.

II. THE GOVERNMENT FACES IRREPARABLE HARM

As the Supreme Court and other courts have explained, irreparable harm ordinarily results from the enforcement of a state law that violates the Supremacy Clause. *See New Orleans Pub. Serv., Inc. v. Council of City of New Orleans*, 491 U.S. 350, 366-67 (1989) (noting that irreparable injury may be established "by a showing that the challenged state statute is flagrantly and patently

violative of . . . the express constitutional prescription of the Supremacy Clause")(citation omitted); *United States v. Arizona*, 641 F.3d 339, 366 (9th Cir. 2011) ("We have 'stated that an alleged constitutional infringement will often alone constitute irreparable harm.'") (quoting *Assoc. Gen. Contractors v. Coal. for Econ. Equity*, 950 F.2d 1401, 1412 (9th Cir. 1991)); *City of El Cenizo v. Texas*, 264 F. Supp. 3d 744, 809 (W.D. Tex. 2017) (noting that "Federal courts at all levels have recognized that a violation of constitutional rights constitutes irreparable harm as a matter of law and no further showing of irreparable injury is necessary." (citing cases)). Therefore, the unconstitutionality of the executive order alone suffices to establish irreparable harm.

But the harm to the federal government goes far beyond that legal injury. Prohibiting contractors from transporting noncitizens would have tremendous consequences. The executive order would jeopardize the health and safety of noncitizens in federal custody, federal law-enforcement personnel and their families, and our communities. The order would exacerbate and prolong overcrowding in facilities and shelters. Sualog Decl., ¶ 13; Hasting Decl. ¶ 21. It would obstruct the federal government's arrangements with nongovernmental partners to ensure that released individuals are transported for appropriate COVID-19 testing or other medical issues. Hastings Decl. ¶ 24. The order directly interferes with the implementation of federal immigration law because federal law requires individuals processed for release to appear before immigration courts or report to U.S. Immigration and Customs Enforcement offices throughout the country, and individuals frequently rely on privately arranged transportation, including buses or trains. *Id.* ¶ 25. And noncitizens released from prison and jail will not have transportation to be processed for further immigration proceedings. Hastings, ¶ 22.

Unless enjoined, the executive order will directly impede the federal government's ability to transport unaccompanied children to ORR in a timely fashion as required by the TVPRA, and will prevent transportation of unaccompanied children between facilities and from facilities to sponsors. Sualog Decl. ¶ 10. It will interfere with the federal government's ability to transport noncitizens who need urgent medical care. *Id.* ¶ 11. The inability to release unaccompanied children to sponsors not only denies such children the care and companionship of their sponsors, who

are typically family members, but it also keeps unaccompanied children in ORR custody longer, which decreases the available bed-space in ORR's facilities and prevents ORR from accepting new referrals from CBP. *Id.* ¶ 12. The executive order's restriction on transportation will result in immediate back-ups either at CBP or ORR facilities. *Id.* ¶ 13. Increased density in these facilities will endanger unaccompanied children and facility personnel by increasing the risk of COVID-19 transmission, prevent unaccompanied children from being placed in the most appropriate facility, and delay unaccompanied childrens' release to their sponsors. *Id.*; *see also* Sualog, ¶ 13 ("The inability to transport" noncitizens "at any stage of the process will result in immediate back-ups either at CBP or ORR facilities" and the "increased density in these facilities will endanger" noncitizens "and facility personnel by increasing the risk of COVID-19 transmission."). The executive order would "significantly increase the number of people held in CBP facilities and lengthen the average time in custody; increase the risk of COVID-19 transmission to migrants and employees; and prolong the government's placement of migrant unaccompanied children into the care and custody of HHS ORR and, from there, to an appropriate sponsor." Hastings Decl. ¶ 21.

The executive order would thus significantly impede the federal government's ability to fulfill its responsibilities under the TVPRA and the Flores Settlement Agreement. Moreover, whereas the federal government coordinates with its NGO partners to alleviate congestion at border facilities and to conduct COVID-19 testing, isolation, and quarantine as appropriate, the executive order seeks to interfere with that relationship and regulate the conduct of the NGO partners. Hastings Decl. ¶ 24. Finally, the executive order would negatively impact ORR's important functions to care for the wellbeing of unaccompanied children, given the need of its grantees to transfer such children for a variety of reasons, including to obtain medical care. In sum, the harm on federal immigration operations cannot be overstated and is irreparable.

III. THE BALANCE OF EQUITIES TIP IN FAVOR OF AN INJUNCTION

The final two factors—the balance of equities and the public interest—merge where, as here, the government is a party. *Nken v. Holder*, 556 U.S. 418, 435 (2009)); *see also Pursuing Am.'s Greatness v. Fed. Election Comm'n*, 831 F.3d 500, 511 (D.C. Cir. 2016) (Government's

"harm and the public interest are one and the same, because the government's interest *is* the public interest"). Here, these factors manifestly favor the United States.

Here, Texas will not be harmed by an injunction. The executive order does virtually nothing to advance its supposed goals. It purports to prevent the spread of COVID-19 by restricting the transportation of "migrants who have been detained by CBP for crossing the border illegally or who would have been subject to expulsion under the Title 42 order." But the order would likely *exacerbate* potential spread of COVID-19 because it prevents the federal government from transporting noncitizens for medical care, COVID-19 testing and consequence management, and most importantly, alleviating congestion in border facilities and border communities. And the order's exemption for federal law-enforcement officers undermines its entire premise: it never explains how restricting the identity of the person who can transport those noncitizens has any relevance to stopping the spread of COVID-19. Even if it could be accomplished at the scale required—which it cannot—there is no public interest served by pulling federal law-enforcement officers off the border and out of immigration detention facilities to drive vans and buses, a scenario that would have significant border and national security implications. In sum, the balance of the equities and the public interest tilt decidedly in favor of enjoining the executive order.

CONCLUSION

For these reasons, the Court should temporarily or preliminarily enjoin the executive order.

Date: July 30, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of this filing was emailed to Kenneth Paxton, Attorney General for the State of Texas, and Brent Webster, the First Assistant to the Texas Attorney General. I further certify that parties will also be served pursuant to Rule 5(b) of the Federal Rules of Civil Procedure.

/s/ Zachary A. Avallone

Zachary A. Avallone

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

EL PASO DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. THE STATE OF TEXAS, GREG ABBOTT, in his official capacity as Governor of the State of Texas, Defendants.	Case No. 3:21-cv-173

DECLARATION OF BRIAN S. HASTINGS

1. I am the Chief Patrol Agent of the Rio Grande Valley (RGV) Sector, U.S Border Patrol (Border Patrol), U.S. Customs and Border Protection (CBP). I have been employed in this capacity since March 16, 2020. Prior to that date, I was the Chief of Law Enforcement Operations for the U.S. Border Patrol (CBP Headquarters, Washington, DC). In my capacity as the Chief Patrol Agent of the RGV Sector, I have direct oversight of nine Border Patrol stations responsible for securing 316 river miles, 317 coastal miles, and 34 counties.
2. I am responsible for executing the missions of the Border Patrol within the Rio Grande Valley RGV Sector. I make this declaration on the basis of my own

knowledge, as well as the documents and information made available to me in my position. I am submitting this declaration to explain the harm that the "Executive Order No. GA-37 relating to the transportation of migrants during the COVID-19 disaster" issued by the Texas Governor on July 28, 2021 would have on Border Patrol's operations, particularly with respect to the Border Patrol's significant reliance on contractors to transport migrants as part of the federal government's immigration operations.

3. The Border Patrol is comprised of 20 Border Patrol sectors. Of those, nine are located along the southwest border of the United States, with four being located completely within Texas and a fifth straddling the states of Texas and New Mexico.

4. The four Border Patrol sectors that are located completely in Texas are RGV, Laredo, Del Rio, and Big Bend. The El Paso Sector covers a portion of the border in Texas as well as New Mexico. There are over 1,200 miles of common border between Texas and Mexico. To date in Fiscal Year 2021, Border Patrol apprehended a total of approximately 860,000 migrants in these five sectors—approximately 69% of all apprehensions made by the entire Border Patrol. RGV alone has accounted for approximately 32% of all apprehensions in FY 2021.

5. I am familiar with the policies and procedures that govern the apprehension, processing, temporary detention and transport of migrants in RGV Sector, as well as those that are applicable for all of Border Patrol nationwide. I am responsible for ensuring that those policies and procedures are communicated to the agents, overseen by the supervisors, and implemented within the RGV Sector.

6. In Fiscal Year 2021, RGV has encountered a significant increase in apprehensions that has strained the capacity at RGV Border Patrol stations, which are only designed for short-term detention. Indeed, in Fiscal Year 2021, RGV's apprehensions are up approximately 529% as compared to Fiscal Year 2020.
7. When RGV Sector has historically faced an influx of apprehensions, Border Patrol has taken various steps to reduce the strain on the capacity to hold migrants who are apprehended entering the United States unlawfully. This includes activating other stations for processing, detailing agents from other sectors, and moving migrants to stations and other sectors that have fewer migrants in custody. These steps have also been taken during the ongoing influx.
8. For example, RGV Sector began transporting certain migrants, primarily those who entered as family units by bus, to other Border Patrol Sectors (e.g., Laredo Sector) to alleviate strain on capacity. Often, the U.S. Border Patrol uses contractors to provide such transportation. RGV has also constructed a new "soft-sided" facility in Donna, Texas. This facility can handle a large influx of migrants. This facility has the capacity to hold 813 migrants (based on current COVID-19 capacity recommendations). However, with the large number of migrants being apprehended this facility currently faces significant capacity constraints.
9. As part of a further effort to mitigate the high number of migrant apprehensions in RGV, the Temporary Outdoor Processing Site (TOPS), was constructed underneath the Anzalduas Bridge and serves as a short-term, open-air intake and processing area that enables CBP to intake, screen, and process certain migrant populations, all while

minimizing employee and migrant exposure to COVID-19 to the greatest extent possible. TOPS currently focuses on expeditiously processing those apprehended as family units in RGV Sector, and often releases migrants into the care of nongovernment organizations (NGOs) upon close coordinating with such NGOs. This coordination allows an average of 500-1,000 migrants to depart government custody and allows more safe and efficient use of CBP's enclosed facilities for custody. Moreover, releasing migrants in coordination with NGOs significantly reduces the COVID-19 risk to both CBP employees and migrants in custody because it reduces the number of individuals in enclosed facilities.

10. Certain classes of migrants without lawful immigration status are subject to mandatory detention and may not be released from immigration custody. For other migrants without lawful immigration status, U.S. Border Patrol generally has discretion to either maintain custody for transfer to the custody of Immigration and Customs Enforcement (ICE), the U.S. Department of Health and Human Services (HHS), Office of Refugee Resettlement (ORR) or release them from custody.

11. Further, the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA) and Flores Settlement Agreement impose limitations on U.S. Border Patrol's ability to detain migrants for extended periods. The TVPRA generally requires that an unaccompanied alien child (migrant unaccompanied child) be transferred to the HHS-ORR within 72 hours after determining that the minor is a migrant unaccompanied child. Similarly for migrant children accompanied by a parent or legal guardian (family units), the Flores Settlement Agreement generally

requires that CBP release the child to the parent within 3 days of apprehension or place the family in a nonsecure licensed facility. Thus, Border Patrol must generally prioritize processing and the transfer out of CBP custody of migrant unaccompanied children and family units.

12. As of July 29, 2021, there were 8,336 migrants in RGV Sector detention facilities. Of these, 6,459 were pending processing, and the average hold time for migrants in custody was 57.22 hours. The detention facilities in the other Texas Border Patrol Sectors are also strained due to the influx of migrants. For instance, as compared to the prior fiscal year, Del Rio Sector has seen an approximate 827% increase in migrant apprehensions. El Paso Sector has seen an approximate 283% increase in migrant apprehensions, and Laredo Sector has seen an approximate 206% increase in migrant apprehensions. Just like in RGV, this significant increase in apprehensions has strained Border Patrol's processing and detention capability in those sectors and has impacted the ability of ICE and HHS to assume custody of migrants.

13. In RGV Sector during this fiscal year, Border Patrol has released approximately 100,700 migrants, of which approximately 9,000 were released last week. Nearly 8,500 family unit migrants were released from CBP custody last week after coordination with an NGO.

14. To date this fiscal year, RGV Sector has transferred approximately 33,700 migrants into the custody of Enforcement and Removal Operations (ERO) of ICE. Last week, RGV Sector transferred at least 3,600 migrants into the custody of ERO. This fiscal year, approximately 51,000 migrant unaccompanied children were transferred from

RGV Sector into the custody of HHS-ORR. Included in the last week, approximately 2,200 migrant unaccompanied children were transferred from RGV Sector into the custody of HHS-ORR.

15. Just in RGV Sector alone, out of all migrants released from Border Patrol custody or transferred to the custody of another agency, such as ICE-ERO or HHS-ORR, for this fiscal year, approximately 120,000 were transported by a contractor of Border Patrol. Indeed, last week, approximately 9,600 migrants were transported from RGV Border Patrol custody by a contractor of Border Patrol.

16. The ability of ICE and its contractors to transfer migrants out of Border Patrol custody is essential as Border Patrol stations are only designed for short term detention.

17. I am familiar with the July 28, 2021 Executive Order issued by Texas Governor Greg Abbott (GA-37) relating to the transportation of migrants.

18. My understanding of this Executive Order is that it prohibits persons (except for federal, state, or local law enforcement officials) from providing ground transportation to a group of migrants who have been detained by CBP for crossing the border illegally or who would have been subject to expulsion under Title 42.

19. The Executive Order would significantly impact CBP operations, would impede CBP's ability to coordinate transportation with other federal partners, and prevent CBP's ability to obtain medical treatment for migrants requiring immediate medical attention.

20. As stated, Border Patrol must generally prioritize processing and the transfer out of custody of migrant unaccompanied children and family units based on the requirement of TVPRA and the Flores Agreement. In order to accomplish this prioritization, CBP coordinates the transfer and transportation of migrant unaccompanied children and family units with contractors from ICE and HHS-ORR. It is my understanding migrant unaccompanied children are transported to shelters throughout Texas and in some instances, to other states.

21. If the Executive Order prevents transportation of migrant unaccompanied children and family units, it would cause migrant unaccompanied children and family units to be held within CBP facilities for a longer period of time, thereby preventing CBP's compliance with both the TVPRA and the Flores Settlement Agreement. Impeding CBP's operations in this manner would also significantly increase the number of people held in CBP facilities and lengthen the average time in custody; increase the risk of COVID-19 transmission to migrants and employees; and prolong the government's placement of migrant unaccompanied children into the care and custody of HHS ORR and, from there, to an appropriate sponsor.

22. CBP utilizes assistance from ICE contract services for the transportation of migrants released from jail or prison. These migrants are transported to CBP facilities for final disposition and oftentimes, for removal from the United States.

23. CBP's daily operations rely heavily on the assistance of ICE contract services to transport migrants released from CBP custody which may include transport to ICE facilities for release or detention. CBP's inability to transfer migrants to ICE contract

services for transportation interferes with CBP's operation and impacts detention numbers and conditions.

24. Based on my experience and position, I expect that the Executive Order would also negatively impact CBP's inability to coordinate release of migrants to NGOs, which partner with CBP to play an important role in conducting COVID-19 testing and other mitigation management. This would also impede operations. Specifically, CBP coordinates with NGOs upon the release of migrants to receive prompt COVID-19 testing prior to being released into the community in order to promote public safety in the border communities. For any family members who test positive for COVID-19 immediately after release, CBP coordinates with appropriate NGOs for the provision of non-congregate accommodations so that the family members released from CBP custody can properly isolate and/or quarantine consistent with public health protocols. Without the assistance of NGOs, CBP would experience an increase in the number of people in custody because CBP would not be able to readily release migrants after coordination with NGOs who provide additional transportation and resources. For similar reasons, CBP would experience impacted detention conditions.

25. Further, NGOs routinely transport migrants released by Border Patrol to bus stations where the migrants board commercial busses to their ultimate destinations in the United States. If bus companies are barred by the Executive Order from transporting migrants released by Border Patrol, this will result in NGOs being unable to intake additional migrants and will ultimately impair Border Patrol's operations. This would likely result in migrants remaining in the local border communities without any

assistance or shelter by the NGOs, causing unsafe conditions for both migrants and the community. Indeed, prohibiting transportation within the State of Texas directly interferes with the migrant's ability to get to the next step in the immigration process. They often must travel in order to report to ICE offices throughout the country or even to appear before immigration courts.

26. Migrants who are in CBP custody oftentimes require transportation by ambulance to local healthcare services for treatment of various physical injuries and medical conditions. The Executive Order impedes CBP's ability to provide adequate medical attention and care otherwise available at local healthcare facilities for these migrants because the ambulance drivers are not law enforcement officials and therefore, would not fall under the exception within the Executive Order.

27. CBP utilizes contract services to assist with transportation of migrants between CBP facilities within the state of Texas. For instance, if a CBP facility in RGV is at or near capacity, CBP may need to rely on contractors to transport migrants to another sector within Texas (e.g., Laredo) that has more processing capacity. Additionally, CBP's operations would be impacted if transport between facilities was prohibited or delayed because this would impact detention numbers, the time in custody and detention conditions within CBP facilities.

28. If contract services to transport migrants were no longer available as a result of the Executive Order, CBP would be faced with untenable choices such as continuing operations with increased numbers of migrants in their facilities or have CBP law-enforcement officials transport these migrants. That later option would be required to

take law-enforcement officials from enforcement duties to engage in transportation activities that normally could be performed by contractors. This would severely impact CBP's daily operations by decreasing border security enforcement at the southwest border thereby increasing threats to national security; decreasing enforcement at checkpoints; and increasing duration for processing.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 30th day of July, 2021.

Brian S. Hastings

Brian S. Hastings
Chief Patrol Agent
Rio Grande Valley Sector
U.S. Border Patrol
U.S. Customs and Border Protection
Edinburg, Texas

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. THE STATE OF TEXAS and GREG ABBOTT, in his official capacity as Governor of the State of Texas, Defendants.	Case No. 3:21-cv-173

DECLARATION OF RUSSELL HOTT

I, Russell Hott, declare the following under 28 U.S.C. § 1746, and state that under penalty of perjury the following is true and correct to the best of my knowledge and belief:

PERSONAL BACKGROUND

1. I am currently employed by the U.S. Department of Homeland Security (DHS), U.S. Immigration and Customs Enforcement (ICE), Enforcement and Removal Operations (ERO) as the Assistant Director for the Custody Management Division (CMD). I have held this position since January 2021. CMD provides policy and oversight for the administrative custody of ICE's highly transient and diverse population of immigration detainees. CMD is composed of three divisions led by three Deputy Assistant Directors under my direct supervision: (1) the Alternatives to Detention Division; (2) the Detention Management Division; and (3) the Custody Programs Division.

2. As the Assistant Director, I am responsible for the effective and proficient performance of these three divisions and their various units, including the oversight of compliance with ICE's detention standards and conditions of confinement at ICE detention facilities generally. I am further responsible for managing ICE detention operations efficiently and effectively to provide for the safety, security, and care of an average of about 19,000 detainees daily and roughly 150,000 detainees annually, at approximately 200 facilities nationwide, including family staging centers (FSCs) along the southwest border.

3. I began my career with the U.S. Government as a detention enforcement officer with the former Immigration and Naturalization Service in New York, NY in 2002. I advanced through a variety of positions including Immigration Enforcement Agent, Deportation Officer, Instructor at the Federal Law Enforcement Training Center, Supervisory Detention and Deportation Officer, acting Assistant Field Office Director, National Program Manager, Unit Chief, acting Deputy Chief of Staff for ERO, Chief of Staff for the ICE Deputy Director, Deputy Field Office Director for both the Boston and Washington field offices, Field Office Director, and acting Deputy Assistant Director.

4. I am familiar with Governor Greg Abbott's July 28, 2021, Executive Order No. GA-37, relating to the transportation of migrants during the COVID-19 pandemic and submit this declaration to explain the extensive adverse impact it would have on ICE operations. The information in this declaration is based upon my personal knowledge and information provided to me in my official capacity.

ICE PRACTICES NATIONWIDE

5. As an operational program of ICE, ERO is responsible for the planning, management, and

direction of broad programs relating to the supervision, detention, and removal of noncitizens from the United States under U.S. immigration laws. ERO's statutory responsibilities include the detention of noncitizens during the pendency of proceedings to determine whether they will be removed from the United States, as well as noncitizens subject to an administratively final removal order, pending their removal from the United States. The immigration laws also mandate the detention of certain categories of noncitizens, including "arriving aliens," as defined in 8 C.F.R. §1.2, and certain categories of criminal and terrorist noncitizens.

6. ICE relies on express statutory authority to contract for goods and services required to carry out its authorities and responsibilities. This includes ICE's routine use of contractors for transporting noncitizens from U.S. Customs and Border Protection (CBP) custody to ICE processing and detention facilities, between ICE facilities, and from ICE facilities for removal from the United States. ICE has traditionally relied on private contractors for its transportation needs in particular, including ground transportation of its detained population to detention facilities nationwide. In addition, almost all ICE contracted detention facilities have some transportation services for local transportation provided on an as-needed basis. The use of contractors for this purpose is essential to ensuring that ICE's trained law enforcement personnel can focus on duties and operations that require law enforcement training and authorities, such as locating and apprehending fugitive noncitizens, conducting arrests, and executing final orders of removal.

7. If ICE were required to reposition personnel and assets from interior offices to handle routine ground transportation, key aspects of ICE's critical mission to protect public safety and maintain national security would not be able to be performed. On average, ICE makes 4,000

arrests of priority migrants within the interior per month. If ICE is forced to divert resources from the interior to perform transportation responsibilities, it will result in ICE not enforcing criminal and immigration laws against criminal migrants and fugitives will remain at large.

8. It is important that ICE focuses its finite law enforcement resources on its public safety mission and targeted enforcement operations like Operation SOAR (Sex Offender Arrest and Removal), a coordinated enforcement operation that builds on ongoing efforts to arrest and remove noncitizen sex offenders from our communities. In Fiscal Year (FY) 2021 through July 24, 2021, ICE ERO apprehended 30,681 noncitizens with criminal convictions; 7,917 noncitizens with pending criminal charges, and 13,630 other immigration violators. 13,779 of all ICE ERO administrative arrests were made at large.
9. Congress provides ICE annual appropriations to pay for transportation contracts, based on its annual budget submissions that request funding for ERO transportation contracts. Congress expects ICE to leverage contractor support in the movement of noncitizens as reflected in ICE's FY 2020, and FY 2021 Budget Requests.[1]
10. Further, in FY 2019, ERO Transportation and Removal Program purchased 17.9 million miles of contractor transportation and over 1.3 million contractor guard hours directly related to transportation. The decentralized ground transportation network allows field offices to control local transportation networks and assets. ICE spent $175.5M in FY 2020, and $136M in FY 2021 to date on ground transportation in Texas alone.
11. In addition to removing noncitizens with a final order of removal and transporting adult

[1] *See* U.S. Immigration and Customs Enforcement, FY 2020 Congressional Budget Justification, *available at* https://www.dhs.gov/sites/default/files/publications/19_0318_MGMT_CBJ-Immigration-Customs-Enforcement_0.pdf; U.S. Immigration and Customs Enforcement, FY 2021 Congressional Budget Justification, *available at* https://www.dhs.gov/sites/default/files/publications/u.s._immigration_and_customs_enforcement_0.pdf.

noncitizens to, from, and between its detention facilities, ICE transfers unaccompanied noncitizen children (UCs) to the care of the Department of Health and Human Services, (HHS) Office of Refugee Resettlement (ORR), upon the assignment of bed space and transports family units internally to ICE FSCs. ERO is responsible for transporting UCs from the DHS apprehending agency to the designated ORR facility. The Juvenile and Family Residential Management Unit coordinates with ORR directly to place UCs encountered in the interior of the United States by other DHS components. In FY 2019, ICE transported 64,718 UCs through contractors, at a total contracted transportation cost of approximately $93.5M. In FY 2021, ICE transported 64,916 UCs within the state Texas. In FY 2021, ICE transported 25,389 family unit members within the state of Texas.

12. In order to fulfill all of ICE's obligations as outlined in the paragraphs above, ICE must be able to transport noncitizens. The mode of transportation, including ground transportation, and the route of travel is contingent upon where the noncitizen is encountered, the applicable custody provisions and processes, and where the noncitizen will be housed and processed prior to their release from ICE custody.

13. Ground transportation includes the pick-up, transfer, and removal of noncitizens, as well as transportation to and from court, scheduled medical appointments, and emergency medical services. Ground transportation provides integral support to other ICE activities, including custody management, enforcement, removals, and local field operations.

ICE PRACTICES IN TEXAS

14. ICE transfers noncitizens to, from, and within the State of Texas. Given the landmass of Texas, ICE leverages local, county transportation contracts for short-range requirements, as well as utilizes its private ground transportation contractors for long-range requirements. ICE

is currently transporting from CBP custody an average of 1,117 noncitizens daily from the southwest border, the majority of which stem from encounters along the border of Texas and Mexico, almost exclusively by contractors. The sheer number of noncitizens encountered by CBP along the southwest border and transferred to ICE custody makes it impossible for it to use law enforcement officers – as opposed to contractors – to transport them while still executing its law enforcement responsibilities.

15. ICE currently has more than 20 contracts with private service providers and county governments in the State of Texas for transportation services that incorporate over 8,000 miles per day. These include major transportation contracts within the San Antonio, El Paso, Houston and Dallas areas with local companies that amount to over $200M annually.

16. As noted above, ICE is also transporting UCs from CBP to ORR custody. The care and custody of noncitizen minors, including their transportation, must comply with specialized laws and regulations, including the Homeland Security Act of 2002, the Trafficking Victims Protection Reauthorization Act (TVPRA), Violence Against Women Reauthorization Act of 2013, and the *Flores* Settlement Agreement. Immigration laws also require the transfer of custody of certain noncitizen minors encountered by DHS to the custody of HHS.

17. ICE also transports family units composed of adult parents or legal guardians with their minor children to FSCs. Because this transport involves minors, some of the special requirements applicable to UCs, such as the *Flores* Settlement Agreement, also apply to the transportation of family units composed of adult parents or legal guardians and minor children. This requires specially trained staff that understand all applicable legal requirements. ICE uses the contractor, MVM Inc., to transport family units and UCs. They hire specially trained staff that have a background in child welfare and can provide appropriate care while fulfilling all

legal requirements. By using contractors, ICE is able to ensure the wellbeing of children during what can be a confusing and challenging process.

18. In FY 2021 to date, ICE's main private transportation contractor for families and UCs, MVM Inc., has transported approximately 97,443 noncitizens.

19. Even with the use of contractors, the current volume of noncitizens encountered at or near the border means that ICE is stretched to the limit transporting individuals away from high saturation points to locations for food, shelter, medical care, and safety, it will further exacerbate the current challenges at various CBP stations along the border. The volume of encounters will quickly outpace any available space and could create a health endemic at those locations. And without the ability to utilize its contract support to transport migrants to hospitals, emergency medical needs would not be supported, and lives would be at stake for heart attacks, high-risk pregnancies, highly contagious diseases, aneurisms, strokes, and more. Given that ICE has incorporated contractor support in its budget and operational planning, ICE does not have the fleet, manpower, or infrastructure necessary to provide and sustain support to the border enforcement in the midst of an unprecedented global pandemic.

20. Additionally, there are some noncitizens whose criminal history means that the presence of law enforcement officers during transport is required to safeguard the public. Use of contractors for the transport of UCs, family units, and noncitizens who do not pose a risk to the community allows ICE to shift scarce law enforcement resources where they are most needed

21. Further, ICE has a very limited number of detention beds near saturation points along the Southwest border and its overall bed capacity got reduced by 15,000 beds to meet the requirements imposed by the COVID-pandemic to account for social distancing and cohorting

needs. It is important that ICE has ability to transport noncitizens in its custody across Texas and nationwide. It is equally important that noncitizens released from CBP custody are able to timely travel to their intended destinations within the United States to comply with their immigration obligations by reporting to local ICE offices and promptly have their immigration proceedings commenced.

22. Finally, contractor support allows ICE to effectuate the repatriation of migrants who have been ordered removed from the United States. Without contractor support, ICE would not be able to safely and effectively transport migrants to the southwest border or to international airports for purposes of removal.

23. If ICE is forced to discontinue the use of contractors for the transport of noncitizens, ICE will not be able to replace these contracts with federal law enforcement officers to handle the transportation. In addition to not having sufficient fleet, ICE must maintain its practice of allocating scarce law enforcement resources to a critical aspect of its mission – public safety. This means that, without contracted fleet, ICE will not be able to transport noncitizens away from the border, worsening the situation. ICE will also be prevented from another of its missions – removing noncitizens subject to final orders of removal, thereby allowing priority noncitizens with criminal convictions to remain in the United States. In short, contractors are an integral to ICE operations. Without these contracts, recent migrants, noncitizens being removed, and U.S. citizens will all be put at unnecessary risk.

This declaration is based upon my personal and professional knowledge, information obtained from other individuals employed by ICE, and information obtained from various records and systems maintained by DHS. I provide this declaration based on the best of my knowledge, information, belief, and reasonable inquiry for the above captioned case.

Signed on July 30, 2021.

Russell Hott
Assistant Director for Custody Management Division
ICE Enforcement and Removal Operations

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. THE STATE OF TEXAS and GREG ABBOTT, in his official capacity as Governor of the State of Texas, Defendants.	Case No. 3:21-cv-173

DECLARATION OF JALLYN SUALOG,
DEPUTY DIRECTOR, OFFICE OF REFUGEE RESETTLEMENT,
U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES

I, Jallyn N. Sualog, declare under penalty of perjury, pursuant to 28 U.S.C. § 1746, that my testimony below is true and correct:

1. I am the Deputy Director of the Office of Refugee Resettlement ("ORR"), an Office within the Administration for Children and Families ("ACF"), U.S. Department of Health and Human Services ("HHS").

2. I have held the position of Deputy Director since June 2018. I was previously the Director of Children's Services from September 2013 through June 2018. I have worked at ORR since February 2007. I have a Master of Arts in Clinical Psychology. Before joining ORR, I worked as a mental health professional and managed the child welfare and social services programs for Hawaii's largest non-profit organization.

3. As the Deputy Director of ORR, I have responsibility for all aspects of the Unaccompanied Children (UC) Program, including all policy, operations, planning and logistics,

medical services, and monitoring. My job duties include coordinating the care and placement of UC and overseeing ORR's nation-wide network of grantee child-care providers, including the transportation of UC to, between, and from ORR facilities throughout the country.

4. My testimony in this declaration is based upon my personal knowledge of the organization and operation of ORR's network of grantee care-providers and information obtained from records and systems maintained by ORR in the regular course of my employment. I am familiar with the allegations in this matter, and submit this declaration in order to describe the immediate and irreparable harm ORR will suffer as a result of Governor Abbott's Executive Order No. GA-37 "Relating to the transportation of migrants during the COVID-19 disaster."

5. ORR is the agency charged by Congress with the care and custody of UC. The UC population includes refugee minors, tender-age children, pregnant and parenting teens, and youth who have been trafficked. Within ORR, the UC Program is responsible for the administration of a network of facilities throughout the country that care for UC arriving in the United States prior to those children being placed with sponsors in the United States, typically a parent or related adult. ORR is not responsible for immigration enforcement and is not a federal law enforcement agency—ORR is a federal child welfare agency.

6. ORR does not directly operate any child-care facilities itself, but rather provides grants to child-care providers throughout the United States, who care for UC on ORR's behalf pursuant to a cooperative agreement with ORR. As of July 2021, ORR oversees over 200 grantee facilities under approximately 50 separate grants. Within Texas, there are 52 care-provider facilities operating under various grants. In addition to these grantee care-provider facilities, ORR also operates two Emergency Intake Sites (EIS) in Texas, which are emergency facilities that were set-up to decompress overcrowded U.S. Customs and Border Protection (CBP) facilities during

the current surge. EIS facilities minimize the time UC must spend in CBP custody and provide basic care to UC while they await release to a sponsor or transfer to a licensed ORR shelter.

7. Currently, there are approximately 8,632 UC in ORR's care and custody in Texas. ORR receives approximately 500 referrals a day from CBP, with a significant percentage of these UC arriving across Texas's Southern border.

8. On July 29, 2021, Texas Governor Greg Abbott issued Emergency Order No. GA-37, which states in relevant part, (i) "No person, other than a federal, state or local law-enforcement official, shall provide ground transportation to a group of migrants who have been detained by CBP for crossing the border illegally or who would have been subject to expulsion under the Title 42 order"; (ii) "The Texas Department of Public Safety (DPS) is directed to stop any vehicle upon reasonable suspicion of a violation of paragraph 1, and to reroute such vehicle back to its point of origin or a port of entry if a violation is confirmed"; and (iii) "DPS is authorized to impound a vehicle that is being used to transport migrants in violation of paragraph 1, or that refuses to be rerouted in violation of paragraph 2."

9. As described below, the Executive Order's prohibition on the ground transportation of non-citizens in Texas by anyone other than federal, state, or local law enforcement will paralyze ORR's operations in three key respects.

10. ***First***, the Department of Homeland Security's contractors will be prevented from transferring UC they encounter in Texas to ORR. The William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA) generally requires that UC be transferred to ORR custody within 72 hours after being determined to be a UC. ORR receives all UC in its custody from either CBP or Immigration and Customs Enforcement (ICE), both of whom rely on contractors to transport UC encountered in Texas to ORR's grantee care-providers. ORR assumes

custody of UC when they are brought to an ORR facility. The vast majority of UC arrive at ORR's facilities on buses or vans operated by CBP and ICE contractors. Thus, if the Executive Order prohibits the ground transport of UC by federal contractors that would directly impede CBP and ICE's ability to transfer UC to ORR in a timely fashion as required by the TVPRA.

11. ***Second***, ORR will be prevented from transporting UC in Texas between facilities within the ORR network. Once UC have entered ORR's care and custody, ORR may need to transfer UC between facilities for a variety of reasons. For instance, a minor may require an immediate transfer from one of ORR's EIS facilities to a grantee care provider within ORR's network due to medical issues such as pregnancy or a newly identified disability, vulnerability (e.g., trafficking concerns), or safety concerns for self and others. In addition, ORR endeavors to transfer UC whose release is expected to take longer than average from EIS facilities to grantee facilities. ORR coordinates planned transfers of anticipated long-stayers (i.e., Category 3 and 4 UC[1]) from EIS to licensed shelters two or three times a week. ORR is also in the process of winding down some EIS sites, which will require the transfer of UC to other facilities. All of these transfers occur routinely in Texas and require ORR's grantees and transportation contractors to transport UC either between facilities located in Texas or from facilities located in Texas to facilities located

[1] *See* ORR Policy Guide § 2.2.1, which defines the various categories of UC based on prospective sponsor:

- Category 1: Parent or legal guardian. (This includes qualifying step-parents that have legal or joint custody of the child or teen).
- Category 2A: An immediate relative—brother; sister; grandparent or other close relative (aunt, uncle, first cousin) who previously served as the UAC's primary caregiver. (This includes biological relatives, relatives through legal marriage, and half-siblings).
- Category 2B: An immediate relative—including aunt, uncle, or first cousin who was not previously the UAC's primary caregiver. (This includes biological relatives, relatives through legal marriage).
- Category 3: Other sponsor, such as distant relatives and unrelated adult individuals.
- Category 4: No sponsors identified.

in other states (and vice versa).[2] In any event, ORR's grantees and transportation contractors will need to utilize ground transportation in Texas to accomplish these transfers.

12. ***Third***, ORR will be prevented from uniting UC with sponsors in Texas. After ORR has identified and vetted a sponsor for a particular UC, that UC must be transported to the sponsor. When a UC or sponsor is located in Texas, ORR's grantees or transportation contractors must travel through Texas with the UC in order to effectuate the release. The inability to use ground transportation in Texas will prevent ORR from reuniting UC and sponsors, whenever either party is located in Texas. The inability to release UC to sponsors not only denies UC the care and companionship of their sponsors, who are typically family members, but it also keeps UC in ORR custody longer, which prevents ORR from accepting new referrals from CBP by decreasing the available bed-space in ORR's facilities.

13. At bottom, to fulfill its statutory responsibility to care for and place UC, ORR and its sister agencies must be able to freely transport UC within Texas, where a large number of non-citizens enter the country, a large number of ORR facilities are located, and a large number of releases take place. The majority of all UC movements are conducted by ground transportation, including a significant amount of ground transportation in Texas. The inability to transport UC at any stage of the process will result in immediate back-ups either at CBP or ORR facilities, and increased density in these facilities will endanger UC and facility personnel by increasing the risk of COVID-19 transmission. The inability to transport UC also will prevent UC from being transferred into ORR custody, placed in the most appropriate facility, and released to their sponsors.

[2] ORR's grantees and transportation contractors also utilize ground transportation to travel to and from Texas airports when transporting UC interstate.

Executed on July 30, 2021.

Jallyn N. Sualog -S

Digitally signed by Jallyn N. Sualog -S
Date: 2021.07.30 11:56:31 -04'00'

Jallyn N. Sualog

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. THE STATE OF TEXAS and GREG ABBOTT, in his official capacity as Governor of the State of Texas, Defendants.	Case No. 3:21-cv-173

[PROPOSED] TEMPORARY RESTRAINING ORDER OR PRELIMINARY INJUNCTION

This matter comes before the Court on the United States' Emergency Motion for a Temporary Restraining Order or Preliminary Injunction (Motion). Upon consideration of the Complaint, the Motion, and the respective declarations of Brian S. Hastings, Chief Patrol Agent of the Rio Grande Valley (RGV) Sector, U.S Border Patrol (Border Patrol), U.S. Customs and Border Protection (CBP); Russell Hott, Assistant Director for the Custody Management Division (CMD), U.S. Immigration and Customs Enforcement (ICE), Enforcement and Removal Operations (ERO); and Jallyn Sualog, Deputy Director, Office of Refugee Resettlement (ORR), U.S. Department of Health and Human Services (HHS); the Court finds as follows:

1. This Court has jurisdiction over the subject matter of this case, there is good cause to believe it will have jurisdiction over all the parties, and venue in this district is proper.

The United States is likely to prevail on its claims that Texas Governor Greg Abbott's "executive order No. GA-37 relating to the transportation of migrants during the COVID-19 disaster," issued on July 28, 2021 (the executive order), violates the Supremacy Clause of the U.S.

Constitution because (1) it conflicts with, and poses an obstacle to, federal immigration law; and (2) it directly regulates the federal government's operations.

2. The executive order causes irreparable injury to the United States and to individuals whom the United States is charged to protect, jeopardizing the health and safety of non-citizens in federal custody, risking the safety of federal law enforcement personnel and their families, and exacerbating the spread of COVID-19.

3. The balance of equities and the public interest also favor the United States.

Accordingly, IT IS HEREBY ORDERED that, pursuant to Federal Rule of Civil Procedure 65, the United States' Emergency Motion for a Temporary Restraining Order or Preliminary Injunction is GRANTED.

IT IS FURTHER ORDERED that Defendants, their agents, officers, and employees, and all other persons and entities in active concert or participation with them, are enjoined, pending a hearing on the United States' application for a preliminary injunction, from taking any action to enforce the executive order.

IT IS FURTHER ORDERED this temporary restraining order shall remain in force until the ____ day of _____, 2021, or until such later date as may be extended by the Court or agreed upon by the parties. Pursuant to Federal Rule of Civil Procedure 65(d), the parties shall appear telephonically before this Court on _____, ____ 2021 for a hearing to show cause, if any, why the preliminary injunction requested by the United States should not be granted. Defendants shall serve and file any response to the application for a preliminary injunction on or before _____, ____ 2021, and the United States shall serve and file any reply on or before on _____, ____ 2021.

SO ORDERED, this the ____ day of _____, 2021.

_____
UNITED STATES DISTRICT JUDGE