

No. 23A607

IN THE SUPREME COURT OF THE UNITED STATES

DEPARTMENT OF HOMELAND SECURITY, ET AL.,
APPLICANTS

v.

STATE OF TEXAS

SUPPLEMENTAL MEMORANDUM REGARDING
EMERGENCY APPLICATION TO VACATE
THE INJUNCTION PENDING APPEAL

ELIZABETH B. PRELOGAR
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

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The government respectfully files this supplemental memorandum to address new activities by the Texas National Guard and Department of Public Safety since the government filed its reply that are relevant to this case. Those activities have changed the situation along the relevant stretch of the Rio Grande, rendering inaccurate the account in prior filings, including Texas's opposition. The developments are described in the appended Declaration of Robert Danley, the Lead Field Coordinator and incoming Chief Patrol Agent for the Del Rio Sector of the U.S. Border Patrol, U.S. Customs and Border Protection. App., infra, 1a-7a.

1. On December 19, 2023, the court of appeals entered an injunction pending appeal that bars Border Patrol agents from "damaging, destroying, or otherwise interfering with Texas's

c[oncertina]-wire fence in the vicinity of Eagle Pass, Texas,” except “if necessary to address any medical emergency as specified in the [temporary restraining order]” previously issued by the district court. Appl. App. 14a. In its decision, the court of appeals noted that “Border Patrol agents already possess access to both sides of the fence . . . to the river and bank by boat and to the further-inland side of the fence by road.” Id. at 6a.

On January 2, 2024, the government filed an emergency application to vacate the injunction pending appeal. Texas filed its opposition on January 9, and the government filed its reply on January 10.

2. The government filed its reply at approximately 5:00 p.m. on January 10. Hours later, Border Patrol learned that Texas National Guard members had begun erecting new concertina wire barriers, adding to others along an approximately 2.5-mile stretch of the border at issue in this case. App., infra, 3a. Texas also erected new fencing, located further inland than the original concertina wire. Ibid. That fencing further restricts Border Patrol’s ability to reach the river in particular areas. The relevant stretch includes the area of Shelby Park, which contains the boat ramp from which Border Patrol routinely launches the patrol boats it uses on this stretch of the Rio Grande. Id. at 2a-3a; see Appl. 11. It also includes the staging area that Border Patrol has used to evaluate and begin inspecting migrants that it has apprehended along this stretch of the border. App., infra, 2a-

3a; see Appl. 21. A map of the relevant stretch is attached as Exhibit A to the declaration. See App., infra, 8a-9a.

3. Border Patrol agents in a vehicle towing a boat to launch on the boat ramp requested access to Shelby Park, but the Texas National Guard refused to permit them to access the area. App., infra, 4a. Border Patrol agents likewise requested access to the staging area and Texas National Guard refused. Id. at 3a-4a. In addition, prior to the evening of January 10, Border Patrol agents were able to drive trucks with mounted surveillance equipment to various locations in this area. Those trucks were used to maintain visibility and awareness of activity along this stretch of the river and border. Id. at 6a. But the Texas National Guard has now blocked Border Patrol's access to the area, rendering its agents unable to place mobile surveillance trucks. Ibid. Border Patrol's ability to view this portion of the border is now limited to a narrow sliver from a single surveillance camera located outside of the newly fenced area. Ibid.

4. As described in the attached declaration, Border Patrol has informed this Office that the new wire, fencing, and blocked access points effectively prohibit Border Patrol agents from accessing or getting near the border along this 2.5-mile stretch of the river. App., infra, at 3a. In its response to the emergency application for vacatur, Texas repeatedly contended that Border Patrol agents could access the border via boat or road without cutting the wire. See Opp. 7 & n.1, 10, 26, 27, 33, 34. But since

the evening of January 10, that is not the case. The boat ramp that Texas has blocked off is the only safe and operationally practical boat ramp with access to the relevant portion of the river. See App., infra, 5a-6a. Photographs depicting how Texas has blocked access to Shelby Park are attached as Exhibit B to the declaration. See id. at 10a-18a. Border Patrol's normal access to the border through entry points in the federal border barrier is likewise blocked by the Texas National Guard installing its own gates and placing armed personnel in those locations to control entry. See id. at 4a. And the Texas National Guard has likewise blocked Border Patrol from using an access road through the pre-existing state border barrier by stationing a military Humvee there. See ibid. A photograph depicting the military Humvee blocking that access road is attached as Exhibit C to the declaration. See id. at 19a-20a.

5. Because Border Patrol can no longer access or view this stretch of the border, Texas has effectively prevented Border Patrol from monitoring the border to determine whether a migrant requires the emergency aid that the court of appeals expressly excepted from the injunction. App., infra, 5a-6a. Texas noted in its opposition that it has never opposed such an exception, Opp. 6, and the court of appeals likewise recognized that "[b]oth the Border Patrol and Texas agree that the c[oncertina] wire must be cut in the event of an emergency, such as the threat of a migrant's drowning or suffering heat exhaustion," Appl. App. 4a; see also

id. at 8a (district court noting that Texas “does not contest” that Border Patrol may cut the wire in the event of an emergency). Yet without any ability to view the border or the migrants who may be crossing the river -- or to be near the concertina wire along the river to render emergency aid -- that exception is largely meaningless for this stretch of the border.

6. Texas’s new actions since the government’s filing demonstrate an escalation of the State’s measures to block Border Patrol’s ability to patrol or even to surveil the border and be in a position to respond to emergencies. Those actions have also changed the situation on the ground from the account in prior filings in this Court, including Texas’s opposition. Those developments reinforce the need for this Court to vacate the court of appeals’ injunction, and to do so as soon as possible.

This Court should vacate the injunction pending appeal in order to restore Border Patrol’s access to the border it is charged with patrolling and the migrants it is responsible for apprehending, inspecting, and processing.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General

JANUARY 2024

APPENDIX

Declaration of Robert Danley.....1a
Exhibit A.....8a
Exhibit B.....10a
Exhibit C.....19a

IN THE SUPREME COURT OF THE UNITED STATES

DEPARTMENT OF HOMELAND
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THE STATE OF TEXAS

No. 23A607

DECLARATION OF ROBERT DANLEY

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

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

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

2. In my capacity as Lead Field Coordinator and as Chief Patrol Agent, my responsibilities include directly supervising all operations in Del Rio, Texas.

3. I am aware that the State of Texas has blocked Border Patrol's access to the border over an approximately 2.5-mile stretch of the Rio Grande, inclusive of the area of Shelby Park and areas south in Eagle Pass, Texas, as of 8:00 p.m. Central Time on January 10, 2024, and has continued to deny access through the time I am submitting this declaration. I am attaching to this declaration as [Exhibit A] a map; the yellow line on this map demonstrates where Border Patrol is blocked from approaching the border.

4. I submit this declaration to inform the Court of the operational challenges presented by the recent actions of the State of Texas.

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

Background

6. Shelby Park is an area of city property that runs along the border between the United States and Mexico. It is a flat and easily accessible area that includes a public boat ramp. Until Wednesday evening, this boat ramp had regularly been used by Border Patrol and other law enforcement agencies for operational deployments of marine assets on the Rio Grande, as well as by the public. The area south of Shelby Park near the commercial port of entry, Port of Entry and Eagle Pass International Bridge II, has also been used by Border Patrol as a staging area for migrants apprehended by Border Patrol on the property in question. The area is advantageous allowing Border Patrol to triage apprehended migrants for medical and/or other

needs. At the same time, Border Patrol uses the staging area to complete mobile intake of migrant biographic information and to transport groups of apprehended migrants to Border Patrol locations where they may be processed more directly. In mid-December 2023, there were as many as 6,000 migrants in the staging area south of Shelby Park used by Border Patrol. Historically, the area of Shelby Park was where most of the migrant traffic encountered by Border Patrol in the Del Rio area of operation attempted entry. Shelby Park and areas south remains critical for maintaining effective control of the U.S.-Mexico border in Del Rio sector.

7. Beginning around 8:00 p.m., Central Time, on January 10, 2024, Border Patrol was denied access to an approximately 2.5 mile stretch of border, inclusive of Shelby Park and stretching south. Texas National Guard (TNG) established fencing and concertina wire, and is blocking access to of Shelby Park and blocking entrances through federally owned and maintained border barriers with armed soldiers. In total, a combination of armed TNG personnel and equipment, fencing, and concertina wire is blocking Border Patrol from approximately 2.5 miles of access points to the U.S.-Mexico border.

8. On January 11, 2024, a Department of Defense (DOD) active duty military servicemember who was deployed to provide logistical support to Border Patrol was denied access to the area underneath the port of entry to refuel Border Patrol's generators staged under the port of entry at the U.S. terminus of the bridge.

9. In addition, on January 11, 2024, at approximately 07:30 a.m., Central Time, Texas DPS turned over approximately 11 migrants to Border Patrol agents performing equipment security in the area underneath the port of entry. A TNG Major walked up to the agents and Texas DPS personnel and informed them that TNG would no longer allow anyone, to include Texas DPS, to drop off or turn over subjects at that location. The TNG Major further

informed the Border Patrol agents that TNG would not allow any transport units to pick up the subjects under the port of entry, and that the agents would have to walk the migrants to Loop 480 to transport them outside of Shelby Park for further processing. Loop 480 is a two-way industrial highway, where there is not a lot of space to safely intake migrants.

10. Additionally, on January 11, 2024, Border Patrol agents in a vehicle towing a boat were denied access to Shelby Park, where the boat ramp is located. Attached to this declaration as [Exhibit B] are photographs depicting how the entrances to Shelby Park, where the boat ramp is located, has been blocked.

11. Within the 2.5 miles blocked by TNG, there are multiple entry points all of which are now blocked. TNG has deployed armed soldiers and vehicles to block Border Patrol agents from access to the river by passing through entry points in the federal border barrier, which is sometimes referred to as the “border wall” by the public. When standing at the border barrier, agents are unable to see the river. Historically, Border Patrol was able to access the land between the river and the border barrier via gates or specific road access through the barrier.

12. In addition, attached to this declaration as [Exhibit C] is a photograph of how Texas National Guard has blocked the access road for existing state border barrier using a military Humvee.

13. On January 11, 2024, I spoke with the Texas Department of Public Safety (DPS). The Regional Director of the Texas DPS advised me that it is the position of the State of Texas, through the National Guard, that it will not allow Border Patrol or DOD personnel who support Border Patrol into the approximately 2.5-mile stretch along the national border near Shelby Park in any operational capacity. I was further advised that Texas does not want Border Patrol to be able to arrest, process, or transport migrants out of the identified area.

Boat Ramp

14. Border Patrol is currently blocked by TNG from accessing the boat ramp in Shelby Park. This boat ramp is one of three within the Eagle Pass area of responsibility. However, for various safety and operational practicality reasons the boat ramp in Shelby Park is the boat ramp most frequently used by Border Patrol to maintain situational awareness of the river, assist migrants in distress, and identify locations where contraband or migrants may attempt to enter the United States. Generally speaking, while the Border Patrol does not operate boats at night for safety reasons, it launches from the boat ramp in Shelby Park several times per day in daylight hours.

15. Approximately 2.5 miles north of the Shelby Park boat ramp is the Gonzalez boat ramp. The Gonzalez boat ramp is on private property, and is difficult to access because the road is not improved and becomes impassable during inclement weather. The increased risks associated with the water in this area and the terrain leading to the boat ramp include a delayed response to render aid to agents or migrants in the area. Law enforcement personnel and migrants have drowned in this area while attempting to rescue migrants in less-than-ideal conditions and so it is not practical for Border Patrol to utilize this location as a primary boat ramp.

16. Approximately 6.9 miles south of the Shelby Park boat ramp is another privately owned boat ramp, also in an unimproved area with ungraded road making access difficult. In addition, because of water depth and obstacles in the water, Border Patrol boats launched from this boat ramp have difficulty accessing the portions of the river along Shelby Park.

17. Therefore, Texas's action depriving Border Patrol of access to the Shelby Park boat ramp results in Border Patrol having no practical means for situational awareness on this portion of the water and no practical options for responding to migrants who may be in distress

in this area, otherwise apprehending such migrants, or monitoring the area for contraband movements.

Visibility of the Border

18. Because of Texas's actions, Border Patrol has substantially reduced visibility of activity along this approximately 2.5-mile stretch of border. Prior to the actions of TNG to deny Border Patrol's access to this approximately 2.5 mile stretch of border, Border Patrol staged between 5 and 7 mobile video surveillance trucks inside Shelby Park and areas south. As of around 10:00 p.m., January 10, 2024, Border Patrol agents exited the border area with the mobile video surveillance trucks at the end of their shift. Border Patrol agents have subsequently been denied access to by TNG, as armed soldiers and vehicles blocked access. Because Border Patrol is now unable to place mobile video surveillance inside this approximately 2.5-mile stretch of border, Border Patrol has only one mobile video surveillance vehicle, placed outside the blocked area approximately 1.9 miles south of the boat ramp in Shelby Park, with extremely limited visibility of activity along the border in this area. All told, I estimate that current operational visibility of activity along the river has been reduced by approximately 90% of our prior surveillance capability as a result of the actions taken by Texas.

19. Mobile video surveillance is important because it allows Border Patrol to identify location(s) where agent response is needed. For example, if a large group is spotted attempting to cross, Border Patrol can make strategic decisions about how many agents and what resources should respond to that location to best apprehend the migrants, as well as what transportation resources are needed to safely move agents and migrants to a location where they may be processed appropriately. In addition, mobile surveillance allows Border Patrol to monitor and respond when a migrant is in distress in the area.

Access under the Port of Entry

20. Border Patrol uses the area underneath Eagle Pass International Bridge II port of entry as a pre-staging area for initial triage of migrant encounters. In mid-December 2023, for example, there were approximately 6,000 migrants waiting in this area for processing by Border Patrol during a surge in migrant crossings. While waiting, Border Patrol engaged in mobile intake of migrants, as well as treating any emergent concerns of medical or welfare needs. Because of Texas's actions, Border Patrol is being denied the opportunity to use the area for staging migrants in a safe location that allows for the optimal use of law enforcement resources.

21. For example, because the area adjacent to POE II is flat and easy to manage, Border Patrol can effectively use fewer agents to control a large group of migrants and have maximum space to load migrants onto buses for transport to formal processing locations in Del Rio and elsewhere. Without access to the staging area, mobile intake and loading onto transportation must occur on the shoulder along Loop 480, a busy two-lane highway most frequently used by commercial traffic traveling at a high speed. Because of the lack of physical space, there is an increased risk to both migrants and agents of traffic-related injury. Further, there are suboptimal conditions for managing any large groups of migrants in such a small space along a road.

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

Executed on January 12, 2024.

ROBERT B DANLEY Digitally signed by
ROBERT B DANLEY
Date: 2024.01.12
00:37:55 -05'00'

ROBERT DANLEY

EXHIBIT A

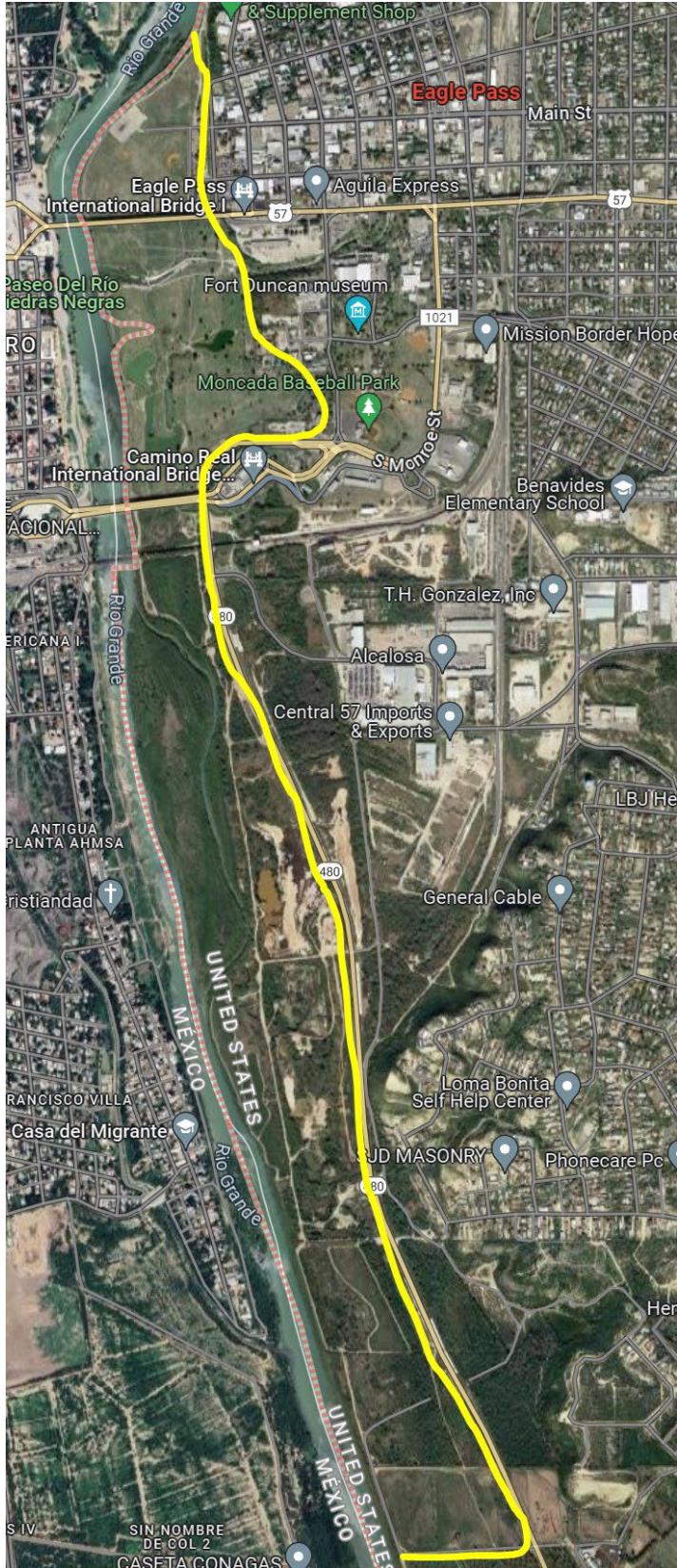


EXHIBIT B



This is a photograph taken the evening of January 10, 2024, that shows the added gates, military Humvees, wire, and barriers that the Texas National Guard erected blocking a gap that would otherwise allow access to Shelby Park.



This is a photograph taken the evening of January 10, 2024, that shows Texas National Guard personnel placing gates at an entrance to Shelby Park and blocking entry to the park.



This is a photograph taken the evening of January 10, 2024, that shows several Texas National Guard personnel placing additional concertina wire and mesh fencing near port of entry 2.



This is a photograph taken the evening of January 10, 2024, that shows Texas National Guard personnel and gates at an entrance to Shelby Park blocking entry.



This is a photograph taken the evening of January 10, 2024, that shows the added gates, military Humvees, wire, and barriers that the Texas National Guard erected blocking a gap that would otherwise allow access to Shelby Park.



This is a photograph taken the evening of January 10, 2024, that shows Texas National Guard personnel placing gates at an entrance to Shelby Park and blocking entry to the park.



This is a photograph taken the evening of January 10, 2024, that shows several Texas National Guard personnel placing additional concertina wire and mesh fencing near port of entry 2.



This is a photograph taken the evening of January 10, 2024, that shows Texas National Guard personnel and gates at an entrance to Shelby Park blocking entry.

EXHIBIT C



This is an aerial photograph taken on January 11, 2024, of a Texas National Guard humvee that the Texas National Guard placed, blocking an access point in state-owned border barrier at along Loop 480. This access point would otherwise allow Border Patrol to reach the river.