

CAUSE NO. _____

EPI'S CANOE & KAYAK TEAM, LLC and
JESSIE F. FUENTES

Plaintiffs,

v.

STATE OF TEXAS; GREG ABBOTT IN HIS
OFFICIAL CAPACITY AS GOVERNOR OF
THE STATE OF TEXAS AND
COMMANDER-IN-CHIEF OF THE TEXAS
MILITARY DEPARTMENT; STEVE
MCCRAW IN HIS OFFICIAL CAPACITY AS
DIRECTOR/COLONEL OF THE TEXAS
DEPARTMENT OF PUBLIC SAFETY;
THE TEXAS DEPARTMENT OF PUBLIC
SAFETY; MAJOR GENERAL THOMAS
SUELZER IN HIS OFFICIAL CAPACITY AS
ADJUTANT GENERAL OF THE TEXAS
MILITARY DEPARTMENT (AKA TEXAS
NATIONAL GUARD); AND THE TEXAS
MILITARY DEPARTMENT (AKA TEXAS
NATIONAL GUARD)

Defendants.

§ IN THE DISTRICT COURT

§

§

§

§

§

§

§

§

§

§

§

§

§

§

§

§

§

§

§

§

§

§

§

_____ JUDICIAL DISTRICT

TRAVIS COUNTY, TEXAS

“While securing the border is the federal government’s responsibility, Texas will not sit idly by as this crisis grows. Texas is responding with the most robust and comprehensive border plan the nation has ever seen.”¹

“With the ending of Title 42 on Thursday, President Biden is laying down the welcome mat to people across the entire world, but Texas is deploying our new Texas Tactical Border Force. The Texas National Guard is loading Blackhawk helicopters and C-130s and deploying specially trained soldiers for the Texas Tactical Border Force, who will be deployed to hotspots all along the border to help intercept and repel large groups of migrants trying to enter Texas illegally.”

¹ Press Release, Governor Abbott Deploys New Texas Tactical Border Force, OFFICE OF THE TEXAS GOVERNOR, (May 8, 2023), <https://gov.texas.gov/news/post/governor-abbott-deploys-new-texas-tactical-border-force>.

“The Texas Tactical Border Force will bolster our Operation Lone Star efforts to secure the Texas border amid the chaos caused by President Biden’s elimination of Title 42.”

Governor Greg Abbott on the purpose of Operation Lone Star

PLAINTIFFS’ ORIGINAL PETITION

NOW COME, Epi’s Canoe and Kayak Team, LLC (“EPI”) and Jessie F. Fuentes (“Mr. Fuentes”) (collectively, “Plaintiffs”) and file suit against the State of Texas (“Texas”); Greg Abbott in his Official Capacity as Governor of the State of Texas and Commander-in-Chief of the Texas Military Department (“Governor Abbott”); Steve McCraw in his Official Capacity as Director/Colonel of the Texas Department of Public Safety; the Texas Department of Public Safety (collectively, “DPS”); Major General Thomas Suelzer in his Official Capacity as Adjutant General of the Texas Military Department; and the Texas Military Department (collectively, “Texas National Guard”) (collectively, “Defendants”) and in support thereof, would respectfully show the Court as follows:

I. INTRODUCTION

1. Through Operation Lone Star (“OLS”), Defendants have engaged in a pattern and practice of targeting Mexicans, Mexican Americans, and immigrants from Latin America who reside at or who are located at or near the United States border without legal authority and in violation of the Texas Administrative Procedures Act (“Texas APA”).

2. Defendants, using saturation patrols, the construction of border barriers, and the proposed installation of buoys within the Rio Grande River located at or near Eagle Pass, Texas, are each *ultra vires* acts.

3. By this lawsuit, Plaintiffs seek to permanently enjoin the Defendants from utilizing and/or enforcing OLS in the State of Texas and permanently enjoin Defendants from installing buoys in the Rio Grande River.

II. DISCOVERY CONTROL PLAN & STATEMENT FOR RELIEF

4. Discovery should be conducted under a Level 3 tailored discovery control plan under Texas Rule of Civil Procedure 190.4.

5. Under Texas Rule of Civil Procedure 47, Plaintiffs seek non-monetary relief, and asserts that all relief sought is within the jurisdictional limits of the Court.

III. THE PARTIES²

6. Epi's Canoe & Kayak Team, LLC is a Texas limited liability company with its principal place of business located at 439 Westlakes Blvd., Eagle Pass, Texas 78852.

7. Jessie F. Fuentes is an individual who resides in Eagle Pass, Texas, and he owns and operates EPI.

8. The State of Texas may be served through the state's "chief executive officer" pursuant to Fed. R. Civ. P. 4(j)(2). The Texas Constitution designates the Texas Governor, Greg Abbott, as the chief executive officer of the State of Texas and may be served with process on behalf of the State of Texas. Tex. Const. Art. IV, § 1. The State of Texas may receive service at the following address: Office of the Governor, Attn: General Counsel, P.O. Box 12428, Austin, Texas 78711.

9. Governor Greg Abbott, in his official capacity as Governor of the State of Texas and commander-in-chief of the Texas Military Department, may be served with process at the following address: Office of the Governor, Attn: General Counsel, P.O. Box 12428, Austin, Texas 78711; or wherever he may be found.

10. The Texas Department of Public Safety is a Texas state department and may be served with process through the Texas Attorney General pursuant to Tex. Civ. Prac. & Rem. Code § 107.002(a)(3).

² Whenever it is alleged that each defendant committed any act, it is also meant that each defendant committed said act or acts through or by their respective officers, directors, agents, employees, servants, contractors, and/or representatives, acting with full authority, by virtue of express, apparent, or implied agency, within the course and scope of any employment and/or with the full ratification of the Defendants.

DPS Safety may receive service at the following address: Office of the Attorney General, Attn: General Counsel, P.O. Box 12548, Austin, Texas 78711-2548.

11. Steve McCraw, as Director/Colonel of the DPS, may be served with process through the Texas Attorney General and in his official capacity pursuant to Tex. Civ. Prac. & Rem. Code § 107.002(a)(3). McCraw may receive service at the following address(s): Office of the Attorney General, Attn: General Counsel, P.O. Box 12548, Austin, Texas 78711-2548; Department of Public Safety Office, Attn: Steve McCraw, P.O. Box 4087, 5805 N. Lamar Blvd., Austin, Texas 78752; or wherever he may be found.

12. The Texas Military Department, a.k.a. the Texas National Guard is a Texas state department and may be served with process through the Texas Attorney General pursuant to Tex. Civ. Prac. & Rem. Code § 107.002(a)(3). The Texas Department of Public Safety may receive service at the following address: Office of the Attorney General, Attn: General Counsel, P.O. Box 12548, Austin, Texas 78711-2548.

13. Major General Thomas Suelzer, as Adjutant General of the Texas National Guard may be served with process through the Texas Attorney General and in his official capacity pursuant to Tex. Civ. Prac. & Rem. Code § 107.002(a)(3). Suelzer may receive service at the following address(s): Office of the Attorney General, Attn: General Counsel, P.O. Box 12548, Austin, Texas 78711-2548; The Texas Military Department Office, Attn: Major General Thomas Suelzer, 2200 W. 35th St., Austin, Texas 78763; or wherever he may be found.

IV. VENUE/JURISDICTION

12. Venue of this lawsuit is mandatory and/or proper in Travis County, Texas pursuant to Tex. Gov't Code § 2001.038(b) ("The action may be brought only in a Travis County district court").

13. Plaintiffs invoke the jurisdiction of this Court pursuant to Article V, Section 8 of the Texas Constitution, Texas Government Code Sections 24.007 and 24.008.

V. STATEMENT OF THE LAW

A. TEXAS APA.

14. Under the Texas APA,

- (A) a rule means a state agency statement of general applicability that:
 - (i) implements, interprets, or prescribes law or policy; or
 - (ii) describes the procedure or practice requirements of a state agency;
- (B) includes the amendment or repeal of a prior rule; and
- (C) does not include a statement regarding only the internal management or organization of a state agency and not affecting private rights or procedures

TEX. GOV'T CODE § 2001.003(6).

15. “‘State agency’ means a state officer, board, commission, or department with statewide jurisdiction that makes rules or determines contested cases. The term includes the State Office of Administrative Hearings for the purpose of determining contested cases.” TEX. GOV'T CODE §2001.003(7).

16. “A state agency rule, order, or decision made or issued on or after January 1, 1976, is not valid or effective against a person or party, and may not be invoked by an agency, until the agency has indexed the rule, order, or decision and made it available for public inspection as required by this chapter.” TEX. GOV'T CODE § 2001.005(A).

17. “The validity or applicability of a rule, including an emergency rule adopted under Section 2001.034, may be determined in an action for declaratory judgment if it is alleged that the rule or its threatened application interferes with or impairs, or threatens to interfere with or impair, a legal right or privilege of the plaintiff.” TEX. GOV'T CODE § 2001.038(B).

18. A court may render a declaratory judgment without regard to whether the plaintiff requested the state agency to rule on the validity or applicability of the rule in question. TEX. GOV'T CODE § 2001.038(B).

B. *Ultra Vires* Claim.

19. On or about March 6, 2021, Governor Abbott directed the DPS to initiate OLS. According to Governor Abbot, as of 2021, OLS has deployed over 1,000 DPS troopers and hundreds of Texas National Guard soldiers to the Texas-Mexico border. Attached hereto as **Exhibit 1** is a copy of the May 31, 2021, Proclamation (“Proclamation”). This proclamation, or a variation of it, has been issued each month by Governor Abbott. Attached as **Exhibit 2 (a-z)** is a true and correct copy of each proclamation from 2021 through the July 2023 Proclamation. These Proclamations function as rules promulgated by Defendants to operate OLS and to install the buoys based on the Texas Disaster Act of 1975, codified at Texas Government Code §418.001 (“Disaster Act”). Each proclamation begins with pretextual language that attempts to fit with the confines of the Disaster Act.

20. Governor Abbott misapplied the Disaster Act to implement OLS. Under §418.002, the Disaster Act has the following purpose:

- (1) reduce vulnerability of people and communities of this state to damage, injury, and loss of life and property resulting from natural or **man-made**³ catastrophes, riots, or hostile military or paramilitary action;
- (2) prepare for prompt and efficient rescue, care, and treatment of persons victimized or threatened by disaster⁴;
- (3) provide a setting conducive to the rapid and orderly restoration and rehabilitation of persons and property affected by disasters;
- (4) clarify and strengthen the roles of the governor, state agencies, the judicial branch of state government, and local governments in prevention of, preparation for, response to, and recovery from disasters;
- (5) authorize and provide for cooperation in disaster mitigation, preparedness, response, and recovery;

³ Man-made is an adjective that means made or caused by humans (as compared to occurring or being made naturally) or artificial. *Man-Made*, Collins Dictionary (last visited Jul. 5, 2023), <https://www.collinsdictionary.com/us/dictionary/english/man-made>.

⁴ Disaster is a noun that means a sudden event, such as an accident or natural catastrophe, that causes great damage or loss of life. *Disaster*, Collins Dictionary (last visited Jul. 5, 2023), <https://www.collinsdictionary.com/us/dictionary/english/disaster>.

- (6) authorize and provide for coordination of activities relating to disaster mitigation, preparedness, response, and recovery by agencies and officers of this state, and similar state-local, interstate, federal-state, and foreign activities in which the state and its political subdivisions may participate;
- (7) provide an emergency management system embodying all aspects of predisaster preparedness and postdisaster response;
- (8) assist in mitigation of disasters caused or aggravated by inadequate planning for and regulation of public and private facilities and land use;
- (9) encourage state agencies, local governments, nongovernmental organizations, private entities, and individuals to adopt the goals of the strategic plan of the Federal Emergency Management Agency for preparing for, responding to, and recovering from a disaster that emphasize cooperation among federal agencies, state agencies, local governments, nongovernmental organizations, private entities, and individuals in each activity or project undertaken to ensure that this state is prepared to effectively respond to and recover from a disaster; and
- (10) provide the authority and mechanism to respond to an energy emergency.

21. Under §418.004, “disaster” is defined as follows:

Disaster means the occurrence or imminent threat of widespread or severe damage, injury, or **loss of life or property resulting from** any natural or **man-made cause**, including fire, flood, earthquake, wind, storm, wave action, oil spill or other water contamination, volcanic activity, epidemic, air contamination, blight, drought, infestation, explosion, riot, hostile military or paramilitary action, extreme heat, cybersecurity event, **other public calamity⁵ requiring emergency action**, or energy emergency (emphasis added).

22. A plain reading of the above stated provisions reveals as a matter of law that this statute **cannot** be used to regulate the Texas-Mexico border because none of its definitions address immigrants, the border, or crimes committed by immigrants.

23. The disaster definition does not include any support for the installation of buoys or barriers in the Rio Grande to impact immigrants crossing between the ports of entry. While the Defendants have obtained disaster declarations from counties at or near the border, the declarations were designed

⁵ *Calamity*, Collins Dictionary (last visited Jul. 5, 2023), <https://www.collinsdictionary.com/us/dictionary/english/calamity>.

by Defendants to allow the Defendants to use the Disaster Act to conduct operations under OLS. Upon information and relief, the evidence will show that the counties that signed the disaster declarations did so to obtain state funds without having an actual disaster as defined under the Disaster Act. Through OLS, Defendants have exceeded the authority granted under the Disaster Act in violation of the Texas APA and such act constitute *ultra vires* action.

24. The installation of a buoy system in the Rio Grande near Eagle Pass has no logical connection to the purpose of the Disaster Act, which is to respond to “the occurrence or imminent threat of widespread or severe damage, injury, or loss of life or property resulting from any natural or man-made cause.”

25. Immigrants, while individuals, are not themselves a man-made cause.

26. Immigrants crossing into the United States without the necessary federal documentation do not constitute “the occurrence or imminent threat of widespread or severe damage, injury, or loss of life or property resulting from any natural or man-made cause” that triggers the emergency powers contained in the Disaster Act as stated in the Proclamations or in the operation of OLS.

27. The definition of disaster cannot be read so broadly to allow Governor Abbott to create his own border patrol agency to regulate the border and prevent immigrants from entering Texas by installing a buoy system in the Rio Grande. In short, Governor Abbott’s reliance on said statute and the acts of Texas under OLS constitute *ultra vires* acts.

28. “To be cognizable, an ultra vires claim must challenge the government official’s authority, not whether the government official made an incorrect decision.” *Paxton v. Waller County*, 620 S.W.3d 843, 849 (Tex. App.—Amarillo 2021, pet. denied).

29. “When an official is granted discretion to interpret the law, an act is not ultra vires merely because it is erroneous; ‘only when these improvident actions are **unauthorized** does an official shed

the cloak of the sovereign and act ultra vires.” *Id.* (citing *Hall v. McRaven*, 508 S.W.3d 232, 243 (Tex. 2017)).

30. “A plaintiff bringing an ultra vires claim must ‘allege, and ultimately prove, that the officer acted without legal authority or failed to perform a purely ministerial act.’” *Abbott v. La Joya Indep. Sch. Dist.*, No. 03-21-00428-CV, 2022 Tex. App. LEXIS 1797, 2022 WL 802751, at *9 (Tex. App.—Austin March 17, 2022, pet. filed) (“[W]e again conclude that the Governor does not possess absolute authority under the Texas Disaster Act to preempt orders issued by governmental entities and officials.”).

C. *Arizona v. U.S.*

31. “The Government of the United States has broad, undoubted power over the subject of immigration and the status of aliens.” *Arizona v. U.S.*, 567 U.S. 387, 392-93 (2012) (citing, *Toll v. Moreno*, 458 U.S. 1, 10, 102 S. Ct. 2977, 73 L. Ed. 2d 563 (1982); see generally *S. Legomsky & C. Rodriguez, Immigration and Refugee Law and Policy* 115-132 (5th ed. 2009)).

32. “This authority rests, in part, on the National Government's constitutional power to “establish a uniform Rule of Naturalization,” Art. I, § 8, cl. 4, and its inherent power as sovereign to control and conduct relations with foreign nations.” *Id.* (citation omitted).

33. “It is fundamental that foreign countries concerned about the status, safety, and security of their nationals in the United States must be able to confer and communicate on this subject with one national sovereign, not the 50 separate States.” *Id.* (citing *Chy Lung v. Freeman*, 92 U.S. 275, 279-280, 23 L. Ed. 550 (1876); see also *The Federalist* No. 3, p. 39 (C. Rossiter ed. 2003) (J. Jay) (observing that federal power would be necessary in part because “bordering States . . . under the impulse of sudden irritation, and a quick sense of apparent interest or injury” might take action that would undermine foreign relations)) *Id.*

34. Texas does not have a constitutional or statutory right to regulate the border like the federal government does, as indicated in the following excerpts:

Agencies in the Department of Homeland Security play a major role in enforcing the country's immigration laws. United States Customs and Border Protection (CBP) is responsible for determining the admissibility of aliens and securing the country's borders. *See Dept. of Homeland Security, Office of Immigration Statistics, Immigration Enforcement Actions: 2010*, p. 1 (2011).

In 2010, CBP's Border Patrol apprehended almost half a million people. *Id.*, at 3. Immigration and Customs Enforcement (ICE), a second agency, "conducts criminal investigations involving the enforcement of immigration-related statutes." *Id.*, at 2. ICE also operates the Law Enforcement Support Center. LESC, as the Center is known, provides immigration status information to federal, state, and local officials around the clock. *See App.* 91.

ICE officers are responsible "for the identification, apprehension, and removal of illegal aliens from the United States." *Immigration Enforcement Actions*, at 2. Hundreds of thousands of aliens are removed by the Federal Government every year. *See id.*, at 4 (reporting there were 387,242 removals, and 476,405 returns without a removal order, in 2010).

35. Under the U.S. Constitution and federal statutes, Texas has no authority to enforce immigration laws absent a 287(g) agreement with DHS (Pre-Emption). Further, International Boundary and Water Commission ("IBWC") regulates and oversees the Rio Grande River, not Governor Abbott. A governor's emergency declaration under the Disaster Act cannot authorize Governor Abbott to pull a runaround the U.S. Constitution and federal statutes to grant itself the authority to enforce federal immigration law. As a matter of policy, it is untenable to argue that a declaration under the Disaster Act could allow Texas to grant itself the war and foreign-affairs powers of the federal government -- allowing itself the broad discretion to reverse-commander the federal authority to state when migration is an "emergency" and when it is "not an emergency" or when there is a "war" and when there is not a "war" or when there is a foreign "invasion" and not foreign "invasion."

36. Because the Disaster Act does not authorize Texas to install buoys in the Rio Grande River and/or operate OLS and because federal law preempts Texas law, Governor Abbott's use of Chapter

418 to enact and support OLS and create his own DHS, CBP, and/or ICE agencies constitutes *ultra vires* acts.

VI. STATEMENT OF FACTS

A. Operation Lone Star (“OLS”).

37. Through OLS Texas seeks to convert aspect of DPS into a Texas border patrol to control the U.S.-Mexico border and to regulate immigrants located within Texas. Here are a few statements made by Texas officials regarding the purpose of OLS:

- (1) Governor Greg Abbott today signed a series of border security legislation passed during the 88th Regular Legislative Session into law at the Texas Capitol. This package of six bills **will expand Texas’ unprecedented efforts to the line and protect Texans from the record level of illegal immigration, weapons, and deadly drugs pouring into Texas from Mexico caused by President Biden’s refusal to secure the border** (emphasis added).⁶
- (2) “Thanks to the leadership and hard work of Director McCraw, General Suelzer, and their teams, Texas has pushed back against the swell of migrants and held the line to keep people out of Texas—but there’s more that needs to be done,” said Governor Abbott.
- (3) “The Texas Legislature has stepped up to make sure we continue to robustly respond to President Biden’s growing border crisis, including allocating \$5.1 billion for border security. Today, I am signing six bills from this year’s regular session to ensure that Texas can continue to do even more to stop illegal immigration at our southern border and provide new tools to the brave men and women along the southern border to protect Texans and Americans from the chaos and crisis of the border.”
- (4) Governor Greg Abbott, the Texas Department of Public Safety (DPS), and the Texas National Guard are continuing to work together **to secure the border**; stop the smuggling of drugs, weapons, and people into Texas; and **prevent, detect, and interdict transnational criminal behavior between ports of entry** (emphasis added).
- (5) Since the launch of Operation Lone Star, the multi-agency effort has led to over **381,000 illegal immigrant apprehensions** and more than 29,000 criminal arrests, with more than 26,000 felony charges reported (emphasis added).

⁶ Press Release, Governor Abbott Signs Sweeping Package Of Border Security Legislation, Office of the Texas Governor, (June 8, 2023), <https://gov.texas.gov/news/post/governor-abbott-signs-sweeping-package-of-border-security-legislation>.

- (6) Texas has also bused more than 9,700 migrants to our nation's capital since April 2022, over 7,600 migrants to New York City since August 5, more than 2,200 migrants to Chicago since August 31, more than 1,400 migrants to Philadelphia since November 15, and over 120 migrants to Denver since May 18.
- (7) Operation Lone Star **continues to fill the dangerous gaps left by the Biden Administration's refusal to secure the border**. Every individual who is apprehended or arrested and every ounce of drugs seized would have otherwise made their way into communities across Texas and the nation due to President Joe Biden's open border policies (emphasis added).⁷

38. The Disaster Act does **not** allow Texas to conduct the following actions:

- a) protect Texans from the record level of illegal immigration pouring into Texas from Mexico caused by President Biden's refusal to secure the border;
- b) push back against the swell of migrants and hold the line to keep people out of Texas based on their immigration status, national origin, color of skin, and/or race;
- c) secure the border;
- d) prevent, detect, and interdict transnational criminal behavior between ports of entry;
- e) apprehend 381,000 illegal immigrants;
- f) bus 9,700 migrants to Washington D.C.;
- g) bus 7,600 migrants to New York City;
- h) bus more than 2,200 migrants to Chicago;
- i) bus more than 1,400 migrants to Philadelphia;
- j) bus over 120 migrants to Denver; or
- k) fill the "dangerous gaps" left by the Biden Administration's refusal to secure the border.

39. Here a short chronology⁸ of each unauthorized step taken by Defendants under the Disaster Act in 2021-August 2022:

March 6 – Operation Lone Star launched by Gov. Greg Abbott.

March 17 – Operation Lone Star expanded to include anti-human trafficking efforts, including conducting interviews with minors.

May 31 – Abbott issued disaster declaration that:

⁷ Press Release, Operation Lone Star Deploys New Border Security Deterrence Strategies, OFFICE OF THE TEXAS GOVERNOR, (June 9, 2023), <https://gov.texas.gov/news/post/operation-lone-star-deploys-new-border-security-deterrence-strategies>.

⁸ Juliana Berg, A Timeline of Texas' Response to the Border Crisis, TEXAS SCORECARD, (August 10, 2022), <https://texasscorecard.com/state/a-timeline-of-texas-response-to-the-border-crisis/>.

- Authorized the use of “all necessary state and local resources” to enforce all federal and state criminal laws including criminal trespassing, smuggling, and human trafficking.
- Directed the Texas Health and Human Services Commission to stop giving state licenses to child care facilities under contract with the federal government who will shelter unlawful immigrants.
- Directed the Texas Commission on Jail Standards and the Texas Commission on Law Enforcement to provide guidance and request all necessary waivers to give border counties flexibility in establishing alternative detention facilities and add or expand capacity as needed.

July 26 – Criminal charges that fall under OLS clarified. The primary offenses are criminal trespass, criminal mischief, smuggling, and human trafficking.

July 28 – Abbott released an executive order that:

- Prohibits private companies and nonprofits from transporting illegal aliens from the southern border into other parts of the state.
- Directs the Texas Department of Public Safety to stop any vehicle upon reasonable suspicion of such violation and reroute such vehicles back to their point of origin or a port of entry.
- Gives DPS the authority to impound a vehicle that violates the order.

Sept. 2 – House Bill 9 passed, adding \$1.8 billion to the funding that was already appropriated (\$1.1 billion). Provides funding to seven different state entities for the purposes of border security.

Sept. 17 – Gov. Abbott signed House Bill 9 into law, which provided an additional \$1.8 billion in state funding for border security (including Operation Lone Star) over the next two years.

Sept. 19 – \$100 million in grants was given for local governments to enhance interagency border security operations supporting OLS.

April 7 – Gov. Abbott announces the plan to bus illegal migrants to Washington, D.C.

April 29 – Additional \$495.3 million approved for Operation Lone Star.

June 29 – Gov. Abbott announced the expansion of the state’s border security operations by creating Texas Department of Public Safety strike teams and establishing new vehicle inspection checkpoints targeting semi-trucks.

July 6 – An additional \$30 million in Operation Lone Star grant funding was given to Texas cities and counties.

Aug. 5 – Texas transported more than 6,500 illegal migrants to Washington, D.C., and New York City.

B. The Buoys.

40. On or about June 8, 2023, Governor Abbott announced his decision to install a series of buoys in the Rio Grande River at or near Eagle Pass, Texas.

41. The buoys are a type of floating border wall:

During the press conference, Governor Abbott also announced the deployment of new marine floating barriers to deter illegal crossings in hotspots along the Rio Grande River. This strategy will proactively prevent illegal crossings between ports of entry by making it more difficult to cross the Rio Grande and reach the Texas side of the southern border. The first 1,000 feet of the marine floating barrier will be deployed near Eagle Pass.



42. The Disaster Act does not allow Governor Abbott to install a floating border barrier. On or about July 7, 2023, the buoys were spotted arriving in Eagle Pass. This lawsuit was filed before the buoys were installed in the Rio Grande. Plaintiffs challenge the use of the proclamations because the

decision to install the buoys without legal authority constitutes arbitrary and capricious action taken by Defendants because they do not have statutory to permit OLS or install the Buoys in Eagle Pass.

C. Eagle Pass.

43. Eagle Pass is a town located in Maverick County, Texas, with a population of approximately 28,000 inhabitants. Eagle Pass borders the city of Piedras Negras, Coahuila, Mexico, which is to the southwest and across the Rio Grande. The Eagle Pass-Piedras Negras metropolitan area (“EP-PN”) is one of six binational metropolitan areas along the United States-Mexican border. As of January 2008, according to the US census, the EP-PN’s population was 48,401 people, and the Piedras Negras metropolitan area’s population was 169,771.

44. Approximately, 96% of people living in Eagle Pass are Hispanic or Mexican American.

45. The communities targeted by OLS—such as Eagle Pass, Laredo, and El Paso—are overwhelmingly Mexican American. The communities at or near the U.S.-Mexico border are the targets of OLS (“OLS Zone”). They are communities that have historically been discriminated against and marginalized. Despite no authority to regulate the U.S.-Mexico border, the Defendants have admittedly created their own DHS, CBP, and ICE in the form of DPS and its Texas Tactical Border Force, which is a convoluted way to say border patrol. This is an example of the Defendants failing to follow their normal procedures.

46. The buoys represent a hateful policy that intends to create the impression that Mexicans, immigrants, and Mexican Americans living within the OLS Zone are dangerous. Evidence of this impact can be seen in the lost or failed events planned by Plaintiffs discussed below.

D. EPI.

47. EPI is owned by Mr. Fuentes, who is a Mexican American residing in Eagle Pass. EPI is a small Texas business that provides customers with training and experience on the Rio Grande River using canoes and kayaks. Attached as **Exhibit A** is a true and correct copy of the Sworn Declaration

of Jessie F. Fuentes. EPI has been serving the river sports crowds since August 1, 2015. According to the information to date, portions of Governor Abbott's buoy floating wall shall be installed just south of the International Bridge #2 in Eagle Pass.

48. EPI conducts activities on the Rio Grande River at or near Bridge #2 where the buoys are intended to be placed. EPI will be unable to conduct tours and canoe and kayak sessions in Eagle Pass because of the installation of the buoys.

49. EPI's market is focused solely on canoeing and kayaking sessions in Eagle Pass on the Rio Grande River in areas to be impacted by the buoys.

50. The buoys will prevent EPI from operating a business in Eagle Pass, which will result in imminent and irreparable harm to EPI.

51. The following lists several examples of events that were cancelled or received little interest because of the media coverage covering OLS in Eagle Pass and the proposed installation of the buoys:

- (1) (June-23) – Several weeks ago EPI launched a Ride The River Campaign that had to abruptly be put on hold because the City of Eagle Pass declared the Shelby Boat Ramp off limits to all individuals except law enforcement in support of OLS. (This campaign has not been able to make any profits for me, and without access to that boat ramp I am still not generating any revenue).
- (2) (March 23) – Kayaking Lessons through South West Texas Jr. College Workforce Center cancelled, no one registered for safety stigma.
- (3) (June-23) – Kayaking Summer School - No one registers due to security controls.
- (4) (May-23) – May river wedding expedition put on hold because of security reasons resulting from the buoys.
- (5) (June -23) – No sponsor willing to sponsor Kayak Races because of the narrative surrounding Eagle Pass because of OLS.
- (6) (June - 23) – Island in the Rio Grande River gets bulldozed to create a security guard post. The flow of the river is altered, rerouted. **The tributary that was bulldozed was our canoe and kayaks main entrance** to the end of our river trips.
- (7) (Present) – My concern is that the next island between both international bridges may also get bulldozed. We must protect our river. That is our main point for all tourists

on the river and in all kayaking classes because there are some naturally occurring rapids in between both international bridges at that point of the river.

52. As a small business owner and business directly impacted by OLS and the installation of the buoys, Plaintiffs challenge Governor Abbott's use of OLS to install buoys in the Rio Grande River in Eagle Pass and seeks a permanent injunction.

VII. CAUSES OF ACTION

A. *Ultra Vires* Acts.

53. Plaintiffs incorporate by reference the allegations in all preceding paragraphs.

54. Relying on the Disaster Act, the Defendants have created their own border patrol, DHS, CBP and ICE agencies called DPS to stop illegal immigration at the U.S. Mexico Border.

55. Relying on the Disaster Act, the Defendants have empowered a border czar, like a king or duke, to govern the OLS Zone.

56. Relying on the Disaster Act, the Defendants have obtained land in the OLS Zone for construction of border barriers.

57. Relying on the Disaster Act, the Defendants have purchased and intend to install buoys in the Rio Grande at or near Eagle Pass.

58. The Disaster Act does not allow the Defendants to take these actions or regulate the U.S.-Mexico Border in this manner. The reliance of the Disaster Act has negatively impacted the Plaintiffs who will be unable to operate their canoeing and kayaking business as before due to the Defendants *ultra vires* acts.

B. Texas APA.

59. Plaintiffs incorporate by reference the allegations in all preceding paragraphs.

60. "The validity or applicability of a rule, including an emergency rule adopted under Section 2001.034, may be determined in an action for declaratory judgment if it is alleged that the rule or its

threatened application interferes with or impairs, or threatens to interfere with or impair, a legal right or privilege of the plaintiff.” TEX. GOV’T CODE § 2001.038(B).

61. A court may render a declaratory judgment without regard to whether the plaintiff requested the state agency to rule on the validity or applicability of the rule in question. TEX. GOV’T CODE § 2001.038(B).

C. Declaratory Judgment Action.

62. Plaintiffs incorporate by reference the allegations in all preceding paragraphs.

63. Plaintiffs seek a declaration from this Court that OLS is *ultra vires* because the Defendants do not have authority under the Disaster Act to implement OLS and create the equivalent of DHS, CBP, and ICE in Texas.

64. Plaintiffs seek a declaration from this Court that installation of the proposed buoys in Eagle Pass is an *ultra vires* act, and that Defendants should be permanently enjoined from installing said buoys and other border barriers at or near the U.S./Mexico border and/or the Rio Grande River.

65. Plaintiffs seek a declaration from this Court that OLS and the installations of the proposed buoys in Eagle Pass as part of OLS are subject to an invalid rule or rules promulgated through the proclamation(s) and announcement(s) made by Defendants collectively referred to as OLS, and said rule(s) or its threatened application interferes with or impairs, or threatens to interfere with or impair, a legal right or privilege of Plaintiffs.

66. Plaintiffs seek a declaration from this Court that OLS and the installations of the proposed buoys in Eagle Pass as part of OLS are a series of rules that are arbitrary and capricious because the Defendants are preempted by federal law and cannot operate OLS and/or install buoys in Eagle Pass as part of OLS.

67. Plaintiffs seek a declaration from this Court that OLS and the installations of the proposed buoys in Eagle Pass as part of OLS are a series of rules that are arbitrary and capricious because the

Disaster Act does not provide Defendants any authority to enact OLS and/or install buoys in Eagle Pass.

VIII. VERIFIED EMERGENCY REQUEST FOR TEMPORARY AND PERMANENT INJUNCTION

68. Plaintiffs incorporate by reference the allegations in all preceding paragraphs.

A. Applicable Authority.

69. The purpose of a temporary restraining order is to preserve the status quo of the subject matter of the litigation until a preliminary hearing can be held on an application for temporary injunction. *Cannan v. Green Oaks Apts., Ltd.*, 758 S.W.2d 753, 755 (Tex. 1988). The status quo is the last actual, peaceable, non-contested status that preceded the controversy. *In re Newton*, 146 S.W.3d 648, 651 (Tex. 2004).

70. The last actual, peaceable, non-contested moment was on July 7, 2023, before the Defendants installed buoys in the Rio Grande River at or near Eagle Pass after Defendants announced the decision or rule to install said buoys.

B. Ex Parte Allegations.

71. Due to the extensive irreparable injuries to be suffered by require emergency relief. For this reason, Plaintiffs respectfully requests the Court to grant an *ex parte* request for relief via a temporary restraining order. Therefore, Plaintiffs seek to enjoin Defendants from installing buoys in the Rio Grande River at or near Eagle Pass under OLS pending the outcome of this litigation.

C. Grounds for TRO/TI.

72. As will be introduced at a hearing, Plaintiffs have no adequate remedy at law because Defendants, through OLS and the proposed buoys to be installed in the Rio Grande River place a physical barrier in the river that prevents Plaintiffs from operating their business. Based on a textual analysis of the Disaster Act, Defendants are not authorized to operate OLS and/or install buoys as

outlined above. Therefore, Plaintiffs have a probable right of recovery on their *ultra vires* and Texas APA/Declaratory Judgment Action claims.

73. Plaintiffs have shown that they have a substantial likelihood of success on the merits, as shown in the causes of action asserted herein.

74. Plaintiffs have a substantial threat of irreparable injury if this injunction is not issued. EPI is a small Texas business that provides customers with training and experience on the Rio Grande River using canoes and kayaks. EPI's market is focused solely on canoeing and kayaking sessions in Eagle Pass on the Rio Grande River in areas to be impacted by the buoys. If Governor Abbott proceeds with installation of the buoys, EPI will be unable to conduct tours and canoe and kayak sessions in Eagle Pass. According to the information to date, portions of Governor Abbott's buoy floating wall will be installed just south of the International Bridge #2 in Eagle Pass, which is where EPI conducts its business activities.

75. If the buoys are installed, EPI will sustain profit loss. As described herein, the Rio Grande is EPI's lifeblood, and without access to same, as it is legally entitled to, EPI will not be able to operate. Conversely, Defendants would not face any injury if the Court grants injunctive relief. Defendants will not be affected in any way if they are unable to install the buoys because there is no evidence that the buoys are necessary and there is no evidence that their installation will remedy any issues at the U.S. – Mexico border. Even if Defendants would face injury if injunctive relief is granted, it would not outweigh the sure loss of Plaintiff's business and livelihood.

76. If the Defendants install the buoys in the Rio Grande as outlined above, Plaintiffs shall suffer imminent and irreparable injury. Plaintiffs are willing to post a bond.

IX. CONDITION PRECEDENT

77. Plaintiffs allege that all conditions precedent to the filing of and recovery on the claims and causes of action have been performed, complied with, and/or have occurred.

X. JURY DEMAND

78. Pursuant to Rule 216 of the Texas Rules of Civil Procedure, Plaintiffs demand a trial by jury on their claims and causes of action.

XI. PRAYER

79. Wherefore, Premises Considered, Plaintiffs respectfully request that the Court:

- a) Declare that OLS and the installation of the buoys in Eagle Pass violate the Fourteenth Amendment of the United States Constitution as outlined above;
- b) Declare that the Texas Disaster Act does not authorize the Defendants to create their own border patrol and/or border policy rendering OLS an *ultra vires* act as outlined above;
- c) Enjoin the Defendants from installing the buoys in Eagle Pass or anywhere along the U.S.-Mexico border.
- d) In the alternative, Plaintiffs pray that this Court declare Plaintiffs' rights or remedies in conjunction with or relating to the Constitutional provisions set out hereinabove;
- e) Award Plaintiffs their costs and reasonable attorneys' fees in this action; and
- f) Grant such other relief as the Court deems just and proper.

Dated: July 7, 2023,

Respectfully submitted,

By: /s/ Carlos Evaristo Flores
Carlos Evaristo Flores (Attorney-in-Charge)
Texas Bar No. 24050606
E-mail: cflores@wctexlaw.com
Natalie Shanel Lewis
Texas Bar No. 24108870
E-mail: nlewis@wctexlaw.com

WHITWORTH CIGARROA, PLLC
602 East Calton, Suite 201
Laredo, Texas 78041
Telephone: (956) 727-4441
Facsimile: (956) 727-2696

and

De Anda Law Firm
212 Flores Ave,
Laredo, TX 78040
(956) 726-0038

*Attorneys for Epi's Canoe and Kayak Team, LLC, and
Jessie F. Fuentes*