

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

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. §

Case No. 1:23-cv-00836 DII

PLAINTIFFS' REPLY IN SUPPORT OF MOTION TO REMAND

Now Come EPI's Canoe & Kayaking Team, LLC ("EPI") and Jessie F. Fuentes ("Fuentes") (collectively, "Plaintiffs") and file this Reply Brief in support of Plaintiffs' Motion to Remand, and in support thereof, would respectfully show the Court as follows:

1. On July 7, 2023, Plaintiffs filed suit against the Defendants for their unlawful use of the Texas Disaster Act of 1975 ("Disaster Act") by Governor Greg Abbott ("Governor Abbott") to install a floating border wall in the Rio Grande near Eagle Pass. Plaintiffs alleged only Texas state law claims, which include: (1) a claim alleging a violation of the Texas Administrative Procedures Act ("Texas

APA”) and (2) a Texas *ultra vires* claim against Governor Abbott for installing the buoys in the Rio Grande under Operation Lone Star (“OLS”).¹

2. Plaintiffs also seek a declaration of rights under Texas law that the Defendants acted outside their delegated authority under the Disaster Act and that Governor Abbott acted without legal authority when he installed the buoys in the Rio Grande.

3. Plaintiffs are not seeking to enforce private rights under the 1944 Water Treaty. *Hidalgo Cnty. Water Control & Imp. Dist. No. 7 v. Hedrick*, 226 F.2d 1, 5-6 (5th Cir. 1955) (“The primary issue arises from the assertion by the plaintiffs that they have a right, created or protected by the treaty, to continue to divert and use the waters of the Rio Grande to the same extent as was done by them at the time of the treaty date without any diminution of such waters by the defendants.” “It was held at an early date that ‘A case * * * may truly be said to arise under the Constitution or a law of the United States, whenever its correct decision depends on the construction of either’”). Plaintiffs’ claims do not raise federal issues and do not require enforcement of federal law to prevail on the merits of the state *ultra vires* and Texas APA claims.

4. Plaintiffs are challenging the Defendants’ use of the Texas Disaster Act to install a floating border barrier in the Rio Grande in the vicinity of Eagle Pass.

5. Like the maritime and state claims in *Rivera*, the Texas Disaster Act was not created by federal law and does not provide this Court with “arising under” jurisdiction. *Rivera v. Orion Marine Grp., Inc.*, 509 F. Supp. 3rd 926, 940 (S.D. Tex. 2020) (“It goes undisputed that federal law does not create the maritime claims and state law claims. And as explained below, the Court also does not have ‘arising under’ jurisdiction under the *Grable* doctrine because Plaintiffs’ general tort claims (both those under

¹ On July 14, 2023, Plaintiffs filed their First Amended Petition, (“Amended Petition”), asserting the same causes of action alleged in the initial petition, supplementing the facts, and augmenting the arguments. Plaintiffs further removed a reference from the Prayer regarding the 14th Amendment to the United States Constitution. In other words, the Amended Petition did not assert federal claims and did not seek relief under federal law.

maritime law and state law) do not necessarily raise a federal issue, and although the first two elements are satisfied as to the strict liability claim against Enterprise, the federal issue raised there, if any, is not substantial.”)

6. Plaintiffs are seeking a textual analysis of the Texas Disaster Act to establish that Governor Abbott acted in an *ultra vires* manner when he relied on the Texas Disaster Act to install buoys in the Rio Grande, and the Defendants acted outside their delegated authority when they also relied on the Texas Disaster Act to install buoys in the Rio Grande.

7. Based on the foregoing, Plaintiffs’ Motion to Remand is proper and should be granted. Alternatively, Plaintiffs seek a preliminary injunction that orders Defendants to remove the buoys already installed and an injunction preventing the installation of additional buoys during the pendency of this matter.

Date: August 8, 2023,

Respectfully submitted,

By: /s/ Carlos E. Flores

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CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that, on the 8th day of August 2023, he electronically submitted a true and correct copy of the foregoing with the Court via the CM/ECF system, which will serve a copy on all counsel of record.

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