THE CONSTITUTIONALITY OF TEXAS' EXECUTIVE ORDERS IMPACTING THE U.S.–MEXICO BORDER

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I. INTRODUCTION

In the last year, Texas Governor Greg Abbott issued multiple disaster declarations across Texas for several tragedies.[1] These declarations included responses to the COVID-19 pandemic and a winter storm that left millions of people without power in freezing temperatures for several days.[2] It also included a disaster declaration regarding the crisis at its border with Mexico.[3] The new administration under President Biden came under fire for immigration issues at United States' southern border, and yet no satisfactory federal response has been forthcoming.[4] While immigration is, was, and likely always will be a highly politicized topic in America,[5] this game of politics poses legal questions, especially with an administration change.

In Texas, disaster declarations give the governor broad power to suspend state laws and regulations considered a hindrance to disaster recovery and reallocate the use of available resources to respond to the disaster.[6] By declaring a disaster at the Texas state border, Abbott was able to reallocate about $250 million of legislatively appropriated funds towards a border wall construction project.[7] Abbott's actions raise questions about the

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1 *See, e.g.*, James Barragan & Cassandra Pollock, *Gov. Greg Abbott is Using a Disaster Declaration to Help Fund a Border Wall*, TEX. TRIB. (June 23, 2021, 3:00 PM), https://www.texastribune.org/2021/06/23/texas-greg-abbott-border-wall/.

2 *See id.*

3 *See Governor Abbott Issues Disaster Declaration in Response to Border Crisis in Texas*, OFF. TEX. GOVERNOR (June 1, 2021), https://gov.texas.gov/news/post/governor-abbott-issues-disaster-declaration-in-response-to-border-crisis-in-texas.

4 *What are President Biden's challenges at the Mexico border?*, BBC NEWS (June 29, 2022), https://www.bbc.com/news/world-us-canada-56255613.

5 Frank V. Vernuccio, Jr., *Politicization of Immigration*, USA GOV POL'Y (July 14, 2018), https://www.usagovpolicy.com/politicization-of-immigration/.

6 TEX. CODE ANN. §§ 418.015-418.016 (2021).

7 Barragan & Pollock, *supra* note 1.

state executive branch's emergency powers. Moreover, several states sent law enforcement officers to the Texas border to support Texas' endeavors.[8] Since securing the border is the federal government's responsibility, what legal standing do responding states actually have? And are those states, in fact, attempting to do the federal government's job? This article analyzes the legal legitimacy of these actions and which precedents would apply if courts are asked to rule on the constitutionality of the state's actions.

II. HISTORY OF PREEMPTION IN IMMIGRATION LAW

National sovereignty rests upon several foundational principles, such as the concept that each nation-state should be able to define and defend its borders and membership.[9] However, the individual states within the United States are not nation states and thus do not have the power to control their borders in the same manner as the federal government.[10] The inability to restrict the movement of people from one state into another state is rooted in the right to free travel within the country and is a fundamental right under our Constitution.[11] Controlling one's borders and deciding the makeup of one's populace is a power specifically reserved for the federal government.[12]

In the last ten years, the federal government struck down several state immigration laws preemptively when it perceived that the state law interfered or conflicted with federal law.[13] There are two types of preemption: express or implied. In express preemption, there is usually some congressional language that "clearly indicates that state laws are not tolerated."[14] In implied preemption, the state laws are perceived to conflict with federal laws or goals, or federal law is so comprehensive in a space that there is no room left for the state to enact laws in the same area.[15] When the federal government strikes down state immigration laws, it usually employs a combination of both types of preemption analysis.[16]

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8 Ana Ceballos, *Florida to Send 50 Law Enforcement Officers to Texas Border*, MIA. HERALD (June 25, 2021, 4:02 PM), https://www.miamiherald.com/article252364603.html; Chelsea Cox, *South Dakota Gov. Kristi Noem to Send National Guard Troops to Southern Border*, USA TODAY (June 29, 2021), https://www.usatoday.com/story/news/politics/2021/06/29/south-dakota-gov-kristi-noem-send-national-guard-troops-texas/7802513002/.

9 *See, e.g.*, R. Linus Chan, *The Right to Travel: Breaking Down the Thousand Petty Fortresses of State Self Laws*, 34 PACE L. REV. 814 (2014).

10 *See id.*

11 *See id.*

12 *See id.* at 818.

13 *See, e.g.*, Arizona v. United States, 567 U.S. 387 (2012); United States v. South Carolina, 720 F.3d 518 (4th Cir. 2013); Lozano v. City of Hazelton, 724 F.3d 297 (3d Cir. 2013).

14 *See* Chan, *supra* note 9.

15 *Id.* at 822.

16 For example, the Court in Arizona followed this approach. It examined Congressional action to create a "complete system for alien registration" (implied) and discussed the presumption that

A. *Arizona v. United States* in 2012

In 2012, the United States brought an action against the State of Arizona, preemptively challenging the constitutionality of four provisions of an Arizona statute relating to undocumented immigrants.[17] First, the Arizona law in question created, among other things, a new state misdemeanor for failure "to complete or carry an alien registration document . . ." thus adding a state-law penalty for conduct already prohibited by federal law.[18] Next, the Arizona statute made it a state misdemeanor for an undocumented immigrant to "knowingly apply for work, solicit work in a public place or perform work as an employee or independent contractor" within the state. There was no similar existing federal law.[19] Thirdly, they challenged the Section of the Arizona statute stating that a state officer, "without a warrant, may 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," which directly contradicts the removal system created by the immigration laws enacted by Congress.[20] Finally, the Arizona statute required state officers to make a "reasonable attempt . . . to determine the immigration status of any person they stop, detain, or arrest on some other legitimate basis if reasonable suspicion exists that the person is an alien and is unlawfully present in the United States."[21] This also flies directly in the face of the immigration verification requirement Congress enacted.[22] Justice Kennedy wrote the opinion for the majority of the Supreme Court, in which the Court held that federal law preempts Arizona's statutes on almost all of the challenged points.[23] The Court's analysis of preemption, in this case, went on to establish precedents impacting the treatment of other state immigration laws in later years.[24]

1. The federal government's power over immigration is broad.

The federal government's authority to legislatively control immigration is derived from the constitutional language of Article I, granting the right to establish a uniform Rule of Naturalization, combined with its specific power

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traditional state police powers were not preempted unless there is a clear manifestation of intent (express). *Arizona*, 567 U.S. at 399-403.

17 *Id.* at 388.

18 *Id.* at 400.

19 *Id.* at 403.

20 *Id.* at 407.

21 *Id*. at 411.

22 *Arizona*, 567 U.S. at 411.

23 *Id.* at 416.

24 *See, e.g.*, *Lozano*, 724 F.3d 297; Georgia Latino Alliance for Human Rts. v. Deal, 958 F.Supp.2d 1355 (N.D. Georgia 2013).

as a sovereign to conduct relations with foreign nations.[25] The Court reasoned that the federal power to determine immigration policy is well settled since immigration policy affects "trade, investment, tourism, and diplomatic relations for the entire nation, as well as the perceptions and expectations" of immigrants in the country.[26] Further, there are ramifications to consider beyond the United States borders as "perceived mistreatment of aliens in the United States may lead to harmful reciprocal treatment of American citizens abroad."[27]

Considering the complexities of immigration law, Congress specified which noncitizens may be removed from the United States, the conditions under which removal may occur, the procedures for doing so, as well as specific categories of noncitizens who may be denied entry into the United States.[28] Unlawful entry and reentry into the country are both federal crimes.[29] Once on American soil, migrants are required to register with the federal government and must always carry proof of status with them.[30] Federal law allows states to deny noncitizens various public benefits and imposes sanctions on employers who hire unauthorized workers.[31] However, the removal of migrants is a civil procedure allowing very broad discretion to immigration officials.[32] As a general matter, federal officials decide whether it makes sense to pursue removal.[33] Once the removal of an immigrant passes feasibility, the decision involves considering many factors, including immediate human concerns such as perceived danger, whether they have children, the political situation in their home countries, and their ties to the community.[34] However, the Court recognized that a handful of states, including Arizona, bear the brunt of the many consequences of unlawful immigration.[35]

In Arizona's brief, the state presented an extensive record of statistics demonstrating the state's ongoing struggle with illegal immigrants.[36] Arizona stated that hundreds of thousands of deportable aliens are apprehended in Arizona each year, and while they constitute just six percent of the state's population, they are reported to be responsible for a significantly disproportionate share of serious crimes.[37] The Court's opinion reflected

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25 *Arizona*, 567 U.S. at 394 (citing U.S. CONST. art I, § 8, cl. 4).
26 *Id.* at 395.
27 *Id.*
28 *Id*. (citing 8 U.S.C. §§ 1182, 1304(e), 1324).
29 *Id*.
30 *Id.* at 396.
31 *Arizona*, 567 U.S. at 396.
32 *Id.*
33 *Id.*
34 *Id.*
35 *Id.* at 397 (2012).
36 Reply Brief for Petitioner at 5-6, *Arizona*, 567 U.S. 387 (No. 11-182).
37 *Arizona*, 567 U.S. at 397.

accounts illustrative of the "epidemic of crime, safety risks, serious property damage, and environmental problems" associated with illegal immigration into Arizona.[38] With these concerns in mind, the Court proceeded with the formal legal analysis of whether federal law allows Arizona to implement the state-law provisions in dispute.[39]

2. State law must give way to federal law.

Federalism is the principle that both the national and state governments are entrusted with very specific elements of sovereignty, the boundaries of which the other must respect.[40] Within this system, it is possible to imagine how laws between the state governments and the federal government can sometimes conflict. The Supremacy Clause provides a clear rule establishing federal law as being supreme and binding upon every state.[41] This is what allows the Supremacy Clause to give Congress the power to preempt state law.[42] Similarly, Congress may withdraw certain powers from the states by enacting a statute containing an express preemption provision.[43]

Additionally, state laws must give way to federal law when "States are precluded from regulating conduct in a field that Congress, acting within its proper authority, has determined must be regulated by its exclusive governance."[44] This federal power can be inferred from the framework of a regulation in which Congress has left no room for states to supplement the law or when the federal interest is so dominant that the federal system is assumed to preclude enforcement of state laws on the same subject.[45] State laws must also give way when they conflict with federal law, including cases in which "compliance with both federal and state regulations is a physical impossibility" and instances in which state laws may stand as obstacles to the accomplishment and execution of the "full purposes and objectives of Congress."[46] The Supreme Court then analyzed Arizona's state law under the aforementioned preemption principles.[47]

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38 *Id.* at 398.
39 *Id.* at 398-99.
40 *Id.* at 398.
41 U.S. CONST. art. VI. cl. 2.
42 *Arizona*, 567 U.S. 387.
43 *Id.*
44 *Id.* at 399.
45 *Id.*
46 *Id.*
47 *Id.* at 400-17.

3. Arizona's state law penalty supplementing federal law intrudes into alien registration, a field in which Congress left no room for state regulation.

The first challenged Section of Arizona's state law forbade the "willful failure to complete or carry an alien registration document . . ." and, in practice, added a state-law penalty for conduct already prohibited by federal law.[48] The federal government argued that the state enforcement mechanism intruded on the field of alien registration, which is a field in which Congress has left no room for states to regulate.[49] The Court agreed.[50] The Court noted that in 1940, Congress added a complete system for alien registration to existing federal immigration law as international conflict spread with World War II.[51] Congress carefully balanced the punishment of an alien's willful failure to register without requiring aliens to carry identification cards.[52] However, federal law now includes a requirement that aliens carry proof of registration.[53]

In a 1940s case challenging a Pennsylvania immigration law, the Court noted that this area involved foreign relations; thus, "Congress intended the federal plan for registration to be a single integrated and all-embracing system."[54] Further, it did not intend to allow the States to "curtail or complement" federal laws or enforce additional regulations.[55] There, the Court concluded that Pennsylvania could not enforce its own alien-registration program.[56] Using the Pennsylvania precedent, the Court in Arizona's case found that though the federal regulation is not identical to the one from the 1940s, Arizona's statute was still invalid.[57] Specifically, the Court said, "[e]very state could give itself independent authority to prosecute federal registration violations, 'diminish[ing] the [federal government's] control over enforcement' and 'detract[ing] from the "integrated scheme of regulation" created by Congress.'"[58] In layman's terms, if one state is allowed to detract from the federal government's immigration laws, then all states could do the same, weakening the strength of the power specifically given to the federal government by the Constitution. Due to Congress's extensive legislation in this field, the Court found that Congress intended to

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48 *Arizona*, 567 U.S. at 400.
49 *Id.*
50 *Id.* at 403.
51 *Id.* at 400 (citing Hines v. Davidowitz, 312 U.S. 52, 70 (1941).
52 *Id.* at 400.
53 *Id.* at 401.
54 *Hines*, 312 U.S. at 73-74.
55 *Arizona*, 567 U.S. 387 (citing *Hines*, 312 U.S. 52).
56 *Hines*, 312 U.S. at 74.
57 *Arizona*, 567 U.S. at 401.
58 *Id.* at 402 (quoting Wisconsin Dept. of Industry v. Gould Inc., 475 U.S. 282, 288-89 (1986)).

preclude states from complementing federal law or enforcing additional regulations and preempted this Section of the Arizona statute.[59]

4. Arizona's state law criminalizing unauthorized aliens' applications for work is preempted as an obstacle to the federal plan of regulation.

Unlike the previous Section, Section 5(C) of Arizona's law enacted a state criminal prohibition where no federal counterpart exists.[60] This provision made it illegal for an "unauthorized alien to knowingly apply for work, solicit work in a public place or perform work as an employee or independent contractor" in Arizona.[61] The violation is a misdemeanor punishable by a fine of $2,500 and incarceration for up to six months.[62] In response to this provision, the federal government argued that this Section of Arizona's law "upsets the balance struck by the Immigration Reform and Control Act of 1986 ("IRCA") and must be preempted as an obstacle to the federal plan of regulation and control."[63] The Court agreed.[64]

According to the Court, in the absence of a comprehensive federal law or program that regulates an issue, a State has the authority to pass its own legislation on the subject.[65] In terms of employment law, the Court cites a case from 1971 in which California passed a law imposing civil penalties on the employment of aliens who were not entitled to lawful residency in the United States, and the law was upheld on a preemption challenge because, at that point, the federal government had not expressed its concern with the employment of illegal immigrants.[66] The Court noted that in 2012, the federal law was much different than in the 1970s when *DeCanas* was litigated.[67] Specifically, Congress enacted the IRCA to combat the employment of illegal aliens at a federal level, making the employment, recruitment, referral, or continued employment of unauthorized workers illegal.[68] Arizona's law penalized employees and did not interfere with the federal law penalizing employers.[69] However, the Court cited the legislative background of the IRCA, underscoring Congress's deliberate choice not to impose criminal penalties on aliens seeking employment.[70] For this reason, the Court held this

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59 *Id.* at 401.
60 *Id.* at 403 (citing ARIZ. REV. STAT. ANN. § 13-2928(C) (2022)).
61 *Id.*
62 *Id.* at 403.
63 *Arizona*, 567 U.S. at 403.
64 *Id.* at 406.
65 *Id.* at 404.
66 *Id.* at 404 (citing DeCanas v. Bica, 424 U.S. 351, 356 (1976)).
67 *Id.* at 404.
68 *Id.* at 404.
69 *Arizona*, 567 U.S. at 403-04.
70 *Id.* at 405.

Section of Arizona's law to be preempted by federal law as an obstacle to the "accomplishment and execution of the full purposes and objectives of Congress."[71]

5. Arizona's state law authorizing certain arrests is an obstacle to the federal removal system.

Next, the Court analyzed Section 6 of the Arizona law and found this Section to also pose an obstacle to the removal system Congress created.[72] This Section authorized Arizona state officers to arrest a person without a warrant if the officer has probable cause to believe the person has committed any public offense that makes him removable from the United States.[73] The federal government argued that Section 6 provided state officers with even greater authority to arrest aliens based on possible removability than federal immigration officers, making the Arizona law an obstacle to the federal removal system.[74] The Court held that since Congress has in place a "system in which state officers may not make warrantless arrests of aliens based on possible removability except in specific, limited circumstances," Section 6 creates an obstacle to the full purposes and objectives of Congress and is therefore preempted by federal law.[75]

Initially, the Court pointed out that, generally, it is not a crime for a removable alien to remain in the United States.[76] The federal structure is very clear about when during the removal process arresting aliens is deemed appropriate.[77] The process allows the Attorney General discretion on warrant issuance for the arrest and detention of aliens.[78] Absent a federal warrant from the Attorney General, federal officers trained in immigration law enforcement have limited authority to arrest an alien in violation of any immigration law or regulation.[79] Since Section 6 provides state officers even greater authority to arrest aliens by allowing state officers to conduct warrantless arrests on aliens they believe are removable for some "public offenses," it effectively allows the state to enact its own immigration policy.[80] The Court found that this conflicts with the system Congress created, and the

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71 *Id*. at 406.
72 *Id*. at 410.
73 *Id*. at 410.
74 *Id*. at 407-08.
75 *Arizona*, 567 U.S. at 410.
76 *Id*. at 407.
77 *Id*. at 407-08 (citing 8 U.S.C. § 1226(a)).
78 *Id*.
79 *Id*. at 408.
80 *Id*. at 408.

Arizona law explicitly violates the removal process that Congress legislated.[81]

6. Arizona's state law requiring immigration status verification may not be preempted; however, the Supreme Court declined to decide the issue.

Lastly, the Court analyzed Section 2(B) of the Arizona statute requiring state officers to make a "'reasonable attempt . . . to determine the immigration status' of any person they stop, detain, or arrest on some other legitimate basis if 'reasonable suspicion exists that the person is an alien and is unlawfully present in the United States.'"[82] The Section built three limits into the provision in which a detainee is presumed not to be an alien unlawfully present in the United States.[83] Officers may not consider race, color, or national origin in their determination process, and the provision must be implemented in accordance with federal immigration laws, protect the civil rights of all persons, and respect the privileges and immunities of United States citizens.[84] The federal government argued that even with these limits, the mandatory nature of Arizona's verification requirements poses an obstacle to the Congressional framework because the status checks bring the possibility of prolonged detention while being performed.[85] However, the Court was not as convinced.[86]

The Court interpreted the Section requiring state officers to conduct status checks during the course of authorized lawful detentions or after detainee release, and in its reading, the Section would likely survive preemption.[87] First, Congress has done nothing to suggest it is inappropriate to communicate with United States Immigration and Customs Enforcement ("ICE") in these situations.[88] In fact, Congress encourages information sharing between state agencies and ICE, with Congress instructing that "no State or local government entity may be prohibited" from sending or receiving information from ICE regarding the immigration status of a person in the United States.[89] This Section of the Arizona law requires state officials to contact ICE as a routine matter, which is a policy allowable within the federal scheme.[90] Secondly, the Court found no clear evidence that this Section of the Arizona law would prolong detentions as the language of the

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81 *Arizona*, 567 U.S. at 409-10.
82 *Id.* at 411.
83 *Id.*
84 *Id.*
85 *Id.*
86 *Id.* at 413-14.
87 *Arizona*, 567 U.S. at 414.
88 *Id.* at 412.
89 *Id.* at 412-13.
90 *Id.* at 413.

Section does not specify when a status check must be made and specifies only that state officers must conduct a status check during the course of an authorized and lawful detention.[91] Additionally, the Court did not address whether reasonable suspicion of illegal entry or another immigration crime would be a legitimate basis for prolonged detention.[92] Before it considered whether the law would be preempted, the Court determined no call could be made since state courts did not yet have the opportunity to interpret the law.[93] There also appeared to be no evidence that state officers would be directed to enforce this law in a manner that would necessitate court involvement.[94] To date, the Court has declined to rule on Section 2(B)'s validity.[95]

7. The federal government has significant power to regulate immigration, and states may not pursue policies that could undermine the federal law.

In conclusion, the Court looked at policy and held in favor of the federal government in its challenge of the Arizona statute.[96] The Court explains that "immigration policy shapes the destiny of the Nation"[97] and that the "history of the United States is in part made of the stories, talents, and lasting contributions of those who crossed oceans and deserts to come . . ." to the United States.[98] The Court acknowledged that while Arizona has "understandable frustrations with the problems caused by illegal immigration,"[99] a state may not pursue policies that undermine federal law. Finally, the Court held that the federal government successfully established that Sections 3, 5(C), and 6 of the Arizona statute are preempted but found it improper to enjoin Section 2(B) before state courts had an opportunity to construe it.[100] This Supreme Court ruling served as the basis for similar challenges of states' immigration laws going forward.[101]

III. COVID-19'S EFFECTS ON IMMIGRATION LAW AND PUBLIC HEALTH ARGUMENTS

In 2021, Texas sought an injunction against the Department of Homeland Security's January 20th Memorandum (the "January 20

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91 *Id.* at 414.
92 *Id.* at 414.
93 *Arizona*, 567 U.S. at 415.
94 *Id.* at 413-15.
95 *See id.* at 415.
96 *Id.* at 416.
97 *Id.* at 415-16.
98 *Id.* at 416.
99 *Arizona*, 567 U.S. at 416.
100 *Id.*
101 *See, e.g.*, *Lozano*, 724 F.3d 297; *Deal*, 958 F. Supp. 2d 1355.

Memorandum"), which directed "an immediate pause on removals of any noncitizen with a final order of removal . . ." for 100 days.[102] The federal court granted Texas' emergency application for a Temporary Restraining Order ("TRO") to enjoin the federal government's 100-day pause on the removal of aliens already subject to a final order of Removal.[103] The federal government countersued, seeking a TRO or a preliminary injunction enjoining the enforcement of the Texas Governor's Executive Order from July 28th, 2021, titled "Relating to the transportation of migrants during the COVID-19 disaster."[104] Texas fought the government's motion based on two emergencies: (1) the COVID-19 pandemic, including the rapid spread of the Delta variant, and (2) the surge of migrants at Texas' international border.[105] The state argued that "the migrant crisis feeds into the pandemic because the Biden Administration's open-border policies allow COVID-infected migrants to spread the disease in Texas."[106] The court sided with the federal government and issued the TRO, enjoined the defendants, but ordered both parties to further brief the court on the facts and law of the issues before entering an order on the federal government's application for a preliminary injunction.[107] To date, the court has yet to rule on the issues, but the arguments seen in this immigration issue are likely to be seen again in any future challenges to Texas border protection initiatives.

A. Arguments for the Federal Government

Texas Governor's Executive Order No. GA-37 limits the transportation of certain migrants within the State of Texas.[108] In the federal government's view, the Order threatens to significantly disrupt the federal immigration process in Texas while "facing a once-in-a-century pandemic as well as a significant influx of noncitizens."[109] The Order states, "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 [Customs and Border Protection ("CBP")] for crossing the border illegally or who would have been subject to expulsion under the Title 42 order."[110] Further, the Texas Department of Public Safety ("DPS") is "directed to stop any

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102 Texas v. United States, 515 F. Supp. 3d 627, 630 (S.D. Tex. 2021).

103 *Id.*

104 United States v. Texas, 557 F. Supp. 3d 810, 814 (W.D. Tex. 2021).

105 Defendant's Response in Opposition to Plaintiff's Motion for a Temporary Restraining Order at 1, *Texas*, 557 F. Supp. 3d 810 (No. 21-173).

106 *Id.*

107 *Texas*, 557 F. Supp. 3d 810.

108 46 Tex. Reg. 4913 (Aug. 13, 2021).

109 United States of America's Emergency Motion for a Temporary Restraining Order or Preliminary Injunction at 1, *Texas*, 557 F. Supp. 3d 810 (No. 21-173).

110 46 Tex. Reg. 4913 (Aug. 13, 2021).

vehicle upon reasonable suspicion of a violation of [the previous provision] and to reroute such a vehicle back to its point of origin or a port of entry if a violation is confirmed."[111] The Order also allows the DPS to impound a vehicle being used to transport migrants in violation of the first or second provisions of the order.[112] The federal government bases its arguments upon two points. The first is that the Executive Order is preempted by federal law, and the second is that the Executive Order violates intergovernmental immunity.[113] Based on the Order, it is unclear who, aside from federal, state, or local law enforcement, would be involved in transporting migrants.[114] As such, the federal government first argues the practical background of the Order to support the position that if noncitizens can be transported in Texas only by law enforcement officials, then the federal immigration system will be severely impacted.[115]

The federal government explains that "noncitizens must be transported for a variety of practical and legal reasons."[116] For example, unaccompanied children may need to be transferred from CBP to other facilities or appropriately vetted sponsors who are typically family members."[117] Other noncitizens released from detention need to be transported to CBP for final disposition and removal.[118] In other instances, noncitizens released by the CBP may require independent transportation to their ultimate destinations.[119] Regardless of the reason for the need for transportation, the federal government relies on "countless people to provide transport—many, if not most, of whom are not law enforcement officers."[120] These people may be non-law enforcement federal employees, federal contractors, federal grantees, or non-governmental Organization ("NGO") partners.[121] To give context to the role non-law enforcement individuals play, the federal government cites that CBP contractors in one sector transported approximately 120,000 migrants released from CBP custody or transferred to the custody of another agency in one fiscal year.[122] In the same time period,

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111 *Id.*

112 *Id.*

113 United States of America's Emergency Motion for a Temporary Restraining Order or Preliminary Injunction, *supra* note 109, at 7-16.

114 The Order specifies no particular person or category of person who otherwise would be involved in the transport of migrants. 46 Tex. Reg. 4913 (Aug. 13, 2021).

115 United States of America's Emergency Motion for a Temporary Restraining Order or Preliminary Injunction, *supra* note 109, at 4.

116 *Id.*

117 *Id.*

118 *Id.*

119 *Id*.

120 *Id.*

121 United States of America's Emergency Motion for a Temporary Restraining Order or Preliminary Injunction, *supra* note 109, at 5.

122 *Id*.

ICE's main transport contractor transported over 97,000 noncitizens.[123] The federal government argues that limiting the ability to transport noncitizens to only law enforcement officials would drastically affect the federal immigration system, hampering the federal government's ability to transport migrants and impeding its ability to fulfill its legal obligations.[124]

In its first legal argument, the federal government cites the 2012 Supreme Court case from Arizona, stating that "the Government of the United States [has] broad, undoubted power over the subject of immigration and the status of aliens."[125] This exclusive federal authority in immigration reflects the inseparability of foreign policy from the importance of the federal government's dealings with other nations.[126] The federal government argues that the Executive Order is invalid because it stands as an obstacle to federal immigration law enforcement as it interferes with federal statutory objectives in at least two ways: (1) it obstructs federal officials' ability to lawfully release and transport noncitizens; and (2) it obstructs the operations of the federal immigration system.[127] This Executive Order unduly interferes with federal law enforcement, and the federal government additionally argues it puts federal partners in the "untenable position of either following federal instructions . . . or complying with the executive order and declining to perform their designated federal functions."[128] Similarly, the Order may be separately preempted by federal law because "it authorizes state officials to make certain federal law determinations that are reserved to the federal government."[129] Accordingly, the federal government argues that the Order is preempted by federal law.[130]

In its second contention, the federal government introduces an argument missing from the *Arizona* holding. It argues that the Order 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 . . .'"[131] Citing the *Trump v. Vance* decision, the federal government argued that the Court reaffirmed "the Constitution guarantees the entire independence of the General Government from any control by the respective States" and that "states can neither control the operations of the constitutional laws enacted by Congress nor impede the Executive Branch's

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123 *Id.*

124 *Id.*

125 *Id.* at 7 (quoting *Arizona*, 567 U.S. at 394).

126 *Id.*

127 United States of America's Emergency Motion for a Temporary Restraining Order or Preliminary Injunction, *supra* note 109, at 10.

128 *Id.* at 11.

129 *Id.* at 12.

130 *Id.* at 14.

131 *Id.* (citing M'Culloch v. Maryland, 17 U.S. 316, 317 (1819)).

execution of those laws."[132] According to the federal government, the Texas Executive Order seeks to regulate the admittance and movement of migrants and is meant to correct President Biden's purported failure to enforce federal immigration laws.[133] Additionally, the federal government is not convinced of the relevance of the issues of public health or safety as the basis for Texas' purported necessity for such measures since the question is not whether the state's law is better or worse at protecting such interest, but if the state can regulate federal activity such as immigration.[134] The federal government warns that if states could regulate, or even ban, federal officials and partners from performing their duties on behalf of the United States, the federal government would "grind to a halt."[135]

B. Arguments for Texas

Texas reasons that the Executive Order addresses the "potentially catastrophic effect on public health in Texas caused by the confluence of the migrant crisis and the pandemic."[136] Responding to the federal government's preemption analysis, Texas states that "courts start with the assumption that the historic police powers of the States were not to be superseded unless that was the clear and manifest purpose of Congress."[137] Texas argues that the United States has shown no applications for GA-37, establishing that no set of circumstances exists under which the Executive Order would be valid.[138] Further, even if the federal government could show that the Order interfered with federal immigration priorities, it did not mean that the Order should be enjoined as a whole.[139] Texas addresses the federal government's preemption arguments in three parts.

First, the state argues that the Order is not an obstacle to federal immigration law enforcement because the federal government failed to show a lawful set of circumstances in which said obstacle could ever occur.[140] Primarily, Texas opines quite simply that even though the state could enforce the Order in ways that conflict with federal immigration laws, it does not mean that the Order as a whole should be struck down.[141] Moreover, the state

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132 *Id.* (citing Trump v. Vance, 140 S. Ct. 2412, 2425 (2020) (internal quotations omitted)).

133 United States of America's Emergency Motion for a Temporary Restraining Order or Preliminary Injunction, *supra* note 109, at 15.

134 *Id.* at 16 (citing 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)).

135 *Id.* at 17.

136 Defendant's Response in Opposition to Plaintiff's Motion for a Temporary Restraining Order, *supra* note 105, at 1.

137 *Id.* at 9 (citing Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)).

138 *Id.*

139 *Id.* at 9-10 (citing Puente Ariz. v. Arpaio, 821 F.3d 1098, 1108 (9th Cir. 2016)).

140 *Id.* at 10.

141 *Id.*

believes the federal government is unable to show the Order is preempted in any specific application because the Order addresses only ground transportation and no other transportation needs or mechanisms for the release of noncitizens from custody.[142] Additionally, since the Order expressly exempts federal, state, or local law-enforcement officials, Texas argues that the Order does not prevent the transfer of certain noncitizens between federal agencies as the federal government suggests.[143] The state points out that the Order does not restrict the transfer of individual migrants and only covers groups; therefore, the federal government is wrong to argue that the Order will prohibit the transport of noncitizens between federal agencies.[144] Then, the state argues that the federal government failed to cite any federal law establishing the role of federal partners or even giving them federal responsibilities, or grants them "the right to disregard state public health-and-safety orders."[145]

Next, in its arguments against preemption, Texas reasons that the Order does not improperly require state officials to make discretionary determinations about federal immigration status.[146] The state responds that the Order does not regulate immigration because it is a public-health measure that makes a public health designation and imposes no consequences on noncitizens based on immigration status without federal direction and supervision.[147] As a result, federal law does not prohibit Texas from protecting public health during a pandemic because "health laws of every description are within the States' police powers."[148] According to Texas, aliens being the subject of a state statute does not automatically make it a regulation of immigration, which (Texas says) is essentially a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain.[149] The state argues that even if the Order may influence operations related to migrants, it does not mean that the only source of authority supporting the Order is the power to regulate immigration. In fact, the state believes it can regulate its own internal police to "guard against physical pestilence from infectious disease."[150] Texas distinguishes itself from Arizona by arguing that the Arizona statute

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142 Defendant's Response in Opposition to Plaintiff's Motion for a Temporary Restraining Order, *supra* note 105, at 11.

143 *Id.*

144 *Id.* at 11-12.

145 *Id.* at 11.

146 *Id.* at 13.

147 *Id.* at 14.

148 Defendant's Response in Opposition to Plaintiff's Motion for a Temporary Restraining Order, *supra* note 105, at 14 (citing City of New York v. Miln, 36 U.S. 102, 133 (1837)).

149 *Id.* (citing DeCanas v. Bica, 424 U.S. 351, 355 (1976)).

150 *Id.* (citing Gibbons v. Ogden, 22 U.S. 1, 203 (1824)).

expressly sought to discourage and deter the unlawful entry and presence of aliens while the Texas law furthers no such purpose.[151]

Lastly, Texas argues that the Biden Administration is violating Title 42. Since that is the case, the Texas Order does not violate federal law but instead supports it.[152] Texas reasons that the Order does not interfere with the federal government's ability to physically release migrants because preventing third parties from providing transportation to groups of migrants "does nothing to prevent the federal government from releasing individuals from detention."[153] Alternatively, Texas argues that even if the Order did interfere with the federal government's operations, the federal government "is not supposed to be releasing these migrants."[154] Since the CDC's Title 42 Order determined "that a suspension of the right to introduce such persons is required in the interest of public health," the federal government is obligated not to release the noncitizens, according to Texas.[155] Texas accuses the Executive Branch of not following Congressional commands and contends that even if the Order impeded the federal government's ability to release migrants "potentially infected with COVID-19," the Order does not violate federal law.[156]

Separately, the state maintains that the Order does not infringe on intergovernmental immunity. Citing a 1990 Supreme Court case, Texas argues that a "state regulation is invalid only if it regulates the United States directly or discriminates against the Federal Government or those with whom it deals."[157] Accordingly, a state "does not discriminate against the Federal Government and those with whom it deals unless it treats someone else better than it treats them."[158] Since the Order treats federal law enforcement officers the same way it treats state and local law enforcement officers, according to Texas, the Order does not discriminate against the federal government.[159] Texas equates its ability to restrict the transportation of migrants to North Dakota's right to "uniformly regulate every liquor distributor operating within its borders, whether it sold to the federal government or not," and to Washington's ability to impose "a tax on every government building contractor operating within its border, whether it contracted only with the

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151 *Id.* at 15-16.
152 *Id.* at 17.
153 *Id.* at 17.
154 Defendant's Response in Opposition to Plaintiff's Motion for a Temporary Restraining Order, *supra* note 105, at 17.
155 *Id.* at 17-18.
156 *Id.* at 20.
157 *Id.* (citing North Dakota v. United States, 495 U.S. 423, 436 (1990)).
158 *Id.* at 20-21 (citing United States v. California, 921 F.3d 865, 881 (9th Cir. 2019)).
159 *Id.* at 20-21.

federal government or not."[160] Mainly, Texas argues that even if intergovernmental immunity were to preclude the application of the Order to the government itself, there is no authority cited stating that intergovernmental immunity extends to federal grantees or NGO partners.[161] Texas believes that the aforementioned lack of federal preemption and lack of infringement on intergovernmental immunity means that the federal government does not meet the burden for a TRO from the court.[162]

C. Court's Order

To date, the court has yet to rule on the injunction as requested by the federal government. The court, however, did grant the federal government's TRO on August 3rd.[163] The court further stated that the United States "is likely to prevail" on its challenge that Texas Governor Greg Abbott's Executive Order violates the Supremacy Clause of the United States Constitution as (1) it conflicts with, and poses an obstacle to, federal immigration law; and (2) it directly seeks to regulate the federal government's operations.[164] Further, the court found that the Order causes irreparable injury to the United States and individuals with whom the United States is charged with protecting.[165] This jeopardizes the health and safety of noncitizens in federal custody, risks the safety of federal law enforcement personnel and their families, and exacerbates the spread of COVID-19.[166] Additionally, the court found that the balance of equities and the public interest also favors the federal government.[167] The TRO was set to expire on August 13th, 2021, but was extended for an additional fourteen days.[168] The parties' arguments in this case, as well as the court's ruling, provide insight into possible justifications related to the states' decisions to send various state law enforcement officers to the Texas border.

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160 Defendant's Response in Opposition to Plaintiff's Motion for a Temporary Restraining Order, *supra* note 105, at 17 (citing *North Dakota*, 495 U.S. at 436; Washington v. United States, 460 U.S. 536, 544-45 (1983)).

161 *Id.* at 22.

162 *Id.* at 26-27.

163 *Texas*, 557 F. Supp. 3d at 822-23.

164 *Id.* at 821-22.

165 *Id.*

166 *Id.*

167 *Id.* at 822.

168 *Id.* at 814.

IV. ANALYSIS OF BORDER ISSUES AND ARGUMENTS FOR THE CONSTITUTIONALITY OF STATE ACTIONS

Securing the border is the federal government's responsibility, so when several states sent state law enforcement officers to help Texas manage border issues, one must wonder: will such actions be challenged in the federal courts? Will the federal government simply ignore these methods? Or will they attribute them to being political statements made by politicians gearing for re-election in their respective states? Regardless, issues at the Texas border are receiving increasing coverage and attention from the media and individual Americans.[169] Using the Supreme Court's decision in *Arizona* and the recent arguments made in the Western District of Texas, this article will now turn to analyze what sort of arguments the federal government and the states can use to litigate the issue if it were to be presented in front of a court.

V. ARGUMENTS FOR THE STATES' ACTIONS

The situation at the Texas border is a profound public and political issue and has been for several years.[170] The situation is not new, though the current status is unique to the Biden Administration. When compounded by a raging pandemic, these immigration issues become extremely exacerbated by the public health crisis.[171] Migration problems at the border directly impact Texas families, law enforcement, public institutions, and health facilities.[172] The lack of response and inability to mitigate the consequences from the federal government leaves these issues to be addressed by the state or states.[173]

Title 42 was utilized under former President Trump and allowed for the expulsion of migrants who could be carrying COVID across the border.[174] The Biden Administration moved to rescind the COVID-related Title 42

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169 *See generally* Anna Giaritelli, *'No Access': Arizona completes shipping container border wall with Mexico*, WASH. EXAMINER (Aug. 25, 2022), https://www.msn.com/en-us/news/us/no-access-arizona-completes-shipping-container-border-wall-with-mexico/ar-AA116J57; Anna Giaritelli, *Texans back Gov. Greg Abbott as he tests immigration policy limits*, WASH. EXAMINER (Aug. 15, 2022), https://www.msn.com/en-us/news/us/texans-back-gov-greg-abbott-as-he-tests-immigration-policy-limits/ar-AA10G1jf.

170 Vernuccio, *supra* note 5.

171 *Immigration Policy*, UNIV. MINN., https://immigrantcovid.umn.edu/immigration-policy (last visited Aug. 22, 2022).

172 Press Release, Texas Att'y Gen.'s Off., AG Paxton: Illegal Immigration Costs Texas Taxpayers Over $850 Million Each Year (March 31, 2021) (on file with the Texas Att'y Gen.'s Off.).

173 For example, after Texas bused immigrants to New York City, the authorities there had to arrange for their housing, medical care, and other necessities normally absorbed by Texas when immigrants remain there. *See* David Brand & Daniel Parra, *NYC Shelter System Awaits Some Immigrants Bused From Texas*, CITY LIMITS (Aug. 8, 2022), https://citylimits.org/2022/08/08/nyc-homeless-shelter-system-awaits-some-immigrants-bused-from-texas/.

174 42 U.S.C. § 265.

action, but it was blocked by the Federal District Court, ruling that Administration must continue to expel migrants under Title 42.[175] Yet, despite the emergence of the delta variant of COVID-19, the federal government has been admitting migrants who are testing positive for COVID into the state of Texas.[176] The federal government's refusal to enforce immigration laws passed by the United States Congress cannot be allowed to compromise the health and safety of Texas by knowingly exposing the state's residents to COVID. However, Texas cannot conquer these challenges and risks alone.[177]

Without any legal direction from Texas, the governors from other states donated numbers of their state law enforcement troopers to support Texas law enforcement at the border.[178] The appropriation of state law enforcement happens at the discretion of the state, not the federal government.[179] It is not unusual for states to share these sorts of resources in times of emergency. For example, in 2018, when California was consumed by wildfires, seventeen states sent various amounts of their own firefighters and other firefighting supplies to assist California in the disaster.[180] Greg Abbott, the Governor of Texas, deployed 200 firefighters and 55 fire trucks and stated that "when disaster strikes, it is imperative that the call for help is answered, and that is exactly what these men and women serving in fire departments across Texas are doing."[181] States such as Florida, which sent their own state law enforcement officers to Texas to help enforce the United States-Mexico border, simply answered Texas' plea for assistance in the matter.[182]

In this instance, there is no preemption. Texas is not enacting state laws that conflict with federal law, nor are the other states.[183] The compilation of

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175 Jasmine Aguilera & Madeline Carlisle, *Federal Judge Blocks Biden From Ending Controversial Border Policy, Title 42*, TIME (May 20, 2022 5:43 PM), https://time.com/6176711/title-42-biden-judge-blocked/.

176 Andrew R. Arthur, *Suspected COVID-Positive Migrants in Texas Suggest Flaws in DHS Quarantine Policies*, CTR. IMMIGR. STUD. (July 29, 2021), https://cis.org/Arthur/Suspected-COVIDPositive-Migrants-Texas-Suggest-Flaws-DHS-Quarantine-Policies.

177 Aside from the federal vs. state debate over immigration policy, Texas is the state with the largest land border with Mexico, but it is not the only one. If a migrant is admitted or otherwise gains access to California, New Mexico, or Arizona, that migrant could still potentially travel to Texas, becoming a burden on its system through the lack of cooperation with another border state. *See U.S. States That Border Mexico*, WORLD ATLAS, https://www.worldatlas.com/articles/us-states-that-border-mexico.html (last visited Aug. 27, 2022).

178 Alexandra Hutzler, *These Four States are Sending Law Enforcement to the Mexico Border Amid Surge in Migration*, NEWSWEEK (Jun. 28, 2021, 10:12 AM), https://www.newsweek.com/these-four-states-are-sending-law-enforcement-mexico-border-amid-surge-migration-1604722.

179 *Id.*

180 *Firefighters from around the U.S. travel to help in California Wildfires*, FIRERESCUE1 (Nov. 14, 2018), https://www.firerescue1.com/mutual-aid/articles/firefighters-from-around-the-us-travel-to-help-in-calif-wildfires-KNHwi9zcUVpnPLlS.

181 *Id*.

182 Ceballos, *supra* note 8.

183 *See Arizona*, 567 U.S. at 399.

troops at the border does not pose an obstacle to the enforcement of federal immigration law. State troops are entrusted to enforce federal laws and state laws alike.[184] The combined state and federal officer presence at the United States-Mexico border does not constitute a situation in which there is an instance of a state regulation expressly conflicting with federal law.[185] Texas and the assisting states are acting within their legal power and are not in conflict with the federal government's immigration operations at the border. In fact, the Constitution contemplates the states' exercise of a "general police power,"[186] which includes providing for the protection "of life and limb, of public property, . . . of the economic welfare of the people generally, and the preservation of exhaustible natural resources."[187] A state's residents have an interest in all laws being upheld, including those written by Congress, especially considering that the state governments will experience the heavy costs of non-enforcement.[188] Those costs will ultimately manifest by housing immigrants, paying medical expenses, and placing additional strains on schools.[189] A state could hardly ensure it is protecting the economic interests of its citizens if it cannot, by adding its own resources, help federal agents enforce national laws. If anything, these states are assisting the federal government's border objectives by supplying more resources and personnel.[190]

There is also no violation of intergovernmental immunity because Texas and the other states are not impeding, burdening, or controlling the operations of the Congressional laws enacted.[191] Although the out-of-state officers are being sent to "remediate" the federal government's purported failure to enforce federal immigration and border laws, these officers are not interfering with any federal official performing official duties.[192] Here, no state is attempting to regulate the federal government in any way. They are simply assisting Texas after a disaster declaration. Ultimately, since there are no federal laws regarding states sending their own state law enforcement

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184 Margaret H. Lemos, *State Enforcement of Federal Law*, 86 N.Y.U. L. REV. 698, 700 (2011).

185 The state's officers would be enforcing only the federal law when at the border. No separate policy would be in contravention to the federal, leaving the state as uninvolved as it normally would be.

186 U.S. CONST. amend. X.

187 16A C.J.S. Constitutional Law § 707.

188 Press Release, Texas Att'y Gen.'s Off., *supra* note 172.

189 *Id.*

190 Law enforcement authorities on the border have asked for outside assistance, indicating just how helpful other agencies can be. *See* Laura B. Martinez, *Cameron County Sheriff's Department, others agree to help Border Patrol*, BROWNSVILLE HERALD (Aug. 18, 2022), https://www.yahoo.com/now/cameron-county-sheriffs-department-others-035200308.html.

191 *See M'Culloch*, 17 U.S. 317.

192 Hutzler, *supra* note 178.

officers to the border,[193] this does not impede or challenge the federal laws in any way.

VI. ARGUMENTS AGAINST THE STATES' ACTIONS

The United States federal government has broad, undoubted power in controlling immigration and the enforcement of the national border.[194] This exclusive authority reflects the federal government's need to conduct foreign policy and the importance of preserving the federal government's ability to speak "with one voice" in dealing with other nations, especially in matters of national security.[195] The states that are attempting to do the federal government's job here are preempted by federal law in the category of field preemption.

"States are precluded from regulating conduct in a field that Congress, acting within its proper authority, has determined must be regulated by [the] exclusive governance" of the federal government.[196] The federal power to determine immigration policy and national security, including border security as it relates to immigration, is well settled.[197] "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."[198] Federal power in this area is necessary, in part, to prevent 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.[199] When states send state law officers to assist Texas at the federal border, they are undermining the federal power in its foreign relations. Whether the states are acting under enacted laws or executive decisions of their governors, such actions are nonetheless preempted by the federal immigration policies. Regardless of whether these state actions actually do obstruct or conflict with federal law or federal action, their mere presence in a field that is exclusive to the federal government is preempted.

On a similar note, the state actions violate intergovernmental immunity because they are trying to control the operations of constitutional laws enacted by Congress to carry into effect the powers vested in the national

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193 In theory, Congress could create an exclusively federal zone along the country's land borders and prevent states from performing any enforcement activities. Doing so would probably be cost-prohibitive, since it might become a compensable "taking" of state land. While expensive, it could be done. *See* Arkansas Game & Fish Comm'n v. United States, 568 U.S. 23 (2012).

194 *Arizona*, 567 U.S. at 394.

195 *Id.* at 409.

196 *Id.* at 399.

197 *Id.* at 395.

198 *Id.* at 395.

199 *Id.* at 395.

government.[200] "The United States may perform its functions without conforming to the police regulations of a state."[201] Here, even if the state officers would not be conflicting or interfering with federal operations, the states' intention to act within a power solely vested in the national government violates intergovernmental immunity. Ultimately, the framers specifically delegated various tasks to the states and other tasks to the national government, with border security being in the federal government's domain and left to the discretion and policies of the federal government.[202] The states' disagreement with federal government action or policy is no reason for them to enter the federal government's domain in this area of national security and foreign policy.

The federal government frequently makes these kinds of policy decisions, even where they result in complete non-enforcement of federal statutes. For example, many states have eliminated possession and use of marijuana from their criminal laws,[203] and many of those states have adopted comprehensive regulatory schemes which license dispensaries and regulate production.[204] Although federal law still deems marijuana to be illegal (a Schedule I substance with no medicinal purposes), federal prosecutors generally decline to prosecute marijuana offenses in those states "as long as people adhere" to the state's laws regarding it.[205] Once again, just because some of the states disagree with an exercise of discretion, there is no reason for them to object to the federal officials' determination.

A. Likely Outcomes

Several states, but especially Texas, are challenging the Biden Administration's handling, or alleged complete lack thereof, of the immigration borders issues in federal courts.[206] However, the issue of states sending their law enforcement officers to Texas has not been challenged, and

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200 *M'Culloch*, 17 U.S. 317.

201 Arizona v. California, 283 U.S. 423, 451 (1931) (citing *Johnson*, 254 U.S. 51).

202 *See* U.S. CONST. art. I, § 8.

203 *State-by-State Medical Marijuana Laws*, PROCON.ORG (June 6, 2022), https://medicalmarijuana.procon.org/legal-medical-marijuana-states-and-dc/.

204 *See, e.g.*, ILL. ADMIN. CODE tit. 86, §§ 423.100 – 423.175 (2022); COL. CODE REGS. §§ 212-3:1-105 – 212-3:8-240 (2022).

205 *Federal Laws for Possession of Weed and Distribution of Marijuana Charges*, LEGALMATCH, https://www.legalmatch.com/law-library/article/federal-marijuana-laws.html (last visited Sept. 22, 2022) (stating the general approach taken by the federal authorities but cautioning readers that the exercise of this discretion can end at any time). Federal law still consider marijuana to be in the highest risk category of drugs, known as Schedule I. *See Drug Scheduling*, DEA, https://www.dea.gov/drug-information/drug-scheduling (last visited Sept. 22, 2022).

206 Associated Press, *Supreme Court won't let Biden implement immigration policy*, ABC NEWS (July 22, 2022, 11:29 AM), https://abcnews.go.com/Politics/wireStory/supreme-court-biden-implement-immigration-policy-87207937.

it likely will not be seen in a federal court any time soon, if ever. The main reason is that the mere sending of state law troops could be seen as an interference with federal policies at the border. However, it remains unclear what these out-of-state officers will be doing at the border and how their presence will materialize into state action at the border.[207] It is also unclear how long the officers will be there and exactly with what mandates or authority they are tasked.[208] Just as the Supreme Court in *Arizona* abstained from deciding whether Section 2(B) is preempted because it was unclear how that Section will be used in effect and its outcomes, these actions by the states in their current form are likely not enough for the federal government to build a strong case as there are no executive orders, laws, or memos illustrating the purpose or role of these out-of-state officers in Texas.

"The pervasiveness of federal regulation does not diminish the importance of immigration policy to the States."[209] Texas and her sister states along the Mexican border bear the brunt of the heavy cost that comes with unlawful immigration and surges of migration at the borders, especially during a worldwide pandemic. Texas is well within its right to be concerned about the security of the federal border because it is the state with the longest border and so must address many of the consequences of immigration issues on a mass and daily basis. Politics aside, America's immigration issues require a bipartisan solution at the federal level in which the states, as a whole, have the ability to discuss, argue, and negotiate the policy on the federal stage.[210]

VII. CONCLUSION

Over the course of the last year and a half, Texas Governor Greg Abbott issued disaster declarations across Texas concerning several tragedies.[211] These declarations responded to, amongst other things, the COVID-19 pandemic that killed thousands of Texans and a winter storm that left millions of people without power for several days in freezing temperatures.[212] In June of 2021, Abbott issued a disaster declaration along Texas' southern border in response to the border crisis.[213] In an effort to assist Texas, several states sent

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207 Ceballos, *supra* note 8.

208 *Id.*

209 *Arizona*, 567 U.S. at 397.

210 Guillermo Contreras, *U.S. top diplomat to Mexico says bipartisan willpower can fix immigration, security problems*, SAN ANTONIO EXP. NEWS (Aug. 24, 2022), https://www.msn.com/en-us/money/markets/us-top-diplomat-to-mexico-says-bipartisan-willpower-can-fix-immigration-security-problems/ar-AA113Rr4.

211 *See, e.g.*, Barragan & Pollock, *supra* note 1.

212 *Id.*

213 *See Governor Abbott Issues Disaster Declaration in Response to Border Crisis in Texas*, *supra* note 3.

their own law enforcement officers to support Texas' endeavors.[214] Although securing the border is the federal government's responsibility, states have a vested interest in the security of their borders. However, federal courts both in the past and recently have struck down states' attempts to conflict or even interfere with federal immigration policy, operations, or objectives.[215] Citing the Supremacy Clause, federal courts do not restrain themselves in drawing the line against states in this area of the law.[216] However, it is unlikely that this particular state action will be seen before the courts in its current stage without advanced reporting on the tasks and projects that the out-of-state officers are required to perform in Texas.

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214 *See* sources cited *supra* note 8.

215 *See, e.g.*, sources cited *supra* note 13.

216 *See* sources cited *supra* note 101.