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## Manufactured State Immigration Emergencies as State Vigilantism

Kate Huddleston

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## MANUFACTURED STATE IMMIGRATION EMERGENCIES AS STATE VIGILANTISM

*by: Kate Huddleston\**

*President Trump shattered norms when he declared a national emergency at the U.S.–Mexico border to build a border wall. State governors have now followed that lead in taking up what Justice Jackson, dissenting in *Korematsu v. United States* (1944), called the “loaded weapon” of emergency—doing so, like Trump, in the context of the border. Governors of Texas, Arizona, and Florida have all issued state declarations of emergency based on (1) migration, and (2) the Biden administration’s purported failure to engage in immigration enforcement. These state emergency declarations have not been studied or even identified in legal literature as a state mirror to Trump’s federal declaration, even though they are as norms-shattering as the Trump declaration was both facially and in implementation. In justifying the emergency declarations, the governors have used xenophobia and the logic of self-help from international law. In other words, this is state vigilantism: claiming that because the federal government is not using its power to protect states’ residents, the states are unilaterally exercising it themselves under state emergency authority. This state vigilantism is sweeping, extraordinary, and contrary to the Supremacy Clause—particularly in Texas, which has implemented a parallel system of state immigration enforcement and has deployed National Guard soldiers along the border with instructions to force migrants into Mexico. It is also continuous with the erosion of norms begun with Trump’s border wall “emergency.” In addition to the reforms that scholars suggested following Trump’s declaration, to combat state vigilantism, I propose that the federal government not only focus on Supremacy Clause litigation but also exercise its civil rights enforcement authority and that state legislatures and judges limit the scope of state emergency declarations, to exclude policy disagreements with the federal government.*

### TABLE OF CONTENTS

I.	INTRODUCTION .....	14
II.	BACKGROUND: PRESIDENT BIDEN’S BORDER IMMIGRATION POLICY .....	15
III.	STATE IMMIGRATION EMERGENCY DECLARATION .....	16
IV.	STATE IMMIGRATION EMERGENCY DECLARATION JUSTIFICATIONS: XENOPHOBIA AND STATE VIGILANTISM .....	19
V.	STATE IMMIGRATION EMERGENCY IMPLEMENTATION: STATE VIGILANTISM .....	23
	A. <i>Litigation by the Federal Executive: Texas’s Transport Ban, Arizona’s Border “Wall,” and Texas’s Border Buoys</i> .....	24
	B. <i>No Federal Executive Action: Texas’s Immigration Enforcement System and Texas’s and Arizona’s Border Militarization</i> .....	26
	1. Texas’s Parallel Immigration Enforcement System .....	26

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\* Nonprofit impact litigation attorney; Yale Law School, J.D. 2016. I previously worked at the ACLU of Texas as a staff attorney, including work on the Operation Lone Star civil rights complaints referenced in this piece. I am grateful to my former colleagues in the immigrants’ rights movement—at the ACLU, in Texas, and otherwise—for years of thinking about the interrelationship between federalism and immigrants’ rights. Many thanks in particular to Andre Segura, Savannah Kumar, and Mitra Ebadolahi for being thought partners on these issues, especially the role of vigilantism in Operation Lone Star.

2. Texas’s and Arizona’s Border Militarization: State National Guard Deployment and Recruitment of Other States .....	28
VI. CONCLUSION: ENDING STATE VIGILANTISM THROUGH MANUFACTURED IMMIGRATION EMERGENCIES .....	31

## I. INTRODUCTION

In February 2019, then-President Donald Trump declared a national emergency due to “[t]he current situation at the southern border,” which he described as “present[ing] a border security and humanitarian crisis that threatens core national security interests.”<sup>1</sup> The emergency declaration, under the National Emergencies Act, built on President Trump’s xenophobic and racist immigration policy.<sup>2</sup> The “emergency” was also a separation of powers dispute: President Trump’s declaration came one day after Congress appropriated far less funding for border barrier construction than he had hoped, and he used the declaration to allocate greatly increased funding to the project—funding that Congress had refused.<sup>3</sup> On his first day in office in January 2021, President Biden terminated the national emergency.<sup>4</sup>

But soon declarations of border immigration emergency emerged anew. Beginning in April 2021, the governors of Arizona, Texas, and Florida declared state-level emergencies or disasters based on (1) migration across the states’ borders, which they too characterized as a threat to security, and (2) the Biden administration’s purported failure to engage in border immigration enforcement.<sup>5</sup> These emergency declarations have built on Trump’s norms erosions: like the border wall declaration, they are predicated on racism and seek to reallocate authority (for Trump, spending; for the state governors, immigration enforcement) within the constitutional structure. Texas’s and Arizona’s governors have undertaken sweeping action under the guise of emergency: in Texas, the state has even created a parallel immigration enforcement scheme. This state vigilantism is an alarming further erosion of norms, in ways that have violated immigrants’ civil rights. Its logic—that *someone* must step in to pick up enforcement power the federal government declines to wield—is of a piece with racist private vigilantism at the border that stretches back decades.

President Trump’s border emergency declaration generated extensive scholarly discussion and policy debate.<sup>6</sup> But the state border immigration emergency declarations have not yet received

<sup>1</sup> Proclamation No. 9844, *Declaring a National Emergency Concerning the Southern Border of the United States*, 84 Fed. Reg. 4949 (Feb. 15, 2019).

<sup>2</sup> *Id.* (citing National Emergencies Act, 50 U.S.C. §§ 1601–1651); Cecillia D. Wang, *Ending Bogus Immigration Emergencies*, 129 YALE L.J. F. 620, 622–23 (2020).

<sup>3</sup> *See* Wang, *supra* note 2, at 622–23.

<sup>4</sup> Proclamation No. 10142, *Termination of Emergency with Respect to the Southern Border of the United States and Redirection of Funds Diverted to Border Wall Construction*, 86 Fed. Reg. 7225 (Jan. 20, 2021).

<sup>5</sup> Arizona Declaration of Emergency, *2021 Border Crisis* (Apr. 20, 2021), [https://azgovernor.gov/sites/default/files/declaration\\_of\\_emergency.pdf](https://azgovernor.gov/sites/default/files/declaration_of_emergency.pdf) [<https://perma.cc/WK4T-BLMR>] [hereinafter Arizona Border Emergency Declaration]; Proclamation by the Governor of the State of Texas (May 31, 2021), [https://gov.texas.gov/uploads/files/press/DISASTER\\_border\\_security\\_IMAGE\\_05-31-2021.pdf](https://gov.texas.gov/uploads/files/press/DISASTER_border_security_IMAGE_05-31-2021.pdf) [<https://perma.cc/S2LB-3W9J>] [hereinafter Texas Border Disaster Declaration]; Florida Exec. Order No. 23-03 (Jan. 6, 2023), <https://www.flgov.com/wp-content/uploads/2023/01/EO-23-03.pdf> [<https://perma.cc/N2V2-RRRC>] [hereinafter Florida Border Emergency Declaration].

<sup>6</sup> *See e.g.*, Robert L. Tsai, *Manufactured Emergencies*, 129 YALE L.J. F. 590 (2020); Stephen I. Vladeck, *The Separation of National Security Powers: Lessons from the Second Congress*, 129 YALE L.J. F. 610 (2020); Wang, *supra* note 2.

collective scholarly or policy attention. In fact, Texas Governor Greg Abbott's Operation Lone Star only recently gained widespread national attention as an immigration federalism confrontation—despite more than two years of rhetoric about Texas protecting itself during an emergency and accompanying action that has included, for years, the creation of a parallel state system of immigration enforcement.

In this piece, I identify this new phenomenon of the state immigration emergency: the declarations, their underlying twin justifications of bigotry and purported federal abdication of responsibility, and their startling implementation. Using state emergency authority, Texas has created a parallel immigration enforcement system that has arrested and imprisoned thousands since its first implementation in July 2021; Arizona and Texas have deployed National Guard troops to the border beyond federal levels; and the two states have requested law enforcement from other states via an interstate compact for emergencies, further circumventing the federal government. The emergency declarations, and Texas's and Arizona's actions, amount to state vigilantism: using essentially the logic of self-help from international law to justify harsh, militarized anti-immigrant action. The underlying racist and xenophobic justifications for doing so are, themselves, a hallmark of private vigilantism—at the border and elsewhere. In addition to scholarly suggestions for reforms in the wake of Trump's border emergency declaration, I provide recommendations specific to the state vigilantism context: use of federal civil rights enforcement authority and state checks to curb emergency declarations predicated on federalism disputes.

## II. BACKGROUND: PRESIDENT BIDEN'S BORDER IMMIGRATION POLICY

Because multiple state governors have declared states of emergency due to the Biden administration's purported lack of immigration enforcement, it is important to start any analysis with a background understanding of President Joe Biden's immigration policy. Contrary to the emergency declarations' assertions, President Biden's administration has set immigration policy and engaged in immigration enforcement at the U.S.–Mexico border—unsurprisingly, as the federal executive has done so at least since the creation of the Border Patrol in 1924.<sup>7</sup> In brief, the Biden administration has retained much of President Trump's immigration policy, but it also modified those policies in ways that have allowed more migrants to be processed under federal immigration law. Most notably, until the end of the COVID-19 national emergency in May 2023, President Biden kept in place the heavily criticized “Title 42” policy, so named for the public health portion of the federal statute on which it is based. This policy eliminated ordinary asylum access at ports of entry and directed the summary expulsion of recently arrived migrants, purportedly on a public health basis.<sup>8</sup> Thus, from the beginning of the Biden administration, as under the Trump administration, U.S. Customs and Border Protection (CBP) processed only a small fraction of arriving migrants under ordinary immigration law, while summarily expelling tens of thousands.<sup>9</sup> More recently, the Biden administration has adopted a “transit ban” restricting

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<sup>7</sup> See KELLY LYTLE HERNÁNDEZ, *MIGRA!: A HISTORY OF THE U.S. BORDER PATROL* (2010).

<sup>8</sup> The Centers for Disease Control and Prevention put the Title 42 policy in place in March 2020 under pressure from anti-immigrant Trump administration officials. Jason Dearen & Garance Burke, *Pence Ordered Borders Closed After CDC Experts Refused*, ASSOCIATED PRESS (Oct. 3, 2020), <https://apnews.com/article/virus-outbreak-pandemics-public-health-new-york-health> [<https://perma.cc/68N5-CRLR>].

<sup>9</sup> AM. IMMIGR. COUNCIL, *Factsheet: Rising Border Encounters in 2021: An Overview and Analysis*, (Mar. 4, 2022), [https://www.americanimmigrationcouncil.org/sites/default/files/research/rising\\_border\\_encounters\\_in\\_2021.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/research/rising_border_encounters_in_2021.pdf) [<https://perma.cc/7QJZ-6H8M>].

migrant access to asylum so similar to a Trump administration rule that the judge hearing a challenge to it joked, “I read somewhere that 2023 was going to be a big year for sequels,” and the federal government’s attorney responded, “I would call this more of a remake.”<sup>10</sup> The Biden administration has also implemented a new version of a policy first put in place by the Trump administration: holding asylum seekers in CBP facilities with no meaningful access to counsel for the initial asylum screening (“credible fear”) interview.<sup>11</sup>

President Biden has not taken all the actions that immigration-restrictionist critics desire. Even with Title 42 in place, the Biden administration did process more apprehended migrants under ordinary immigration law than the Trump administration had.<sup>12</sup> This ordinary immigration processing allowed those individuals to physically remain in the United States and await an immigration court date or further processing, as was the procedure before the pandemic.<sup>13</sup> The administration has also created special processes for Cubans, Haitians, Nicaraguans, Venezuelans, and Ukrainians to be paroled into the United States.<sup>14</sup> Although President Biden’s immigration policy has not been as draconian as that of President Trump, that is not the same as having *no* immigration policy. There can be no serious debate that the Biden administration, in processing and for a time also expelling migrants arriving at the U.S.–Mexico border, has set immigration policy and engaged in immigration enforcement.

### III. STATE IMMIGRATION EMERGENCY DECLARATIONS

Nevertheless, the governors of Arizona, Texas, and Florida each declared an emergency—or, in Texas’s case, a disaster<sup>15</sup>—after President Biden took office, based on both the purported threat that increased levels of migration pose to each state and its residents *and* the Biden administration’s purported “failure”<sup>16</sup> or “unwillingness, ambivalence, or inability to enforce federal immigration laws.”<sup>17</sup> Like President Trump’s border wall national emergency declaration,

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<sup>10</sup> Isabela Dias, *Federal Judge Blocks Biden Administration’s Rule Restricting Asylum*, MOTHER JONES (July 25, 2023), <https://www.motherjones.com/politics/2023/07/federal-judge-blocks-biden-administrations-rule-restricting-asylum/> [<https://perma.cc/P4WD-L37S>].

<sup>11</sup> Eileen Sullivan, *Lawyers Say Helping Asylum Seekers in Border Custody Is Nearly Impossible*, N.Y. TIMES (July 22, 2023), <https://www.nytimes.com/2023/07/22/us/politics/biden-asylum-policies-border.html> [<https://perma.cc/JQD3-DH86>]; Kate Huddleston, *Ending PACR/HARP: An Urgent Step Toward Restoring Humane Asylum Policy*, JUST SEC. (Feb. 16, 2021), <https://www.justsecurity.org/74678/ending-pacr-harp-an-urgent-step-toward-restoring-humane-asylum-policy/> [<https://perma.cc/M2MK-9RFQ>] (describing Trump administration policy that first shifted from holding asylum seekers in Immigration and Customs Enforcement custody, with both meaningful in-person and meaningful telephonic access to counsel, to keeping them in CBP custody for the credible fear interview).

<sup>12</sup> AM. IMMIGR. COUNCIL, *supra* note 9.

<sup>13</sup> See Quinn Owen & Benjamin Siegel, *Migrants Released from Rio Grande Valley Without Court Dates*, ABC NEWS (Mar. 24, 2021, 9:20 AM), <https://abcnews.go.com/Politics/migrants-released-rio-grande-valley-court-dates/story?id=76642838> [<https://perma.cc/72QD-CTLK>]; *Texas v. Biden*, No. 2:21-CV-067-Z, 2021 WL 5399844, at \*4 (N.D. Tex. Nov. 18, 2021) (describing release of migrants into United States on legal authorities).

<sup>14</sup> *Processes for Cubans, Haitians, Nicaraguans, and Venezuelans*, U.S. Citizenship & Immigr. Serv., <https://www.uscis.gov/CHNV> [<https://perma.cc/6S49-P3YS>]; *Uniting for Ukraine*, U.S. Citizenship & Immigr. Serv., <https://www.uscis.gov/ukraine> [<https://perma.cc/PS4P-DCWU>].

<sup>15</sup> Texas law uses “disaster” instead of “emergency.” *E.g.*, TEX. GOV’T CODE ANN. § 418.004(1). The concept is the same. General textual references to state states of emergency encompass states of disaster.

<sup>16</sup> Arizona Border Emergency Declaration, *supra* note 5, at 2; Florida Border Emergency Declaration, *supra* note 5, at 2.

<sup>17</sup> Texas Border Disaster Declaration, *supra* note 5, at 1.

the state immigration emergency declarations are “bogus”—a false emergency premised on “scapegoating of immigrants,” as Cecillia Wang has analyzed in detail regarding the border wall declaration.<sup>18</sup> The state border immigration declarations are premised on (1) racism and xenophobia, depicting migration as an “emergency” or “disaster,” and (2) the false claim that the Biden administration has declined to engage in immigration enforcement, as described in more detail *infra* Part IV. The text of the declarations demonstrates just how extraordinarily far removed they are from norms of state emergency declarations.

Similar to the president’s ability to declare a national emergency, state governors may declare state states of emergency. Under Arizona law, for example, a “state of emergency” means that the governor has proclaimed the “existence of conditions of disaster or of extreme peril to the safety of persons or property within the state . . . .”<sup>19</sup> This may be due to “air pollution, fire, flood or floodwater, storm, epidemic, riot, earthquake or other causes” that “require the combined efforts of the state and the political subdivision” to control.<sup>20</sup> Under Texas law, a “disaster” is “the occurrence or imminent threat of widespread or severe damage, injury, or loss of life or property from any natural or man-made cause.”<sup>21</sup> The state definition lists twenty possible causes, including “fire,” “wind,” “storm,” “wave action,” “oil spill or other water contamination,” “explosion,” “riot,” “hostile military or paramilitary action,” “extreme heat,” “energy emergency,” and “other public calamity requiring emergency action.”<sup>22</sup> In contrast, Florida law does not provide specific examples. It generally defines an “emergency” as “any occurrence, or threat thereof, whether natural, technological, or manmade, in war or in peace, which results or may result in substantial injury or harm to the population or substantial damage to or loss of property.”<sup>23</sup>

Unsurprisingly, none of these states specifically list policy differences with the federal government, or even the federal government failing to exercise its legal authority, as a ground for emergency or disaster. Nor do any of the states list, or hint at in the statutory text, ongoing migration or border crossing as the basis for an emergency. Ordinarily, governors declare states of emergency for sudden catastrophic events that pose threats to people and property, like hurricanes,<sup>24</sup> wildfires,<sup>25</sup> or the COVID-19 pandemic.<sup>26</sup>

Then-Arizona Governor Doug Ducey’s state declaration of emergency in April 2021, three months after President Biden’s inauguration, was therefore remarkable. Governor Ducey titled the declaration “2021 Border Crisis.”<sup>27</sup> The declaration began, “WHEREAS, soon after January 20, 2021, as a result of a new Presidential administration’s anticipated policy changes regarding immigration, foreign nationals began entering the United States at substantially higher rates

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<sup>18</sup> Wang, *supra* note 2, at 621.

<sup>19</sup> ARIZ. REV. STAT. ANN. § 26-301(15).

<sup>20</sup> *Id.*

<sup>21</sup> TEX. GOV’T CODE ANN. § 418.004(1).

<sup>22</sup> *Id.*

<sup>23</sup> FLA. STAT. ANN. § 252.34(4).

<sup>24</sup> *E.g.*, Fla. Exec. Order No. 20-224 (Sept. 14, 2020), [https://www.flgov.com/wp-content/uploads/orders/2020/EO\\_20-224.pdf](https://www.flgov.com/wp-content/uploads/orders/2020/EO_20-224.pdf) [<https://perma.cc/P9Y7-U96N>].

<sup>25</sup> *E.g.*, Arizona Declaration of Emergency, *Arizona Wildfire Suppression Emergency* (June 23, 2017), [https://azgovernor.gov/sites/default/files/related-docs/declaration\\_of\\_emergency\\_-\\_arizona\\_wildfire\\_suppression\\_emergency.pdf](https://azgovernor.gov/sites/default/files/related-docs/declaration_of_emergency_-_arizona_wildfire_suppression_emergency.pdf) [<https://perma.cc/LJ3S-5VWA>].

<sup>26</sup> *E.g.*, Proclamation by the Governor of the State of Texas (Mar. 13, 2020), [https://gov.texas.gov/uploads/files/press/DISASTER\\_covid19\\_disaster\\_proclamation\\_IMAGE\\_03-13-2020.pdf](https://gov.texas.gov/uploads/files/press/DISASTER_covid19_disaster_proclamation_IMAGE_03-13-2020.pdf) [<https://perma.cc/WWU9-ETFS>].

<sup>27</sup> Arizona Border Emergency Declaration, *supra* note 5, at 1.

through both legal and illegal means.”<sup>28</sup> Governor Ducey took issue with what he described as “federal agencies[’] . . . ‘catch and release’ policy as it relates to the detainment of these foreign nationals,” characterizing this purported policy as “sudden, unexpected, and unforeseen.”<sup>29</sup> Governor Ducey claimed that “the federal government has failed to prevent, mitigate or take significant action to stop or reduce this influx such that its failure has created conditions of extreme peril to the safety of persons and property within our state . . . .”<sup>30</sup> He declared an emergency in six counties in the state of Arizona on this basis.<sup>31</sup>

One month later, Texas Governor Greg Abbott followed suit and declared a disaster in Texas based on migration and federal policy failure.<sup>32</sup> Governor Abbott relied on very similar arguments to those advanced by Governor Ducey. Abbott’s disaster declaration claimed that “the federal government used to take seriously its responsibility to enforce federal immigration laws and secure the international border[,]” but that “under the Biden Administration . . . the federal government has shown unwillingness, ambivalence, or inability to enforce federal immigration laws, to deter and stop illegal border crossings into the United States, or to meaningfully partner with Texas in pursuing these goals.”<sup>33</sup> Abbott asserted that “the Biden Administration’s inaction . . . is causing a dramatic increase in the number of individuals unlawfully crossing the international border into Texas.”<sup>34</sup> He described the administration’s immigration policies as “open-border” and “failing Texans.”<sup>35</sup> Abbott declared a “disaster”—Texas’s equivalent of an emergency.<sup>36</sup> He found that “the ongoing surge of individuals unlawfully crossing the Texas–Mexico border poses an ongoing and imminent threat of widespread and severe damage, injury, and loss of life and property.”<sup>37</sup>

Most recently, in January 2023—as increased numbers of migrants arrived in the Florida Keys<sup>38</sup>—Florida Governor Ron DeSantis also declared a state of emergency based on what he termed “the Biden Border Crisis.”<sup>39</sup> For Florida, the sequence of events is a little different: Governor DeSantis had already issued an executive order in September 2021 directing state agencies to undertake informational inquiries about immigrants in Florida and directing state law enforcement to “reasonably attempt to determine” the immigration status of people in vehicles stopped for state offenses, as consistent with the state and federal constitutions.<sup>40</sup> That order was based on Governor DeSantis’ differences with President Biden’s immigration policy, which the governor characterized as “failing to faithfully enforce the immigration laws”—but it was not an emergency order.<sup>41</sup> The January 2023 emergency order repeated this logic, claiming that “the

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<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 2.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> Texas Border Disaster Declaration, *supra* note 5.

<sup>33</sup> *Id.* at 2.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 1.

<sup>36</sup> *Id.* at 3.

<sup>37</sup> *Id.*

<sup>38</sup> Matt Dixon, *DeSantis Activates National Guard as Hundreds of Cuban Migrants Arrive in Florida*, POLITICO (Jan. 6, 2023, 6:30 PM), <https://www.politico.com/news/2023/01/06/desantis-activates-national-guard-as-hundreds-of-cuban-migrants-arrive-in-florida-00076864> [<https://perma.cc/L894-JWB4>].

<sup>39</sup> Florida Border Emergency Declaration, *supra* note 5, at 1.

<sup>40</sup> Fla. Exec. Order No. 21-223, at 8 (Sept. 28, 2021), [https://www.flgov.com/wp-content/uploads/2021/09/EO\\_21-223.pdf](https://www.flgov.com/wp-content/uploads/2021/09/EO_21-223.pdf) [<https://perma.cc/4MG6-HPWC>].

<sup>41</sup> *Id.* at 1.

response from the Biden Administration on this crisis is inadequate and presents an undue burden on [sic] local law enforcement to prevent the mass migration.”<sup>42</sup>

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It’s worth noting that during President Biden’s tenure—particularly in May 2023, just before the end of Title 42 and an expected concomitant increase in migration that did not immediately materialize—several states and localities have declared states of emergency based on migration for humanitarian reasons. For example, in October 2022 New York City declared a state of emergency “based on the arrival of thousands of individuals and families seeking asylum.”<sup>43</sup> The function of that emergency declaration was to provide a mechanism for the operation of “temporary humanitarian relief shelters” and “to take all appropriate and necessary steps to preserve health and public safety during this humanitarian crisis.”<sup>44</sup> In May 2023, the state of New York declared an emergency based on “an already large-scale humanitarian crisis” due to large numbers of migrants arriving in the state;<sup>45</sup> the cities of El Paso and Brownsville, in Texas, did so in the same month in anticipation of the end of Title 42;<sup>46</sup> and Massachusetts did so in August 2023, likewise calling migration to the state a “humanitarian crisis.”<sup>47</sup>

While these emergency declarations are also premised at their root on large numbers of migrants, they differ from those of Arizona, Texas, and Florida. The “humanitarian crisis” emergency declarations are not premised on the idea that migrants themselves pose a threat to state residents, or on the idea that the emergency is due to the federal executive branch abandoning its constitutionally allocated duties. These declarations function to provide large-scale humanitarian relief such as food and shelter to asylum seekers, analogous to post-disaster emergency aid that states often provide to people internally displaced by hurricanes or flooding, rather than to attempt to deter migration. The existence of these ordinary emergency declarations focused on humanitarian relief in response to high levels of immigration highlights the extraordinariness of Arizona’s, Texas’s, and Florida’s declarations, both in underlying rationale and in function.

#### IV. STATE IMMIGRATION EMERGENCY DECLARATION JUSTIFICATIONS: XENOPHOBIA AND STATE VIGILANTISM

Taken together, Arizona’s, Texas’s, and Florida’s declarations of emergency and disaster, based on the federal government’s purported lack of immigration enforcement, are extraordinary. The state immigration emergency declarations rest on two interlocking premises: (1) that unauthorized migration poses a threat to the state and its residents, and (2) that the Biden administration’s purported failure to adequately address this supposed threat constitutes an

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<sup>42</sup> Florida Border Emergency Declaration, *supra* note 5, at 2.

<sup>43</sup> The City of New York, Office of the Mayor, Emergency Exec. Order No. 224, at 2 (Oct. 7, 2022), <https://www.nyc.gov/assets/home/downloads/pdf/executive-orders/2022/eo-224.pdf> [<https://perma.cc/D4HQ-HJND>].

<sup>44</sup> *Id.*

<sup>45</sup> N.Y., Exec. Order No. 28 (May 9, 2023), <https://www.governor.ny.gov/executive-order/no-28-declaring-disaster-emergency-state-new-york> [<https://perma.cc/9PMG-LUUD>].

<sup>46</sup> Sarah Asch & Laura Rice, *El Paso Mayor Declares State of Emergency in Anticipation of Title 42 Ending*, TEX. STANDARD (May 1, 2023, 11:06 AM), <https://www.texasstandard.org/stories/el-paso-mayor-declares-state-of-emergency-in-anticipation-of-title-42-ending/> [<https://perma.cc/2A89-HRDN>].

<sup>47</sup> Letter from Maura Healey, Governor, Mass., to Alejandro Mayorkas, Sec’y, Dep’t of Homeland Sec. (Aug. 8, 2023), [https://www.mass.gov/files/documents/2023/08/08/Emergency%20Declaration%20Letter\\_0.pdf](https://www.mass.gov/files/documents/2023/08/08/Emergency%20Declaration%20Letter_0.pdf) [<https://perma.cc/GYR6-AQUN>].



“emergency” or “disaster.” Like President Trump’s border wall emergency declaration, these state immigration emergency declarations are based on a xenophobic and factually unmoored rationale—the same “bogus immigration emergencies” that Trump relied on.<sup>48</sup> Like the Trump border wall emergency declaration, the state immigration emergency declarations seek to weaponize the emergency power as a tool in an intragovernmental power struggle—for Trump, separation of powers, and here, federalism.<sup>49</sup> But these state emergency declarations have gone further even than the Trump border declaration: the intragovernmental power struggle is part of the basis for the emergency itself. In other words, the emergency is not just the fact of migration but also, as a but-for cause, the federal executive branch’s immigration policy and approach to immigration enforcement.

This first rationale on which the state emergency declarations rely, that unauthorized migration is a threat to the state, is obviously racist and xenophobic. The emergency declarations’ language of “influx” and “surge” fuels a longstanding xenophobic trope of immigrants as a dehumanized natural disaster, which reaches back at least to animus towards Chinese immigrants in the late 1800s.<sup>50</sup> The declarations and the state governors’ rhetoric falsely link immigration with both criminality and disease in line with, again, longstanding racist and xenophobic tropes.<sup>51</sup> Indeed, each of the declarations is premised on the idea that irregular migration—people crossing into the United States outside immigration ports of entry—itself represents a grave threat or danger to people and property in the states migrants arrive in. These false and discriminatory claims about migrants accompanying the states’ declarations of “emergency” are essentially the same false claims spread by former President Trump that animated his xenophobic policies, including Trump’s border wall national emergency declaration.<sup>52</sup>

The second interlocking rationale, that the Biden administration’s purported failure to adequately address this supposed threat constitutes an “emergency” or “disaster,” is truly extraordinary from a federalism perspective. The supposed catastrophe is not a hurricane or a flood but rather the purported result of a policy disagreement with the federal executive branch’s exercise of its immigration enforcement authority. As discussed below, the Supreme Court has long held that immigration—entry, exit, and status—and immigration enforcement are federal powers. Contrary state action is preempted. Yet, the states’ *declared* “emergency” is that the federal government is not setting immigration policy and conducting immigration enforcement in a way that passes muster with the governors of Arizona, Texas, and Florida. And by turning simmering disapproval of federal policy choices into an “emergency” or “disaster,” the states unlock the use of sweeping state emergency powers intended for actual immediate crisis response, such as to fires, floods, or hurricanes—turning those powers into, instead, a tool of antagonistic federalism.

The state immigration emergency declarations are explicit: the emergency is, according to then-Arizona Governor Ducey, that “the federal government has failed to prevent, mitigate or take significant action to stop or reduce” migration.<sup>53</sup> Florida Governor DeSantis’s declaration likewise claims that “the Biden Administration has repeatedly demonstrated its ineptitude at managing the crisis it created.”<sup>54</sup> Or, as Texas Governor Abbott puts it, “the federal government has shown

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<sup>48</sup> Wang, *supra* note 2, at 620.

<sup>49</sup> See Tsai, *supra* note 6, at 594.

<sup>50</sup> ERIKA LEE, AMERICA FOR AMERICANS: A HISTORY OF XENOPHOBIA IN THE UNITED STATES 75 (2019).

<sup>51</sup> *Id.* at 39.

<sup>52</sup> Wang, *supra* note 2, at 622.

<sup>53</sup> Arizona Border Emergency Declaration, *supra* note 5, at 2.

<sup>54</sup> Florida Border Emergency Declaration, *supra* note 5, at 1.

unwillingness, ambivalence, or inability to enforce federal immigration laws.”<sup>55</sup> Again, this is truly extraordinary—the states claim that the declared emergency stems from the federal government’s purported failures in a core area of federal governance.

The regulation of immigration—at its very core, of entry into the United States and determinations as to whether individuals may remain—has long been held an exclusively federal power. For example, in 1915, the United States Supreme Court held that an Arizona law requiring that at least 80% of companies’ employees be citizens violated the Equal Protection Clause.<sup>56</sup> The Court explained that Arizona could not have a legitimate interest “hostil[e] to exclusive Federal power” and that “[t]he authority to control immigration—to admit or exclude aliens—is vested solely in the Federal government.”<sup>57</sup> More recently, a 1976 Supreme Court decision cited decisions stretching back to 1849 for the proposition that “[p]ower to regulate immigration is unquestionably exclusively a federal power.”<sup>58</sup> As the Court explained in 1982, “Our cases have long recognized the preeminent role of the Federal Government with respect to the regulation of aliens within our borders.”<sup>59</sup>

The Court upheld that long-settled understanding of regulatory power over immigration as primarily federal in *Arizona v. United States*, the modern touchstone for immigration federalism.<sup>60</sup> In *Arizona*, the Court held several state statutory provisions preempted by federal immigration authority.<sup>61</sup> Arizona could not criminalize failure to comply with federal law requiring immigrants to register with the federal government; it could not criminalize seeking or engaging in work as an unauthorized immigrant; and it could not authorize state and local arrests for offenses making a person potentially removable under federal immigration law.<sup>62</sup> Justice Kennedy, writing for the Court, explained that the federal government “has broad, undoubted power over the subject of immigration and the status of aliens” and that “[t]he federal power to determine immigration policy is well settled.”<sup>63</sup> This power stems, he explained, in part from “the National Government’s constitutional power ‘to establish an uniform Rule of Naturalization’”<sup>64</sup> and in part from “its inherent power as sovereign to control and conduct relations with foreign nations.”<sup>65</sup> Notably, for foreign relations purposes “[i]t 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.”<sup>66</sup> Further, in immigration

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<sup>55</sup> Texas Border Disaster Declaration, *supra* note 5, at 1.

<sup>56</sup> *Truax v. Raich*, 239 U.S. 33, 35, 43 (1915).

<sup>57</sup> *Id.* at 42.

<sup>58</sup> *De Canas v. Bica*, 424 U.S. 351, 354–55 (1976) (citing *Passenger Cases*, 7 How. 283 (1849); *Henderson v. Mayor of New York*, 92 U.S. 259 (1876); *Chy Lung v. Freeman*, 92 U.S. 275 (1876); *Fong Yue Ting v. United States*, 149 U.S. 698 (1893)).

<sup>59</sup> *Toll v. Moreno*, 458 U.S. 1, 10 (1982).

<sup>60</sup> *Arizona v. United States*, 567 U.S. 387, 416 (2012).

<sup>61</sup> *Id.* at 393–94, 416.

<sup>62</sup> *Id.* The Court overturned the preliminary injunction and remanded as to a fourth statutory provision, requiring state and local officers to verify immigration status in certain circumstances during a stop or detention. *Id.* at 394, 416 (requiring “some showing that enforcement of the provision in fact conflicts with federal immigration law and its objectives”).

<sup>63</sup> *Id.* at 394–95.

<sup>64</sup> *Id.* at 394 (quoting U.S. Const. art. I, § 8, cl. 4).

<sup>65</sup> *Id.* at 395.

<sup>66</sup> *Id.*

enforcement “[s]ome discretionary decisions”—such as asylum or the appropriateness of removal—“involve policy choices that bear on this Nation’s international relations.”<sup>67</sup>

Since *Arizona*, federal district and appellate courts have followed its precepts and held a range of state laws preempted for their regulation of immigration.<sup>68</sup> As the Fifth Circuit explained in 2018, “*Arizona* emphasized the ‘principle that the removal process is entrusted to the discretion of the Federal Government,’”<sup>69</sup> and the *Arizona* Court “found Section 6 of Arizona’s SB 1070 preempted because it granted local officers authority to conduct unilateral warrantless arrests of aliens suspected of being removable.”<sup>70</sup> The governors of Arizona, Texas, and Florida do not seem to disagree—all recognize that immigration and immigration enforcement are primarily federal matters. Indeed, they have premised their emergency declarations on the federal executive branch’s failure to engage in immigration enforcement as they would prefer. The declarations themselves implicitly recognize that immigration enforcement is a federal responsibility.

As a result of this recognition, the state governors’ claims in the emergency declarations disturbingly mirror the “unable or unwilling” use-of-force standard in international law. That standard applies where a non-state actor operating out of a “territorial country” attacks or poses an imminent threat of attack to a second country (the “target country”).<sup>71</sup> If the territorial country is “unable or unwilling” to suppress the threat the non-state actor creates for the target country, then the target country may lawfully use force against the non-state actor in the territorial country without that country’s consent.<sup>72</sup>

Moreover, following essentially the same logic as the “unable or unwilling” standard, Texas and Arizona—particularly Texas—have taken extraordinary actions to take matters into the state’s own hands unilaterally. The state governors believe this action to be contrary to ordinary federal-state allocations of power, since their emergency declarations view immigration enforcement at the border as the responsibility of the federal government. In essence, using the justification that the federal executive branch has abdicated its responsibilities in a way that causes imminent danger, the states are engaging in what would be regarded as self-help under international law.

These are norms-shattering steps. The claim that the executive branch has declined to enforce laws in a way that poses an emergency to state residents is plainly extraordinary: far beyond ordinary discourse and, as described above, false. This is a “manufactured emergency” in the sense that it is “a public-policy problem whose nature or scope is fabricated or exaggerated beyond reasonable parameters”<sup>73</sup>—all the more so because the emergency *is* (purportedly) in part the ordinary immigration enforcement actions of the federal executive itself. And the immigration enforcement steps that the states have taken are unauthorized under basic federalism principles. In the United States’ constitutional order, we can think of these immigration emergency declarations

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<sup>67</sup> *Id.* at 396.

<sup>68</sup> *E.g.*, *United States v. Alabama*, 691 F.3d 1269, 1293 (11th Cir. 2012); *Villas at Parkside Partners v. City of Farmers Branch*, 726 F.3d 524, 526 (5th Cir. 2013) (en banc).

<sup>69</sup> *City of El Cenizo v. Texas*, 890 F.3d 164, 179 (5th Cir. 2018) (quoting *Arizona*, 567 U.S. at 409).

<sup>70</sup> *Id.*

<sup>71</sup> Ashley S. Deeks, “*Unwilling or Unable*”: *Toward a Normative Framework for Extraterritorial Self-Defense*, 52 VA. J. INT’L LAW 483, 486–87 (2012); Craig Martin, *Challenging and Refining the “Unwilling or Unable” Doctrine*, 52 VAND. J. TRANSNAT’L L. 387, 390–91 (2019).

<sup>72</sup> Martin, *supra* note 71, at 390–91. Ironically, the “unable or unwilling” standard also appears in U.S. immigration law: a refugee is a person “who is unable or unwilling to return to” their country of origin due to “persecution or a well-founded fear of persecution” on protected grounds. 8 U.S.C. § 1101(a)(42).

<sup>73</sup> Tsai, *supra* note 6, at 592.

and ensuing state actions as state vigilantism: action by a state unauthorized under the Supremacy Clause, purportedly to protect citizens through the enforcement of federal law to a greater extent than the federal government's exercise of enforcement discretion.<sup>74</sup>

In attempting to militarize and police the border on the ground that the federal government has abdicated responsibility and left citizens in danger, these states are in fact aligned with decades of racist and xenophobic vigilantism at the U.S.–Mexico border. Dr. Monica Muñoz Martinez has extensively documented how “ethnic Mexicans were criminalized and harshly policed by an intersecting regime of vigilantes, state police, local police, and army soldiers” in the Texas–Mexico borderlands in the early twentieth century.<sup>75</sup> There, “police abuse and collusion with vigilante mobs”—including by the Texas Rangers, now a subset of Texas's state police—killed hundreds of people of Mexican ethnicity.<sup>76</sup> By the 1970s, private vigilante actions along the border were resurgent. As the creator of the Klan Border Watch, a militia active at the U.S.–Mexico border, explained in 1977—in reasoning essentially indistinguishable from Arizona's, Texas's, and Florida's here: “When our government officials refuse to enforce the laws of the country, we will enforce them ourselves.”<sup>77</sup> Or, as Texas Governor Abbott tweeted in July 2023: “President Biden abandoned his constitutional duty to secure the border. Texas will defend our sovereign authority to respond to the crisis Biden's open border policies created. Texas is the ONLY government authority stopping illegal border crossings.”<sup>78</sup>

## V. STATE IMMIGRATION EMERGENCY IMPLEMENTATION: STATE VIGILANTISM

Pursuant to their immigration emergency declarations, the Texas and Arizona governors, in particular, have taken a series of extraordinarily sweeping unilateral actions. Texas's Governor Abbott declared a ban on any individuals providing “ground transportation” to groups of migrants in the state and created a parallel immigration enforcement system that arrests migrants for trespassing under state law, to date imprisoning more than 5,000. Arizona's then-Governor Ducey created a shipping container “wall” on federal lands. Both governors deployed the National Guard under state authority to the border and asked other states to send law enforcement pursuant to an emergency mutual-aid interstate compact. The sweeping scope of emergency powers has enabled the governors' actions.

The animating logic is state vigilantism: the federal executive is purportedly not using its power to engage in immigration enforcement, so someone—border states—should step up and take it over. The federal government has responded to some of these extraordinary actions, successfully halting the migrant transport ban and the Arizona “wall.” But it has not confronted Texas over its system of arresting, imprisoning, and prosecuting migrants, or either state over state National Guard deployments or efforts to attract law enforcement from other states to the border.

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<sup>74</sup> Cf. Andrew E. Taslitz, *Daredevil and the Death Penalty*, 1 OHIO ST. J. CRIM. L. 699, 705–06 (2004) (describing the death penalty as “state vigilantism”—the bringing of private vigilantism into the public house,” in light of late-1800s efforts to “co-opt[]” lynching through rapid death penalty trials by all-white juries).

<sup>75</sup> MONICA MUÑOZ MARTINEZ, *THE INJUSTICE NEVER LEAVES YOU: ANTI-MEXICAN VIOLENCE IN TEXAS* 7–8 (2018).

<sup>76</sup> *Id.* at 7.

<sup>77</sup> KATHLEEN BELEW, *BRING THE WAR HOME: THE WHITE POWER MOVEMENT AND PARAMILITARY AMERICA* 38 (2018).

<sup>78</sup> Greg Abbott (@GregAbbott\_TX), X (formerly known as TWITTER) (July 28, 2023, 3:29 PM), [https://twitter.com/GregAbbott\\_TX/status/1685024714039721984](https://twitter.com/GregAbbott_TX/status/1685024714039721984) [<https://perma.cc/JK3P-2Q7P>].

A. *Litigation by the Federal Executive: Texas’s Transport Ban, Arizona’s Border “Wall,” and Texas’s Border Buoys*

The federal government has directly confronted Texas’s and Arizona’s actions under the immigration emergency declarations twice: both times, through litigation over further executive orders issued pursuant to the emergency declarations. First, in July 2021 Texas Governor Abbott issued an executive order, citing the immigration emergency declaration and a COVID emergency declaration, that banned “ground transportation” of “group[s] of migrants who have been detained by CBP for crossing the border illegally or who would have been subject to expulsion under the Title 42 order.”<sup>79</sup> Governor Abbott’s order directed state troopers to stop vehicles on reasonable suspicion of a violation, and it authorized vehicle impoundment and “rerout[ing],” including to a port of entry.<sup>80</sup> The order threatened to upend the federal immigration system by stranding migrants released from CBP custody in Texas in border areas, without the ability to travel to their destination cities for required check-ins with federal immigration enforcement and immigration court hearings. It also posed an obvious threat to the rights of individuals in Texas, through both racial profiling and Fourth Amendment violations. The U.S. Department of Justice (DOJ) swiftly sued to block the order, arguing that Texas had violated the Supremacy Clause by “obstruct[ing] the Federal Government in the discharge of its constitutional responsibilities.”<sup>81</sup> The district court granted a temporary restraining order and then a preliminary injunction, which is still in effect.<sup>82</sup>

Second, in August 2022 then-Arizona Governor Ducey issued an executive order, relying on his immigration emergency declaration, that authorized Arizona’s Department of Emergency Management “to close the gaps in Arizona’s southern border wall.”<sup>83</sup> Arizona began double-stacking shipping containers into a “wall” on federal lands.<sup>84</sup> The federal government informed Arizona that creating this unauthorized “wall” on federal and tribal property violated federal law,<sup>85</sup> prompting Governor Ducey to sue for declaratory relief.<sup>86</sup> In December 2022 DOJ countersued,<sup>87</sup> while the Department of Homeland Security (DHS) announced that it would complete border

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<sup>79</sup> Tex. Exec. Order No. GA-37 (July 28, 2021) at 2, [https://gov.texas.gov/uploads/files/press/EO-GA-37\\_transportation\\_of\\_migrants\\_during\\_COVID\\_IMAGE\\_07-28-2021.pdf](https://gov.texas.gov/uploads/files/press/EO-GA-37_transportation_of_migrants_during_COVID_IMAGE_07-28-2021.pdf) [<https://perma.cc/5KFW-WHW8>].

<sup>80</sup> *Id.*

<sup>81</sup> Complaint at 1, *United States v. Texas*, 586 F. Supp. 3d 574 (W.D. Tex. 2022) (No. 3:21-cv-173), ECF No. 1.

<sup>82</sup> Order Granting Plaintiff’s Motion for Temporary Restraining Order, *United States v. Texas*, 586 F. Supp. 3d 574 (W.D. Tex. 2022) (No. 3:21-cv-173), ECF No. 18; Order Granting Plaintiff’s Motion for Preliminary Injunction, *United States v. Texas*, 586 F. Supp. 3d 574 (W.D. Tex. 2022) (No. 3:21-cv-173), ECF No. 52.

<sup>83</sup> Ariz. Exec. Order No. 2022-04 (Aug. 12, 2022) at 4, [https://azgovernor.gov/sites/default/files/eo\\_2022-04\\_securing\\_arizonas\\_southern\\_border.pdf](https://azgovernor.gov/sites/default/files/eo_2022-04_securing_arizonas_southern_border.pdf) [<https://perma.cc/8G6M-HPH4>].

<sup>84</sup> Melissa del Bosque, *Arizona Governor Builds Border Wall of Shipping Crates in Final Days of Office*, THE GUARDIAN (Dec. 11, 2022, 6:00 PM), <https://www.theguardian.com/us-news/2022/dec/11/arizona-governor-border-wall-shipping-containers> [<https://perma.cc/M3AW-SCZD>].

<sup>85</sup> José Ignacio Castañeda Perez, *“Unauthorized Placement”*: *Feds Say Ducey Broke Law with Shipping Containers at Border*, ARIZ. REPUBLIC (Oct. 14, 2022, 6:03 PM), <https://www.azcentral.com/story/news/politics/border-issues/2022/10/14/federal-officials-say-arizona-gov-ducey-broke-law-shipping-containers-border/10499065002/> [<https://perma.cc/3C8U-HKPH>].

<sup>86</sup> Complaint, *Ducey v. Moore*, No. 2:22-cv-01814 (D. Ariz. Oct. 21, 2022), ECF No. 1.

<sup>87</sup> Complaint, *United States v. Ducey*, No. 2:22-cv-02107 (D. Ariz. Dec. 14, 2022), ECF No. 1.

barrier construction in several locations, including Yuma, Arizona.<sup>88</sup> Roughly a week later, shortly before leaving office, Governor Ducey agreed to dismantle the barrier.<sup>89</sup>

Most recently, in July 2023 Governor Abbott placed a floating barrier of buoys and netting in the Rio Grande, along with razor wire along the banks, to block migrants from entering the United States.<sup>90</sup> Texas officials have cited the disaster declaration as the legal basis for the barrier.<sup>91</sup> After a national outcry over the cruelty of Governor Abbott’s border militarization under Operation Lone Star (OLS), DOJ sued—but only over the border buoy barrier, alleging that it violates the federal Rivers and Harbors Act by obstructing the Rio Grande.<sup>92</sup>

Texas’s arguments in the border barrier litigation, and Governor Abbott’s accompanying statements, wholly confirm that the state’s approach to the border is state vigilantism. Texas argues, in essentially so many words, that its purported right to “self-help” against an “invasion” of “non-state actors” trumps federal law, and that it need not comply with the Rivers and Harbors Act.<sup>93</sup> The state asserts that immigration constitutes an “invasion” and that the Biden administration’s purported “refusal to faithfully execute federal immigration laws” is “unconstitutional[] refus[al] to” protect Texas from “‘invasion’ by transnational cartels.”<sup>94</sup> Accordingly, Texas argues, Article I, § 10, Clause 3 of the Constitution provides it with the power to protect itself from incursions by arriving migrants.<sup>95</sup>

Importantly, while the identified actor is the “cartels,” Texas is clear that the reason for asserting purported state power to protect against “invasion” hinges on the federal government’s implementation of *immigration* enforcement (not criminal law enforcement related to, for example, drug trafficking).<sup>96</sup> Texas’s argument here clearly mirrors the self-help “unable or unwilling to protect” doctrine under international law. In fact, Texas explicitly argues that its power under Article I, § 10, Clause 3 encompasses “invasions from non-state or quasi-state actors, like the cartels”<sup>97</sup>—paralleling the non-state actor incursions that led to the development of the doctrine under international law. And it *invokes that doctrine*, citing the September 2001 Authorization for the Use of Military Force and arguing, in support of the idea that immigration constitutes an invasion: “After the attacks of September 11, 2001, Congress authorized the use of military force against not only responsible ‘nations’ but also ‘organizations’ and ‘persons.’”<sup>98</sup>

Because this is not how constitutional systems work, Texas’s actions are not international self-help under any reading but rather unlawful state vigilantism. Texas’s ultimate argument is

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<sup>88</sup> Press Release, U.S. Dep’t of Homeland Sec., DHS to Address Life, Safety, Environmental, and Remediation Requirements for Border Barrier Projects in San Diego, Yuma, El Paso (Dec. 13, 2022), <https://www.dhs.gov/news/2022/12/13/dhs-address-life-safety-environmental-and-remediation-requirements-border-barrier> [<https://perma.cc/EE9J-7VNY>].

<sup>89</sup> Alicia Victoria Lozano, *Arizona Agrees to Dismantle Shipping Container Border Wall*, NBC NEWS (Dec. 22, 2022, 2:15 PM), <https://www.nbcnews.com/news/us-news/arizona-agrees-dismantle-shipping-container-border-wall-rcna62979> [<https://perma.cc/CKM7-4ZVV>].

<sup>90</sup> Valerie Gonzalez & Acacia Coronado, *Texas Is Using Disaster Declarations to Install Buoys and Razor Wire on the US-Mexico Border*, AP NEWS (July 23, 2023, 11:01 PM), <https://apnews.com/article/immigration-texas-border-buoys-wire-abbott-5f138e354e88fc319f46c55344d7335c> [<https://perma.cc/JDZ7-ESA3>].

<sup>91</sup> *Id.*

<sup>92</sup> Complaint, United States v. Abbott, No. 1:23-cv-853 (W.D. Tex. Jul. 24, 2023), ECF No. 1.

<sup>93</sup> Defendants’ Memorandum in Opposition to Plaintiff United States’ Motion for Injunction at 18–20, *Abbott*, No. 1:23-cv-00853, ECF No. 26.

<sup>94</sup> *Id.* at 18.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 19.

extraordinary: “To prevent a collision between the Rivers and Harbors Act and the State’s constitutionally guaranteed right to protect itself, the Court should hold that the terms of the Rivers and Harbors Act do not apply here.”<sup>99</sup> This is, as described above, the argument of the vigilante: in the absence of state law enforcement, I am the law. Its logic, if adopted, would be alarming—that the Supremacy Clause and federal laws of general applicability do not apply when a state is exercising constitutional power to protect itself from invasion. Texas’s reasoning seems to exempt state officials acting to halt immigration from compliance with *any* federal law—such as federal civil rights law. Could Texas officials hurt or even kill migrant families attempting to cross the Rio Grande with impunity from federal legal consequences, on the ground that they were exercising a power that the federal government had failed to? Surely, in a constitutional system, the answer must be no. The alternative is vigilante lawlessness and the evisceration of federal law at the whim of state governors—potentially including federal civil rights protections enacted to secure individual rights against state vigilante violence.<sup>100</sup>

B. *No Federal Executive Action: Texas’s Immigration Enforcement System and Texas’s and Arizona’s Border Militarization*

By contrast, the Biden administration has not confronted state use of emergency authority to engage in border and immigration enforcement in two other extraordinary contexts that pose direct threats to federal authority. Texas has created a parallel state system of immigration enforcement under state emergency authority and the thin disguise of arresting recently arrived migrants for trespassing on private land. And Arizona and Texas have not only deployed National Guard troops to the border under state authority, but they have invoked an interstate emergency management compact to urge other states to do so as well. Both sets of actions are unprecedented state vigilantism that purposely usurp the federal government’s border immigration enforcement role.

1. Texas’s Parallel Immigration Enforcement System

Using his sweeping disaster powers, Texas Governor Abbott has created an unprecedented parallel state system of immigration enforcement, with the purpose of punishing individuals for arriving in the United States. That system has now been in place for over two years and has arrested and imprisoned roughly 10,000 people on state misdemeanor trespass charges.<sup>101</sup> This system is distinct from the recently passed Texas law SB 4 that creates a state law crime for crossing the border not at a port of entry,<sup>102</sup> discussed more *infra* section VI: the system Texas has already had in place for years is predicated wholly on deploying large numbers of state and local law

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<sup>99</sup> *Id.* at 20.

<sup>100</sup> See William M. Carter, Jr., *The Anti-Klan Act in the Twenty-First Century*, 136 HARV. L. REV. F. 251, 263–65 (2023).

<sup>101</sup> Jolie McCullough, *Travis County Judges Can’t Hear Appeals from Migrants Arrested Under Texas Border Security Push*, COURT RULES, TEX. TRIB. (Dec. 7, 2022, 11:00 AM) <https://www.texastribune.org/2022/12/07/texas-migrant-arrests-court-criminal-appeals/> [<https://perma.cc/V6P7-76UH>]; Acacia Coronado, *Texas Has Arrested Thousands on Trespassing Charges at the Border. Illegal Crossings Are Still High*, ASSOCIATED PRESS (Dec. 28, 2023, 2:21 PM), <https://apnews.com/article/texas-immigration-law-border-b0100138a88a0d034ae8e68787ef41b7> [<https://perma.cc/N8F5-F6K9>].

<sup>102</sup> SB 4, 88th Leg., 4th S.S. (2023), *available at* <https://capitol.texas.gov/tlodocs/884/billtext/pdf/SB00004F.pdf#navpanes=0>.

enforcement to target migrants for arrest near the border for the pre-existing state misdemeanor crime of trespass on private property.<sup>103</sup> As Governor Abbott has explained the OLS trespass arrest program:

We are employing state law, as opposed to federal law, because when we make an arrest under federal law we typically have to turn people over to the federal authorities, and they just release them, they go across the border, and they come back across the border, etc. So what we have done is we actually created additional jail cells and we created a court system down in South Texas. We are arresting people coming across the border illegally, and we are jailing them in jails in the state of Texas, sending the message that if they come across the border in the state of Texas, they're not going to be caught and released like under the Biden administration, they're going to be spending time behind bars.<sup>104</sup>

There is no mistaking the program's purpose: Governor Abbott has explained that Texas is "accelerating the process of arresting these people who are coming across the border because somebody has to step up and secure the border."<sup>105</sup> Again, Governor Abbott uses the logic of vigilantism to justify taking up authority that he himself recognizes as federal.

The use of state disaster authority is integral to the OLS trespass arrest program. The program is, essentially, a separate system of state criminal arrest, detention, and prosecution specifically for migrant men—an immigration enforcement system with a mustache.<sup>106</sup> Under OLS, Governor Abbott has used his disaster authority to deploy state troopers and Texas National Guard to South Texas communities and to order them to target migrants for arrest on state misdemeanor trespass charges.<sup>107</sup> Again using disaster authority, the Office of the Governor and state agencies have created a separate state criminal prosecution and detention system for those arrested under OLS.<sup>108</sup> Instead of being held in county jails, migrants charged with trespass under OLS are taken to centralized processing facilities specifically for booking OLS arrestees and then held in converted state prisons.<sup>109</sup> State law enhances trespass sentences in a disaster area, and

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<sup>103</sup> See Complaint from ACLU of Texas et al. to Att'y Gen. Merrick Garland et al., Texas Migrant Arrest Program Under "Operation Lone Star"—Urgent Need for Investigation into Race and National Origin Discrimination by Texas Agencies (Dec. 15, 2021), [https://www.aclutx.org/sites/default/files/field\\_documents/ols\\_trespass\\_arrest\\_title\\_vi\\_complaint.pdf](https://www.aclutx.org/sites/default/files/field_documents/ols_trespass_arrest_title_vi_complaint.pdf) [<https://perma.cc/NE9V-YHR7>] [hereinafter OLS Trespass Arrests Civil Rights Complaint].

<sup>104</sup> Greg Abbott (@GregAbbott\_TX), X (formerly known as TWITTER) (Sept. 28, 2021, 10:51 AM), [https://twitter.com/GregAbbott\\_TX/status/1442879549692338191](https://twitter.com/GregAbbott_TX/status/1442879549692338191) [<https://perma.cc/K4DG-7FFK>] (embedded video).

<sup>105</sup> Greg Abbott (@GregAbbott\_TX), X (formerly known as TWITTER) (July 16, 2021, 3:46 PM), [https://twitter.com/GregAbbott\\_TX/status/1416137109602250764](https://twitter.com/GregAbbott_TX/status/1416137109602250764) [<https://perma.cc/3WJC-K3G6>] (embedded video).

<sup>106</sup> OLS Trespass Arrests Civil Rights Complaint, *supra* note 103.

<sup>107</sup> Texas Border Disaster Declaration, *supra* note 5, at 3; Perla Trevizo et al., *Fact-Checking Texas Leaders' Claims About Operation Lone Star*, TEX. TRIB. (Apr. 27, 2022, 5:00 AM), <https://www.texastribune.org/2022/04/27/texas-operation-lone-star-greg-abbott-border/> [<https://perma.cc/3BVX-3K5Q>].

<sup>108</sup> Texas Border Disaster Declaration, *supra* note 5, at 3; Jolie McCullough, *Texas' Border Operation Is Meant to Stop Cartels and Smugglers. More Often, It Arrests Migrants for Misdemeanor Trespassing.*, TEX. TRIB. (Apr. 4, 2022), <https://www.texastribune.org/2022/04/04/texas-border-operation-imprisons-thousands-accused-only-of-trespassing/> [<https://perma.cc/X365-AAYP>].

<sup>109</sup> OLS Trespass Arrests Civil Rights Complaint, *supra* note 103, at 23.



prosecutors apply this enhancement in the OLS trespass arrest cases.<sup>110</sup> Under the auspices of “disaster,” the entire program mirrors the federal government’s Operation Streamline, for rapid prosecutions for the federal crime of illegal entry.<sup>111</sup>

Civil rights groups have documented that the OLS trespass arrest program is “riddled with civil rights violations.”<sup>112</sup> These include arrests that lack probable cause, the detention of hundreds of arrested individuals for weeks or months without access to courts or even a lawyer, and atrocious detention conditions.<sup>113</sup> Recently, a Texas appellate court held that Texas’s practice of arresting and prosecuting only *men* under OLS violated the Equal Protection Clause.<sup>114</sup> Traffic stops by Texas state troopers searching for undocumented immigrants have also violated civil rights, with significant evidence of racial profiling and unlawful searches and seizures. In one stop, a state trooper detained a vehicle for search because he claimed to smell “a distinct odor” that “undocumented aliens emit.”<sup>115</sup> This systemic pattern of egregious civil rights violations is disturbingly consistent with Governor Abbott’s stated goal of deterrence through harsh punishment, and with the broader historical pattern of vigilantism under the cover of law enforcement authority at the Texas-Mexico border.

## 2. Texas’s and Arizona’s Border Militarization: State National Guard Deployment and Recruitment of Other States

Finally, Arizona and Texas have used their emergency declarations to engage in military mobilization against immigration beyond the federal government’s (already significant) border militarization, and they have urged other states to do the same.

Both the Arizona and Texas governors deployed National Guard members to their state’s border with Mexico under state rather than federal authority in response to the purported emergency. Texas has continued to escalate that deployment, most recently with a “Texas Tactical Border Force” of “specially trained” National Guard “soldiers” who will “intercept and repel” migrants.<sup>116</sup> Advocates have criticized such deployments as unlawful and urged the Biden administration to take action to stop Texas’s in particular, either through preemption litigation or

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<sup>110</sup> Tex. Penal Code §§ 12.50, 30.05.

<sup>111</sup> See Donald Kerwin & Kristen McCabe, *Arrested on Entry: Operation Streamline and the Prosecution of Immigration Crimes*, MIGRATION POL’Y INST. (Apr. 29, 2010), <https://www.migrationpolicy.org/article/arrested-entry-operation-streamline-and-prosecution-immigration-crimes> [<https://perma.cc/C23Q-T8QJ>].

<sup>112</sup> OLS Trespass Arrests Civil Rights Complaint, *supra* note 103, at 1.

<sup>113</sup> *Id.* at 17–19, 25–31, 34–38.

<sup>114</sup> *Ex parte Aparicio*, 672 S.W.3d 696, 715 (Tex. App.—San Antonio 2023, pet. granted). Texas has now begun arresting women perceived as migrants on trespass charges and detaining them in state prisons under OLS, as it has for men since summer 2021. Jolie McCullough, *Facing Sex Discrimination Claims, Texas Begins Jailing Migrant Women Under Border Crackdown*, TEX. TRIB. (July 26, 2023), <https://www.texastribune.org/2023/07/26/women-arrests-texas-border-operation-lone-star/> [<https://perma.cc/GX6P-5YSB>].

<sup>115</sup> Letter from ACLU of Texas, to Att’y Gen. Merrick Garland et al., Operation Lone Star: Racial Profiling in Texas Department of Public Safety (DPS) Traffic Stops and High Death Toll from DPS Vehicle Pursuits (July 28, 2022), [https://www.aclutx.org/sites/default/files/ols\\_traffic\\_stops\\_title\\_vi\\_complaint.pdf](https://www.aclutx.org/sites/default/files/ols_traffic_stops_title_vi_complaint.pdf) [<https://perma.cc/55VZ-VRQ4>].

<sup>116</sup> Press Release, Office of Texas Governor Greg Abbott, Governor Abbott Deploys New Texas Tactical Border Force (May 8, 2023), <https://gov.texas.gov/news/post/governor-abbott-deploys-new-texas-tactical-border-force> [<https://perma.cc/KPR8-AM8L>].

federalizing the National Guard.<sup>117</sup> The administration has not done so to date. Florida has not yet engaged in the same kind of emergency state vigilantism as Texas and Arizona pursuant to its emergency declaration, but it is now creating a Florida State Guard for use in emergencies and “aiding law enforcement with riots and illegal immigration.”<sup>118</sup>

Perhaps most remarkably from a federalism perspective, in June 2021, Arizona and Texas used the inter-state Emergency Management Assistance Compact (EMAC) to directly ask other states to send law enforcement to the Arizona and Texas borders, without the involvement of the federal government. EMAC is an interstate compact consented to by Congress in 1996 that allows states to share resources during disasters.<sup>119</sup> In a letter to governors, Arizona and Texas asked that states “send all available law-enforcement resources to the border in defense of our sovereignty and territorial integrity,” pursuant to EMAC.<sup>120</sup> They cited their emergency declarations as the basis for this request, explaining that “call[ing] in reinforcements under” EMAC was a “legal consequence[]” of the declarations.<sup>121</sup> As in the state declarations, the governors framed the underlying emergency as “the Biden Administration’s open-border disaster.”<sup>122</sup>

In response, in 2021, two states sent National Guard troops to Arizona and Texas, and an additional five sent state law enforcement.<sup>123</sup> In 2023, Governor Abbott (alone, after Governor

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<sup>117</sup> Joseph Nunn, *As Title 42 Comes to an End, So Should Military Operations at the US-Mexico Border*, JUST SEC. (May 19, 2023), <https://www.justsecurity.org/86625/as-title-42-comes-to-an-end-so-should-military-operations-at-the-us-mexico-border/> [https://perma.cc/494P-QJH2]; Katherine Yon Ebright & Joseph Nunn, *The Biden Administration’s Options for Responding to Abbott’s Unconstitutional Border Enforcement Executive Order*, JUST SEC. (July 13, 2022), <https://www.justsecurity.org/82298/the-biden-administrations-options-for-responding-to-abbotts-unconstitutional-border-enforcement-executive-order/> [https://perma.cc/AJQ8-Q6VK].

<sup>118</sup> Lawrence Mower et al., *Veterans Quit DeSantis’ Florida State Guard Over Militialike Training*, TAMPA BAY TIMES (July 14, 2023), <https://www.tampabay.com/news/florida-politics/2023/07/14/florida-state-guard-desantis-national-guard-training/> [https://perma.cc/8K3V-KX8Q].

<sup>119</sup> Emergency Management Assistance Compact, H.R.J. Res. 193, 104th Cong. (1996).

<sup>120</sup> Letter from Texas Governor Greg Abbott & Arizona Governor Doug Ducey, to Fellow Governors (June 10, 2021), [https://gov.texas.gov/uploads/files/press/Abbott-Ducey\\_Compact\\_Letter\\_to\\_Governors.pdf](https://gov.texas.gov/uploads/files/press/Abbott-Ducey_Compact_Letter_to_Governors.pdf) [https://perma.cc/GLT5-J7K7].

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at 2.

<sup>123</sup> Arkansas and South Dakota sent National Guard troops; Florida, Idaho, Iowa, Nebraska, and Ohio sent state law enforcement. Press Release, Arkansas Governor Asa Hutchinson, Governor Hutchinson Authorizes 90-Day Deployment of Up to 40 National Guard Members to U.S. Southern Border, <https://portal.arkansas.gov/news/governor-hutchinson-authorizes-90-day-deployment-of-up-to-40-national-guard-members-to-u-s-southern-border/> [https://perma.cc/AW4E-4YTV]; Stephen Groves, *GOP Donor Funds South Dakota National Guard Troops in Texas*, ASSOCIATED PRESS (June 29, 2021 10:00 PM), <https://apnews.com/article/joe-biden-sd-state-wire-south-dakota-texas-c9461c65234434f91f749a92608d2287> [https://perma.cc/9G59-NZA7]; Ana Ceballos, *DeSantis’ Law Enforcement Border Mission Racks Up \$1.6 Million Bill*, TAMPA BAY TIMES (Nov. 30, 2021), <https://www.tampabay.com/news/florida-politics/2021/11/30/desantis-law-enforcement-border-mission-racks-up-16-million-bill/> [https://perma.cc/HUA8-5EBQ]; Alex Hinojosa, *Republican States Send National Guard Troops to Texas Border in Show of Force*, THE GUARDIAN (June 8, 2023), <https://www.theguardian.com/us-news/2023/jun/08/texas-border-immigration-florida-desantis-national-guard-republican> [https://perma.cc/D4WY-QHJW]; Clark Corbin, *Little to Send Five Idaho State Police Troopers to U.S.-Mexico Border*, IDAHO CAPITAL SUN (July 1, 2021), <https://idahocapitalsun.com/2021/07/01/little-to-send-five-idaho-state-police-troopers-to-u-s-mexico-border/> [https://perma.cc/R6EH-EGUT]; Stephen Gruber-Miller, *Kim Reynolds Says Sending Iowa State Troopers to US-Mexico Border Was “The Right Thing to Do,”* DES MOINES REG. (July 28, 2021), <https://www.desmoinesregister.com/story/news/politics/2021/07/28/governor-kim-reynolds-iowa-state-patrol-deployed-texas-mexico-border-immigration/8056750002/> [https://perma.cc/9HJB-8KPG]; Aaron Sanderford, *Texas Hasn’t Paid: Nebraska Still Footing \$500K Bill for Helping With Border Surge*, KMTV (Oct. 4,

Ducey was voted out of office) invoked EMAC again to request further deployments.<sup>124</sup> Thirteen governors have committed to sending a total of 1,305 National Guard troops and 231 law enforcement members, saying that as governors they “are stepping up to protect Americans where Biden has failed”—in other words, also adopting the logic of state immigration vigilantism.<sup>125</sup> North Dakota’s governor has even issued an executive order declaring a border emergency to justify the deployment of state National Guard troops.<sup>126</sup>

The 2021 deployments were transparently political stunts—limited duration (most for three weeks or less), low numbers for most states (Idaho sent only five state troopers), and little autonomy or work for out-of-state law enforcement. The invocation of state “emergency” to attempt to band states together in engaging in policy oppositional to the federal government, in an area of core federal authority, is nevertheless extraordinary and deeply troubling. It is a step toward normalizing states unilaterally taking over federal immigration enforcement power. It also provides a roadmap for similar actions in the future—for state governors to disagree with federal policy choices, particularly law enforcement decisions, and to use state emergency authority not only to engage in state vigilantism themselves but to recruit other states to do so.

And the states’ border militarization via emergency itself has caused real—and severe—harm. Texas National Guard soldiers have placed miles of razor wire along the border, to deter migrants from crossing.<sup>127</sup> People have been injured by the razor wire and state National Guard actions: several people have required hospitalization for lacerations, including one man who required transport to a major medical center and staples; a boy broke his leg attempting to evade the wire; and a four-year-old girl passed out from heat exhaustion when Texas National Guard soldiers forced her and other migrants back from the wire, toward the river.<sup>128</sup> A Texas state trooper deployed under OLS reports a superior officer directing him and others to force a group of 120+ migrants, including small children and nursing babies, into the Rio Grande to force them to Mexico.<sup>129</sup> These actions violate both migrants’ civil rights and the constitutional precept that states cannot engage in unilateral immigration enforcement.

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2021), <https://www.3newsnow.com/news/investigations/no-money-from-texas-nebraska-still-footing-bill-for-sending-troopers-to-border> [<https://perma.cc/4MWY-DBD2>]; WSAZ, *Gov. DeWine Authorizes Ohio State Highway Patrol to Assist Law Enforcement at Border* (July 5, 2021), <https://www.wsaz.com/2021/07/05/gov-dewine-authorizes-ohio-state-highway-patrol-assist-law-enforcement-border/> [<https://perma.cc/M5GN-2CFG>].

<sup>124</sup> Letter from Texas Governor Greg Abbott, to Fellow Governors (May 16, 2023), [https://gov.texas.gov/uploads/files/press/Governors\\_Letter\\_Border\\_Support\\_1.pdf](https://gov.texas.gov/uploads/files/press/Governors_Letter_Border_Support_1.pdf) [<https://perma.cc/WTV8-NVKD>].

<sup>125</sup> Iowa Gov. Kim Reynolds et al., *Republican Governors Send Troops to the Border to Support Governor Abbott’s Operation Lone Star*, <https://oklahoma.gov/content/dam/ok/en/governor/documents/Final%20Joint%20Border%20Statement%206.1.23.pdf> [<https://perma.cc/W8HR-PFUX>].

<sup>126</sup> N.D. Exec. Order No. 2023-07 (June 13, 2023), <https://www.governor.nd.gov/sites/www/files/documents/executive-orders/Exective%20Order%202023-07.pdf> [<https://perma.cc/A3X7-GK69>].

<sup>127</sup> Press Release, Texas Office of Texas Governor Greg Abbott, *Operation Lone Star Deploys New Border Security Deterrence Strategies* (June 9, 2023), <https://gov.texas.gov/news/post/operation-lone-star-deploys-new-border-security-deterrence-strategies> [<https://perma.cc/2HPN-45J3>].

<sup>128</sup> Benjamin Wermund, *Exclusive: Texas Troopers Told to Push Children into Rio Grande, Deny Water to Migrants, Records Say*, HOUS. CHRON. (July 17, 2023), <https://www.houstonchronicle.com/politics/texas/article/border-trooper-migrants-wire-18205076.php> [<https://perma.cc/J8W9-J4Q3>].

<sup>129</sup> *Id.*

## VI. CONCLUSION: ENDING STATE VIGILANTISM THROUGH MANUFACTURED IMMIGRATION EMERGENCIES

State vigilantism, in both emergency declarations and action, here threatens the ability of the federal government to act with one cohesive voice in an area long understood to be a core federal responsibility. As a federalism matter, the states' use of state emergency authority as a trump card to justify setting immigration policy and engaging in immigration enforcement is extraordinarily destabilizing and dangerous. The idea that the federal government's policy choices themselves can constitute an "emergency" that justifies states taking over exclusively federal power has no basis in law. The relationship between a state and the federal government is not the same as the relationship between a target state and a territorial state in international law: there is no "unable or unwilling" standard.<sup>130</sup> A state governor lacks authority to usurp the federal government's constitutionally allocated role because they would commit more resources to enforcement or exercise enforcement discretion differently.<sup>131</sup>

Moreover, this approach—and the powerful state-law tool of emergency—has no limiting principle except plainly malleable state definitions of emergency. Could a state governor declare a threat based on the presence of undocumented immigrants in the state, along the same lines as Texas's and Arizona's declarations, and take similar sweeping, harsh measures against residents who have resided there for years? Could a state governor declare an emergency over the imminent threat to lives of unborn children, and ban abortion in violation of a federal statutory codification of *Roe*? Or an emergency based on the presence of trans people (perhaps falsely as a threat to children), notwithstanding federal anti-discrimination law? Could states band together to coin their own money if they believed the United States should return to the gold standard and that the federal government's failure to do so was destroying the economy?

The state immigration emergencies, as "bogus" emergencies<sup>132</sup> precipitated by disagreement with another governmental actor, are continuous in their norms erosion with President Trump's border emergency declaration. Their effect is similar: arrogating power constitutionally committed to the other actor under the supposed exigency of emergency. The corrosive and dangerous systemic implications of such actions are obvious. Texas's punitive parallel immigration enforcement system has particularly caused harm for the thousands subjected to targeted arrest, detention in often horrific conditions, and criminal punishment due to their perceived immigration status.<sup>133</sup>

Further, in Texas, the ongoing idea of "emergency" and logic of vigilantism—unchecked by federal intervention—has only escalated the state's confrontation with the federal government. In late 2023, the state legislature passed and Governor Abbott signed a new state law, popularly called SB 4, that creates a state crime of "illegal entry from a foreign nation" by "a person who is an alien," authorizes state magistrates and judges to order "returns" to Mexico, and delegates to state and local law enforcement effectuation of such "return"—essentially a deportation by the state of Texas.<sup>134</sup> SB 4 has no exception to state deportation for people with pending, not yet adjudicated applications for asylum or other protection from return to danger in their countries of

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<sup>130</sup> It *should* go without saying that migrants crossing the United States-Mexico border are also in no way equivalent to non-state actors who pose a threat of actual or imminent attack to target states, as under the unable or unwilling standard.

<sup>131</sup> See *United States v. Texas*, 599 U.S. 670 (2023).

<sup>132</sup> Wang, *supra* note 2, at 620.

<sup>133</sup> See OLS Trespass Arrests Civil Rights Complaint, *supra* note 103.

<sup>134</sup> Tex. Penal Code § 51.02; Tex. Code Crim. Proc. Ann. art. 5B.002.

origin. And it has no prohibition against the state sending people to danger in Mexico, even though migrants are frequently kidnapped, raped, injured, and killed in northern Mexico near the Texas border.<sup>135</sup> These basic protections in federal law<sup>136</sup> are simply absent from Texas' state deportation scheme.

SB 4 is independent of Governor Abbott's emergency declaration more than two years earlier, but it flows from the same logic akin to self-help in international law, of state self-help in the constitutional system. State legislators were clear that the rationale for SB 4 was the Biden administration's purported abdication of federal immigration enforcement authority: on its passage, the lieutenant governor described the catalyst for the bill as Texans' knowledge that "the Biden Administration has perpetuated the crisis on our southern border, and [that] Texas must take matters into our own hands to keep our state safe."<sup>137</sup> The passage of SB 4 is truly breathtaking state vigilantism that, in the process, dispenses with federal legal protections for individuals.

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In the wake of President Trump's border wall "emergency," scholars and practitioners proposed potential checks on presidential emergency power. Robert L. Tsai, for example, recommended closer judicial scrutiny of assertions of emergency and the facts underlying them, especially when there is reason to believe the emergency is manufactured.<sup>138</sup> Stephen I. Vladeck suggested legislatively limiting delegation of military authority, providing for sunsets, and providing expressly for judicial review of the underlying facts.<sup>139</sup> Cecillia D. Wang endorsed meaningful judicial review of claimed emergencies and, in the border emergency context, ending punitive and militarized immigration enforcement and implementing policies that combat xenophobia.<sup>140</sup> All of these recommendations are obtained for state immigration emergency declarations as well, with tweaks for the state context—state rather than federal judicial review as to whether there is in fact an "emergency," for example.

There are two additional actions that governmental actors should take specific to the state context. First, the federal executive should robustly use its federal civil rights enforcement authority to protect the rights of individuals subjected to state immigration enforcement actions. It seems likely that the Biden administration has not sued over Texas's state immigration system predicated on trespass law or Texas's and Arizona's deployment of the National Guard because it

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<sup>135</sup> E.g., Human Rights First, *Asylum Ban Strands Asylum Seekers and Migrants in Mexico and Returns Them to Danger* (Nov. 28, 2023), <https://humanrightsfirst.org/library/asylum-ban-strands-asylum-seekers-and-migrants-in-mexico-and-returns-them-to-danger/> [<https://perma.cc/2M39-RVLM>] (describing the organization's catalogue of "over 1,300 reports of torture, kidnapping, rape, extortion, and other violent attacks on asylum seekers and migrants stranded in Mexico"); CBS, *Mexico Authorities Rescue 32 Migrants, Including 9 Kids, Abducted On Way to U.S. Border* (Jan. 4, 2024), <https://www.cbsnews.com/news/mexico-authorities-rescue-32-migrants/> [<https://perma.cc/865X-W56U>]; Laura Gottesdiener et al., *Migrants Are Being Raped at Mexico Border As They Await Entry to US*, REUTERS (Sept. 29, 2023), <https://www.reuters.com/world/migrants-are-being-raped-mexico-border-they-await-entry-us-2023-09-29/> [<https://perma.cc/TM9X-9BS3>].

<sup>136</sup> 8 U.S.C. §§ 1158, 1231(b)(3) (asylum and withholding of removal statutes); 8 C.F.R. §§ 208.16–18 (regulations implementing the United States' obligations under the Convention Against Torture).

<sup>137</sup> Press Release, Office of the Texas Lieutenant Governor, Lt. Gov. Dan Patrick: Statement on the Passage of Senate Bill 4 – State Authority to Enforce the Border (Nov. 9, 2023), <https://www.lt.gov.texas.gov/2023/11/09/lt-gov-dan-patrick-statement-on-the-passage-of-senate-bill-4-state-authority-to-enforce-the-border/> [<https://perma.cc/VU49-XYS4>].

<sup>138</sup> Tsai, *supra* note 7, at 604–08.

<sup>139</sup> Vladeck, *supra* note 7, at 618–19.

<sup>140</sup> Wang, *supra* note 2, at 620–22.

has not wanted to provoke a judicial confrontation with a state over immigration enforcement. The Texas Office of the Attorney General publicly stated more than a year ago that it is seeking a test case to overturn *Arizona* at the Supreme Court.<sup>141</sup> But in the absence of litigation, states' actions flowing from bogus immigration emergency declarations have eroded democratic norms and violated the rights of thousands of migrants and Latino individuals in Texas.

In January 2024, almost three years after the first state immigration emergency declaration, DOJ sued Texas over SB 4, the law enacting the state's new and even more blatant parallel system of state immigration enforcement.<sup>142</sup> DOJ's lawsuit is predicated on the Supremacy Clause and, as a backstop, the Foreign Commerce Clause—that is, on structural constitutional law pertaining to federal-state allocations of authority.<sup>143</sup> While DOJ still has not sued over any of the state immigration emergency declarations under the Supremacy Clause, that pathway is open, either now or following the resolution of the SB 4 litigation.

And in any event, the federal executive can and should continue to follow the logic of *Arizona*, including its affirmation that protecting the rights of immigrants is a responsibility of the federal government. DOJ can, and should, use its enforcement authority under Title VI of the Civil Rights Act;<sup>144</sup> its authority to act on patterns and practices of rights violations by law enforcement agencies;<sup>145</sup> and its authority to protect the civil rights of imprisoned individuals.<sup>146</sup> DOJ and DHS should act to provide immigration relief to individuals who have been subject to civil rights abuses under OLS to the maximum extent available under federal law.<sup>147</sup> And the administration can, and should, swiftly and publicly act to ensure CBP agents in south Texas are not participating in OLS, including the civil rights violations that underlie it: civil rights advocates have documented extensive participation of on-the-ground CBP officers in OLS trespass arrests.<sup>148</sup>

Second, state legislatures and judges should curb governors' misuse of disaster authority for immigration enforcement or other state vigilante purposes that usurp the federal government's constitutionally allocated authority. State legislatures should formally limit the definition of "emergency" or "disaster" under state law, including to rule out actions by the federal government, and should require periodic review of emergency declarations by the legislature. State judges should provide meaningful review of emergency declarations and should invalidate emergencies premised on bigotry or federalism. It's clear that Texas officials, especially, view a disaster declaration as an unreviewable blank check: the state police officer in charge of Operation Lone Star has stated, in justifying seizing private property to put up razor wire, "Gov. Abbott made it

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<sup>141</sup> Jasper Scherer, *Ken Paxton Wants Supreme Court Reversal on Immigration, Giving Texas More Sway in Border Fight*, HOUS. CHRON. (Mar. 16, 2022), <https://www.houstonchronicle.com/politics/texas/article/Paxton-wants-Supreme-Court-reversal-on-17004794.php> [<https://perma.cc/WVX3-2F4W>].

<sup>142</sup> Complaint, *United States v. Texas*, No. 1:24-cv-00008 (W.D. Tex. Jan. 3, 2024), ECF No. 1.

<sup>143</sup> *Id.* at 15–16.

<sup>144</sup> See Perla Trevizo, *DOJ Investigating Texas' Operation Lone Star for Alleged Civil Rights Violations*, PROPUBLICA (July 6, 2022), <https://www.propublica.org/article/operation-lone-star-doj-investigation-abbott> [<https://perma.cc/EU8S-Z75A>]; OLS Trespass Arrests Civil Rights Complaint, *supra* note 103.

<sup>145</sup> 34 U.S.C. § 12601.

<sup>146</sup> 42 U.S.C. § 1997a.

<sup>147</sup> See 8 U.S.C. § 1101(a)(15)(U).

<sup>148</sup> Letter from Kathryn Huddleston et al., ACLU of Texas, to Alejandro Mayorkas et al., Border Patrol Collusion in Texas Migrant Arrest Program Under "Operation Lone Star"—Urgent Need for Immediate End to Collusion (Dec. 2, 2022) (available at [https://static.texastribune.org/media/files/c7b90d91cada0fd9268a2cb7e78b357a/ACLUTX\\_DHS\\_Complaint\\_OLS.pdf](https://static.texastribune.org/media/files/c7b90d91cada0fd9268a2cb7e78b357a/ACLUTX_DHS_Complaint_OLS.pdf) [<https://perma.cc/2NAQ-TBYR>]).

very clear: His expectations are we stop and stem the flow of migrants. That's the authority—we need to stop bad things from happening.”<sup>149</sup>

State vigilantism is dangerous. It permits a breakdown of federal-state allocations of authority. In the immigration context, it scapegoats and harms immigrants and, through racial profiling, Latino state residents. And, as described above, this kind of state vigilantism cannot be limited to immigration. A system governed by emergency, and particularly an emergency predicated on xenophobia and racial discrimination, is one in which an emergency “lies about like a loaded weapon, ready for the hand of any authority that can bring forward a plausible claim of an urgent need.”<sup>150</sup> These norms erosions by state governors build upon a similar norms erosion by the federal executive. It is essential that federal and state governmental officials act now to halt the misuse of emergency, with respect both to immigration and federalism, before such erosion goes any farther, before more communities are scapegoated, before further civil rights violations, and before any more harm by state officials to migrants arriving in the United States.

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<sup>149</sup> Benjamin Wermund & Jeremy Wallace, *Texas DPS Installed Razor Wire on Private Border Property Despite Landowner's Protest*, HOUS. CHRON. (July 18, 2023), <https://www.houstonchronicle.com/politics/texas/article/dps-border-wire-landowner-18206776.php> [<https://perma.cc/9NPQ-E9BG>].

<sup>150</sup> *Korematsu v. United States*, 323 U.S. 214, 246 (1944) (Jackson, J., dissenting).