Texas Claim of Immigration Invasion Buckles Under Constitution

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- WilmerHale attorneys question Texas "invasion" defense
- State in litigation with US government over immigration

Is Texas at "war"? And, if so, may Texas take immigration enforcement into its own hands in "self-defense"? These are among the provocative questions raised by *United States v. Texas* . Texas may not like the answers it's likely to get.

The federal government is suing Texas to halt the state's enforcement of a 2023 statute known as Senate Bill 4, which criminalizes certain immigration-related offenses at the state level. On Feb. 29, the US District Court for the Western District of Texas preliminarily enjoined Texas from enforcing the statute, finding it was preempted by federal immigration law, and rejected Texas' "invasion defense."

Just last week, the US Court of Appeals for the Fifth Circuit declined to stay that injunction pending Texas' appeal. How the Fifth Circuit will rule on SB 4's lawfulness remains unclear. But it seems unlikely Texas will ultimately prevail, in part because accepting its position could lead to a chaotic patchwork of state-level immigration enforcement regimes, undermining important federal interests in uniform administration of immigration law.

SB 4 forbids unauthorized entry of noncitizens into Texas from outside the US and requires Texas judges to order anyone convicted under SB 4 to be removed from the US—regardless of whether federal authorities have or will determine the defendant's immigration status.

According to Gov. Greg Abbott (R), these legislative measures were based on authority drawn from Article I, Section 10, Clause 3 of the US Constitution—the State War Clause—which permits a state to "engage in War" without Congressional authorization when "actually invaded."

As the US Supreme Court stated in *Arizona v. United States* in 2012, the "federal power to determine immigration policy is well settled," and federal courts have frequently reiterated the federal government's "broad, undoubted power over the subject of immigration." There, the justices found federal immigration law preempted certain Arizona statutes.

Likely recognizing that escaping *Arizona* and similar preemption precedents would be an uphill battle, Texas has taken the position that the US Constitution permits Texas to circumvent and/or supplement federal authority over immigration law enforcement—on the theory that noncitizens' migration into Texas constitutes an invasion of the state by transnational cartels. Claiming that authority under the State War Clause, Gov. Abbott asserted such authority "supersedes any federal statutes to the contrary."

Texas' attempted end run around Arizona and federal preemption is unlikely to succeed. Invoking the State War Clause depends on equating immigration with invasion—an unsound position as a matter of constitutional text, structure, and history. The district court so held, and commentators (including originalist commentators) have so argued.

Additionally, Texas' position would create an unworkable and unacceptably chaotic mess of state-level immigration enforcement regimes. As Justice Sonia Sotomayor observed on March 19—expressing a preliminary view of the merits in dissenting from a stay-related order by the US Supreme Court—the near-exclusive federal power over "the admission and removal of noncitizens" is meant to "preclude[] States from regulating entry and removal in a patchwork across the Nation."

Although our federalism tolerates varied state-by-state approaches in many areas, Article I of the Constitution expressly empowers Congress to "establish an uniform Rule of Naturalization … throughout the United States," and there are compelling reasons to do likewise with immigration enforcement. That is what we have consistently done throughout our history—not least because of the myriad intersections between immigration law and US foreign relations and treaty obligations.

For example, statutes such as SB 4—which purports to forbid Texas judges from considering pending or impending federal applications for asylum or withholding of removal as a reason to abate state removal proceedings—would frustrate US efforts to meet its treaty obligations to protect noncitizens from removal to a country where they would face persecution.

Interestingly, these concerns about SB 4 echo concerns about patchwork state-level enforcement that the Supreme Court expressed last month in Trump v. Anderson, the justices' per curiam decision holding that Congress, rather than states, is responsible for enforcing Section 3 of the 14th Amendment against federal officeholders and candidates.

Although arising in a different legal context, Trump v. Anderson demonstrates the justices' attentiveness to the practical consequences of permitting state-by-state enforcement where that approach threatens to disrupt important federal interests and cause nationwide ripple effects beyond a state's own borders.

Even if Texas brings its fight all the way to the Supreme Court, the justices are likely to decide that the nation's borders must be governed by a uniform policy crafted by federal legislators and enforced by federal officers—not by a variety of states taking differing and inconsistent approaches, under a claim that they are waging war.

The case is *United States v. Texas* , 5th Cir., No. 24-50149, denying motion for stay pending appeal 3/26/24 .said.

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