

December 15, 2021

Merrick Garland, Attorney General  
Lisa Monaco, Deputy Attorney General  
Vanita Gupta, Associate Attorney General  
Kristen Clarke, Assistant Attorney General  
Christine Stoneman, Chief, Federal Coordination and Compliance  
United States Department of Justice  
950 Pennsylvania Ave. NW  
Washington, D.C. 20530

*Via email*

**Re: Texas Migrant Arrest Program under “Operation Lone Star”—Urgent Need for Investigation into Race and National Origin Discrimination by Texas Agencies**

Dear Attorney General Garland, Deputy Attorney General Monaco, Associate Attorney General Gupta, Assistant Attorney General Clarke, and Ms. Stoneman,

Anti-immigrant hate is on the rise in Texas, and state and local officials are fanning the flames. Officials regularly use the same white supremacist rhetoric of “invasion” that led a shooter to target Latinx residents of El Paso in 2019, murdering 23 people. Governor Greg Abbott has claimed the state is under threat from migrants “from countries you haven’t even heard of before.” The sheriff’s office for Kinney County along the Texas border recently approvingly shared a social media post comparing migrants to deer and suggesting they should be shot.

In this racist and xenophobic environment, officials are targeting migrants for criminal arrest and prosecution—under the guise of state criminal trespass law but with the explicit, stated goal of punishing migrants based on their immigration status. Using state criminal law, the state of Texas and participating counties have created and are carrying out what is in reality a system of state immigration enforcement that targets Black and Brown— primarily Latinx— individuals for prosecution and enhanced punishment. Governor Greg Abbott explicitly contrasts this system to federal immigration policy, calling the Texas program “arrest and jail.”

Pursuant to this program, sometimes called “Operation Lone Star” (OLS), Texas has arrested more than 2,200 people on misdemeanor state criminal trespass charges. Texas has created a separate criminal prosecution and detention system for these individuals, with separate criminal dockets, separate public defender assignments, separate jails (converted state prisons), and even a separate “criminal migrant processing facility” for booking. This separate system is riddled with civil rights violations, including failure to appoint counsel, failure to timely file charges, and even the unilateral replacement of judges. Hundreds of those arrested have waited in jail for weeks or months without a lawyer or without a court date. In the end, the overwhelming majority of cases are simply dropped—through dismissal, or declined prosecution.

The trespass arrests themselves are pretextual and regularly lack probable cause—including cases in which law enforcement has directed individuals to a certain location, only to then arrest them for trespass once they get there. Arrest records show profiling based on race and national origin, including with numerous descriptions of observing or receiving reports of “undocumented migrants.” Virtually all if not all of those arrested to date are Latinx and Black men and are migrants. And the nature of the program—state-sanctioned targeting of immigrants—has further fueled racist, anti-immigrant rhetoric and action, including attempts by Kinney County to partner with vigilante groups and to fund a private security force to target migrants.

Title VI of the Civil Rights Act of 1964 bars discrimination on the basis of race, color, or national origin in programs and activities that receive federal financial assistance.<sup>1</sup> By creating and implementing the OLS trespass arrest program, Texas state and local agencies that receive federal financial assistance—including the Texas Office of the Governor, Texas Department of Public Safety, Texas National Guard, Texas Parks and Wildlife Department, Texas Department of Criminal Justice, Texas Division of Emergency Management, Texas Office of Court Administration, Val Verde County, Kinney County, and Galveston County—are violating Title VI’s prohibitions on discrimination. State and local officials began implementing the OLS trespass arrest program in July. The program is now backed by almost \$2 billion in state funding for the next two years, with planned expansion to other counties. Officials have said they plan to continue the program for years; one state official recently termed it “indefinite.”

Texas is the first state to operationalize a unilateral state immigration policy of this magnitude, using state criminal law to target Black and Brown immigrants for punishment. We respectfully request that the Department of Justice investigate Texas state and local agencies implementing the migrant arrest program and terminate federal funding to Texas agencies that engage in discrimination. There is an urgent need for federal action to protect the rights of Black and Brown migrants targeted by this unlawful system and to ensure that this kind of pretextual, discriminatory program does not flourish in Texas or spread to other states.

## **I. Overview: The OLS Trespass Arrest Program**

The OLS trespass arrest program is one facet of the state of Texas’s broader effort to unilaterally create a state immigration policy and unilaterally engage in immigration enforcement. In March 2021, Texas Governor Greg Abbott ordered the large-scale deployment of Texas Department of Public Safety (“DPS”) troopers and members of the Texas National Guard to Texas communities along the border with Mexico.<sup>2</sup> By August, the state had deployed

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<sup>1</sup> 42 U.S.C. § 2000d *et seq.*

<sup>2</sup> “Operation Lone Star” is, originally, the name for this deployment. Press Release, Office of the Texas Governor, *Governor Abbott, DPS Launch “Operation Lone Star” To Address Crisis At Southern Border*, Mar. 6, 2021, <https://gov.texas.gov/news/post/governor-abbott-dps-launch-operation-lone-star-to-address-crisis-at-southern-border>. In addition to the deployment of DPS and National Guard troops to implement the migrant trespass arrest program, OLS thus includes traffic stops by DPS and “apprehensions” of migrants by DPS troopers and National Guard troops along the border, most notably in the Rio Grande Valley. *See, e.g.*, Texas Department of Public Safety, *Operation Lone Star Briefing*, Dec. 2, 2021,

more than 1,250 DPS troopers to border communities and had also deployed National Guard troops, with plans to increase the National Guard presence to up to 2,500 troops.<sup>3</sup> In May 2021, Governor Abbott declared a state of “disaster” based on “federal government policies” and federal “inaction” that he claimed had led to “a dramatic increase in the number of individuals unlawfully crossing the international border.” The disaster declaration described Operation Lone Star as intended to “deter[] illegal border crossings.”<sup>4</sup> In addition to the OLS trespass arrest program, Texas’s efforts to deter migration include Governor Abbott’s July 2021 executive order barring ground transport of certain migrants in the state, including recently arrived asylum seekers,<sup>5</sup> and a state-funded border wall.<sup>6</sup>

State and local officials, including Governor Abbott, have been crystal clear: the underlying purpose of the OLS trespass arrest program is to deter migration and punish migrants for coming to the United States. From officials’ public statements and the system’s design and

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<https://www.facebook.com/ktabtv/videos/409242960930203/>. Texas has a long history of surging DPS troopers to the border for what it terms “border security operations,” reflecting the militaristic nature of the deployments. See Texas Legislative Budget Board, *Update: State Funding for Border Security, May 2016*, [https://www.lbb.state.tx.us/Documents/Publications/Presentation/3248\\_Update\\_State\\_Funding\\_Border\\_Security.pdf](https://www.lbb.state.tx.us/Documents/Publications/Presentation/3248_Update_State_Funding_Border_Security.pdf). These surges regularly lead to increased stops for minor traffic violations and create an anti-immigrant environment where individuals fear travel because the saturation of state law enforcement places them at risk of deportation, including since the start of Operation Lone Star in March. See, e.g., Tanvi Varma, *Records: Operation Lone Star Resulting in Increases as High as 1,000% in Minor Citations for Drivers in Starr County*, KRGV, Aug. 5, 2021, <https://www.krgv.com/news/records-operation-lone-star-resulting-in-increases-as-high-as-1-000-in-minor-citations-for-drivers-in-starr-county/> (describing skyrocketing citations in the Rio Grande Valley under Operation Lone Star for “materials on a windshield” and “any transparent material on a windshield”); J. David Goodman, *Helicopters and High-Speed Chases: Inside Texas’ Push to Arrest Migrants*, N.Y. Times, Dec. 11, 2021, <https://www.nytimes.com/2021/12/11/us/texas-migrant-arrests-police.html> (Containing statements by residents who have been routinely pulled over by DPS, including the mayor of Brackettville, who was told by DPS that he had been stopped because his license plate light was insufficiently bright); Debbie Nathan, “*They’re Taking Everybody*” —Videos Show Texas Troopers Ripping Apart Immigrant Families During Traffic Stops, The Intercept, Dec. 10, 2017, <https://theintercept.com/2017/12/10/theyre-taking-everybody-videos-show-texas-troopers-ripping-apart-immigrant-families-during-traffic-stops/>.

<sup>3</sup> Texas House Appropriations Committee Hearing, H.B. 9, Relating to making supplemental appropriations relating to border security and giving direction regarding those appropriations, Aug. 24, 2021, 8:00 AM, [https://tlchouse.granicus.com/MediaPlayer.php?view\\_id=46&clip\\_id=22334](https://tlchouse.granicus.com/MediaPlayer.php?view_id=46&clip_id=22334) (Testimony of Office of the Governor Budget Director Sarah Hicks at approximately 2:46:00) [hereinafter “Hearing on H.B. 9”].

<sup>4</sup> Gov. Greg Abbott, Proclamation by the Governor of the State of Texas, May 31, 2021, at 1-2, [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).

<sup>5</sup> Gov. Greg Abbott, Executive Order GA-37, July 28, 2021, [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). A federal court preliminarily enjoined enforcement of the order, on the basis that it is likely preempted, in litigation by the Department of Justice and individuals and organizations affected by the order. *United States v. Texas*, 3:21-cv-00173, Doc. 52 (W.D. Tex. Aug. 26, 2021).

<sup>6</sup> Press Release, Office of the Texas Governor, *Governor Abbott Announces Border Wall Construction Strategy*, June 16, 2021, <https://gov.texas.gov/news/post/governor-abbott-announces-border-wall-construction-strategy>.

implementation, it's plain that the trespass program is a pretextual use of state criminal law, with the underlying interest of harming Black and Brown migrants.

Under the program, DPS officers collaborate with the Texas National Guard and county sheriff's offices to arrest Black and Brown migrants on state misdemeanor criminal trespass charges. Virtually all if not all<sup>7</sup> of those arrested on trespass charges are Black or Brown, the overwhelming majority of whom are Latinx, and virtually all if not all of those arrested are migrants. State troopers' affidavits evince racial profiling: they describe observing groups of "undocumented migrants" and note Latinx ethnicity as apparently relevant to arrest. Arrests lack probable cause: in many instances, law enforcement in fact directed those arrested to a particular place or otherwise gave them the impression they had permission to be on the property, only to then arrest them for trespassing. And the state is literally constructing the conditions for a criminal charge—at Governor Abbott's direction, the Texas National Guard has set up fences on private property for the purpose of establishing the "notice" element of state criminal trespass. In other words, the state is attempting to make crossing property criminal where it was not before, to enable the arrest of migrants.

Once arrested, individuals are channeled into a separate criminal system that is designed for migrants. Instead of being booked into the county jail, the ordinary site for pretrial detention, they are taken to a separate processing center specifically for the OLS trespass arrest program, which DPS terms the "criminal migrant processing center."<sup>8</sup> After magistration (the initial appearance), they are taken by the Texas Department of Criminal Justice ("TDCJ")—the state prison system—to one of two state prisons hours away that have been converted to jails to hold migrants. In June, the Dolph Briscoe Unit ("Briscoe"), located in Dilley, Texas, transferred prisoners to other facilities to make room for those arrested under the OLS trespass system.<sup>9</sup> Briscoe has capacity for about 1,000 people. When Briscoe became full, TDCJ also began holding individuals at the Segovia Unit in Edinburg, Texas.<sup>10</sup>

Counties then prosecute those arrested for state criminal trespass, on charges that prosecutors have enhanced by one misdemeanor class because of the disaster declaration predicated on migration and state law providing for disaster enhancements. The entire criminal

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<sup>7</sup> Much information regarding the OLS trespass arrest program is difficult or impossible to access. We have been unable to secure access to records for all arrests to date, even though they are open records. In fact, the Kinney County Attorney has reportedly had delayed access to arrest files from DPS, in some cases reportedly receiving the files after the statutory deadline for filing charges has elapsed. Charlotte Cuthbertson, *In Pursuit of a Secure Border: Small Texas County Leads Charge Against Border Crime*, *The Epoch Times*, Nov. 11, 2021.

<sup>8</sup> Kinney County initially conducted en masse magistrations in a parking lot rather than sending individuals to the processing center for magistration. *See, e.g.*, Greg Abbott (@GregAbbott\_TX), Twitter (Aug. 6, 2021, 11:35 AM), [https://twitter.com/GregAbbott\\_TX/status/1423684063760719885](https://twitter.com/GregAbbott_TX/status/1423684063760719885).

<sup>9</sup> Reese Oxner, *Texas empties prison to prepare to detain immigrants arrested during ramped-up border enforcement*, *The Texas Tribune*, June 17, 2021, <https://www.texastribune.org/2021/06/17/immigration-prison-border-jail/>.

<sup>10</sup> Honest Austin News, *Texas Holds 850 Migrants on State Charges as it Opens Up More Prison Capacity*, *Honest Austin*, Sept. 27, 2021, <https://www.honestaustin.com/2021/09/27/texas-prisons-operation-lone-star/>.

process takes place in a separate criminal system specifically for the trespass arrests. Prosecutions take place along a separate track from ordinary criminal cases in the county, on dedicated dockets, with a different pool of public defenders and with different judges. The criminal process is under greater centralized state control than ordinary misdemeanor criminal trespass prosecutions, which are run by counties. In an unprecedented move, the state's Border Prosecution Unit assists with these misdemeanor prosecutions.

The criminal process is rife with civil rights violations that have led to extreme, outrageous delays in cases that overwhelmingly end in dismissal or nonprosecution. As of November 1, roughly 70% of resolved cases had been dropped; meanwhile, 53% of those jailed on November 1 had already been detained for more than 30 days.<sup>11</sup> Many of those detained have languished in jail for weeks without an attorney or without communicating with their attorney. Kinney County has waited more than a month to file charges against migrants, in violation of state law, leading to weeks-long delays before arraignments at which individuals may be released. Once a judge orders release, physical release from detention is likewise delayed.

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In sum, state and local officials have created a separate state system intended to punish migrants and effectuate a state immigration policy, under the guise of state criminal trespass law. State and local law enforcement are targeting individuals for arrest and prosecution on state criminal trespass charges due to race and perceived immigration status. Virtually all if not all of those arrested to date are people of color. Once arrested, individuals are placed in a separate criminal process and in separate detention compared to the ordinary process and detention system for those arrested on state misdemeanor criminal charges. This separate system is rife with civil rights abuses, including failures to provide basic access to process that lead to people languishing in pretrial detention for weeks on misdemeanor trespass charges.

In September, the Texas Legislature passed and Governor Abbott signed H.B. 9, a bill which appropriated \$1.8 billion in funding to the OLS trespass arrest system and other aspects of Operation Lone Star over the next two years. This funding includes more than \$301 million for the Texas National Guard for a two-year period and almost \$139 million for DPS for a one-year period.<sup>12</sup> The Kinney County Attorney has stated he expects the arrests to continue for the next

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<sup>11</sup> Elizabeth Findell & Alicia A. Caldwell, *Texas Jails Fill With Migrants as Border Arrests Overwhelm Courts*, Wall Street Journal, Nov. 8, 2021, <https://www.wsj.com/articles/texas-jails-fill-with-migrants-as-border-arrests-overwhelm-courts-11636376402>.

<sup>12</sup> *An Act Relating to Making Supplemental Appropriations Relating to Border Security and Giving Direction Regarding Those Appropriations*, H.B. 9, 2d C.S. (2021), <https://capitol.texas.gov/tlodocs/872/billtext/pdf/HB00009F.pdf#navpanes=0> (providing funding for aspects of the OLS trespass arrest program for a two-year period); Press Release, Office of the Texas Governor, *Governor Abbott Signs Border Security Funding Into Law*, Sept. 17, 2021, <https://gov.texas.gov/news/post/governor-abbott-signs-border-security-funding-into-law>.

three years.<sup>13</sup> As a DPS official stated on December 4, Operation Lone Star is “indefinite.”<sup>14</sup> The program is set up to continue for years, and state officials have repeatedly stated their intent to expand it beyond Val Verde and Kinney Counties to other counties in Texas.<sup>15</sup> Absent federal intervention, it provides a blueprint for other Texas localities and other states to join in similar use of the criminal system to discriminate against Black and Brown migrants and seek to effectuate a separate, punitive state immigration system.

## II. Legal Background: Title VI

Title VI of the Civil Rights Act of 1964 bars discrimination on the basis of race, color, or national origin in any program or activity receiving federal financial assistance.<sup>16</sup> A federal “program or activity” is “all of the operations of” a state or local “department, agency . . . or other instrumentality,” as well as a state or local entity that distributes federal financial assistance.<sup>17</sup> The non-discrimination requirement of Title VI applies to all noncitizens, including undocumented individuals, as Title VI bars discrimination against any “person in the United States.”<sup>18</sup> Separate is never equal, and Title VI exists to guard against the precise discrimination unfolding in the state of Texas.

Pursuant to Title VI and its implementing regulations, a recipient of federal funds may not, among other prohibitions, “provide any disposition . . . to an individual which is different, or is provided in a different manner, from that provided to others under the program” or “subject an

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<sup>13</sup> Charlotte Cuthbertson, *In Pursuit of a Secure Border: Small Texas County Leads Charge Against Border Crime*, The Epoch Times, Nov. 11, 2021, [https://www.theepochtimes.com/in-pursuit-of-a-secure-border-small-texas-county-leads-charge-against-border-crime\\_4084276.html+&cd=1&hl=en&ct=clnk&gl=us](https://www.theepochtimes.com/in-pursuit-of-a-secure-border-small-texas-county-leads-charge-against-border-crime_4084276.html+&cd=1&hl=en&ct=clnk&gl=us) (Kinney County Attorney Brent Smith saying, in the context of migrant arrests, “Now, will this Operation Lone Star continue for the next three years? Probably so. Unless the federal government decides to actually follow the laws passed by Congress—which at the moment they’re not doing.”).

<sup>14</sup> Operation Lone Star Briefing, Dec. 2, 2021, at 24:10, [https://www.facebook.com/watch/live/?ref=watch\\_permalink&v=409242960930203](https://www.facebook.com/watch/live/?ref=watch_permalink&v=409242960930203).

<sup>15</sup> *E.g.*, Operation Lone Star Briefing, Oct. 28, 2021, at 12:34, <https://www.conchovalleyhomepage.com/news/operation-lone-star-dps-to-hold-fifth-briefing/s-DPS-gives-briefing-on-ongoing-operations-at-the-border> (describing state officials’ efforts to expand the OLS trespass arrest program to Brooks County,); Operation Lone Star Briefing, Nov. 18, 2021, at 5:41:00 [https://www.valleycentral.com/news/local-news/texas-dps-to-hold-briefing-on-operation-lone-star-focus-on-apprehension-numbers/rrest-numbers-at-the-border|KVEO-TV\(valleycentral.com\)](https://www.valleycentral.com/news/local-news/texas-dps-to-hold-briefing-on-operation-lone-star-focus-on-apprehension-numbers/rrest-numbers-at-the-border|KVEO-TV(valleycentral.com)), (DPS official stating that OLS trespass arrests began in Val Verde and Kinney Counties and that “soon we’ll expand to other counties”); Hearing on H.B. 9, *supra* n.3 (Office of the Governor Budget Director Sarah Hicks testifying at 2:49:00, “The vision is that as we go and as we get the agreements in additional counties along the border, we could go up to 3 intake centers and up to 3 total jails.”).

<sup>16</sup> 42 U.S.C. § 2000d.

<sup>17</sup> *Id.* § 2000d-4a.

<sup>18</sup> 42 U.S.C. § 2000d; *see also* U.S. Dep’t of Justice, Civil Rights Division, *Title VI Legal Manual*, § V at 2 (Apr. 2021), <https://www.justice.gov/crt/book/file/1364106/download> (“It is well-settled that the word ‘person’ includes citizens and noncitizens alike and that undocumented individuals in the United States are protected from discrimination on the basis of race, color, and national origin.”).



individual to segregation or separate treatment in any matter related to his receipt of any disposition . . . under the program.”<sup>19</sup> Nor may a recipient “utilize criteria or methods of administration which have the effect of” discriminating on the basis of race or national origin.<sup>20</sup>

Federal regulation provides that “[a]ny person who believes . . . any specific class of individuals to be subjected to discrimination prohibited” under Title VI may file a written complaint.<sup>21</sup> Any complaint or other information that “indicates a possible failure to comply with [Title VI]” triggers the requirement that the Department of Justice “make a prompt investigation.”<sup>22</sup> “The investigation should include, whenever appropriate, a review of the pertinent practices and policies of the recipient,” the underlying circumstances, and other relevant factors.<sup>23</sup>

### III. State and Local Agencies Involved in the OLS Trespass Arrest Program

Because Operation Lone Star is a multi-agency operation, we request that the Department of Justice coordinate an investigation into each state and local agency involved with the program that receives federal funding for purposes of Title VI.<sup>24</sup> Relevant state and local agencies’ federal funding sources and roles in the OLS trespass arrest program include:

**Texas Office of the Governor.** The Texas Office of the Governor received, by its own account, over \$343 million in federal funds in Fiscal Year 2021, including \$206,210,910 in funding through the Crime Victims Assistance Program (CFDA No. 16.575.000), \$16,250,000 from the Edward Byrne Memorial Justice Assistance Grant program (CFDA No. 16.738.000), and \$98,443,090 in Homeland Security Grant funding (CFDA No. 97.067.000).<sup>25</sup> In November 2021, the Office of the Governor also received \$341,200,000 from the federal Coronavirus State Fiscal Recovery Fund established under the American Rescue Plan Act (ARPA), as allocated by the state of Texas.<sup>26</sup>

Governor Abbott initiated the OLS trespass arrest program, and the Office of the Governor encourages counties to participate and coordinates the program’s implementation. Further, the Border Prosecution Unit housed within the Office of the Governor’s Public Safety

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<sup>19</sup> 28 C.F.R. § 42.104(b)(1)(ii), (iii).

<sup>20</sup> *Id.* § 42.104(b)(2).

<sup>21</sup> 28 C.F.R. § 42.107(b).

<sup>22</sup> *Id.* § 42.107(c).

<sup>23</sup> *Id.*

<sup>24</sup> We make this request pursuant to DOJ’s role of “ensuring the consistent and effective implementation of Title VI across the federal government,” which includes coordination of investigations into complaints that implicate multiple agencies, as well as pursuant to the federal funding sources named here that DOJ directly administers. *See* U.S. Dep’t of Justice, Civil Rights Division, Title VI Legal Manual 1, 5 (2021), <https://www.justice.gov/crt/book/file/1364106/download>.

<sup>25</sup> Tex. Off. of the Gov., Federal Funds Supporting Schedule (2020), attached as Exhibit 1.

<sup>26</sup> Making Supplemental Appropriations and Giving Direction Regarding Appropriations, 2021 Tex. Sess. Law Serv. 3rd Called Sess. Ch. 10 §§ 2, 3, 24 (West).

Office, as a “border program,”<sup>27</sup> supports OLS criminal trespass prosecutions by cross-deputizing prosecutors who are part of the Border Prosecution Unit to assist in OLS trespass cases.<sup>28</sup>

**Texas Department of Public Safety.** The Texas Department of Public Safety (“DPS”) received millions of dollars in Fiscal Year 2021. It received \$278,513 through the State and Local Implementation Grant Program (CFDA No. 11.549.000), \$265,398 through the Public Safety Partnership and Community Policing Program (CFDA No. 16.710.000), \$692,385 through the Forensic DNA Backlog Reduction Program (CFDA No. 16.741.00), and \$147,803,386 in Hurricane Harvey Public Assistance (CFDA No. 97.036.002).<sup>29</sup>

In the OLS trespass arrest program, DPS is the primary agency that arrests individuals on criminal trespass charges. As of December 2, DPS had arrested 2,106 people for the OLS trespass arrest program.<sup>30</sup>

**Texas Parks and Wildlife Department.** The Texas Parks and Wildlife Department (“TPWD”) estimated that it received \$70.1 million in Fiscal Year 2021 “from the federal government in the form of apportionments, grants and contracts.”<sup>31</sup> This includes funding allocated by formula under the Pittman-Robertson Wildlife Restoration Act, 16 U.S.C. § 669 et seq.; Texas received \$31,095,765 in Pittman-Robertson funding in Fiscal Year 2021 (CFDA Nos. 15.611 and 15.626).<sup>32</sup> The TPWD also received \$20,713,023 in Fiscal Year 2021 and is scheduled to receive \$20,048,857 in Fiscal Year 2022 under the Dingell-Johnson Sport Fish Restoration Act, 16 U.S.C. § 777 et seq. (CFDA 15.605).<sup>33</sup>

The Texas Parks and Wildlife Department directly arrests migrants for the OLS trespass program and provides information to DPS to facilitate DPS arrests. To date, the Parks and

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<sup>27</sup> See Tex. Gov’t Code § 772.052 (providing that “[t]he governor shall establish the border prosecution unit within the criminal justice division. . . .”); State of Texas Border Prosecution Unit, Border Prosecution Unit Quick Facts, <https://senate.texas.gov/cmtes/81/c640/1108-TomKrampitz-3.pdf> (explaining that the Border Prosecution Unit was initially “administered as [a] trustee grant program through [the] Criminal Justice Division of [the] Governor’s Office”); *Border Programs*, Office of the Texas Governor, <https://gov.texas.gov/organization/hsgd/border-programs> (describing the Border Prosecution Unit’s functions as one of the “Border Programs” within what is now the Public Safety Office of the Office of the Governor).

<sup>28</sup> Hearing on H.B. 9, *supra* n.3 (testimony of Border Prosecution Unit General Counsel Tom Krampitz at 3:51:00–3:52:00).

<sup>29</sup> Tex. Dep’t of Public Safety, Federal Funds Supporting Schedule, attached as Exhibit 2.

<sup>30</sup> Operation Lone Star Briefing, December 9, 2021, ~ 2:28, [https://www.facebook.com/watch/live/?ref=watch\\_permalink&v=277771827651145&t=0](https://www.facebook.com/watch/live/?ref=watch_permalink&v=277771827651145&t=0) (reporting and showing corresponding data for December 2, 2021).

<sup>31</sup> See Tex. Parks and Wildlife Dep’t, Financial Overview 9 (2020),

[https://tpwd.texas.gov/publications/pwdpubs/media/pwd\\_rp\\_a0900\\_0679\\_12\\_20.pdf](https://tpwd.texas.gov/publications/pwdpubs/media/pwd_rp_a0900_0679_12_20.pdf).

<sup>32</sup> See U.S. Dep’t of the Interior, Fish and Wildlife Service, Budget Justifications and Performance Information, Fiscal Year 2022 at WR-7 (2021), <https://www.doi.gov/sites/doi.gov/files/fy2022-fws-budget-justification.pdf>.

<sup>33</sup> See *id.* at SF-9.



Wildlife Department has arrested more than 180 people for criminal trespass under the OLS program.<sup>34</sup>

**Texas Military Department (Texas National Guard).** The Texas National Guard, a component of the Texas Military Department, received funding through the Emergency Security Supplemental to Respond to January 6 Appropriations Act of 2021 (H.R. 3237 – 117<sup>th</sup> Congress).<sup>35</sup> The Emergency Security Supplemental Act appropriated \$521 million to the National Guard to reimburse it for costs associated with deployment to the United States Capitol in the wake of the January 6, 2021 attack, including the Texas National Guard, which deployed over 1,000 troops.<sup>36</sup>

Governor Abbott has ordered the deployment of the Texas National Guard to arrest and assist in the arrest of individuals in the OLS trespass program, as well as to build fences to attempt to establish the notice element of criminal trespass under state law.

**Texas Department of Criminal Justice.** TDCJ received \$8,644,147 in Fiscal Year 2021, through the Criminal Alien Assistance Program (CFDA Number 16.606.000) and has requested the same amount for Fiscal Year 2022.<sup>37</sup> It also received \$359,673,191 from ARPA, as allocated by the state of Texas in November 2021.<sup>38</sup>

TDCJ provides prisons and staff for the OLS trespass arrest program.

**Texas Office of Court Administration.** The Texas Office of Court Administration (“OCA”) receives federal funding distributed by the Office of the Governor. Grants that have been used to fund OCA include the Edward Byrne Memorial Justice Assistance Grant program (CFDA No. 16.738). OCA also received \$16,942,446 from ARPA in November 2021, as allocated by the state of Texas.<sup>39</sup> OCA manages the separate court system created for the OLS trespass arrest program.

**Texas Division of Emergency Management.** The Texas Division of Emergency Management (“TDEM”) received \$297,889,727 in federal funds through Hurricane Harvey Public Assistance programming (CFDA No. 97.036.002), \$5,862,529 through the Department of Homeland Security’s Crisis Counseling program (CFDA No. 97.032.000), and \$5,993,222 in

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<sup>34</sup> See Dec. 9 Operation Lone Star Briefing, *supra* n. 30, at ~2:40 (reporting Texas Parks and Wildlife conducted criminal trespass arrests of 182 people).

<sup>35</sup> See Press Release, White House, Bill Signed: H.R. 3237 (July 30, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/30/bill-signed-h-r-3237/>.

<sup>36</sup> See Wes Rapaport, *Texas National Guard Still Waiting for Reimbursement for Deployment to U.S. Capitol after January 6*, KXAN (July 27, 2021), <https://www.kxan.com/news/texas-politics/texas-national-guard-still-waiting-for-reimbursement-for-deployment-to-u-s-capitol-after-january-6/>.

<sup>37</sup> Tex. Dep’t of Crim. J., Federal Funds Supporting Schedule, attached as Exhibit 3.

<sup>38</sup> Making Supplemental Appropriations and Giving Direction Regarding Appropriations, *supra* n. 26 at § 6(a); see Press Release, Office of the Texas Governor, Governor Abbott Signs Senate Bill 8, Allocating Federal American Rescue Plan Act Funding (Nov. 8, 2021), <https://gov.texas.gov/news/post/governor-abbott-signs-senate-bill-8-allocating-federal-american-rescue-plan-act-funding> (describing SB 8’s allocation of “the nearly \$16 billion federal American Rescue Plan Act (ARPA) funding awarded to the State of Texas earlier this year”).

<sup>39</sup> Making Supplemental Appropriations and Giving Direction Regarding Appropriations, *supra* n. 26, at § 29(a)(2).

COVID-19 Emergency Management Performance Grants (CFDA No. 97.042.119).<sup>40</sup> It also received \$300,000,000 from ARPA, as allocated by the state of Texas.<sup>41</sup> In addition, TDEM is responsible for managing the distribution of \$1.85 billion in funding provided through the Coronavirus Economic Stabilization Act of 2020 (“CARES ACT”).<sup>42</sup> TDEM Chief W. Nim Kidd testified to the Texas House Appropriations Committee in August that “our agency’s responsible for about \$12 billion of federal fund monitoring” in “grants that are passed through the division, through the state, back down to local governments.”<sup>43</sup>

TDEM coordinates the “criminal migrant processing center”<sup>44</sup> used for booking individuals detained in OLS trespass arrests in lieu of county jails. It also contracts with vendors to support OLS trespass arrests.<sup>45</sup>

**Val Verde County - Sheriff’s Office and County Attorney.** Val Verde County received \$9,522,532 in ARPA funding in 2021.<sup>46</sup> Additionally, it budgeted \$384,737 for FY 2021 that it received through the Department of Homeland Security’s Operation Stonegarden (OPSG) program (CFDA No. 97.067).<sup>47</sup> In Fiscal Year 2021, the county also received \$145,225 in funding through the Coronavirus Emergency Supplemental Funding (CESF) Program, and \$457,850 from the Coronavirus Relief Fund, each established under the CARES Act.<sup>48</sup>

The Val Verde County Sheriff’s Office has been directly involved with arresting individuals for the Operation Lone Star trespass arrest program, and the County Attorney has prosecuted those arrested.

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<sup>40</sup> Tex. Dep’t of Emergency Mgmt., Federal Funds Supporting Schedule, attached as Exhibit 4.

<sup>41</sup> Making Supplemental Appropriations and Giving Direction Regarding Appropriations, *supra* n. 26, at § 9.

<sup>42</sup> 15 U.S.C. § 116; *see also* Tex. Dep’t Emergency Mgmt, *CARES Act: Coronavirus Relief Fund*, <https://tdem.texas.gov/crf/#:~:text=Under%20the%20CARES%20Act%2C%20the,Texas%20is%20approximately%20%2411%20billion.>

<sup>43</sup> Hearing on H.B. 9, *supra* n. 3, at 3:55:00–3:55:15.

<sup>44</sup> Greg Abbott (@GregAbbott\_TX), *supra* n. 8.

<sup>45</sup> *Id.* at 2:51:25–2:51:50 (TDEM Chief Kidd testifying, “As it relates to our assignments on the border, we’ve helped local officials establish and build an intake facility, we’ve sourced and procured raw materials, and we’ve brought in additional personnel from volunteer sources through contracts with through the emergency management assistance compact. Today we’re working with 16 different vendors and 11 agencies to support our local government request.”).

<sup>46</sup> *See* Val Verde County, Tex., Adopted Budget Fiscal Year 2021–2022 at 117 (2021), [https://valverde.mygovcenter.com/uploads/cms/21\\_22AdoptedBudget-1634152325433-1634152341411.pdf](https://valverde.mygovcenter.com/uploads/cms/21_22AdoptedBudget-1634152325433-1634152341411.pdf).

<sup>47</sup> *Id.* at 115. Operation Stonegarden was first established by appropriation in the Consolidated Security, Disaster Assistance, and Continuing Appropriations Act. Pub. L. No. 110-329, 122 Stat. 3671 (2009). Val Verde County appears to be allocating the \$1,161,183 it received through Operation Stonegarden in Fiscal Year 2019 over multiple years. *See* U.S. Dep’t of Homeland Security, Federal Emergency Management Agency (FEMA), Final Allocation and Award Announcement, Fiscal Year 2019, State and Local Preparedness Grant Programs 10 (2019), [https://www.dhs.gov/sites/default/files/publications/19\\_0801\\_ola\\_fy19-allocation-announcement.pdf](https://www.dhs.gov/sites/default/files/publications/19_0801_ola_fy19-allocation-announcement.pdf).

<sup>48</sup> Val Verde County, Tex., Adopted Budget Fiscal Year 2021–2022, *supra* n. 46, at 120–21.

**Kinney County - Sheriff's Office and County Attorney.** The State of Texas directed \$24,801 in federal funds received through the Edward Byrne Memorial Justice Assistance Grant Program (CFDA 16.738) to fund an interoperability project in 2021.<sup>49</sup> Additionally, Kinney County received funds from the United States Marshals through the Prisoner Transport program totaling over \$9 million in Fiscal Year 2021.<sup>50</sup> The county has also received \$19,569 in funding through the CARES Act, distributed through TDEM.<sup>51</sup> The Kinney County Sheriff's Office received several Operation Stonegarden grants in the last few years.<sup>52</sup> They are listed as one of the eligible counties for Stonegarden funds.<sup>53</sup> As of 2019, Kinney County Sheriff Brad Coe was using Stonegarden deputies for border enforcement.<sup>54</sup> The Kinney County Sheriff's Office in February 2021 publicly advertised on Facebook the open position "Part time - Stonegarden Deputy."<sup>55</sup>

The Kinney County Sheriff's Office is directly involved in arresting individuals for the Operation Lone Star trespass arrest program, and the County Attorney prosecutes people arrested in the County for trespassing.

**Galveston County - Sheriff's Office and County Constables.** The State of Texas directed \$85,250 in federal funds received through the Edward Byrne Memorial Justice Assistance Grant Program (CFDA 16.738) to Galveston County to fund the purchase of body-worn cameras in 2021.<sup>56</sup> The county has also received \$460,515 in funding through the CARES Act, distributed through TDEM.<sup>57</sup> Galveston County has received ARPA funds and has unilaterally funneled some of that money to "border security." In addition to authorizing the use of ARPA funds for "border security" generally, the County has authorized the transfer of up to

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<sup>49</sup> See Office of Governor, Public Safety Office, Criminal Justice Division - Justice Programs, Justice Assistance - FY2021 at 6 (2021), [https://gov.texas.gov/uploads/files/press/Justice\\_Assistance\\_-\\_FY2021\\_Grant\\_List.pdf](https://gov.texas.gov/uploads/files/press/Justice_Assistance_-_FY2021_Grant_List.pdf).

<sup>50</sup> See Kinney County, Tex., Kinney County Budget, Fiscal Year October 1, 2021 through September 30, 2022 at 48,

<http://www.co.kinney.tx.us/upload/page/0304/docs/Financial/Budget/Kinney%20County%20Budget.pdf>.

<sup>51</sup> See Tex. Dep't Emergency Mgmt., *CRF Allocations for Texas Jurisdictions*, <https://tdem.texas.gov/wp-content/uploads/2019/08/CRF-Allocations-for-Texas-Jurisdictions-10.23.2020-V10.pdf>.

<sup>52</sup> See Kinney County, Tex., Kinney County Budget, *supra* n. 50, at 242.

<sup>53</sup> *Operation Stonegarden (OPSG) (Texas)*, <https://www.interoperabilitygrants.info/GrantDetails.aspx?gid=27244>.

<sup>54</sup> Vanessa Croix, *Rise in Human Smuggling Cases Stretching Kinney Cty. Resources*, KENS 5 (June 27, 2019), <https://www.kens5.com/article/news/human-smuggling-cases-stretching-kinney-county-resources/273-f2a5b625-1496-46b9-a51e-f2020199c207>.

<sup>55</sup> Kinney County Sheriff's Office, *Kinney County Sheriff's Office is Now Hiring for Three Positions*, Facebook (Feb. 5, 2021),

<https://www.facebook.com/KinneyCountySheriffsOffice/posts/876229279801482>.

<sup>56</sup> See Office of Governor, Public Safety Office, Criminal Justice Division - Justice Programs, Justice Assistance - FY2021, *supra* n. 49, at 4.

<sup>57</sup> Tex. Dep't Emergency Mgmt., *CRF Allocations for Texas Jurisdictions*, *supra* n. 51, at 14.

\$6.6 million, 10% of the funds allocated to the county under ARPA, to the construction of a state border wall.<sup>58</sup>

The Galveston County Sheriff's Office and Galveston County Constables have been directly involved in arresting individuals in Kinney County for the OLS trespass arrest program, using ARPA funds to fund their involvement in the OLS trespass arrest program.<sup>59</sup> Officials have discussed a memorandum of understanding between the Kinney County Sheriff's Office, the Galveston County Sheriff's Office, and Galveston County Constables' Office.<sup>60</sup> Further, Galveston County has posted videos on social media to highlight their arrest of migrants in collaboration with Kinney County.<sup>61</sup> Kinney County Sheriff Brad Coe has publicly thanked Galveston for sending "troops."<sup>62</sup>

#### **IV. OLS Trespass Arrests: Targeting Migrants, Profiling, Arrests Lacking Probable Cause, and Result of Arresting Black and Brown Migrants**

Under the OLS trespass arrest program, at the direction of Governor Abbott, state and local actors collaborate to target for state misdemeanor criminal trespass arrest individuals they believe to be adult male migrants traveling not as part of a family unit. The criminal trespass arrests have a one-level enhancement in misdemeanor class due to Governor Abbott's declaration of a state disaster based on migration, and prosecutors' understanding of state law enhancements. To date, over 2,200 people have been arrested on state criminal trespass charges under Operation Lone Star.<sup>63</sup>

Public statements by Governor Abbott, who created the OLS trespass arrest program, and other state and local officials demonstrate the program's intent to target individuals for arrest and

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<sup>58</sup> Alejandro Serrano, *Galveston County Judge Mark Henry Issues Disaster Declaration in Response to Border Situation*, Houston Chron. (June 30, 2021), <https://www.houstonchronicle.com/news/houston-texas/houston/article/Galveston-County-Judge-Mark-Henry-issues-disaster-16282889.php>.

<sup>59</sup> Robert Arnold, *'Law Enforcement Down Here Is Over-Extended': Galveston County Constables Work Overtime to Assist at Border*, KPRC2 (Aug. 20, 2021), <https://www.click2houston.com/news/investigates/2021/08/20/law-enforcement-down-here-is-over-extended-galveston-county-constables-work-overtime-to-assist-at-border/>; see also Robert Arnold, *Galveston County Constables Return to Help with Border Crisis in Kinney County*, KPRC2 (Sept. 30, 2021), <https://www.click2houston.com/news/investigates/2021/09/30/galveston-county-constables-return-to-help-with-border-crisis-in-kinney-county/>; J. David Goodman, *Helicopters and High-Speed Chases: Inside Texas' Push to Arrest Migrants*, N.Y. Times (Dec. 11, 2021), <https://www.nytimes.com/2021/12/11/us/texas-migrant-arrests-police.html> (describing Galveston constables staying in a ranch guesthouse in Kinney County "[f]or months").

<sup>60</sup> Commissioners Court of Kinney County, Texas, *Notice of Regular Open Meeting at 3w* (Sept. 13, 2021), <https://cokinneytx.civicweb.net/document/18293>.

<sup>61</sup> Galveston County, Texas, *Galveston County Law Enforcement Addressing the Crisis at the Border*, Facebook (Aug. 25, 2021), <https://fb.watch/9UK5JyAkhY/>.

<sup>62</sup> Kinney County Sheriff Brad Coe, *We are Thankful for Galveston County, Texas for Sending Their Troops to Help us Out!*, Facebook (Aug. 25, 2021), <https://www.facebook.com/BradCoeForSheriff/posts/6240479125992327>.

<sup>63</sup> Dec. 9 Operation Lone Star Briefing, *supra* n. 30, at 2:41.

punishment under state criminal trespass law based on national origin, including immigration status. Many arrests lack probable cause for criminal trespass—for example, in many cases because law enforcement directed individuals to or permitted their entry on private land. The state has also sought to criminalize conduct in order to arrest migrants by building fences on property near the border, to fulfill an element of the criminal trespass statute, and the arrest process is otherwise highly irregular, including in the Governor’s authorization for the state National Guard to conduct misdemeanor trespass arrests. And in Kinney County, the county sheriff is both deeply involved in the OLS trespass arrests in his law enforcement role and a complaining witness, as a property manager, in multiple cases.

The outcome of the program is severe racial disparities: most if not all individuals arrested to date are people of color, primarily Latinx and also Black migrants. Affidavits from arresting DPS troopers indicate profiling, with descriptions of observing “undocumented migrants” and troopers’ apparent presumption that Latino men are particular targets for arrest under the program. As this direct, indirect, and outcome-based evidence together shows, arrests under the migrant arrest program subject individuals to discrimination on the basis of race and national origin, including immigration status, in violation of Title VI.

**A. Statements from State and Local Officials Regarding the OLS Trespass Arrest Program’s Intent to Target Migrants for Arrest and to Punish Them for Traveling to the United States**

State officials have been explicit: the goal of the OLS trespass arrest program is to arrest migrants. Statements from Governor Abbott and DPS officials make plain that state actors’ intent in initiating and carrying out the OLS trespass arrest program is to target for arrest recently arrived migrants, using the vehicle of state criminal trespass law, in order to deter migration and to punish migrants for crossing into the United States—not to neutrally enforce state criminal trespass law. Statements from Governor Abbott to this effect include:

- In a news appearance, Governor Abbott stated, “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>64</sup>
- In another news appearance, Governor Abbott similarly stated, “So what Texas is doing—we’re not playing games anymore. I’ve deployed the National Guard as well as

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<sup>64</sup> Greg Abbott (@GregAbbott\_TX), Twitter (Sept. 28, 2021, 10:51 AM) [https://twitter.com/GregAbbott\\_TX/status/1442879549692338191](https://twitter.com/GregAbbott_TX/status/1442879549692338191) (sharing an interview in which he provides this quote at 0:46–1:25).



the Texas Department of Public Safety, and we have a new program in place because the Biden administration plan is to catch and release. The Texas plan is to catch and to jail. So we are arresting and jailing, the program has already begun, it took a few weeks to set up because we actually had to set up an entirely new booking system, we had to get judges involved in the process, magistrates too—who would magistrate these people. We had to open up a former prison that has now a thousand jail beds that we’re starting to fill up. We are arresting people every single day, and we’re arresting for trespass.”<sup>65</sup>

- Governor Abbott also stated in a news appearance, “I’m going to be back down on the border again tomorrow, working to make sure that we are accelerating the process of building the wall, accelerating the process of arresting these people who are coming across the border because somebody has to step up and secure the border, because the Biden administration has completely abandoned its responsibility to his fellow Americans.”<sup>66</sup>
- A tweet from July 23 describes “the new program to arrest and jail illegal immigrants arrested for trespassing in Texas.”<sup>67</sup>
- “Meeting with @TDEM, @TXMilitary, @TxDPS, & the Texas Commission on Jail Standards about our plan to catch and jail illegal migrants crossing the border. The Biden administration caused this crisis, Texas is stopping it.”<sup>68</sup>
- “The Texas Dept. of Public Safety continues to arrest illegal migrants coming across the border and sending them to jail. Here is an example from this morning with @TxDPS working with the Kinney County Sheriff’s Office.” The tweet then shares a screenshot of a Kinney County Sheriff’s Office Facebook post with several pictures of 17 men lined up, dressed in white jail garb in front of white vans and under the guard of law enforcement, stating, “This is happening! 17 illegals this morning. At the Kinney County Sheriff’s Office. Judge Narci Villarreal magistrated each illegal alien. Thank you DPS for all your help.”<sup>69</sup>

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<sup>65</sup> Greg Abbott (@GregAbbott\_TX), Twitter (July 25, 2021, 1:50 PM), [https://twitter.com/GregAbbott\\_TX/status/1419369434414731266](https://twitter.com/GregAbbott_TX/status/1419369434414731266) (sharing a Fox News interview in which he provides this quote at 00:00–00:40).

<sup>66</sup> Greg Abbott (@GregAbbott\_TX), Twitter (July 16, 2021, 3:46 PM), [https://twitter.com/GregAbbott\\_TX/status/1416137109602250764](https://twitter.com/GregAbbott_TX/status/1416137109602250764) (sharing a Fox News interview in which he provides this quote at 00:30–00:51).

<sup>67</sup> Greg Abbott (@GregAbbott\_TX), Twitter (July 23, 2021, 6:57 PM), [https://twitter.com/GregAbbott\\_TX/status/1418722056003280896](https://twitter.com/GregAbbott_TX/status/1418722056003280896).

<sup>68</sup> Greg Abbott (@GregAbbott\_TX), Twitter (July 26, 2021, 2:41 PM), [https://twitter.com/GregAbbott\\_TX/status/1419744773200617478](https://twitter.com/GregAbbott_TX/status/1419744773200617478).

<sup>69</sup> Greg Abbott (@GregAbbott\_TX), Twitter (Aug. 6, 2021, 11:35 AM), [https://twitter.com/GregAbbott\\_TX/status/1423684063760719885](https://twitter.com/GregAbbott_TX/status/1423684063760719885).



- “The Texas Department of Public Safety & Texas National Guard are taking unprecedented steps to ensure the safety of our communities & secure the border. Illegal immigrants caught trespassing into Texas will be arrested & sent to jail.”<sup>70</sup>
- A video on the Governor’s Twitter account includes a graphic, “SYSTEM TO ARREST AND JAIL ILLEGAL IMMIGRANTS,” and an accompanying voiceover states, “We created a system to arrest and jail illegal immigrants who are trespassing in Texas.”<sup>71</sup>
- “Texas National Guard is authorized to arrest illegal immigrants trespassing in Texas. They arrested these in the Rio Grande Valley. We opened thousands of jail beds for all of the new arrests. They are also working with @TxDPS to seal border regions.” An accompanying photograph shows ten migrants seated on the ground, with two members of the Texas National Guard in the background.<sup>72</sup>
- “Texas Department of Public Safety & Texas National Guard arrest illegal immigrants trespassing on private property. We put them behind bars, not catch & release. Texas continues to secure our border.”<sup>73</sup>
- “Texas Dept. of Public Safety arrest illegal immigrants hiding in rail cars. They will be put behind bars, not sent to Border Patrol for catch & release. @TxDPS, along with the Texas National Guard, have made thousands of arrests this year through #OperationLoneStar.”<sup>74</sup>

An email from a DPS official on July 20, at the start of migrant arrests, recorded the agency’s policy of “arresting . . . in Val Verde County for Criminal Trespass . . . only . . . adult males not traveling as family units.”<sup>75</sup> DPS and Texas National Guard officials’ public statements further confirm that the agencies are specifically targeting migrants for arrest:

- A DPS spokesperson explained in September, “Operation Lone Star . . . the reason why it began is the turn of, in January, we were seeing an influx of migrants coming in.”<sup>76</sup> The spokesperson further explained that DPS is identifying areas “for the ones that are trying to avoid detection. They’re doing it for a reason, and we’re looking for them.”<sup>77</sup>

<sup>70</sup> Greg Abbott (@GregAbbott\_TX), Twitter (Sept. 28, 2021, 10:51 AM), [https://twitter.com/GregAbbott\\_TX/status/1442879549692338191](https://twitter.com/GregAbbott_TX/status/1442879549692338191).

<sup>71</sup> Greg Abbott (@GregAbbott\_TX), Twitter (Oct. 8, 2021, 10:33 AM), [https://twitter.com/GregAbbott\\_TX/status/1446498871606059011](https://twitter.com/GregAbbott_TX/status/1446498871606059011) (sharing a video with the corresponding text and voiceover at ~ 00:20).

<sup>72</sup> Greg Abbott (@GregAbbott\_TX), Twitter (Oct. 10, 2021, 7:17 PM), [https://twitter.com/GregAbbott\\_TX/status/1447355631309045761](https://twitter.com/GregAbbott_TX/status/1447355631309045761).

<sup>73</sup> Greg Abbott (@GregAbbott\_TX), Twitter (Oct. 14, 2021, 12:30 PM), [https://twitter.com/GregAbbott\\_TX/status/1448702868568088581](https://twitter.com/GregAbbott_TX/status/1448702868568088581).

<sup>74</sup> Greg Abbott (@GregAbbott\_TX), Twitter (Oct. 26, 2021, 2:27 PM), [https://twitter.com/GregAbbott\\_TX/status/1453080838648877064](https://twitter.com/GregAbbott_TX/status/1453080838648877064).

<sup>75</sup> Jay Root (@byjayroot), Twitter (Aug. 24, 2021, 12:54 PM), <https://twitter.com/byjayroot/status/1430227046928719879>.

<sup>76</sup> Tex. Dep’t of Public Safety, Operation Lone Star Briefing, Sept. 16, 2021, ~ 1:15, available at <https://www.valleycentral.com/news/local-news/dps-tmd-to-give-updates-operation-lone-star-at-first-briefing/?fbclid=IwAR03g0OqcPMJEDp7l6gTMEENqA3MIpUiqAFMjYenzctSnYzIKBR8Y63C28>.

<sup>77</sup> *Id.* at ~ 8:30.

- In October, a DPS official described a proposed expansion of OLS trespass arrests to Brooks County, an idea that has since apparently been discarded. The official explained, “Once it’s operational, it will be a partnership similar to what we’re doing in Val Verde, along with the National Guard, and the purpose again is to identify these illegal immigrants that are trying to bypass the checkpoints. . . . Again, you gotta keep in mind that we don’t know who these individuals are, we don’t know their backgrounds until we actually apprehend them and find out who they are.”<sup>78</sup>
- Also in October, a DPS official said, “We did speak to some of those individuals that were in the temporary processing center, and they did say that right now—what they’re anticipating is, what they expect is that they’re going to get turned over to USBP. And when they do, they get returned back to Mexico, and then they cross back days later or weeks later. But when they find out that they’re being arrested by DPS for a state charge, their demeanor changes. They’re not expecting that. So the message is getting across. They know that now it’s a lot more challenging for them to get across because they will be arrested if they do encounter DPS.”<sup>79</sup>
- In October, a Texas National Guard official said, “We are always trying to attempt to turn back and push or repel illegal immigration to an extent. There is times where they’ve already made land or they’ve already come onto the property and we can no longer turn back.” In such cases, he stated, the National Guard will refer the individual to DPS in the first instance.<sup>80</sup>
- An October DPS press release described how “DPS has recently had significant interactions with migrants hiding in railcars to attempt to escape detection,” including “an incident on Oct. 24, in which DPS personnel in Kinney County found 19 migrants” and one on October 25 when DPS encountered “20 migrants.”<sup>81</sup>
- In an October statement, DPS Director Steven McCraw said, “We continue to work to secure the border and arrest people who have entered our country illegally and trespassed on private land.”<sup>82</sup>

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<sup>78</sup> Operation Lone Star Briefing, Oct. 21, 2021, ~ 11:15, available at [https://www.facebook.com/watch/live/?ref=watch\\_permalink&v=1720890721432763&t=0](https://www.facebook.com/watch/live/?ref=watch_permalink&v=1720890721432763&t=0).

<sup>79</sup> Operation Lone Star Briefing, Oct. 28, 2021, ~ 10:30, available at [https://www.valleycentral.com/news/local-news/operation-lone-star-dps-holds-fifth-briefing/?fbclid=IwAR2pCBMhmfjH4T5bcs8nE7N7XGSzMX4ULXStzuSeUIIJQSiVUXtXbGpIL\\_s](https://www.valleycentral.com/news/local-news/operation-lone-star-dps-holds-fifth-briefing/?fbclid=IwAR2pCBMhmfjH4T5bcs8nE7N7XGSzMX4ULXStzuSeUIIJQSiVUXtXbGpIL_s).

<sup>80</sup> *Id.* at ~ 15:50.

<sup>81</sup> Press Release, Tex. Dep’t of Public Safety, *DPS, TMD Discuss Railcars, Staging Personnel at OLS Weekly Briefing*, Oct. 28, 2021, <https://www.dps.texas.gov/news/dps-tmd-discuss-railcars-staging-personnel-ols-weekly-briefing>.

<sup>82</sup> Press Release, Tex. Dep’t of Public Safety, *TMD, DPS Provide Update on Progress of OLS at Weekly Briefing*, Oct. 14, 2021, <https://www.dps.texas.gov/news/tmd-dps-provide-update-progress-ols-weekly-briefing>.

- In a November statement, Director McCraw similarly said, “The state of Texas is sending a message to anyone who is thinking of crossing into our country illegally: If you are caught on private property, you will be arrested for criminal trespass and put in jail.”<sup>83</sup>

Statements from county officials further confirm that the intent of the OLS trespass arrest program is to target migrants for arrest—not to neutrally enforce state criminal trespass laws. Val Verde County Sheriff Joe Frank Martinez testified before the Texas House Appropriations Committee that people in his jurisdiction have asked him, regarding migrants on their property, “When can I shoot?” and that he believes that migrants “should be arrested versus them getting shot.”<sup>84</sup>

This understanding among state and local actors that the OLS trespass arrest program is about punishing migrants—in other words, punishing certain noncitizens in Texas—makes plain that state and local entities have designed the program to target migrants and implement it accordingly.

## **B. Unlawful Arrests and Irregularities in the OLS Trespass Arrest Process**

State officials, in seeking to ensnare migrants in the OLS trespass arrest program, have sought to criminalize conduct in ways that violate migrants’ rights and entrap them in unlawful arrests. Additionally, the OLS trespass arrest system has serious irregularities in charging decisions and authorization for the Texas National Guard to arrest in the state for state misdemeanor crimes.

First, OLS trespass arrests regularly violate the Fourth Amendment because they lack probable cause—including numerous cases in which law enforcement agents have directed individuals to private property or given them the impression that they have permission to be on the property. Many migrants arrested under the OLS criminal trespass program described state officials directing groups *toward* private land, where men were then arrested for criminal trespass, or welcoming them onto private land where they were then arrested:

- A Latino Venezuelan migrant arrested for trespass under OLS was jailed for 63 days on an eventually dismissed trespass charge after law enforcement motioned him through an open gate.<sup>85</sup> He recounted in an affidavit that he and two other Venezuelan men “saw people in green camouflage military uniforms standing by an open gate. We approached the officers and they stepped aside and gestured for us to enter the gate. The officers asked us in English where we were from and we responded Venezuela. They did not ask us any other questions but said that they were calling the authorities.”<sup>86</sup>

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<sup>83</sup> Press Release, Tex. Dep’t of Public Safety, *DPS, TMD, & TDCJ Discuss OLS Arrest and Detention Process*, Nov. 19, 2021, <https://www.dps.texas.gov/news/dps-tmd-tdcj-discuss-ols-arrest-and-detention-process>.

<sup>84</sup> Hearing on H.B. 9, *supra* n. 3, ~ 1:48:53.

<sup>85</sup> Declaration of A.V.O., ¶ 3.

<sup>86</sup> *Id.* ¶ 2.

- A Latino Venezuelan migrant was likewise detained on a trespass charge for 63 days after officers beckoned him through an open gate; the charge was eventually dismissed.<sup>87</sup> He described, “I was walking along the road near Del Rio . . . with several other Venezuelan male asylum-seekers. We noticed two officials dressed head-to-toe in camouflage. They were standing on the other side of a fence, near an open gate in the fence. We were outside of the fence, and they were standing inside the fence. We believed them to be immigration officials and we thought maybe we could ask them for asylum. These officials signaled to us to come toward them. So, obeying their hand signals, we walked through the gate to talk to them. I told them I was seeking asylum, and they said to me in English, ‘sit down here.’” After a law enforcement official arrived, “he told us that we had committed the crime of trespass to private property and that we would be taken to jail as prisoners. I was so confused because all I had done was walk through an open door toward officials who were signaling to me to walk towards them. I walked towards the officials because I thought they would help us seek safety. I had no idea I was on private property.”<sup>88</sup>
- A Latino Nicaraguan migrant was detained for 37 days before his charges were dismissed before his first hearing.<sup>89</sup> He too was invited through an open gate by law enforcement. He recounted, “My brother and I arrived at an open gate with a sign that said ‘no trespassing’ in English. On the other side of the gate, we saw two young men wearing tan and gray uniforms. The two appeared to be American soldiers and they had a little camp set up . . . . We called out to them from outside the gate, said ‘we are here to apply for asylum’ and waved our blue and white Nicaraguan flag to try to get their attention. The soldiers invited us to come to the other side of the gate. They started to approach us and said in Spanish, ‘Vengan aqui’ (come over here) and ‘tranquilo’ (stay calm). We hesitated at first because of the ‘no trespassing’ sign, but as the soldiers continued to insist and walked to meet us at the gate, eventually we followed their instructions and went to meet them on the other side of the gate. We felt safe entering the gate because they had invited us. . . . We told them that we wanted to speak to Border Patrol and they made a phone call.” The individual did not realize he was being arrested, thinking instead—through the point that he was handcuffed and placed in a van—“I was just going through the normal process at the border.”<sup>90</sup>
- A Latino Venezuelan migrant was detained for 41 days after he was arrested for trespass under OLS; his charges too were dismissed.<sup>91</sup> He described, “I was alone, lost and wanted to ask for help, so when I saw police officers nearby I got the officers’ attention and said ‘Help, I am Venezuelan, I need help please.’ The officers told me to come over

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<sup>87</sup> Declaration of A.M., ¶ 2.

<sup>88</sup> *Id.* ¶¶ 5-7.

<sup>89</sup> Declaration of O.A.C.-G., ¶ 1.

<sup>90</sup> *Id.* ¶¶ 4-6.

<sup>91</sup> Declaration of Z.A.M., ¶ 5.

to where they were. . . . I thought the officers would take me to immigration but the officers told me that I had entered on private property and was going to be arrested.”<sup>92</sup>

- The Val Verde County attorney has dropped cases for arrests that lacked probable cause. For example, in one set of dropped cases, troopers waved people through a gate, with “body language [that] was welcoming,” as the Val Verde County attorney described the body camera footage, and then—after they walked through the gate—arrested them for trespass.<sup>93</sup>
- In another case, migrants arrested under the OLS trespass program described DPS troopers arresting them for criminal trespass after they were already detained by local Border Patrol and, while detained, required to climb over a fence onto a ranch.<sup>94</sup>
- In another set of cases dropped by the Val Verde County attorney, a group of migrants had walked up to an open gate near which state troopers were standing, the officers stood aside to let the group pass, and the officers then arrested the single adult man in the group.<sup>95</sup>

As these cases show, numerous arrests of Black and Brown men under the Operation Lone Star trespass program in fact lack probable cause for a trespass arrest. Yet such arrests have led to lengthy jailing, in some cases for more than two months.

Second, Texas is attempting to criminalize travel that previously was not, by putting up fences to establish the element of notice for state criminal trespass. One element of criminal trespass in Texas is “notice that the entry was forbidden,” which may be fulfilled by “fencing or other enclosure obviously designed to exclude intruders or to contain livestock.”<sup>96</sup> Governor Abbott has thus directed the Texas National Guard to set up fences on private land along the border, in order to create the conditions for criminal trespass charges where they did not exist before.<sup>97</sup>

Third, under the OLS trespass arrest program, DPS troopers arrest for and prosecutors charge criminal trespass with a one-level enhancement—typically, from a Class B to a Class A misdemeanor. This is because in May 2021 Governor Abbott declared a “disaster” due to migration across the Texas-Mexico border.<sup>98</sup> Under Texas law, in a disaster area penalties are

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<sup>92</sup> *Id.* ¶¶ 2, 21.

<sup>93</sup> Findell & Caldwell, *Texas Jails Fill With Migrants*, *supra* n. 11.

<sup>94</sup> Jolie McCullough, *Texas Prosecutor Drops Charges After Migrants Claim They Were Marched to Private Property, Then Arrested for Trespassing*, *Tex. Tribune*, Oct. 5, 2021, <https://www.texastribune.org/2021/10/05/texas-migrants-arrest-charges-dropped/>.

<sup>95</sup> Findell & Caldwell, *Texas Jails Fill With Migrants*, *supra* n. 11.

<sup>96</sup> *Tex. Penal Code* § 30.05(a)(1), (b)(2)(B).

<sup>97</sup> Hearing on H.B. 9, *supra* n. 3, ~ 2:44:55 (Texas Office of the Governor budget and policy director testifying, regarding temporary fencing, “again, it provides the notice of criminal trespass, with enhanced penalties where a disaster is declared”).

<sup>98</sup> Gov. Greg Abbott, 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).

enhanced to those for “the next higher category of offense.”<sup>99</sup> Through his “disaster” declaration, based on migration, Governor Abbott has thus enhanced the potential punishment of the offense for the migrants whom the state arrests. Thus, those arrested and prosecuted under OLS—i.e., those targeted as noncitizens—are subject to more severe penalties, a violation of equal protection principles.

Fourth, in July Governor Abbott ordered the Texas National Guard to conduct arrests under Operation Lone Star.<sup>100</sup> This is a highly unusual deployment of the military to combat the commitment of—and engage in state arrests for—alleged misdemeanor state criminal violations. As DPS Director McCraw told the Center for Immigration Studies,<sup>101</sup> “Nobody’s ever really used the guard before in this capacity.”<sup>102</sup>

Finally, specific to Kinney County: the Kinney County sheriff is both the top law enforcement official involved in the migrant arrests for the county and, also, the complaining witness in multiple criminal trespass cases. Our analysis of arrest affidavits unearthed three cases in Kinney County in which Sheriff Brad Coe was the complaining witness—that is, the person pressing charges for criminal trespass. Sheriff Coe has signed a criminal trespass affidavit agreeing to pursue charges against those who trespass on property he manages.<sup>103</sup> We are unaware of Sheriff Coe publicly disclosing his involvement in the OLS trespass arrests as a complaining witness pressing charges as well as sheriff. We are likewise unaware of either Sheriff Coe or DPS taking any steps to identify problems associated with this conflict of interest or take remedial measures. In any event, this dual involvement raises serious conflict of interest questions in light of Sheriff Coe’s significant role in Kinney County’s involvement in the OLS trespass arrest program—and serious concerns as to both Kinney County’s and DPS’s apparent failure to identify and attempt to counteract this conflict of interest. It is yet another deeply concerning irregularity in arrests under the OLS trespass program.

The way that arrests are conducted in the OLS trespass program—with arrests lacking Fourth Amendment probable cause, attempts at entrapment, and significant departures from the

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<sup>99</sup> Tex. Penal Code § 12.50(b)(7). Governor Abbott specifically noted this increase in punishment “for certain criminal offenses committed in an area for which a disaster has been declared, including for criminal trespass” in his declaration of a disaster based on migration. Gov. Greg Abbott, Proclamation, May 31, 2021, at 2.

<sup>100</sup> Letter from Gov. Greg Abbott to Adjutant General Major General Tracy R. Norris, July 27, 2021, <https://gov.texas.gov/uploads/files/press/O-NorrisTracy20210727.pdf>.

<sup>101</sup> The Southern Poverty Law Center has designated the Center for Immigration Studies a hate group due in part to “its repeated circulation of white nationalist and antisemitic writers and “its record of publishing reports that hype the criminality of immigrants.” Southern Poverty Law Center, *Center for Immigration Studies*, <https://www.splcenter.org/fighting-hate/extremist-files/group/center-immigration-studies>.

<sup>102</sup> Todd Bensman, *In Historic United States First, National Guard Soldiers Start Arresting Illegal Migrants on the Texas-Mexico Border*, Center for Immigration Studies, Oct. 20, 2021, <https://cis.org/Bensman/Historic-United-States-First-National-Guard-Soldiers-Start-Arresting-Illegal-Migrants>

<sup>103</sup> Two affidavits describe the relevant property as “the Rio Grande Cattle Company ranch”; one describes it as “a private property managed by Sheriff Brad Coe.”



norm for misdemeanor criminal arrests in Texas—all further evince unlawful discrimination against migrants in implementing the program, in violation of Title VI.

### **C. Outcomes: Mass Arrests of People of Color and Evidence of Targeting Individuals for Arrest Based on Race and National Origin**

Arrests under Operation Lone Star are severely racially disparate: the overwhelming majority (if not all) arrests are of Black and Brown men. Trespass arrest affidavits authored by DPS troopers reveal these racial disparities and also show clear indications of profiling based on race and national origin. This analysis is based on DPS trooper affidavits providing arresting officers' accounts of 168 arrests—72 in Val Verde County and 96 in Kinney County.<sup>104</sup>

First, the affidavits demonstrate stark racial disparities in arrests: *all* arrests are of people of color, and almost all are of Latino men. 98% were recorded as “H/M” (Hispanic male) and 2% as “B/M” (Black male). In 57% of cases in Val Verde County, the arrest narrative describes the individual's perceived ethnicity, country of origin, and/or perceived immigration status: 17% include perceived ethnicity, 37.5% include country of origin, and 39% include perceived immigration status. For Kinney County, of the 96 arrest affidavits analyzed, 33% describe country of origin and/or perceived immigration status: 29% include perceived immigration status, and 8% include country of origin. (These totals for each category equal more than 100% because some narratives include for example, both perceived race and perceived immigration status.)<sup>105</sup>

Second, beyond these bare statistics the descriptions in the affidavits' arrest narratives strongly indicate racial profiling. For example, the affidavits for five individuals state, “Trooper Austin Melvin responded . . . in reference to multiple people seen trespassing by National

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<sup>104</sup> While affidavits in the OLS trespass arrest program, like similar arrest records, are in theory available to the public, in practice, obtaining them has proven highly challenging. The affidavits that we have been able to obtain, through records requests and provision by attorneys, represent a sliver of the more than 2,000 OLS trespass arrests. We are reportedly not the only ones with difficulty gaining access to this information: local news states that the Kinney County attorney has “[i]n some cases . . . received the arrest files from DPS on day 29 [after arrest], or even beyond day 30 [after arrest, the date when charges must be filed in certain criminal cases].” Charlotte Cuthbertson, *In Pursuit of a Secure Border: Small Texas County Leads Charge Against Border Crime*, The Epoch Times, Nov. 11, 2021, [https://www.theepochtimes.com/in-pursuit-of-a-secure-border-small-texas-county-leads-charge-against-border-crime\\_4084276.html](https://www.theepochtimes.com/in-pursuit-of-a-secure-border-small-texas-county-leads-charge-against-border-crime_4084276.html).

<sup>105</sup> No arrest affidavits that we analyzed for Kinney County include a description of perceived race or ethnicity, but we have been able to analyze only a small subset of the hundreds of arrests in the county. The Kinney County affidavits are less illuminating: 44 of the arrest affidavits we analyzed for Kinney County pertained to the Kinney County Rail Port or Union Pacific location—a railyard in the county—and those arrest affidavits, unlike those for other properties, tend to have cursory descriptions of the arrests.

Guardsmen posted on the property. Upon arriving, I<sup>106</sup> observed multiple Spanish<sup>107</sup> males sitting near the following latitude/longitude.” Affidavits for several men state, “Trooper Jimenez saw 6 Hispanic males trespassing on the Bordelon Crossing property. . . . I saw a Hispanic male open the closed gate to the residential property. The six adult males were undocumented migrants UDM’s from Venezuela.”<sup>108</sup> Both sets of affidavits suggest that the individual’s perceived ethnicity was relevant to the DPS trooper’s understanding that that person was not welcome on the property. Two other affidavits also describe observing, and then arresting, Latino men.

DPS troopers’ arrest narratives also strongly indicate profiling on the basis of national origin, including perceived immigration status. The arrest narrative in two affidavits states, “I . . . was advised of a group of non-citizens trespassing on X Bar H Ranch in Kinney County.” Several arrest narratives describe observing “undocumented migrants.” For example, the arrest narrative in one complaint states, “I observed a group of undocumented persons (UDPS) cross over a chain that enclosed the property.” For three affidavits, the narrative states that a member of the National Guard informed the affiant “that 22 undocumented migrants (UDMs) emerged from marked private property” and states, “upon arriving, I saw 22 UDMs.” Others describe “undocumented migrants seen trespassing by National Guardsmen” and “I observed 13 undocumented migrants traveling through the . . . [p]roperty.” Another arrest narrative recounts, “I . . . was notified by [a DPS trooper] of several undocumented migrants trespassing on the property. . . . Upon arrival, I located three undocumented migrants.”

DPS troopers’ emphasis on perceived immigration status evinces discriminatory policing in two ways. First, troopers’ statements that they are observing “undocumented migrants”—where the overwhelming majority of those they arrest are Latinx—indicate that they are instead using racial profiling to identify those they term “undocumented migrants,” whom they in turn target for arrest and prosecution. The use of ethnicity as a proxy for immigration status is evident in an arrest narrative that states that a member of the National Guard informed the trooper “that a group of 4 undocumented migrants were seen trespassing on the Bordelon Crossing property . . . . While on patrol, I saw one adult Hispanic male sitting and that was found to be single and not part of a family unit.” There is no way to ascertain immigration status through sight, and the narratives’ conclusory assertions indicate that officers are instead relying on racial profiling. Second, it indicates that DPS troopers view immigration status as relevant to these state law enforcement arrests for state criminal trespass violations.

Notably, Kinney County Attorney Brent Smith recognizes that the troopers’ references to immigration status are indicia of racial profiling. In response to criticism that the migrant arrest

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<sup>106</sup> While the affiant is Trooper Melvin, the affidavit—like several others—is written in both the first and third person.

<sup>107</sup> This is best read in the context of south Texas’ sociopolitical environment as a description of perceived Latinx ethnicity rather than perceived nationality.

<sup>108</sup> While the affidavit refers to six men, Val Verde County records only include affidavits for five men.

cases are racially motivated, he falsely claimed that “[t]he criminal complaints make no mention of immigration status.”<sup>109</sup>

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Thus, statements by public officials regarding the intent of the program, the implementation of the program, and the outcomes of that implementation demonstrate that arrests under the OLS trespass arrest program are discriminatory on the bases of race and national origin, including perceived immigration status. This evidence of discrimination in criminal trespass arrests under Operation Lone Star triggers the requirement of Title VI and its implementing regulations that the federal government investigate whether termination of federal funds is warranted.

## **V. The OLS Trespass Arrest Program’s Separate Criminal Process and Detention System with Rampant, Systemic Civil Rights Violations.**

Once individuals are arrested under the OLS trespass program, they are channeled into a criminal system that is entirely separate and distinct from the ordinary criminal legal process and pretrial detention system for state misdemeanor charges. Those arrested under the OLS trespass program are not taken to county jails, as is the ordinary process for misdemeanor arrests; instead, they are booked into a separate processing facility in Val Verde County, which DPS calls a “criminal migrant processing facility.”<sup>110</sup> At the processing facility, they are magistered by judges designated specifically for the OLS trespass program. From the processing facility, they are then transported to state prisons that state actors have converted to pretrial jails specifically for OLS. They are assigned public defenders through a separate system established by the state specifically for OLS arrests, not through a common pool of public defenders shared with others arrested in Val Verde and Kinney Counties. They are placed on separate dockets specifically for OLS criminal trespass arrests, with separate arraignments.

In the separate criminal system that state and local officials have established specifically for trespass arrests under Operation Lone Star, there have been systemic violations of individual rights. Among other shortcomings, state and local officials have failed to vindicate individuals’ right to counsel, have failed to timely file charges, and have failed to timely release individuals from custody. Snapshot data shows the extreme delays in this separate system. The Wall Street Journal reported that 53% of the 1,006 people detained on November 1 under the OLS trespass arrest program (533 people) had been jailed longer than 30 days, 14% (141 people) longer than 60 days, and 2 people—both Cuban migrants—for 98 days. By contrast, guilty pleas to trespass under the OLS program have typically resulted in sentences of roughly 15 days—much less than the time hundreds of people have been forced to spend waiting for process.<sup>111</sup>

Moreover, most cases under the OLS trespass program—70% of those resolved as of November 1—have been dismissed or otherwise dropped. Of the remaining cases, all involved

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<sup>109</sup> Press Release, Kinney County Attorney, Oct. 26, 2021, <https://www.facebook.com/photo/?fbid=125607406514360&set=a.125607456514355>.

<sup>110</sup> Nov. 18 Operation Lone Star Briefing, *supra* n. 15, ~ 1:45, <https://www.valleycentral.com/news/local-news/texas-dps-to-hold-briefing-on-operation-lone-star-focus-on-apprehension-numbers/>.

<sup>111</sup> Findell & Caldwell, *Texas Jails Fill With Migrants*, *supra* n. 11.

guilty pleas, and in none were individuals sentenced to more than time already served.<sup>112</sup> The breakdowns in the criminal system under the OLS trespass program deny due process and, in doing so, harshly punish Black and Brown migrants jailed in cases that overwhelmingly end up being in some way thrown out.<sup>113</sup>

### A. Separate System for Appointment of Counsel

People arrested under the OLS trespass program are appointed counsel through a byzantine process orchestrated at the statewide level that is completely separate from the appointment system for the same or similar offenses for all other people arrested in the participating counties. In Texas, every county is required to establish an Indigent Defense Plan (IDP), which controls all procedures related to eligibility for and involving appointed counsel for indigent people accused of crimes.<sup>114</sup> Each county involved in OLS accordingly has an IDP prescribing the county’s methods for appointment of counsel, which predates its participation in OLS. But individuals arrested under OLS are not appointed counsel according to the local IDP.<sup>115</sup>

Instead, the Texas Supreme Court has issued an order purporting to modify statutory provisions of the Code of Criminal Procedure specifically “for individuals arrested under Operation Lone Star.” This order purports to modify Texas law “to authorize the Executive Director of the Texas Indigent Defense Commission (‘TIDC’) to approve procedures for appointing counsel that differ from an affected county’s procedures”; “to waive . . . requirements to maintain a public appointment list and to appoint only from that list”; “to authorize TIDC to approve and establish an alternative program for appointing counsel”; and “to authorize TIDC as an additional entity permitted to designate an existing governmental entity or nonprofit corporation” as a public defender’s office and also as “a managed assigned counsel program to appoint counsel.”<sup>116</sup> The purported legal basis of this order is a state statute that permits the supreme court to “modify . . . procedures for the conduct of any court proceeding affected by a disaster,”<sup>117</sup> and Governor Abbott’s declaration of disaster based on migration.

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<sup>112</sup> *Id.*

<sup>113</sup> Detained individuals who do not speak Spanish reportedly have experienced language barriers in court proceedings and detention centers, and they have not been provided access to interpreters. *See* Declaration of O.A.C.-G., ¶ 11; Declaration of A.V.O., ¶ 14.

<sup>114</sup> Tex. Code Crim. P. art. 26.04

<sup>115</sup> Texas Indigent Defense Commission, Procedures for Appointment, Supervision, and Compensation of Counsel to Defendants Arrested Under Operation Lone Star Pursuant to the Texas Supreme Court’s Border Security State of Disaster Emergency Order (Sep. 24, 2021), *available at* <http://www.tidc.texas.gov/media/8d98da945cd5899/ols-counsel-appointment-procedures-9-24-21.pdf>.

<sup>116</sup> Emergency Order Regarding Indigent Defense and the Border Security State of Disaster, Misc. Docket No. 21-9104 (Tex. Aug. 30, 2021), <https://www.txcourts.gov/media/1452716/219104.pdf>; Renewed Emergency Order Regarding Indigent Defense and the Border Security State of Disaster, Misc. Docket No. 21-9123 (Tex. Oct. 12, 2021), <https://www.txcourts.gov/media/1453005/219123.pdf>.

<sup>117</sup> Tex. Gov’t Code Ann. § 22.035(b) (West 2019); Emergency Order Regarding Indigent Defense and the Border Security State of Disaster, *supra* n. 116, § 1 (citing this statutory provision as authority).

Accordingly, counsel is instead appointed by retired judges across the state who have temporary authorization from the Texas Supreme Court to perform magistration hearings, but who are not “appointing authorities,” according to the local IDP.<sup>118</sup> Once these retired judges have appointed counsel, lawyers are assigned through a statewide system orchestrated by state agencies, most notably OCA and TIDC, both of which are based in Austin, in coordination with TDEM, which operates the Val Verde Processing Center. TIDC has contracted with the Lubbock Private Defenders Office (LPDO), a nonprofit organization, to manage assignment of counsel for OLS prosecutions but not for any other prosecutions in the “participating counties.”<sup>119</sup> The LPDO is based in Lubbock, 350 miles north of the Val Verde Processing Facility where initial magistration hearings occur. Lawyers appointed to represent OLS trespass defendants maintain offices throughout the state of Texas, and virtually all cases are assigned to lawyers who are *not* approved to take criminal cases through the IDPs of the “participating counties.”<sup>120</sup>

In short, no part of the process for appointing counsel that applies to people arrested under the OLS trespass program is the same as the procedure used for any other person arrested in those exact same counties whose arrest is not designated as being related to OLS. Instead of adding attorneys for Val Verde and Kinney Counties, to whom anyone on the docket may be assigned, the state has created a separate system specifically for these cases.

## **B. Failure to Timely Appoint Counsel and Denial of Meaningful Access to Counsel**

Individuals prosecuted under OLS have a right to counsel under both the federal Constitution<sup>121</sup> and Texas law.<sup>122</sup> The United States Supreme Court has specifically held that in Texas, the initial bail-setting hearing is a point at which the Sixth Amendment right to counsel attaches and that counsel must be appointed within a reasonable time after that hearing.<sup>123</sup> State law requires the appointment of counsel within three working days of a request for appointed counsel.<sup>124</sup>

Despite these legal requirements, there have been widespread, egregious failures to appoint counsel in the OLS trespass arrest program. People arrested pursuant to the OLS trespass program have faced dramatic delays in, and in some cases outright refusal of, appointed counsel.

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<sup>118</sup> Emergency Order Regarding Indigent Defense and the Border Security State of Disaster, *supra* n. 116, § 1.

<sup>119</sup> See Jolie McCullough, *Thanks to local politics and a railroad, rural Kinney County accounts for most of Texas’ migrant arrests*, Tex. Tribune, Sept. 2, 2021, <https://www.texastribune.org/2021/09/02/texas-immigration-arrests-jail-kinney-county/>.

<sup>120</sup> These attorneys are quite literally spread throughout the entirety of the state, including in Bowie County, Dallas County, Harris County, and Travis County.

<sup>121</sup> See generally *Gideon v. Wainwright*, 372 U.S. 335 (1963) (establishing right to appointed counsel in state criminal prosecutions).

<sup>122</sup> Tex. Code Crim. Pro. Ann. art. § 1.051(c) (providing right to appointed counsel for all indigent people charged with crimes).

<sup>123</sup> *Rothgery v. Gillespie Cty.*, 554 U.S. 191, 213 (2008).

<sup>124</sup> Tex. Code Crim. P. art. 1.051(i).

Hundreds of indigent arrestees have waited more than a month to be appointed counsel after requesting a lawyer at their initial bail-setting appearance.<sup>125</sup> In September, an attorney at Restoring Justice, a public defense organization with many clients in the OLS trespass arrest program, stated that most of their assigned clients had “sat in prison without attorneys for nearly six weeks.”<sup>126</sup> Most of these individuals were unaware of any aspect of the criminal process and their rights, including that they could bond out.<sup>127</sup>

Because people detained receive no notice from the court or detention facility of who their court-appointed lawyer is or whether someone has been appointed at all, they frequently resort to calling non-profit organizations to try to determine whether they have a lawyer and who it might be. The problem is so endemic that LPDO has established a separate toll-free phone number exclusively for OLS detainees to call and inquire whether they have a lawyer yet and who that might be.<sup>128</sup> Hundreds of people arrested under OLS were detained without counsel and without charging documents for longer than state law allows them to be detained without being formally charged with a crime.<sup>129</sup>

Individuals detained at Briscoe and Segovia who have contacted the Texas Jail Project have consistently reported a lack of meaningful access to counsel. Of the detained individuals who have contacted the Jail Project, dozens have reported having never been assigned counsel. Many of those assigned counsel have never spoken with their lawyer.<sup>130</sup> Some have reported being held in jail for three months without ever speaking to counsel.<sup>131</sup> Of the 68 men in the Jail Project’s database, 47 men—69%—reported not having or being unaware of having an attorney.<sup>132</sup> Those who had not been assigned counsel reported being in jail for longer than two months.<sup>133</sup> The Jail Project staffer responsible for OLS detainee calls describes the men he has communicated with as “generally weary, scared, and defeated.”<sup>134</sup> He reports that at the detention

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<sup>125</sup> Jolie McCullough, *Migrants arrested by Texas in border crackdown are being imprisoned for weeks without legal help or formal charges*, Tex. Tribune, Sept. 27, 2021, <https://www.texastribune.org/2021/09/27/texas-border-migrants-jail/>.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> Operation Lone Star Indigent Defense, Lubbock Private Defenders Office, <https://www.lpdo.org/projects-8>.

<sup>129</sup> Compare Findell & Caldwell, *Texas Jails Fill With Migrants*, *supra* n. 11 (tallying time in detention under Operation Lone Star) with Tex. Code Crim. P. art. 17.151 (establishing mandatory release timelines).

<sup>130</sup> Decl. of Benjamin L. Drachman, attached as Exhibit 5, ¶ 6.

<sup>131</sup> *Id.* This is consistent with messages passed by people detained under Operation Lone Star to CNN on behalf of fellow detained individuals. One person told CNN that unrepresented people detained with him said, “Ask about us. Tell them we have 90 days, 80 days and we haven’t seen an attorney. We don’t know anything and here we are[.]” Rosa Flores, *Texas Gov. Greg Abbott’s Anti-Migrant Plan: Many Arrested, Many Detained, Few Prosecuted*, CNN, Oct. 25, 2021, <https://www.cnn.com/2021/10/24/us/texas-migrant-trespass-detentions/index.html>.

<sup>132</sup> Drachman Decl, ¶ 9.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*, ¶ 10.



facilities they are provided with no answers to their questions, and “generally no information is shared about the legal process.”<sup>135</sup>

At least one subset of 155 people arrested in Kinney County in August were forced to submit involuntary waivers of counsel at the magistration (the initial appearance).<sup>136</sup> The county judge, Tully Shahan, presided over the initial bail-setting hearings for the first several weeks of arrests in Kinney County.<sup>137</sup> Judge Shahan performed these hearings in groups, under a tree in a parking lot, using a sheriff’s deputy to interpret parts of the proceeding.<sup>138</sup> He required everyone to submit a waiver of appointed counsel in English, a language that most of those detained under the OLS trespass arrest program do not understand with fluency; the waiver had already been filled out by a county employee before the hearing began, and Judge Shahan did not provide the opportunity to change it.<sup>139</sup> Those who “submitted” a waiver were only able to request counsel weeks later, from the Briscoe prison unit, and then waited several more weeks to actually have an attorney appointed to represent them.<sup>140</sup>

### **C. Denial of Due Process, Including Unlawful Delays of Weeks or Months, in Criminal Proceedings**

Within this separate, makeshift criminal system, state and local agencies are failing to follow basic rules of criminal procedure and to protect the rights of those charged. Kinney and Val Verde County prosecutors denied due process guarantees by failing even to file charges for a huge number of people who were detained. For hundreds of people, that failure, in combination with severely dilatory appointment of counsel, resulted in weeks of detention past the date at which release was required.<sup>141</sup> Delays across the criminal process continue. Most recently, on November 30, 2021, the *Texas Tribune* reported that more than 90 men arrested under the OLS

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<sup>135</sup> *Id.*

<sup>136</sup> Jolie McCullough, *Thanks to local politics and a railroad, rural Kinney County accounts for most of Texas’ migrant arrests*, *Tex. Tribune*, Sept. 2, 2021, <https://www.texastribune.org/2021/09/02/texas-immigration-arrests-jail-kinney-county/>.

<sup>137</sup> See Tex. Judicial Branch, About Tex. Courts, <https://www.txcourts.gov/about-texas-courts/trial-courts/> (explaining, “The Texas Constitution provides for a county court in each of the 254 counties of the state, though all such courts do not exercise judicial functions. In the more populous counties, the county judge may devote his or her full attention to the administration of county government.”).

<sup>138</sup> Jolie McCullough, *Thanks to local politics and a railroad, rural Kinney County accounts for most of Texas’ migrant arrests*, *Tex.as Tribune*, Sept. 2, 2021, <https://www.texastribune.org/2021/09/02/texas-immigration-arrests-jail-kinney-county/>.

<sup>139</sup> Jolie McCullough, *Migrants arrested by Texas in border crackdown are being imprisoned for weeks without legal help or formal charges*, *Tex. Tribune*, Sept. 27, 2021, <https://www.texastribune.org/2021/09/27/texas-border-migrants-jail/>.

<sup>140</sup> Jolie McCullough, *Thanks to local politics and a railroad, rural Kinney County accounts for most of Texas’ migrant arrests*, *Tex. Tribune*, Sept. 2, 2021, <https://www.texastribune.org/2021/09/02/texas-immigration-arrests-jail-kinney-county/>.; Decl. of Benjamin L. Drachman, ¶¶ 6-7.

<sup>141</sup> Arelis Hernández et al., *Hundreds of migrants held for weeks without charges as Texas’s border crackdown overwhelms justice system*, *Wash. Post*, Sept. 30, 2021, <https://www.washingtonpost.com/nation/2021/09/30/texas-migrant-arrests-release/>.

trespass program had their first court date canceled because two Kinney County officials tested positive for COVID-19.<sup>142</sup> An October press release by Kinney County even referred to “the piles of cases that have stacked up as a result of Operation Lone Star.”<sup>143</sup>

### 1. Failure to Timely File Charges

Texas law requires prosecutors to file charges within a certain timeframe, the number of days varying depending on the classification of the charge, or to allow the person to be released on a personal bond if charges have not been filed within the timeframe.<sup>144</sup> Alternatively, prosecutors can allow the bond to be reduced to an amount affordable for the defendant.<sup>145</sup> As University of Texas law professor Jennifer Laurin recently put it, the goal of this law is to protect criminal defendants’ right to a speedy trial,<sup>146</sup> a fundamental aspect of due process.<sup>147</sup> While trespassing is typically a Class B misdemeanor, for which state law requires the filing of charges within fifteen days, with enhancement to a Class A misdemeanor—as may occur if the alleged offense allegedly took place in a declared disaster area—prosecutors argue that state law extends the filing deadline to thirty days.<sup>148</sup> Those detained pursuant to OLS must therefore be released either on bond or by a reduced bail amount if the state is not prepared to prosecute within 15 or, at most, 30 days.<sup>149</sup>

Yet, several hundred individuals arrested under the OLS trespass program were detained far past either filing deadline. By September 27, 2021, Brent Smith, the Kinney County misdemeanor prosecutor, had filed charges against, at most, 75 people out of over 700 who had been arrested by Kinney County under the OLS trespass program and were still detained.<sup>150</sup> A

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<sup>142</sup> Jolie McCullough, *Coronavirus shuts down legal proceedings in latest misstep for Texas border crackdown*, Tex. Tribune, Nov. 30, 2021, [https://www.texastribune.org/2021/11/30/texas-migrants-arrests-coronavirus/?mc\\_cid=be5170f623&mc\\_eid=612589b377](https://www.texastribune.org/2021/11/30/texas-migrants-arrests-coronavirus/?mc_cid=be5170f623&mc_eid=612589b377).

<sup>143</sup> Press Release, Kinney County Attorney, *supra* n. 109.

<sup>144</sup> Tex. Code Crim. Proc. art. 17.151; *Ex Parte Gill*, 413 S.W.3d 425 (Tex. Crim. App. 2013) (holding that the judge abused his discretion when he failed to comply with art. 17.151).

<sup>145</sup> *See id.* Presumably, that would also include a personal bond if a judge has determined the person is indigent as is the case with the majority, if not the entirety, of the people who have been arrested as part of Operation Lone Star.

<sup>146</sup> Jolie McCullough, *After Delay, Texas to Begin Releasing Migrants Held in Violation of State Law under Gov. Greg Abbott’s Border Crackdown*, Tex. Tribune (Oct. 1, 2021), <https://www.texastribune.org/2021/10/01/texas-migrants-jail-greg-abbott/>.

<sup>147</sup> *Barker v. Wingo*, 407 U.S. 514, 515 (1972) (citing *Kloper v. North Carolina*, 386 U.S. 213 (1967)).

<sup>148</sup> Tex. Penal Code § 30.05 (criminal trespass); Tex. Penal Code § 12.50 (enhancement for committing a crime in a declared disaster area). Governor Abbott declared and continues to renew and expand his declaration stating that all border counties are disaster areas. Proclamation, *Governor Abbott Renews Border Security Disaster Declaration in October 2021* (Oct. 28, 2021), <https://gov.texas.gov/news/post/governor-abbott-renews-border-security-disaster-declaration-in-october-2021>.

<sup>149</sup> Tex. Code of Crim Proc. art. 17.151(2), (3).

<sup>150</sup> Jolie McCullough, *Migrants Arrested by Texas in Border Crackdown are Being Imprisoned for Weeks without Legal Help or Formal Charges*, Tex. Tribune (Sept. 27, 2021), <https://www.texastribune.org/2021/09/27/texas-border-migrants-jail/>.

generous estimate places Smith’s charging rate at that time at slightly above 10 percent, meaning that the County likely violated state statute and the due process guarantees of the federal and state constitutions with respect to nearly 90 percent of the Kinney County OLS trespass arrests during this period.<sup>151</sup> Smith blamed the failure to file charges by the statutory deadline on missing information in the probable-cause affidavits, or other information necessary to make a charging decision. Neither explanation excuses Kinney County from its statutory obligations, nor acknowledges that the County could have complied with the statute by reducing the bail amount or requesting a personal bond.<sup>152</sup>

The lack of charges in these cases further frustrated detainees’ due process rights first because many of them sat waiting for a lawyer beyond the date at which they were entitled to release and then because the attorneys who finally were appointed were stymied from applying for clients’ release. Attorneys were told they could not file habeas petitions on behalf of their clients—simply because clerks had no case numbers for the unfiled misdemeanors, even though pretrial writs of habeas corpus are distinct legal matters. Criminal defense attorneys at Texas RioGrande Legal Aid persisted and filed an application for pretrial writs of habeas corpus on behalf of 300 clients they had been appointed to represent, each of whom had been arrested and detained beyond the statutory deadline without charges being filed—and thus for each of whom ongoing detention was illegal.<sup>153</sup> Though each person had been arrested and magistered for misdemeanor criminal trespass, not a single one had been formally charged.<sup>154</sup> After the writs were filed, Val Verde and Kinney County prosecutors agreed to the release of 243 people who had not been charged at either the 15- or 30-day mark.<sup>155</sup> The district judge granted the

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<sup>151</sup> See Hernández et al., *Hundreds of Migrants Held for Weeks Without Charges as Texas’s Border Crackdown Overwhelms Justice System*, Wash. Post, *supra* n. 141.

<sup>152</sup> *Id.*

<sup>153</sup> Verified Application for Pretrial Writs of Habeas Corpus, Ex Parte Augustin Chavarria-Urbe, et al., Cause 5121 (63rd Judicial Dist. Sept. 22, 2021). When release was ordered at the September 28 hearing, petitioners had been detained between 29 and 60 days. *Id.* At the hearing, petitioners took the stance that they were entitled to release at 15 days and Kinney County argued that the offense had already been enhanced so the petitioners were being held under the Class A misdemeanor criminal offense of trespass. District Judge Andrade agreed with the County and found prosecutors had 30 days to file charges. Jolie McCullough, *Texas Court Orders Release of More than 200 Migrants Imprisoned in Gov. Greg Abbot’s Border Security Clampdown*, Tex. Tribune (Sept. 28, 2021), <https://www.texastribune.org/2021/09/28/texas-migrants-prison-release/>. The distinction was ultimately irrelevant for these petitioners, however, because of the amount of time that had passed between filing and the hearing.

<sup>154</sup> Verified Application for Pretrial Writs of Habeas Corpus at 2, Ex Parte Augustin Chavarria-Urbe, et al., Cause 5121 (63rd Judicial Dist. Sept. 22, 2021).

<sup>155</sup> Jolie McCullough, *Texas Court Orders Release of More than 200 Migrants Imprisoned in Gov. Greg Abbot’s Border Security Clampdown*, Tex. Tribune (Sept. 28, 2021), <https://www.texastribune.org/2021/09/28/texas-migrants-prison-release/>. Based on the agreements with county prosecutors, people arrested in Val Verde County were to be released after 15 days and people arrested in Kinney County were to be released after 30 days. Jolie McCullough, *After Delay, Texas to Begin Releasing Migrants Held in Violation of State Law Under Gov. Greg Abbott’s Border Crackdown*, Tex. Tribune (Oct. 1, 2021), <https://www.texastribune.org/2021/10/01/texas-migrants-jail-greg-abbott/>.

petitioners' motion for release on no-cost bond, agreeing that prosecutors were required to file charges within the statutory limit and had not done so in the vast majority of cases.<sup>156</sup> This hearing, and the eventual releases, provided relief for a portion of those who had experienced weeks and months of denial of due process and loss of liberty in this shadow criminal system. Despite this public loss on a grand scale, prosecutors for Kinney County continue to fail to file charges entirely in some cases.<sup>157</sup>

## 2. Deficient Charging Documents Lacking Essential Information Regarding Charges

In cases in which Kinney County prosecutors *are* filing charges, a related issue—which also has due process implications—of filing deficient charging documents without essential information has emerged.<sup>158</sup> Defense attorneys have challenged many of the charging documents filed by Kinney County prosecutors for lacking necessary information, such as the location of the trespass, entirely, or for only including vague descriptions.<sup>159</sup> In some cases, the deficient charging documents forced prosecutors to dismiss the cases entirely, though not until the men arrested in those cases were detained and deprived of liberty for months without a court hearing.<sup>160</sup>

The state has provided funding for Border Prosecution Unit (BPU) Embedded prosecutors to supplement the local prosecutorial staff.<sup>161</sup> These additional prosecutors have not necessarily made the wheels of justice turn any faster, and in fact their addition to the prosecutorial team has slowed it down at times. The rotating list of prosecutors has made it difficult for defense attorneys to know who to contact and can delay urgent communications like bond negotiations.<sup>162</sup> In a hearing on the morning of December 13, BPU prosecutors James Sales and Laurie English were unprepared to respond to a writ properly filed by a defense attorney in

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<sup>156</sup> *See id.*

<sup>157</sup> Jolie McCullough, *In Latest Blunder, Charges Dropped Against Migrants Arrested in Texas Governor's Border Crackdown Because of Faulty Paperwork*, Tex. Tribune (Nov. 4, 2021), <https://www.texastribune.org/2021/11/04/texas-border-migrants-charges-dropped/> (reporting on thirty dismissed cases and an unknown number of releases on November 2 because no charges had been filed within thirty days).

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> Charlotte Cuthbertson, *In Pursuit of a Secure Border: Small Texas County Leads Charge Against Border Crime* (Nov. 11, 2021), Epoch Times, [https://www.theepochtimes.com/in-pursuit-of-a-secure-border-small-texas-county-leads-charge-against-border-crime\\_4084276.html](https://www.theepochtimes.com/in-pursuit-of-a-secure-border-small-texas-county-leads-charge-against-border-crime_4084276.html); Office of the Texas Governor, Border Programs (<https://gov.texas.gov/organization/hsgd/border-programs>) (summarizing the Border Prosecution Unit).

<sup>162</sup> Jolie McCullough, *Coronavirus shuts down legal proceedings in latest misstep for Texas border crackdown*, Tex. Tribune (Nov. 30, 2021), [https://www.texastribune.org/2021/11/30/texas-migrants-arrests-coronavirus/?mc\\_cid=be5170f623&mc\\_eid=612589b377](https://www.texastribune.org/2021/11/30/texas-migrants-arrests-coronavirus/?mc_cid=be5170f623&mc_eid=612589b377).

November.<sup>163</sup> Though Mr. Sales and the defense attorney were in regular communication, the defense attorney had not been informed Mr. Sales would be handling hearings on December 13 and had not known to send him courtesy copies of writs filed for that day, and the Kinney County Attorney's Office had forwarded the relevant writ to Mr. Sales and Ms. English only after court had already begun. After a recess to confer on the writ, Mr. Sales said, "I am only a minion," before deferring to his colleague, Ms. English, who said she was on the same footing as Mr. Sales and made a brief argument that included a request for more time to gather a witness. The BPU prosecutors are also contributing to other systemic due process violations, such as the aforementioned filing of faulty charging documents.<sup>164</sup>

### **3. Irregular Judicial Assignments, Including the Kinney County Judge's Improper Purported Removal of Judges**

The irregularities in this system extend even to the judicial assignments process and the identity of the judges themselves. The state courts reassigned judges to process, on dockets separate from ordinary county misdemeanor cases, OLS trespass arrest cases in the two counties in which the arrests occur, Val Verde and Kinney. In Kinney County, in the face of unfiled charges and speedy trial violations, those judges have granted motions for release. Kinney County officials have grown dissatisfied, and, in recent days, County Judge Shahan, who has repeatedly invoked white supremacist tropes and expressed gratitude for white supremacist militias,<sup>165</sup> has begun—outside of the process provided for by Texas law and beyond the powers given to him—to refashion the bench as he sees fit by illegally replacing visiting judges.

What started as a funneling of judges to border counties to handle OLS trespass cases has now transmuted into a power grab by Judge Shahan. Judge Shahan's actions in seeking to remove duly-appointed visiting judges with whom he disagrees and instead seat his preferred replacements threaten to undermine the independence of the judiciary in OLS trespass cases, and other cases. Texas law vests the power to reassign multiple judges to handle cases in counties with a backlog of cases in two people: the Chief Justice of the Supreme Court and the Presiding

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<sup>163</sup> All information from the December 13 hearing is based on statements made on the record by officers of the court. The court proceedings began at approximately 9:30 a.m. CT on December 13 and were broadcast via a livestream that is not made available once the court proceedings have concluded. 63rd District Court, 63rd District Court's Personal Meeting Room, [https://www.youtube.com/watch?app=desktop&v=9ophJ\\_cT-Ms](https://www.youtube.com/watch?app=desktop&v=9ophJ_cT-Ms).

<sup>164</sup> Jolie McCullough, *In Latest Blunder, Charges Dropped Against Migrants Arrested in Texas Governor's Border Crackdown Because of Faulty Paperwork*, Tex. Tribune (Nov. 4, 2021), <https://www.texastribune.org/2021/11/04/texas-border-migrants-charges-dropped/> (reporting on thirty dismissed cases and an unknown number of releases on November 2 because no charges had been filed within thirty days).

<sup>165</sup> See *infra* VI.A, C, VII.B.



Judge of the administrative judicial region where the backlogged county is located.<sup>166</sup> A county judge, by contrast, may appoint one visiting judge to handle cases when county dockets are overstretched.<sup>167</sup> If the county judge seeks to appoint a visiting judge to a pending case, they must show good cause.<sup>168</sup> Under these circumstances, the parties are entitled to notice and a hearing.<sup>169</sup> Pursuant to this statutory scheme, in July 2021, the Chief Justice of the Supreme Court of Texas assigned dozens of judges to conduct magistration in border counties.<sup>170</sup> Then, in August and September 2021, the presiding judge of the relevant administrative judicial region—Judge Stephen Ables—assigned three judges to hear misdemeanor cases for one year in Kinney County.<sup>171</sup> Kinney County Judge Shahan did not seek to appoint a judge. Confronted with mass civil rights violations, the three visiting judges appointed by Judge Ables granted release in a number of cases.<sup>172</sup> On December 7, 2021, Kinney County Attorney Brent Smith filed an Application for Writ of Prohibition and Motion for Stay of Proceedings Below, referencing the visiting judges’ decisions in favor of detained people and seeking to prevent all three from granting any further relief in pending cases.<sup>173</sup> The same day, before any decision had been issued on the Writ, County Judge Shahan, citing neither any authority nor grounds showing good cause, purported to unilaterally relieve the visiting judges appointed by Judge Ables and cancel the court dates scheduled before them.<sup>174</sup> He did so while claiming paradoxically that the county

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<sup>166</sup> Tex. Gov’t Code §§ 74.052, 74.054, 74.056, and 74.057. The duration of the assignment is dictated by the terms of the assignment order. See *Mangone v. State*, 156 S.W.3d 137, 139–40 (Tex. App.—Fort Worth 2005, pet. ref’d).

<sup>167</sup> Tex. Gov’t. Code § 26.024(a).

<sup>168</sup> Tex. Gov’t Code § 26.022(a).

<sup>169</sup> Tex. Gov’t Code § 26.022(b). These rules apply in counties where there are no statutory county courts and all duties of the county court rest with the county judge. Tex. Gov’t Code. § 26.021.

<sup>170</sup> Judicial Assignments for Proceedings under Article 15.17, Code of Criminal Procedure, Misc. Docket 21-9080, (Tex., July 20, 2021), <https://www.txcourts.gov/media/1452518/219080.pdf>.

<sup>171</sup> Presiding Judge Ables’ assignment orders for Schild, Torres, Wright, Exhibit 8.

<sup>172</sup> Findell & Caldwell, *Texas Jails Fill With Migrants*, *supra* n. 11; Jolie McCullough, *Hundreds of migrants accused of trespassing languish in Texas prisons. A county judge’s new approach might prolong their detention*, Tex. Tribune (Dec. 10, 2021), <https://www.texastribune.org/2021/12/10/texas-border-security-migrant-prisons/>

<sup>173</sup> Application for Writ of Prohibition and Motion for Stay of Proceedings Below, *In re State ex rel. Brent Smith*, Ct. of Crim. App. Tex., WR-93, 354-01 (Dec. 7, 2021), at 1-2, 5-6, attached as Exhibit 6. In the Application for a Writ of Prohibition and Motion for Stay of Proceedings Below, Smith fails to supply either an account of occurrences or documents from any individual case to justify the issuance of a writ or imposition of a stay. Devoid of facts, the filing fails to satisfy the threshold requirements for a petition seeking extraordinary relief. See Tex. R. App. P. 52.3(g).

<sup>174</sup>Shahan Order and Letter, attached as Exhibit 7. This purported termination clearly conflicted with the one-year duration specified in each of the visiting assignment orders issued by Presiding Judge Ables. Since the period of these three judges’ assignment had not elapsed, not even Judge Ables, let alone Judge Shahan, had authority to terminate their authority over their cases. See *Beard v. Beard*, 49 S.W.3d 40, 50 (Tex. App.—Waco 2001, pet. denied) (finding no provision “that authorizes a presiding judge to remove an assigned judge or to terminate his authority, once given,” asserting that the assignment order controls as to the parameters of the assignment, and noting that to give the presiding judge authority to replace one



was handling a larger volume of cases than it could hear without outside help.<sup>175</sup> After arrogating to himself the power to remove the duly assigned visiting judges, Judge Shahan then apparently handpicked not one, but five judges to serve in Kinney County.<sup>176</sup> Judge Ables explained that he believed these five judges to be “friends” of Judge Shahan whom Shahan thought “underst[ood] West Texas.”<sup>177</sup> Judge Shahan’s actions subvert the distribution of judicial assignment power under Texas law, threaten to subject detained people to still further delays, and severely undermine the bench’s integrity and appearance of impartiality. These outrageous developments only reinforce the dire need for federal investigation.

#### **D. Failure to Timely Release**

Irregular delays in proceedings persist even after individuals are ordered released. The Kinney County Sheriff’s Office and TDCJ have repeatedly failed to timely release OLS arrestees. Time and again, those who have been granted personal bond, paid bail, or had their cases dismissed have remained confined in the absence of any legal authority for their detention and, in at least one instance, in the face of a court order mandating release. In short, in this separate system, unlawful prolonged detention is routine.

Across the course of OLS, judges have granted personal bonds and dismissed cases in large numbers, entitling detainees to release.<sup>178</sup> Still more detainees have had their bail paid, giving them the right to go free. But legal entitlement to release has only resulted in further detention for many of them. To try to effectuate release, defense attorneys who have learned that their clients remain detained have been forced to shuttle for days between the County Sheriff’s Office; the newly devised Val Verde Processing Center; and the TDCJ facilities, Briscoe and Segovia.<sup>179</sup> In many cases, defense attorneys’ release advocacy has been stymied not just by

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assigned judge with another at any time would “undermine the judicial independence of all assigned judges”).

<sup>175</sup> *Id.*

<sup>176</sup> Jolie McCullough, *Hundreds of Migrants Accused of Trespassing Languish in Texas Prisons. A county judge’s new approach might prolong their detention*, Tex. Tribune (Dec. 10, 2021).

<sup>177</sup> *Id.* The rationale of West Texas familiarity is specious for at least two reasons. First, since all judges across the state are charged with applying the United States Constitution and Texas Law, “underst[anding] West Texas” has no bearing on a visiting judge’s ability to discharge that judge’s duties. Second, one of the three judges Judge Shahan seeks to remove, Kitty Schild, is herself from El Paso, in West Texas. *See* Assignment Order by Judge Ables, attached as Exhibit 8 (describing her regular seat as “El Paso County Court at Law No. 4”). Judge Shahan’s reason for wanting to appoint his chosen five judges, then, can presumably be reduced to their friendship with him and their shared beliefs about West Texas.

<sup>178</sup> *Supra* Sections V, V.c.1.

<sup>179</sup> Respondents’ Response in Opposition to Relator’s Emergency Petition for Writ of Mandamus, at 3–4, *In re* [REDACTED], *Relators*, No. 21-0918, 2021 WL 5177611 (Tex. Oct. 25, 2021) (No. 21-0918) (defense counsel submitted an affidavit attesting that she spent eight days communicating with the Sheriff’s Office, Processing Center, and TDCJ Facility, trying in vain to secure clients’ release after issuance of personal bonds).

OLS' improvised and convoluted custodial arrangements, but by misinformation from TDCJ as to their clients' release status. Attorneys who have won personal bonds for their clients report having been told by TDCJ that their clients had been released from custody only to find, days later, that those same clients had in fact been transferred to another TDCJ facility, with no plan for their release.<sup>180</sup>

In the most pointed instance, even a court order mandating the release of a man detained under the OLS trespass program to his attorney did not suffice to prevent his transfer to the custody of federal immigration officials without a valid federal immigration detainer or indeed any authority at all to continue detention. In direct defiance of a court order to release him, with criminal charges having been dismissed three days before, prison officials instead transported the man to CBP custody even as his lawyer waited outside the prison facility to meet him.<sup>181</sup>

In this system, even once those arrested have surmounted the considerable obstacles to having counsel appointed, the procedural requirements of the Texas Criminal Code followed, and release ordered, their freedom is not secured. Rampant disregard for the most basic right of people arrested under the OLS trespass program—to be free from illegal confinement—and for the authority of the courts calls out for federal intervention.

#### **E. Egregious Detention Conditions in the Separate Criminal System for Noncitizens**

Unlike ordinary pretrial detention, those arrested under the OLS trespass program are detained at Briscoe and Segovia, already troubled state prisons converted to jails specifically for this program. In fact, TDCJ prisoners serving prison sentences remain at Briscoe.<sup>182</sup> Briscoe is particularly notorious for its terrible conditions. In July 2020, prisoners rioted due to poor conditions, including understaffing and the inability to make telephone calls.<sup>183</sup> In November 2021, TDCJ officers deployed chemical agents against individuals detained at Briscoe during unrest reportedly prompted by poor conditions and a lack of court access. TDCJ informed a journalist that this occurred “in a building separate from where the illegal detainees are being held.”<sup>184</sup>

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<sup>180</sup> Affidavit of Neha Dubey, attached as Exhibit 8.

<sup>181</sup> Suzanne Gamboa, *Texas Prison Officials Stall Release of Migrants Despite Judge's Order*, NBC (Oct. 1, 2021), <https://www.nbcnews.com/news/latino/texas-prison-officials-stall-release-migrants-judges-order-rcna2518>; Motion for Finding of Contempt, at 1–3, *Ex Parte Texas Department of Criminal Justice, Brad Coe (Kinney Co. Sheriff), Maria Ramirez (Dolph Briscoe Unit Warden)*, Department of Public Safety, Cause No. 5118, (63rd Dist. Ct., Kinney Co., Tex., Oct. 20, 2021), attached as Ex. 9.

<sup>182</sup> Nov. 18 Operation Lone Star Briefing, *supra* n. 15, ~ 9:00.

<sup>183</sup> Keri Blakinger, *Breaking Out With A Bar of Soap*, The Marshall Project, Aug. 11, 2020, <https://www.themarshallproject.org/2020/08/11/breaking-out-with-a-bar-of-soap>.

<sup>184</sup> Keri Blakinger (@keribla), Twitter (Nov. 16, 2021, 10:25 AM), <https://twitter.com/keribla/status/1460645209335808006>.

As of November 18, 1,071 people were detained under Operation Lone Star, with 535 at Briscoe and 536 at Segovia.<sup>185</sup>

The Texas Jail Project has gathered facts regarding the egregious prison conditions from about 68 detained people at Briscoe and Segovia and their family members.<sup>186</sup> Benjamin Drachman, the Jail Project staffer who speaks with detainees and family members, concludes “that people in Briscoe and Segovia are desperate,” explaining that they “had not received any help for months and were eager to talk to [him]. Some of the stories are traumatizing.”<sup>187</sup> In addition, seven people arrested under OLS have provided declarations detailing similarly atrocious conditions.<sup>188</sup> Food, medical care, and telephone access are all inadequate. Detained people have also reported racist and xenophobic remarks by prison guards.

### 1. Inadequate Food for Detained People

Detained individuals report inadequate food at OLS trespass arrest jails. The Texas Commission on Jail Standards mandates, “except in emergency situations, meals shall be served in accordance with a written menu approved and reviewed annually for compliance with nationally recognized allowances for basic nutrition . . . This approval and review shall be documented and should be performed by a licensed or provisional licensed dietitian.”<sup>189</sup> Care should also be taken to ensure that hot foods are served reasonably warm and cold foods are served reasonably cold.<sup>190</sup>

Nevertheless, those detained have reported that the food at Briscoe and Segovia is “insufficient,” “often rotten,” and “served at inconsistent and inappropriate times.”<sup>191</sup> They have reported that they are served small, often spoiled portions of beans and that they rarely receive meat. Detained people have reported being served raw food,<sup>192</sup> frozen food,<sup>193</sup> and even food with worms.<sup>194</sup> Diabetic people have been especially harmed by this insufficient diet. One detained person even reported that he lost 15 kilos—or about 33 pounds—in two months,<sup>195</sup> and another detained person stated that he lost 16 pounds during the 42 days he was detained.<sup>196</sup>

Furthermore, the Texas Commission on Jail Standards requires that food is served “three times in any 24-hour period.”<sup>197</sup> In addition, “[n]o more than 14 hours shall pass between meals

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<sup>185</sup> Nov. 18 Operation Lone Star Briefing, *supra* n. 15, ~ 10:00. This total may include individuals detained for smuggling or other non-trespass crimes at Briscoe.

<sup>186</sup> *See generally* Drachman Decl.

<sup>187</sup> *Id.* at ¶ 10.

<sup>188</sup> A.J.S.A., A.M., A.V.O., G.G.S.C., O.A.C.-G., R.D.A., and Z.A.M. Decls.

<sup>189</sup> 37 Tex. Admin. Code § 281.3.

<sup>190</sup> *Id.* § 281.5.

<sup>191</sup> Drachman Decl., ¶ 9. *See* O.A.C.-G. Decl., ¶ 18; Declaration of R-D-A, ¶ 15(b), (c).

<sup>192</sup> *Id.*; Declaration of A.J.S., ¶ 12.

<sup>193</sup> Declaration of A.J.S. ¶ 12.

<sup>194</sup> Declaration of Z.A.M., ¶ 14.

<sup>195</sup> *Id.* *See also* Declaration of GGSC, ¶ 10.

<sup>196</sup> Declaration of Z.A.M., ¶ 14.

<sup>197</sup> 37 Tex. Admin. Code § 281.1.

without supplemental food being served.”<sup>198</sup> However, detained people have generally reported more than 14 hours between meals, with breakfast regularly being served between 3 and 4 AM, lunch sometimes skipped, and dinner provided as late as 9 PM.<sup>199</sup> On a day where lunch is skipped and dinner is not served until 9 PM, at least 17 hours pass between meals, and detained people report no supplemental food being served. Many have reported that they are hungry a lot of the time.<sup>200</sup> This reported practice blatantly violates the Texas Commission on Jail Standards requirement, and detained people fear retaliation if they speak up. When one man complained about the 3 AM breakfast, guards struck him and put him in segregated housing with no windows.<sup>201</sup>

Moreover, the facilities are unsanitary. The Texas Commission on Jail Standards requires “the maintenance of all . . . utensils with which food or drink comes into contact in a clean condition and in good repair.”<sup>202</sup> Detained people have reported unwashed cutlery and no access to disinfectant,<sup>203</sup> which is yet another violation of Commission standards—further evidence of the discriminatory nature of OLS.

## 2. Inadequate Medical Care

Detained individuals report inadequate medical care at Briscoe and Segovia. According to the Texas Commission on Jail Standards, facilities “shall provide medical, mental, and dental services in accordance with the approved health services plan.”<sup>204</sup> Each health plan shall:

- (1) provide procedures for regularly scheduled sick calls;
- (2) provide procedures for referral for medical, mental, and dental services;
- (3) provide procedures for efficient and prompt care for acute and emergency situations;
- (4) provide procedures for long-term, convalescent, and care necessary for disabled inmates; . . .<sup>205</sup>

However, the Texas Jail Project has concluded from its intakes that “[c]are for illness and injuries is essentially nonexistent.”<sup>206</sup> Those detained under the OLS trespass program have reported “lack of attention to pinkeye, lacerations, diabetes, and kidney-related illness.”<sup>207</sup> Many have also reported being denied medication. For example, in November 2021, the son of a person detained at Briscoe called the Texas Jail Project and reported that his 62-year-old father had kidney problems, and he, like many other detained peoples, had not received medical care,

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<sup>198</sup> *Id.*

<sup>199</sup> Declaration of Benjamin L. Drachman, ¶ 9.

<sup>200</sup> Z.A.M. Decl., ¶ 14.

<sup>201</sup> *Id.*

<sup>202</sup> 37 Tex. Admin. Code § 279.1(6).

<sup>203</sup> Drachman Decl., ¶ 9.

<sup>204</sup> 37 Tex. Admin. Code § 273.1.

<sup>205</sup> *Id.* § 273.2.

<sup>206</sup> Drachman Decl., ¶ 9.

<sup>207</sup> *Id.*

despite requests.<sup>208</sup> One individual reported that they were denied prescribed depression medication for an entire month in Briscoe<sup>209</sup> and another stated that they were denied HIV medication.<sup>210</sup> Detained individuals lack access to information and do not know where to take medical complaints.<sup>211</sup> Even for those able to request medical care via written request, they have had to wait up to one week for medical care. When they are examined by medical staff, there is no follow-up.<sup>212</sup> Sometimes doctors' orders, such as ensuring pills are taken with a snack or at medication administration times, are reportedly not followed.<sup>213</sup> And despite the COVID-19 pandemic, not all staff wear masks. One individual jailed under the OLS trespass arrest program described a COVID-19 outbreak in his dorm "because the guards failed to separate sick people."<sup>214</sup>

### 3. Inadequate Telephone Access

Those detained under the OLS trespass arrest program report inadequate phone access. The Texas Commission on Jail Standards states that "[a] telephone and telephone directory shall be available for inmates' use within the processing area."<sup>215</sup> In addition, "[t]he inmate should be advised that he will be allowed to contact any attorney upon reasonable request."<sup>216</sup>

But people detained at Briscoe and Segovia have reported being allowed only one phone call per day.<sup>217</sup> Some have stated that they were only allowed to make phone calls for "two minutes every four days"<sup>218</sup> or "around one to two times a week."<sup>219</sup> They were not given the opportunity to make more than one phone call at a time, and this rule was enforced even when it came to contacting attorneys.<sup>220</sup> Further, "there is no mechanism to purchase phone time or additional funds into a phone account."<sup>221</sup>

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<sup>208</sup> *Id.* ¶ 6. *See also* A.M. Decl., ¶ 23-24 (explaining that mental health treatment was not provided after detained person requested help and that adequate treatment for a kidney stone was also denied); R-D-A Decl., ¶ 24 (detailing four written medical requests that went unanswered).

<sup>209</sup> A.J.S.A. Decl., ¶ 4.

<sup>210</sup> Declaration of A.V.O., ¶ 9.

<sup>211</sup> *Id.* ¶ 9; *see also* Declaration of AVO ¶ 19.

<sup>212</sup> 37 Tex. Admin. Code § 273.2(1).

<sup>213</sup> Declaration of A.V.O., ¶¶ 16-17.

<sup>214</sup> Declaration of O.A.C.-G, ¶ 21.

<sup>215</sup> 37 Tex. Admin. Code § 265.7.

<sup>216</sup> *Id.* § 265.8.

<sup>217</sup> *Id.*

<sup>218</sup> Declaration of Z.A.M., ¶ 18.

<sup>219</sup> Declaration of Z.A.M., ¶ 13.

<sup>220</sup> *Id.*

<sup>221</sup> Declaration of Benjamin L. Drachman, ¶ 9.

#### 4. Racist and Xenophobic Language from Guards

People detained under the OLS trespass program have reported that guards used racist and xenophobic language. This includes guards using slurs—for example, reportedly calling detained people *mojados* (wetbacks)<sup>222</sup> and *mugrosos* (dirty people)<sup>223</sup>—and saying to them that they should “go back to [their] country”<sup>224</sup> and that they were “invading” the United States.<sup>225</sup> A person who was detained at Briscoe stated that at the beginning of breakfast, they once heard an officer say that “the monkeys are coming in.”<sup>226</sup> One person who was detained at Briscoe noted that they didn’t hear “officers speak this way to the other inmates in the prison who were not immigrants.”<sup>227</sup> Another person who was detained observed, “the other inmates at the prison who weren’t immigrants were treated differently than we [immigrants] were. The guards respected them more.”<sup>228</sup>

Detained individuals report that “the detainees that were singled out for the worst treatment were the ones with the darkest skin, like the Senegalese men and black Hondurans.”<sup>229</sup> Guards reportedly referred to Black immigrants from Honduras, Cuba, and Senegal as “monkeys” and “pinche negros” (f\*\*\*ing Black people).<sup>230</sup>

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No one should be detained in these inhumane and disturbing conditions—including Black and Brown migrants. Nor should anyone be subjected to the racist and anti-immigrant animus evinced by guards at Briscoe.

#### VI. State and Local Decision-Makers Have Evinced Extremist Anti-Immigrant Animus

State and local officials implementing the OLS trespass arrest policy have grounded their actions in racist and anti-immigrant rhetoric. This includes the same rhetoric that not only has undergirded prior anti-immigrant governmental actions in Texas but also has led to deadly violence, including the white supremacist mass murder at an El Paso Wal-Mart in 2019.

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<sup>222</sup> Declaration of Z.A.M., ¶ 11; Declaration of O.A.C.-G., ¶ 14; Declaration of A.M., ¶ 16(c).

<sup>223</sup> Declaration of A.V.O., ¶ 10.

<sup>224</sup> Z.A.M. Decl., ¶ 11.

<sup>225</sup> A.J.S. Decl., ¶ 11; *see also* R.D.A. Decl., ¶ 14.

<sup>226</sup> A.V.O. Decl., ¶ 10.

<sup>227</sup> G.G.S.C. Decl., ¶ 9; *see also* A.M. Decl., ¶ 17.

<sup>228</sup> G.G.S.C. Decl., ¶ 9.

<sup>229</sup> O.A.C.-G. Decl., ¶ 15.

<sup>230</sup> A.M. Decl., ¶ 16(c).



**A. State and Local Leadership Has Used Racist, Nativist Rhetoric of “Invasion” that Echoes Extremist Rhetoric Used to Justify Past White Supremacist Violence in Texas**

Texas state and local officials regularly use white supremacist rhetoric of invasion to justify their anti-immigrant actions, including the OLS trespass arrest program. For example, Kinney County officials have repeatedly relied on this rhetoric while linking migration to Texas’s war of independence from Mexico in the 1830s. The drumbeat of anti-immigrant rhetoric in the county traces back at least to a local disaster declaration issued in April.

Kinney County Judge Tully Shahan and County Attorney Brent Smith issued a local declaration of disaster due to migration on San Jacinto Day, the day of the final battle of Texas’ war with Mexico—citing the choice of San Jacinto Day as significant.<sup>231</sup> As the local disaster declaration put it, “Today in Kinney County we are declaring a Local State of Disaster due to the thousands of illegal aliens invading our great State of Texas...Today, 185 years later, Texas is once again under siege, as thousands upon thousands of illegal aliens invade our State through our border with Mexico.”<sup>232</sup> The declaration stated, “The ongoing border crisis has resulted in thousands of illegal aliens invading Kinney County...”<sup>233</sup> Officials have pushed the false and demeaning narrative that migration across the Texas-Mexico border is not a humanitarian challenge but an “invasion.” County leadership also termed migration a “siege.” Both the Kinney County website and a website run by the county soliciting funds to pay for private contractors to deter migrants<sup>234</sup> announce, “KINNEY COUNTY IS DRAWING A LINE IN THE SAND! WILL YOU CROSS IT AND STAND WITH US?”<sup>235</sup> The “line in the sand” is a reference to the story, well known in Texas, that the Texas commander of the Alamo drew a line in the sand with his sword and called on his soldiers to cross it to defend the Alamo until death.<sup>236</sup> In Texas’ sociopolitical context, these statements by Kinney County officials are thinly veiled white supremacist remarks.

Kinney County Attorney Brent Smith frequently describes the humanitarian situation in the county as “an invasion” by Latinx and Black migrants that requires a response of force and

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<sup>231</sup> Kinney County Judge Tully Shahan, *Declaration of Local State of Disaster*, April 21, 2021, <https://cokinneytx.civicweb.net/document/16670/3.e%20Declaration%20of%20Local%20State%20of%20Disaster%20for%20Kin.pdf?handle=B7DFA16D4B5F44CE9DBFA7466939E756>; Brent Smith, *Op-Ed: Texas, as a Sovereign State, Has the Right to Defend Its Own Borders; Here’s What Needs to Happen Now*, San Marcos Corridor News, (June 26, 2021), <https://smcorridornews.com/op-ed-texas-as-a-sovereign-state-has-the-right-to-defend-its-own-borders-heres-what-needs-to-happen-now/> (Kinney County Attorney stating, “It is no coincidence that we waited to file [the disaster declaration] on San Jacinto Day”).

<sup>232</sup> *Id.*

<sup>233</sup> *Id.*

<sup>234</sup> Defend Our Borders, Kinney County Official Webpage (December 14, 2021), <https://defendourborders.org/> S

<sup>235</sup> *Id.*; see also Kinney County Website, <http://www.co.kinney.tx.us/>

<sup>236</sup> See, e.g., Randy Roberts & James S. Olson, *A Line in the Sand: The Alamo in Blood and Memory* (2001).

aggression. In promoting the local disaster declaration, Smith told local media, “We’re being invaded.”<sup>237</sup> On his personal Facebook page, Smith shared a post calling on Texans to take up arms. “It’s time to equip Texas Militias. It’s time to equip Texas citizens.... The federal government has abandoned Texas... The Haitian migrants have stated that they are ready for war. Are we?”<sup>238</sup> In another post, Smith shared an image of a U.S. Border Patrol agent on horseback using ropes as whips against a Haitian migrant in Del Rio, Texas. The image included text which read: “Del Rio’s Newest Hero.”<sup>239</sup> Mr. Smith has described “two different types of invasions that are going on,” one in “Val Verde County, where the Haitians were,” where people “want to claim asylum” and one in Kinney County where, purportedly, people do not want to claim asylum.<sup>240</sup> Mr. Smith explained that the County recently declared anew a state of disaster “with the amount of Haitians and caravans coming this way”--particularly evincing racist animus in his focus on Black Haitian migrants since the overwhelming number of those arrested for traveling through the county are Latinx.<sup>241</sup> These statements from the Kinney County Attorney are public expressions of racist, including anti-Black and anti-immigrant, ideas by the prosecutor for the county with by far the most arrests under Operation Lone Star.

Kinney County Judge Tully Shahan has also described migration as an “invasion,” including during public county meetings. During the opening prayer of a special Kinney County Commissioners Meeting, Judge Shahan prayed for, “Protection from the [pause] non-citizens coming our way.”<sup>242</sup> When a militia leader claimed at a county meeting that migration was an “invasion” and described the county as “a powder keg waiting to explode,” Judge Shahan reportedly told him, “You’re preaching to the choir.”<sup>243</sup>

Similarly, Val Verde County Sheriff Martinez testified on the trespass arrest program to the Texas House Appropriations Committee, “This crisis is not going to stay on the border. It’s going to affect all of us, all of us in the state of Texas and all of us in the United States. . . . Whatever gets through us, it’s coming to you all, to your constituents. . . . So the border’s

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<sup>237</sup> Vanessa Croix, *Kinney Co. officials issue disaster declaration, calling on state leaders for help*, CBS KENS5, April 21, 2021, <https://www.kens5.com/article/news/special-reports/at-the-border/kinney-co-officials-issue-disaster-declaration-calling-on-state-leaders-for-help/273-1ac31fd5-c37d-4221-8675-d201ab40f6d3>.

<sup>238</sup> Brent Smith, *Chad Prather Post*, Facebook (October 9, 2021), [https://www.facebook.com/permalink.php?story\\_fbid=10110887423143708&id=16717258](https://www.facebook.com/permalink.php?story_fbid=10110887423143708&id=16717258).

<sup>239</sup> Brent Smith, *Del Rio’s New Hero*, Facebook (September 21, 2021), [https://www.facebook.com/permalink.php?story\\_fbid=10110849118601318&id=16717258](https://www.facebook.com/permalink.php?story_fbid=10110849118601318&id=16717258).

<sup>240</sup> Gateway Pundit, *Kinney Co. TX Sheriff TX Takes Historic Action to Fight Back Against Illegal Invasion*, YouTube, Oct. 18, 2021, [https://www.youtube.com/watch?v=jiTvH3jOXzE&list=UUMaLetBcZ8fqsOIryB015og&index=4&ab\\_channel=GatewayPundit](https://www.youtube.com/watch?v=jiTvH3jOXzE&list=UUMaLetBcZ8fqsOIryB015og&index=4&ab_channel=GatewayPundit).

<sup>241</sup> *Id.*

<sup>242</sup> Kinney County Commissioners meetings are accessible through a live conference line and there are no public recordings of these meetings available. This note was made during a direct observation of the meeting held on October 25, 2021.

<sup>243</sup> Karen Gleason, *News – North Texas Militia Vows Protection for Kinney County*, The 830 Times (October 19, 2021), <https://830times.com/news-north-texas-militia-vows-protection-for-kinney-county/>.

basically, we're at the tip of the spear in fighting this crisis."<sup>244</sup> Sheriff Martinez specifically clarified that his testimony was "speaking for Val Verde County."<sup>245</sup> The "tip of the spear" is a war metaphor used in the military: it means the first to enter into combat. Kinney County Sheriff Brad Coe has also described his county as the "tip of the spear."<sup>246</sup> Sheriff Martinez's depiction of migrants as a threat coming to American communities and the two sheriffs' use of this war metaphor are additional examples of local officials' use of the racist, xenophobic rhetoric of invasion.

State officials have also used the racist language of invasion to describe migration. In rhetoric paralleling language used by the white supremacist killer in the El Paso Wal-Mart shooting, Texas Lieutenant Governor Dan Patrick claimed that "in 18 years if every one of them has two or three children, you're talking about millions and millions and millions of new voters" and that this is part of a purported "silent revolution" by Democrats to "take over our country without firing a shot."<sup>247</sup> Both Lieutenant Governor Patrick and Governor Abbott have used the rhetoric of invasion to justify measures such as the construction of a border wall.<sup>248</sup> Perhaps most alarmingly, State Representative Bryan Slaton told Kinney County residents at a meeting about border issues in May, "If your elected officials are not going to stand up and fight for what's right, maybe God is paving the way for you to step in, and for you to do it"--a veiled call to vigilantism.<sup>249</sup> Representative Slaton is a co-author of H.B. 9, the recently enacted border funding legislation.<sup>250</sup>

This rhetoric mirrors the vitriol that fueled the mass shooting in El Paso two years ago. In 2019, a white supremacist drove 10 hours across the state of Texas to a Wal-Mart in El Paso and opened fire with a weapon, killing 20 people and injuring many more.<sup>251</sup> Before the El Paso shooting, the shooter posted a manifesto online which stated: "...this attack is a response to the

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<sup>244</sup> Hearing on H.B. 9, *supra* n. 3, ~ 12:28.

<sup>245</sup> *Id.*

<sup>246</sup> *Kinney Co. TX Sheriff TX Takes Historic Action to Fight Back Against Illegal Invasion*, YouTube (Oct. 18, 2021), ~ 16:30, [https://www.youtube.com/watch?v=jiTvH3jOXzE&list=UUMaLetBcZ8fqsoIryB015og&index=4&ab\\_channel=GatewayPundit](https://www.youtube.com/watch?v=jiTvH3jOXzE&list=UUMaLetBcZ8fqsoIryB015og&index=4&ab_channel=GatewayPundit).

<sup>247</sup> James Barragán, *Dan Patrick warns democrats are allowing in immigrants for "silent revolution," mirroring language of far-right extremists*, *The Tex. Tribune* (Sept. 17, 2021), <https://www.texastribune.org/2021/09/17/texas-dan-patrick-immigrants-democrats-haitians>.

<sup>248</sup> Heidi Pérez-Moreno and James Barragán, *Critics denounce Greg Abbot and Dan Patrick's "invasion" rhetoric on immigration, saying it will incite violence*, *The Tex. Tribune* (June 17, 2021), <https://www.texastribune.org/2021/06/17/greg-abbott-dan-patrick-el-paso-invasion-immigration/>.

<sup>249</sup> Charlotte Cuthbertson, *Amid Federal Inaction, Texans Push for Control of Own Border*, *The Epoch Times* (June 10, 2021), [https://www.theepochtimes.com/amid-federal-inaction-texans-push-for-control-of-own-border\\_3849867.html](https://www.theepochtimes.com/amid-federal-inaction-texans-push-for-control-of-own-border_3849867.html).

<sup>250</sup> See *Tex. Legis. Online, Authors* (Aug. 19, 2021), <https://capitol.texas.gov/BillLookup/Authors.aspx?LegSess=872&Bill=HB9> (listing authors of HB 9).

<sup>251</sup> Tim Arango, Nicholas Bogel-Burroughs and Katie Benner, *Minutes Before El Paso Killing, Hate-Filled Manifesto Appears Online*, *The N.Y. Times* (Aug. 3, 2019), [nytimes.com/2019/08/03/us/patrick-crusius-el-paso-shooter-manifesto.html](https://www.nytimes.com/2019/08/03/us/patrick-crusius-el-paso-shooter-manifesto.html).

Hispanic invasion of Texas.”<sup>252</sup> The idea of an invasion at the border had been propagated by state officials and by then-President Donald Trump.<sup>253</sup> Federal officials are prosecuting the shooter for federal hate crimes due to national origin discrimination.<sup>254</sup>

In fact, following the El Paso shooting, Governor Abbott said “mistakes were made” in a mailer he sent out shortly before the shooting calling on Texans to “DEFEND” the border. Governor Abbott said that he had spoken with El Paso legislators about “the importance of making sure that rhetoric will not be used in any dangerous way.”<sup>255</sup> Yet, Governor Abbott has returned to precisely that rhetoric that he suggested in the wake of the shooting was “dangerous” and termed a “mistake,” and other state officials have returned to it as well--fanning the flames of anti-immigrant animus in the state of Texas again.

## **B. Officials Have Framed Arrests of Migrants as Trophies and Have Even Suggested Texas Residents May Shoot Migrants**

State and local officials have in fact further dehumanized migrants through xenophobic social media posts about capturing or even “hunting” migrants.

Alarming, in November, the Kinney County Sheriff’s Office’s Facebook page re-shared a video depicting a group of brown-skinned people walking through brushland captioned, “Gotta love deer hunting in South Texas...Age and score please.”<sup>256</sup> One comment on the post reads, “Looks like deer to me.” Comments on the post, including one by County Public Information Officer Matt Benacci, make clear that viewers of the KCSO Facebook page understand the people in the video to be migrants. The post is particularly concerning given that Kinney County Attorney Brent Smith has asked, “What do you think’s going to happen when illegal aliens, hundreds of thousands of illegal aliens, are on those properties while [hunters are] trying to hunt?”<sup>257</sup> Kinney County officials are, through their rhetoric, normalizing the idea of private individuals shooting migrants.

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<sup>252</sup> Peter Baker and Michael D. Shear, *El Paso Shooting Suspect’s Manifesto Echoes Trump’s Language*, The N.Y. Times (Aug. 4, 2019) [nytimes.com/2019/08/04/us/politics/trump-mass-shootings.html?searchResultPosition=8](https://www.nytimes.com/2019/08/04/us/politics/trump-mass-shootings.html?searchResultPosition=8).

<sup>253</sup> Alexia Fernández Campbell, *Trump described an imaginary “invasion” at the border 2 dozen times in the past year*, Vox (Aug. 7, 2019), <https://www.vox.com/identities/2019/8/7/20756775/el-paso-shooting-trump-hispanic-invasion>.

<sup>254</sup> *U.S. v. Patrick Wood Crusius*, 2020 WL 6572331 (W.D. Tex. 2020) (superseding indictment listing hate crime charges). See Jim Parker, *Walmart mass shooting suspect now faces additional federal charges*, ABC 7 KVIA (July 9, 2020) <https://kvia.com/news/crime/2020/07/09/walmart-mass-shooting-suspect-now-faces-additional-federal-charges/>.

<sup>255</sup> Alex Samuels, *Gov. Greg Abbott Says “Mistakes Were Made” in his Fundraising Letter Before the El Paso Shooting*, The Tex. Tribune (Aug. 29, 2019), <https://www.texastribune.org/2019/08/29/texas-gov-greg-abbott-admits-mistakes-immigration-rhetoric/>.

<sup>256</sup> Kinney County Sheriff’s Office, Facebook (Nov. 17, 2021, 1:10 pm), [https://m.facebook.com/story.php?story\\_fbid=1054471385310603&id=159181914839559](https://m.facebook.com/story.php?story_fbid=1054471385310603&id=159181914839559).

<sup>257</sup> Robert Montoya, *Border County Struggles with Security as Abbott Postures*, Tex. Scorecard (July 15, 2021), <https://texasscorecard.com/state/border-county-struggles-with-security-as-abbott-postures/>.

Governor Abbott regularly tweets photos of people of color whom state law enforcement have detained or arrested. In one such post in October, the Governor retweeted a DPS photo of nine brown-skinned people sitting on the ground in Kinney County and tweeted: “These illegal immigrants thought they were going to make it through by wearing camouflage clothing. [Three ‘faces with tears of joy’ emojis].”<sup>258</sup> In another, the Governor tweeted a photograph of three brown-skinned people crouched in front of a soldier in the Texas National Guard, who is standing and holding a large gun.<sup>259</sup> These tweets dehumanize migrants by framing their arrests as trophy moments for arresting officers, similar to hunting or cartel photos.

### C. Officials Have Otherwise Evinced Extremist Anti-Immigrant Animus

State and local officials have made plain their xenophobia toward migrants coming to Texas. Kinney County Judge Shahan has claimed, “Biden is diffusing all of these people in our country to change our culture.”<sup>260</sup> In describing migrants’ countries of origin, officials have singled out certain countries and areas as particularly unfamiliar and threatening. In June, Governor Abbott warned Texans that migrants are coming “in from countries you haven’t even heard of before. It comes [sic] from 160 different countries across the entire globe. Senegal, Bangladesh, Ubezikstan [sic].”<sup>261</sup> In April, Kinney County Attorney Brent Smith wrote in an op-ed, “individuals who unlawfully enter our country originate from many different countries from around the world, including the Middle East.”<sup>262</sup>

## VII. Kinney County is Undertaking Additional Efforts to Target Migrants, Including by Seeking to Hire Private Security and Partnering with Militias

Kinney County provides an encapsulation of how government officials are using extremist racist, anti-immigrant rhetoric to justify the OLS trespass arrest program and, in turn, using the trespass arrest program to fuel further anti-immigrant actions and escalating anti-immigrant rhetoric. Kinney County has the highest number of arrests and prosecutions of people

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<sup>258</sup> Greg Abbott, @GregAbbott\_TX, Twitter (Oct. 19, 2021, 9:08 pm), [https://twitter.com/GregAbbott\\_TX/status/1450645075885703169](https://twitter.com/GregAbbott_TX/status/1450645075885703169).

<sup>259</sup> Greg Abbott, @GregAbbott\_TX, Twitter (Aug. 27, 2021, 3:27 PM), [https://twitter.com/GregAbbott\\_TX/status/1431352778945929223](https://twitter.com/GregAbbott_TX/status/1431352778945929223).

<sup>260</sup> Aaron Nelsen, *Kinney County Has Embraced Greg Abbott’s Operation Lone Star Like Nowhere Else. It’s Fueling the Hysteria of Some Locals.*, Tex. Monthly (Oct. 29, 2021), <https://www.texasmonthly.com/news-politics/operation-lone-star-kinney-county/>.

<sup>261</sup> KPRC 2 Click2Houston, *TX Gov. Gregg Abbott hosts Border Security Summit in Del Rio, announces actions to secure the border*, YouTube (June 10, 2021), <https://www.youtube.com/watch?v=INe-AZKN-uM>; see Press Release, Gov. Greg Abbott, Governor Abbott Hosts Border Security Summit, Announces Comprehensive Border Security Plan to Crack Down on Unlawful Border Crossings (June 10, 2021), <https://gov.texas.gov/news/post/governor-abbott-hosts-border-security-summit-announces-comprehensive-border-security-plan-to-crack-down-on-unlawful-border-crossings>.

<sup>262</sup> Brent Smith, *Kinney County Attorney Says Texans’ Must Protect Own Borders*, 830 Times (Apr. 8, 2021), <https://830times.com/opinion-kinney-county-attorney-says-texans-must-protect-own-borders/>.



in the OLS trespass arrest program.<sup>263</sup> From August through December, the county arrested and prosecuted 1,327 individuals for criminal misdemeanors under Operation Lone Star.<sup>264</sup> As described above, to justify these actions, county officials—including Sheriff Brad Coe, County Attorney Brent Smith, and County Judge Tully Shahan—have created a dangerous echo chamber of hate speech against Latinx and Black migrants, echoing nativist language such as that of “invasion” to stir up anti-immigrant hysteria. They have sought to partner with extreme anti-immigrant vigilante groups, including by apparently—in collaboration with DPS—partnering with an extremist group to thermally track and apprehend migrants and by exploring deputizing private militia members. Further, they are soliciting funds into a county bank account for “border defense” and have explored hiring private security forces to deter and arrest migrants.

#### **A. Kinney County Leadership Has Expressed Support for Using Vigilante Groups in Anti-Immigrant Efforts**

Kinney County leadership has expressed support for both vigilante groups specifically and hyper-militarization of the border generally. County Attorney Brent Smith has been especially vocal. After the county’s issuance of a local disaster declaration in April, Smith called for additional law enforcement at the border, saying, “An important thing for us to do is the prevention of the illegal entries, and that means boots on the ground near the border.”<sup>265</sup> In August, Smith said in an interview, “State officials need to realize that this crisis has surpassed that of a law enforcement issue. The solution will have to include aspects of a military operation.” He went on to express support for militias as a potential solution, saying, “If it wasn’t for militias, we wouldn’t have a country today . . . Militias was what freed Texas from the Mexican government.”<sup>266</sup>

Kinney County officials’ rhetoric appears to be influencing private actors. Similar calls for troops at the border followed the County Attorney’s post. A video posted by “Frank Lopez Jr. – U.S. Border Patriot” called for veterans to join the “Kinney County Defense Forces” as requested by the “Kinney government.”<sup>267</sup> The video mentions a meeting at the Brackettville

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<sup>263</sup> Guzman Decl., Ex. 10, ¶ 5. According to public records available on iDocket.com, 1,327 criminal misdemeanor prosecutions have been filed in Kinney County Court from August 22, 2021 through December 8, 2021. In comparison, only four criminal misdemeanor charges from January - August 2021, one charge in 2020, seven in 2019, nine in 2018, and 23 in 2017.

<sup>264</sup> *Id.*

<sup>265</sup> Vanessa Croix, *Kinney Co. officials issue disaster declaration, calling on state leaders for help*, CBS KENS5, April 21, 2021, <https://www.kens5.com/article/news/special-reports/at-the-border/kinney-co-officials-issue-disaster-declaration-calling-on-state-leaders-for-help/273-1ac31fd5-c37d-4221-8675-d201ab40f6d3>.

<sup>266</sup> Charlotte Cuthbertson, *The New Wild West: Texas Border County’s Desperate Bid to Curb Illegal Immigration*, The Epoch Times, Aug. 21, 2021, [https://www.theepochtimes.com/the-new-wild-west-texas-border-countys-desperate-bid-to-curb-illegal-immigration\\_3955137.html](https://www.theepochtimes.com/the-new-wild-west-texas-border-countys-desperate-bid-to-curb-illegal-immigration_3955137.html).

<sup>267</sup> Kim Keeler, *Calling All Veteran’s*, YouTube (Oct. 14, 2021), <https://www.youtube.com/watch?v=3G2EJuwkTu4>.



Civic Center and indicates Sheriff Coe would provide further instructions.<sup>268</sup> Smith frequently shares posts by Frank Lopez Jr.<sup>269</sup>

## **B. Kinney County Leadership Has Actively Sought Partnerships with Vigilante Groups**

Acting on this rhetoric, Kinney County has repeatedly actively sought to partner with vigilante actors, including the extremist groups Women Fighting for America (WFFA) and Patriots for America. Both of these groups are strongly anti-immigrant, and both supported the January 6, 2021, attack on the United States Capitol.

WFFA is an organization headed by a January 6 insurrectionist<sup>270</sup> who was previously active in anti-immigrant border efforts in Arizona.<sup>271</sup> In November, the WFFA leader live-streamed a ride-along with Kinney County Sheriff Coe, which she described as “working with the sheriff[] hand in hand and doing some proof of concepts out here, basically, to help facilitate closing down our borders.”<sup>272</sup> She filmed nighttime apprehensions by DPS and Kinney County as she was riding in the car with Sheriff Coe. According to the WFFA leader’s statements during the live stream, WFFA provided Kinney County with thermal technology. As the WFFA head put it, the group is “working with border town sheriffs who really want this program. . . . Our dr—our systems were only up for less than 15 minutes, and we found over 16 [migrants]. And we’re literally following and apprehending and assisting with the apprehension and finding these illegals who are coming over here . . . . We’re able to thermotrack these guys.” She explained that state arrest is preferable to migrants passing to Border Patrol custody because, she explained inaccurately, as a result of the state arrest migrants “will not be able to ever get their citizenship, because they have an arrest record.” The video of WFFA’s trip makes clear that WFFA believed itself to be an equal partner in the Kinney County arrests. At one point, for example, the WFFA founder instructed someone to “light the drone.” Both the Kinney County Sheriff’s Office and DPS were involved in the arrest of the migrants that WFFA says were apprehended due to its thermal tracking.

WFFA’s brief video of the set of nighttime arrests shows the organization’s anti-immigrant hate. At one point, the head of the organization described migrants as “either rapists,

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<sup>268</sup> *Id.*

<sup>269</sup> See, e.g., Brent Smith, *Carrizo Springs Influx Care Facility Invasion Update!* Facebook (Sept. 26, 2021), [https://www.facebook.com/permalink.php?story\\_fbid=10110860661554148&id=16717258](https://www.facebook.com/permalink.php?story_fbid=10110860661554148&id=16717258).

<sup>270</sup> Right Wing Watch, “*Are You Ready to Start a Revolution?*” *Women Fighting for America Founder Tells Trumpists to Advance the Line on Eve of Insurrection*, Jan. 17, 2021, <https://www.rightwingwatch.org/post/are-you-ready-to-start-a-revolution-women-fighting-for-america-founder-tells-trumpists-to-advance-the-line-on-eve-of-insurrection/>.

<sup>271</sup> Freddy Cruz, *White Nationalists, Jan. 6 Protesters and QAnon: What You Need to Know About Border Vigilantes Along the Border*, Southern Poverty Law Center Dec. 2, 2021, <https://www.splcenter.org/hatewatch/2021/12/02/white-nationalists-jan-6-protesters-and-qanon-what-you-need-know-about-border-vigilantes>.

<sup>272</sup> WFFA, *LIVE Apprehension!!! Text fight to 91776*, Facebook, Nov. 8, 2021, <https://fb.watch/9AciBsCVfp/>.

murderers, terrorists, drug smugglers, all of those things,” as well as “some who just want to come over here and sneak into our country and not be caught and just disappear.” At another point, WFFA stated, “We have to take back our country. We the people. We’re the answer. This is action right here . . . working hand in hand with law enforcement and those who really do care about our country and our sovereignty.” WFFA was very clear that the purpose of its actions is to target migrants using state law. At one point, the group’s leader described the purpose of broader white supremacist efforts as “to apprehend illegals who are trying to get away, who are either trying illegally to get into our country.” Further, WFFA was clear that it sought a long-term private-public partnership with Kinney County and other border counties.

Kinney County leadership has also expressed a desire to partner with the vigilante group Patriots for America, which is active in the county—including floating the idea of deputizing vigilante group members through the Kinney County Sheriff’s Office. Patriots for America’s founder and president attended an October county commission meeting to promote the group’s presence in the county, using the same rhetoric of “invasion” as that used by county and state officials. He summed up the situation in the county as, “This is a powder keg waiting to explode, and it’s not a matter of if but when.”<sup>273</sup> Judge Shahan asked the group leader if he “...[had] been able to sit down with the sheriff?” The group leader replied, “multiple conversations.” Judge Shahan responded, “We really, really appreciate your offer, glad you came, you’re preaching to the choir, and we appreciate you coming and appreciate you being here, and we will take your help the right way.” Later that month, the group leader posted a video on YouTube of a group of armed militia members and called for more individuals to travel to Kinney County as reinforcements.<sup>274</sup>

Sheriff Coe has described the militia members he has “recently met” in the county as “well-trained” and “Christian-based,” saying militias have kind of gotten “a bad name and a bad rap.”<sup>275</sup> By fostering governmental relationships with armed vigilante groups that seek to target migrants, Kinney County leadership is discriminating against migrants. These efforts increase the chances of violence against Black and Brown individuals in Kinney County. If effectuated, they will continue to lead to unlawful and discriminatory actions on the basis of race and national origin by vigilante groups functioning as state actors.

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<sup>273</sup> Karen Gleason, *News – North Texas Militia Vows Protection for Kinney County*, The 830 Times, October 19, 2021, <https://830times.com/news-north-texas-militia-vows-protection-for-kinney-county/>.

<sup>274</sup> *Id.*

<sup>275</sup> Gateway Pundit, *Kinney Co. TX Sheriff TX Takes Historic Action to Fight Back Against Illegal Invasion*, YouTube, Oct. 18, 2021, [https://www.youtube.com/watch?v=jiTvH3jOXzE&list=UUMaLetBcZ8fqsoIryB015og&index=4&ab\\_channel=GatewayPundit](https://www.youtube.com/watch?v=jiTvH3jOXzE&list=UUMaLetBcZ8fqsoIryB015og&index=4&ab_channel=GatewayPundit).

### **C. County Officials Seek Private Security to Expand Efforts to Arrest Migrants and Deter Migration**

Kinney County has repeatedly sought to engage private contractors or a private defense force to supplement its efforts to arrest migrants. Shortly after the county attorney publicly declared the county's intent to contract private companies to supplement border security in the county,<sup>276</sup> the County issued a letter of intent to contract with Garrison Trading Associates, Inc. (Garrison), a company that also operates as a wartime security contractor. The letter of intent provided that Garrison would "provide, as a service to Kinney County, Texas, Border Mitigation and Deterrence Support which is designed and implemented to deter non-United States personnel from entering the US without constraint, restriction, or monitoring." The letter provided that Garrison would provide one armed individual and one emergency medical technician. Along with the letter, Garrison provided Kinney County with the resumes of employees who had previously worked in Iraq and Afghanistan.<sup>277</sup> While Kinney County initially approved the letter of intent, several weeks later, Garrison indicated a misunderstanding with the county, and the commission moved to withdraw the letter of intent.<sup>278</sup>

However, Kinney County is still seeking to engage private groups to arrest migrants for border enforcement. In October, Sheriff Coe told a news outlet that he was preparing to sign an agreement for a "defensive security force" to move into the county, voicing his hope that there would be about 600 members and stating, "We'll try to get them deputized or something to get the ball rolling." Sheriff Coe made clear that he intended this group to engage in "processing" migrants.<sup>279</sup>

### **D. Kinney County Officials Are Raising Money Using Their Racist, Anti-Immigrant Rhetoric**

The same county officials are utilizing anti-immigrant hate speech to solicit donations. Kinney County has created a county donation page with a county bank account named "Kinney

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<sup>276</sup> Robert Montoya, *Border County Struggles With Security as Abbott Postures*, Texas Scorecard, July 15, 2021, <https://texasscorecard.com/state/border-county-struggles-with-security-as-abbott-postures/>.

<sup>277</sup> LETTER OF INTENT TO CONTRACT (July 12, 2021), <https://cokinneytx.civicweb.net/document/17977/Letter%20of%20Intent%20to%20Contract%20Garrison%20Trading.pdf?handle=F497D8AC0D1B401A867AB73F2B36E1F0>.

<sup>278</sup> NOTICE OF REGULAR OPEN MEETING OF THE COMMISSIONERS COURT OF KINNEY COUNTY, TEXAS COMPLETE AGENDA, Nov. 22, 2021, <https://cokinneytx.civicweb.net/document/19114>.

<sup>279</sup> Charlotte Cuthbertson, *Emotions Run High as Texas Border Residents Feel Abandoned, Fear for Their Lives*, The Epoch Times, Oct. 13, 2021, [https://www.theepochtimes.com/emotions-run-high-as-texas-border-residents-feel-abandoned-fear-for-their-lives\\_4047807.html](https://www.theepochtimes.com/emotions-run-high-as-texas-border-residents-feel-abandoned-fear-for-their-lives_4047807.html).

County Border Security.”<sup>280</sup> The webpage for electronic donations is <https://defendourborders.org/>, and it calls for donations with the scare tactic of an invasion:

Texas is running out of time to secure the southern border! Each day, thousands of illegal aliens are invading Texas and spreading into the interior of the United States. Texans have had enough. Kinney County wants your help to secure our own border and stop relying on the federal government to save us. It is time for patriots to step up and SAVE THE UNITED STATES! <sup>281</sup>

The Kinney County government home page displays a similar statement and directs visitors “to visit our Border Crisis webpage and make a donation.”<sup>282</sup> The Kinney County attorney has described the fund as set up to support “personnel.”<sup>283</sup> It is fundraising for money to hire private contractors to deter migration using the language of white supremacy.

The misleading and discriminatory language on which Kinney County officials base their need for money singles out immigrants and in particular Latinx immigrants for animosity. By engaging in and promoting hate speech against migrants, allowing it to be publicly displayed on an official’s page and in official public meetings, Kinney County officials promote the accompanying discriminatory narrative and encourage others to do so as well. The same officials who seek to use this rhetoric to further anti-immigrant actions manage the county’s participation in the OLS trespass arrest program.

**E. The OLS Trespass Arrest Program, Combined with Kinney County Officials’ Rhetoric, Has Contributed to a Volatile Environment with the Potential for Violence**

The escalating xenophobic rhetoric and actions from state and local officials have created a highly volatile environment that normalizes violence against migrants—nowhere more so than in Kinney County. As described above, Val Verde County Sheriff Martinez has noted that people in Val Verde County have asked him, regarding migrants on their property, “When can I shoot?”<sup>284</sup> Violent rhetoric is especially prevalent in Kinney County. As described above, the Kinney County Sheriff’s Office shared a post likening brown-skinned men walking on a ranch to deer to be shot. One local rancher told a news outlet, “I feel like there’s only two ways that this problem is going to get solved. And it’s either going to be ‘We the People’ or the people up top. I

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<sup>280</sup> NOTICE OF SPECIAL OPEN MEETING OF THE COMMISSIONERS COURT OF KINNEY COUNTY, TEXAS COMPLETE AGENDA, Oct. 25, 2021, <https://cokinneytx.civicweb.net/document/18837>.

<sup>281</sup> Defend Our Borders, <https://defendourborders.org/> (last visited Nov. 23, 2021).

<sup>282</sup> Kinney County, Texas, <http://www.co.kinney.tx.us/> (last visited Dec. 14, 2021).

<sup>283</sup> Gateway Pundit, *Kinney Co. TX Sheriff TX Takes Historic Action to Fight Back Against Illegal Invasion*, YouTube, Oct. 18, 2021, [https://www.youtube.com/watch?v=jiTvH3jOXzE&list=UUMaLetBcZ8fqsoIryB015og&index=4&ab\\_channel=GatewayPundit](https://www.youtube.com/watch?v=jiTvH3jOXzE&list=UUMaLetBcZ8fqsoIryB015og&index=4&ab_channel=GatewayPundit).

<sup>284</sup> Hearing on H.B. 9, *supra* n. 3.

sure don't like to think about 'We the People' taking care of it, but who knows.'"<sup>285</sup> Reportedly, this rancher in September asked four people to patrol his ranch, and those individuals unlawfully detained seven migrants.<sup>286</sup>

Kinney County officials' rhetoric and actions have dangerously contributed to creating and perpetuating the county's volatile, anti-immigrant environment. Kinney County's involvement in the OLS trespass arrest program demonstrates how state and local actors have not only (1) targeted Black and Brown noncitizens for arrest and (2) funneled them into a separate criminal process rife with civil rights abuses but also (3) in doing so, fueled anti-immigrant hate and contributed to creating a volatile atmosphere in Texas.

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Accordingly, pursuant to Title VI and its implementing regulations, we urgently request that your office investigate the Texas Office of the Governor, Texas Department of Public Safety, Texas National Guard, Texas Parks and Wildlife Department, Texas Department of Criminal Justice, Texas Division of Emergency Management, Texas Office of Court Administration, Val Verde County, Kinney County, and Galveston County for engaging in discrimination prohibited by Title VI. The information detailed in this complaint triggers the "prompt investigation" requirement of Title VI's implementing regulations. We further request the termination of federal funding for all Texas agencies engaging in discrimination.

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<sup>285</sup> Charlotte Cuthbertson, *Texas Ranchers Live in Fear as Encounters With Illegal Aliens Increase*, The Epoch Times, June 2, 2021, [https://www.theepochtimes.com/texas-ranchers-live-in-fear-as-encounters-with-illegal-aliens-increase\\_3829471.html](https://www.theepochtimes.com/texas-ranchers-live-in-fear-as-encounters-with-illegal-aliens-increase_3829471.html).

<sup>286</sup> The rancher told local news that DPS called him the next day and informed him that these actions were "not even legal" and "technically kidnapping," and that in future they would not take people so detained into custody. The article indicates that DPS did take the seven individuals apprehended by private citizens that night into custody, however. See Charlotte Cuthbertson, *Border Sheriff Says State Threatened to Pull Resources If He Didn't Stop Militia*, The Epoch Times, Oct. 27, 2021, [https://www.theepochtimes.com/mkt\\_app/border-sheriff-says-state-threatened-to-pull-resources-if-he-didnt-stop-militia\\_4072144.html](https://www.theepochtimes.com/mkt_app/border-sheriff-says-state-threatened-to-pull-resources-if-he-didnt-stop-militia_4072144.html).

These state and local agencies in Texas are targeting individuals for arrest based on race and national origin, including perceived immigration status, and are then placing those arrested individuals in a separate, criminal process and detention system that disregards their rights. Title VI forbids this discrimination. Please do not hesitate to contact us for additional information or to discuss any of these matters further.

Sincerely,

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