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The Honorable Warren Kenneth Paxton, Jr.
Attorney General of the State of Texas
P.O. Box 12548
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Delivered via Electronic Mail

Re: Letter in support of Chairman Krause’s opinion request inquiring whether the federal government has breached its obligation to protect the southern border and whether the State of Texas has the sovereign power to defend itself from invasion

April 22, 2022

General Paxton:

On March 28, 2022, Representative Matt Krause, a member of our caucus and Chair of the House Committee on General Investigating, sent you a request inquiring whether the federal government has failed to uphold its obligation to protect Texas from invasion under Article IV, Sec. 4 of the U.S. Constitution, and whether Texas has the sovereign power to defend itself from invasion.¹ With the Biden Administration’s imminent termination of Title 42 removals that will result in a massive influx of illegal immigrants at the Texas southern border, we write today to echo Chairman Krause’s inquiry, to request an expedited response, and to share with you and your office relevant and important research that has been brought to the attention of our caucus in support of an affirmative response to both of the questions posed by Chairman Krause.se

In his letter, Chairman Krause references the advisory opinion issued on February 7, 2022 by Arizona Attorney General Mark Brnovich (hereafter “the Arizona Opinion”) in which General Brnovich analyzes Article IV, Sec. 4 of the U.S. Constitution (hereafter “the U.S. Invasion Clause”), Article 1, Section 10 of the U.S. Constitution (hereafter “the State Self-Defense Clause”), and

¹ Letter from Texas State Rep. Matt Krause, Chairman of House Committee on General Investigating, to Ken Paxton, Attorney General of Texas (Mar. 28, 2022) (RQ-0454-KP).

Article V, Section 3 of the Arizona Constitution in order to determine whether the State of Arizona has a sovereign right under those constitutions to repel invasions from outside forces seeking to break federal and state law by skirting the immigration process, thereby causing an influx in lawlessness in the surrounding areas and other areas of the country.

The Arizona Opinion supplies multiple historical references evidencing the intent and meaning of the federal constitutional provisions discussed therein,² and it concludes that the Federal Government has failed to perform its constitutional duty to protect states against invasion. It also concludes that the State of Arizona has the authority under the U.S. and Arizona Constitutions to repel invasions, commenting that “[t]he State Self-Defense Clause exists precisely for situations such as the present, to ensure that States are not left helpless.”

The situation in Arizona is not much different than that in Texas, except that in Texas the problem is substantially worse. U.S. Customs and Border Protection reports that the the Arizona-based Tucson and Yuma sectors encountered 271,729 illegal immigrants in 2022, while the Texas-based Rio Grande Valley, Laredo, Del Rio, Big Bend, and El Paso sectors of the border collectively encountered 626,750 illegal immigrants over the same time period—over double that of what was seen in Arizona.³

It is with these facts in mind that Chairman Krause sent you his initial request. If the Arizona Opinion is accurate, then it would behoove us as a state to investigate whether we have the same sovereign authority under the U.S. and Texas Constitutions. For the reasons stated below, we believe that we do—not only because the Texas Constitution contains substantially the same language as Arizona’s constitution, thereby putting us on at least equal footing with them—but because it contains something Arizona’s constitution does not: specific textual authority for the Governor of Texas to use the militia to enforce the law in order to repel invasions.⁴

The Texas Constitution has a similar provision to that of Arizona’s constitutional guidelines—Article IV, Sec. 7 (hereafter “the Texas Invasion Clause”)—which deem the Governor as the “commander in chief” of

² The following are just a few examples of historical references contained in the Arizona Opinion evidencing the intent of the federal constitution: Ariz. Att’y Gen. Op. No. I22-001, at 8 (Feb. 7, 2022) (noting that in Federalist No. 43, James Madison explained with respect to the U.S. Invasion Clause that “[a] protection against invasion is due from every society to the parts composing it. The latitude of the expression used here seems to secure each state, not only against foreign hostility, but against ambitious or vindictive enterprises of its more powerful neighbors.”) (quoting THE FEDERALIST NO. 43); Ariz. Att’y Gen. Op. No. I22-001, at 7 (explaining that “[t]he history of the adoption of the Constitution . . . shows that the Founders understood the States were giving up certain sovereign powers to the national government, but retaining core self-defense powers against both domestic and foreign threats to their actual security within their territories.”); Ariz. Att’y Gen. Op. No. I22-001, at 9 (discussing James Madison’s speech at the Virginia Ratifying Convention in which Madison explained that under the U.S. Constitution, States still retained the right to defend themselves in the face of invasion.) (citing James Madison, *Debate From Virginia Ratifying Convention* (June 16, 1788)).

³ U.S. CUSTOMS & BORDER PROTECTION, SOUTHWEST LAND BORDER ENCOUNTERS (BY COMPONENT), <https://www.cbp.gov/newsroom/stats/southwest-land-border-encounters-by-component> (last visited Apr. 21, 2022).

⁴ Compare Ariz. Const. art. V, § 3 (“The governor shall be commander-in-chief of the military forces of the state, except when such forces shall be called into the service of the United States.”) with Tex. Const. art. IV, § 7 (“He shall be Commander-in-Chief of the military forces of the State, except when they are called into actual service of the United States. *He shall have power to call forth the militia to execute the laws of the State, to suppress insurrections, and to repel invasions.*”) (emph. added).

military forces. The section contains two clauses. The first clause, which is nearly identical in language to that of Arizona’s Constitution, states:

“[The Governor] shall be Commander-in-Chief of the military forces of the State, except when they are called into actual service of the United States.”

The second clause reads:

“[The Governor] shall have power to call forth the militia to execute laws of the State, to suppress insurrections, and to repel invasions.”

The meaning of the first clause is clear: the Governor has authority over all Texas military forces unless they are called into actual service of the United States. As Texas military forces have not been called into “actual service,”⁵ our analysis moves to clause two. In the U.S. Supreme Court case of *Sterling v. Constantin*, at issue was whether Texas Governor Ross Sterling acted ultra vires in prohibiting Constantin, an oil field operator, from producing oil at a time in which the counties where his oil fields were located found themselves “in a state of insurrection, tumult, riot, and a breach of the peace,”—words that could easily be used to describe our current situation at the border. The Court found that the Governor’s orders were unconstitutional, but only because the Governor was not engaged in “execut[ing] laws of the State,” holding that “[b]y virtue of his duty to cause the laws to be faithfully executed’, the executive is appropriately vested with the discretion to determine whether an exigency requiring military aid for that purpose has arisen.”⁶ The Court then qualifies their analysis: “Such measures, conceived in good faith, in the face of the emergency, and directly related to the quelling of the disorder or the prevention of its continuance, fall within the discretion of the executive in the exercise of his authority to maintain peace.”⁷

Should Governor Abbott choose to invoke the Texas Invasion Clause to quell an invasion on our southern border, Courts will, as they have in the past, question whether that action was a good-faith measure and whether it was directly related to ending the invasion or preventing its continuance. Considering the daily, massive flow of illegal immigration into Texas, we believe that it would be difficult to make an argument that invoking the Texas Invasion Clause was done in bad faith; that argument itself would have to be made in bad faith. Similarly, it would be difficult to argue that invoking the Texas Invasion Clause was not directly related to the quelling of the disorder at the border. Thus, considering Texas constitutional and court history, we believe that the Governor not only has the authority to invoke the Texas Invasion Clause, but also that Texas courts and even the U.S. Supreme Court will uphold that action if challenged.

In addition to the Texas Invasion Clause, the Texas Constitution also contains a provision in Art. III, Sec. 49 that speaks to invasions of the state. Indeed, the framers of the Texas Constitution considered the ability and need for state resources to repel an invasion as so important that a specific provision to allow for the creation of debt without legislative approval was inserted into every state constitution except that of the

⁵ “Actual service,” as written in the clause, has been widely interpreted throughout the state’s history as being “called into the [military] service of the United States,” and is linked to U.S. Const. Art. II, Sec. 2, which provides that the President is the Commander in Chief of the “Militia of the several States, when called into the actual Service of the United States”. GEORGE D. BRADEN, ET AL., *THE CONSTITUTION OF THE STATE OF TEXAS: AN ANNOTATED AND COMPARATIVE ANALYSIS* 313 (1977).

⁶ *Sterling v. Constantin*, 287 U.S. 378, 399 (1932).

⁷ *Id.* at 400.

Reconstruction Constitution of 1869.⁸ The provision currently reads: “No debt shall be created by or on behalf of the State, except: . . . (2) to repel invasion, suppress insurrection, or defend the State in war”

Texas jurisprudence provides that “[d]ifferent sections, amendments, or provisions of a constitution which relate to the same subject matter should be construed together and considered in the light of each other.”⁹ When construed together, the Texas Invasion Clause and Art. III, Sec. 49(a) are clear in their objective: allow for a way for Texas to defend its borders should the Federal Government skirt its duty to do so. This is, in fact, the exact situation the drafters of the original form of this provision were dealing with at the time. Records of the debates that occurred during the Texas Constitutional Convention of 1875 show that the Texas Invasion Clause provision was contemplated in light of the Federal Government’s failure to protect the Texas-Mexico border against Mexican raiders, even absent a state of war. Mr. Stockdale, one of the delegates to the convention, argued:

“It was said that the Constitution of the United States provided for [repelling invaders and quelling rebellions]. . . . The neglect of the Government to defend its citizens left them the right to be defended themselves, even if they proceeded to extreme measures. . . . Its failure to [protect the border] made it devolve upon the commonwealth to do so, and failing in that, it became the duty of the section injured to defend itself”¹⁰

The Texas border is in a dire state of emergency, and with the elimination of Title 42 protections against illegal immigration, the problem will only become worse—and quickly. If Texas will not use this provision against caravans of illegal immigrants set on breaking the laws of Texas and the United States, then at what point will the failure of the Mexican Government to address this problem, and indeed encourage lawlessness, be deemed an “invasion?” The time is now, General.

Texas history is of the utmost importance when considering constitutional questions such as these. We were supplied this historical research by one of our own founding members, Representative Briscoe Cain, whose work at the Texas Legal Institute has uncovered countless truths about the origins of the Texas Constitution, including Texas’s power to repel invasions. We thank him for his tireless work in the defense of liberty and hope that you will approach this question with a similar passion and zeal. Please expedite Chairman Krause’s request so that Texas can join Arizona in defending our state against further damage and lawlessness.

Sincerely,



Rep. Mayes Middleton
Chairman, Texas Freedom Caucus



Rep. Briscoe Cain
Chairman, Texas House Committee on Elections



Rep. James White
Chairman, Texas House Committee on Homeland
Security and Public Safety

⁸ See Tex. Const. of 1845, art. VII, § 33; Tex. Const. of 1861, art. VII, § 33; Tex. Const. of 1866, art. VII, § 33; Tex. Const. art. III, § 49 (1876); and Tex. Const. art. III, § 49(a) (1991).

⁹ *Collingsworth Cty. v. Allred*, 40 S.W.2d 13, 15 (Tex. 1931) (citations omitted).

¹⁰ DEBATES OF THE TEXAS CONSTITUTIONAL CONVENTION OF 1875 161 (Seth Shepard McKay, ed. 1930).