UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

CITY OF EL CENIZO, et.al.	§	Civil Action No. 5:17-CV-00404-OLG
	§	(Lead Case)
EL PASO COUNTY; RICHARD WILES,	§	Case No. 5:17-CV-00459-OLG
SHERIFF OF EL PASO COUNTY in his official	§	Consolidated
capacity; and the TEXAS ORGANIZING	§	
PROJECT EDUCATION FUND,	§	
Plaintiffs,	§	
	§	
TEXAS ASSOCIATION OF HISPANIC	§	
COUNTY JUDGES AND COUNTY	§	
COMMISSIONERS,	§	
Proposed Plaintiff/Intervenor	§	
	§	
V.	§	
STATE OF TEXAS	§	
Defendants,	§	

PLAINTIFF-INTERVENOR TEXAS ASSOCIATION OF HISPANIC COUNTY JUDGES AND COUNTY COMMISSIONERS POST HEARING BRIEF

The Texas Association of Hispanic County Judges and County Commissioners (HJ&C) is an association of elected officials from counties throughout Texas. We have members from counties as diverse as Zapata County in the border area and Midland County, in West Texas. Some of our counties have high concentrations of noncitizen population; some of our counties have populations with racial attitudes that SB 4 could be used as a tool to harass the Latino population. Moreover, when local residents are afraid of being reported, detained, or deported by local law enforcement, they are less likely to report crimes against them and are afraid to cooperate with police in criminal investigations. SB 4 applies to all 254 counties in Texas; every county in Texas has four (4) elected county commissioners and an elected county judge – all are

subject to removal if they violate SB 4.

RACIAL ANIMUS LEADING TO PASSAGE OF SB 4

It is impossible to detach SB 4 from the cultural context in which it was passed; the perniciousness and insidious potential harm unleashed by SB 4 can only be understood in the context of the recent political winds whirling across the country. The 2016 election both in Texas and in the United States was riddled with nativist and anti-immigrant appeals. For instance, then-candidate Trump repeatedly claimed that illegal immigrants were "rapists," "criminals" roaming the streets, killing people and stealing jobs from American workers. He also publicly attacked persons of Hispanic descent, including by questioning the impartiality of a United States federal judge presiding over a lawsuit related to Trump University.

Likewise, Texas lawmakers and members of the State's leadership have made racial and xenophobic appeals in supporting laws like SB 4. In campaigns, Lieutenant Governor Dan Patrick called immigration into Texas an "invasion" and said that immigrants coming to Texas bring "third world diseases," such as leprosy. Without factual data, Patrick blamed immigrants for "a rising crime rate, overcrowded schools, an overburdened health-care system, and runaway growth in the state budget," and characterized illegal immigrants as "terrorists and drug runners."

Texas Legislatures have considered so-called "Sanctuary Cities" and "Show Me Your Papers" bills in several forms in past legislative cycles, but SB 4 is the first, and most extreme, anti-immigrant measure to be enacted into law in Texas. It flew through the legislative process at an unusually fast pace, despite a chorus of public cries against it.

SB 4 was filed by Senator Charles Perry on November 15, 2016, as a pre-filed bill. In

Committee, the Senate State Affairs Committee held a day long committee hearing in which hundreds of people testified in person. Despite the volume of testimony, only a few people testified in person in support of the bill.

On February 7, 2017, SB 4 was passed to engrossment and sent to the House. SB 4 was referred to the House Committee on State Affairs and was heard on March 15, 2017. Again, hundreds of people testified in person against the bill. Again, only a few testified in favor. On April 12, 2017, the bill was voted out of the House State Affairs Committee as substituted and sent to the Calendars Committee on April 20, 2017 at 2:22 PM. Just 48 minutes later, the bill was placed on the Emergency Calendar.

The House considered SB 4 on April 26, 2017. Chairman Charlie Geren was the House sponsor for SB 4. In all, the House considered 145 amendments, accompanied by emotional debate, in a session that extended until 4:30 AM on April 27, 2017.

THE ACT AND PREEMPTION

States cannot properly evaluate the international implication of the sovereign interests of the United States.

I. INJUNCTIVE RELIEF:

SB 4 was enacted for the "enforcement by campus police departments and certain local governmental entities of state and federal **laws governing immigration** and to related duties and liability of certain persons in the criminal justice system; providing a civil penalty; creating a criminal offense." (Dkt #77-2 p 2) [Emphasis added] Moreover, SB 4 makes the failure of a jail official to honor any detainer request a Class A misdemeanor, even when doing so would, in the view of the Detention Center officials, violate the Fourth Amendment. Tex. Penal Code §39.07. A misdemeanor exposes employees of the Detention Center to arrest, a jail term of up

to one year and a fine of up to $4,000. Texas Penal Code § 12.21. Furthermore, SB 4 exposes the City, its Detention Center and employees to penalties under Section 752.056, and officials could face removal from elected or appointed office. Tex. Gov't Code §752.0565.

A determination by this Court that federal law preempts passage of SB 4 will, in effect, cover the requirements for this Court to issue preliminary injunctive relief. [1] A finding of preemption by this Court will meet all the requirement for preliminary injunctive relief. A finding of preemption means that SB4 is a nullity, it is "void"[2]; by definition and a clear reading of SB 4, it encroaches on an area of law left exclusively to the federal government; therefore, by definition SB 4 meets the likelihood of "success", "injury", and "public interest" criteria justifying preliminary injunctive relief.

II. PREEMPTION

The familiar and fundamental frameworks for assessing conflicts between federal and state power are the Supremacy Clause of the Constitution and the corresponding doctrine of preemption. Preemption of state law comes in three forms: field preemption, whereby federal authority implicitly occupies an entire area; express congressional preemption by statute; and conflict preemption, which occurs when state and federal laws impose conflicting duties, especially when those conflicts are irreconcilable. Immigration falls within the first form – federal authority implicitly occupies the entire area.

When it comes to immigration law, even when considered in light of states police

[1] A plaintiff seeking a preliminary injunction must establish: (1) a substantial likelihood of success on the merits, (2) a substantial threat of irreparable injury if the injunction is not issued (3) that the threatened injury if the injunction is denied outweighs any harm that will result if the injunction is granted, and (4) that the grant of an injunction will not disserve the public interest. *Id.* Preliminary injunctions favor the status quo and preserve the relative positions of the parties until a trial on the merits can be held. *Wenner v. Tex. Lottery Comm'n,* 123 F.3d 321,326 (5th Cir. 1997); *Univ. of Tex. v. Camenisch,* 451 U.S. 390, 395 (1981).

[2] [W]henever the statute of a State invades the domain of legislation which belongs exclusively to the Congress of the United States, it is void, no matter under what class of powers it may fall, or how closely allied to powers conceded to belong to the States, *Henderson,* 92 U.S., at 271-72

powers:

> "no definition of it, and no urgency for its use, can authorize a State to exercise it in regard to a subject-matter which has been confided exclusively to the discretion of Congress by the Constitution. . . . [W]henever the statute of a State invades the domain of legislation which belongs exclusively to the Congress of the United States, it is void, no matter under what class of powers it may fall, or how closely allied to powers conceded to belong to the States. *Henderson v. Mayor of N.Y.,* 92 U.S.259 at 271-72

Federal control over immigration is granted by the Constitution's provisions that explicitly authorize Congress to regulate interstate commerce[3], to establish a 'Uniform Rule of Naturalization," [4] and to conduct foreign affairs.[5] Clearly, federal immigration policy has international implications that can only be assessed by the federal government; because of their limited view and interests, states are not capable of evaluating the international impact of federal immigration policy. According to the *Henderson* Court's reasoning, immigration "belongs to that class of laws which concern the exterior relation of this whole nation with other nations and governments,"[6]

State "classifications based on alienage," the Court has said, "are inherently suspect and subject to close judicial scrutiny." *Graham v. Richardson*, 403 U.S. 365, 372 (1971) invalidating an Arizona law that restricted legal aliens' access to benefits). "The laws which govern the right to land passengers in the United States . . . ought to be the same in New York, Boston, New Orleans, and San Francisco." *Henderson,* 92 U.S. at 273.

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[3] U.S. CONST. art. I, § 8, cl. 3; The Head Money Cases, 112 U.S. 580, 599 (1884) ("Congress [has] the power to pass a law regulating immigration as a part of commerce of this country with foreign nations . . . .").

[4] U.S. CONST. art. I, § 8, cl. 4. The power is also recognized by implication in Article V, which prohibited, until 1808, amendment of the provision of Article I that denies Congress the authority to prohibit the "Migration or Importation of such Persons as any of the States now existing shall think proper to admit," *id.* art. I, § 9, cl. 1. That is, but for the prohibition before 1808, Congress may prohibit the migration or importation of certain persons.

[5] *See* U.S. CONST. art. I, § 8, cl. 3 (granting Congress the power "[t]o regulate Commerce with foreign Nations"); Toll v. Moreno, 458 U.S. 1, 10 (1982) (holding that federal authority to regulate the status of aliens arises out of the constitutional power to regulate commerce with foreign nations, the broad authority over foreign affairs, and the power to establish a uniform rule of naturalization). Because the foreign-affairs power is at least partly in the hands of the president, some authority exists for the notion that the president has some inherent power in the immigration context. *See infra* Part III.B.

[6] *Henderson*, 92 U.S. at 268.

SB 4 does the complete opposite of what *Graham* and *Henderson* dictate: it creates a whole new structure for state officials to interpret, apply and enforce immigration law that may be completely at odds with what is done in the other 49 states. Clearly, SB 4 and the policies it is attempting to propagate are completely preempted by the United States Immigration laws and the United States Constitution.

III. CONCLUSION

Given the strong body of federal law on preemption concerning immigration matters, this Court should immediately issue a preliminary injunction; there is no reason to delay the striking down of a state law that is clearly not within the authority of Texas to enact.

DATED: July 8, 2017

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that all the parties to this Cause have been notified of this Post Hearing Brief through the electronic filing system used by the federal courts.

/s/ ***Rolando L. Rios***
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