IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

CITY OF EL CENIZO, TEXAS, *et al.*; Plaintiffs,	§	
CITY OF AUSTIN, *et al.*, Plaintiff-Intervenors,	§	CIVIL ACTION NO. 5:17-cv-404-OLG
v.	§	
STATE OF TEXAS, *et al.*, Defendants.	§	

CITY OF AUSTIN'S POST-HEARING BRIEF IN SUPPORT OF INJUNCTIVE RELIEF

TO THE HONORABLE JUDGE ORLANDO L. GARCIA:

The City of Austin ("Austin") files this post-hearing brief in support of its motion for preliminary injunction (Doc. 57) to discuss (1) the relevance of the uncontested evidentiary record to showing plaintiffs' likelihood of success on the merits and (2) how Texas' evidence reveals Fourth Amendment deficiencies in the "show me your papers" provision of SB 4.

ARGUMENT

I. Uncontested Evidence Demonstrates that Plaintiffs are Likely to Succeed on the Merits and Injunctive Relief is Necessary to Prevent Imminent Harm

Generally, to obtain injunctive relief, plaintiffs and plaintiff-intervenors (collectively, "plaintiffs") must show a likelihood of success on the merits; a threat of irreparable harm; that the balance of equities tips in their favor; and that injunctive relief would serve the public interest. *Winter v. NRDC*, 555 U.S. 7, 20 (2008). In regard to their Supremacy Clause claims, however, plaintiffs need only show a likelihood of success on the merits. *See Tex. Midstream Gas Servs., LLC v. City of Grand Prairie*, 608 F.3d 200, 206 (5th Cir. 2010).

Through written submissions and witness testimony, plaintiffs established a robust record including evidence that SB 4 will likely cause economic and social harm. The State made

objections to relevance, and at the hearing attempted to limit witness testimony; Texas did not present contrary evidence, however. The undisputed factual record supports plaintiffs' claims under the Supremacy Clause as well as Austin's home rule claim under the Texas Constitution.

A. SB 4's likely negative impact on U.S. economic and diplomatic interests demonstrates the necessity of field preemption.

In *Arizona v. U.S.*, the Court explained why federal authority preempts state action in the field of immigration:

> Immigration policy can affect trade, investment, tourism, and diplomatic relations for the entire Nation, as well as the perceptions and expectations of aliens in this country who seek the full protection of its laws. Perceived mistreatment of aliens in the United States may lead to harmful reciprocal treatment of American citizens abroad.

Arizona v. U.S., 132 S.Ct. 2492, 2498 (2012) (citations omitted). These national concerns, in addition to local public safety concerns, provide "the background" for formal preemption analysis. *Id.* at 2500. In *Arizona*, the Court considered threatened economic impacts identified by Argentina and other foreign nations, as well as diplomatic concerns identified by former Secretary of State Madeleine Albright. *Id.* at 2498.

Here, plaintiffs have established a record of likely negative economic impacts as well as negative social impacts for foreign nationals residing within the United States.

In regard to economic impacts, plaintiffs presented evidence of likely harm including: (1) cancellation of and diminished participation in major events, with resulting economic losses; (2) loss of clients and employees for local businesses; (3) labor shortages across major industries including agriculture and construction; (4) lower student attendance and academic achievement at public schools, leading to losses of funding based upon student attendance; (5) and an overall perception that Texas is anti-immigrant, which will discourage business relocation and

development, scare away national conventions, suppress consumer spending, weaken student enrollment at public universities, and hamper economic development.[1]

In regard to diplomatic impacts, plaintiffs presented evidence that foreign nationals in Texas will likely be denied access to essential public services, including (1) health care, (2) education, (3) housing, and (4) police protection.[2] Austin also presented evidence that foreign nationals will be denied the ability to practice their chosen religion.[3] Finally, plaintiffs presented evidence that SB 4 would penalize foreign nationals who are present in the United States pursuant to the trilateral NAFTA treaty, in direct contradiction to the will of Congress.[4] *See Crosby v. NFTC*, 530 U.S. 363, 378 (2000) (state immigration law violated Supremacy Clause by "penalizing individuals and conduct that Congress has explicitly exempted or excluded from sanctions").

This evidence supports plaintiffs' argument that the field of immigration is preempted by federal authority due to the national interests at stake, including the vitality of the national economy and the proper treatment of foreign nationals within U.S. borders.[5]

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[1] P-416 (harm to SXSW international festival) and P-417 (cancellation of major convention in Grapevine, Texas); P-407 (loss of restaurant's customers and employees); P-317 (expert opinion concerning likely labor shortages); P-410, P-411 and P-423 ¶¶ 36-55 (decreased student attendance leading to loss of public funding for schools); P-429 (expert opinion concerning negative economic impacts due to perception that Texas is anti-immigrant).

[2] P-404 (mixed status family cannot take child to doctor), P-405 (denial of access to medical clinic), P-426 (same), 427 (same), P-406 (denial of access to violence prevention counseling and support), P-424 ¶¶ 6-35 (denial of access to WIC services), P-425 (same); P-402 (parents cannot participate in child's school), P-403 (same), P-428 (foreign national teachers and students are impacted), P-410 and P-411 (students denied access to high-performing school), and P-423 ¶¶ 36-55 (students denied access to school during immigration enforcement actions); P-408 (denial of decent housing); P-412 (denial of police services), P-403 (same).

[3] P-414 (foreign national parishioners denied access to place of worship)

[4] P-1 ¶¶ 49-50 (local officers are not trained to understand NAFTA treaty status).

[5] The Department of Justice argued at hearing that the Executive Branch supports Texas' enactment of SB 4, but the Administration cannot delegate authority it does not have. Congress is responsible for enacting the Immigration and Nationality Act, including the carefully calibrated treatment of foreign nationals who reside in the United States. Further, only Congress has ratified

B. The record shows how SB 4 conflicts with the First, Fourth, and Fourteenth Amendments of the U.S. Constitution.

"[A] political subdivision has standing to bring a constitutional claim against its creating state when the substance of its claim relies on the Supremacy Clause and a putatively controlling federal law." *Branson School Dist. RE-82 v. Romer*, 161 F.3d 619, 628 (10th Cir. 1998); *see also Rogers v. Brockette*, 588 F.2d 1057, 1069-1071 (5th Cir. 1979).

Here, Austin argues that SB 4 would impede the First Amendment-protected conduct of its officials and would require local police to conduct immigration inquiries in violation of the 4th Amendment and Equal Protection. Because SB 4 directly conflicts with controlling federal law embodied in these constitutional amendments, Austin may sue Texas under the Supremacy Clause.

Local officials possess the First Amendment right to speech as part of their formulation of public policy. *Bond v. Floyd*, 385 U.S. 116, 136 (1966). Here, the undisputed record establishes how SB 4 will inhibit the policy-making activities of local officials, and thus injure plaintiffs such as Austin, San Antonio, and Bexar County.[6] In regard to conflicts with the Fourth and Fourteenth Amendments, Austin presented evidence showing how SB 4's reliance on state identification as proof of lawful status will lead to unreasonable detention and discrimination against Hispanic residents.[7] Co-plaintiffs also presented substantial and compelling evidence for these claims.[8]

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treaties that are impacted by SB 4 enforcement, such as NAFTA. Accordingly, counsel for the United States has no authority to "delegate" immigration powers to Texas.

[6] P-401 (Austin council member's policy objections to SB 4), P-409 (same), P-412 (Austin mayor's policy objections to SB 4); *see also* P-305 (San Antonio council member's policy objections to SB 4); Transcript of Preliminary Injunction Hearing at 208-230 (Bexar County judge's policy objections to SB 4).

[7] P-415 (expert report showing that (1) many lawful residents are unable to acquire state identification and (2) driver's license requirements negatively and disproportionately impact Hispanic and African-American Texans).

[8] *See, e.g.*, P-202 (discrimination in the legislative process), P-203 (same), P-301 through P-302 (same).

Based upon this record, the Court should find that SB 4 is preempted by the First, Fourth, and Fourteenth Amendments to the Constitution.

C. The record shows how SB 4 violates the Home Rule Amendment of the Texas Constitution by withdrawing local control over police while failing to advance any legitimate state interest.

Texas is not authorized to pass SB 4 unless it can show that the law is "reasonably related to public health and welfare" as a "valid exercise of the police power." *See Gibson Distrib, Inc. v. Downtown Develop. Ass'n of El Paso, Inc.*, 572 S.W.2d 334, 335 (Tex. 1978). The overwhelming and undisputed evidence shows that SB 4 will make Texas less safe, however.

Texas provides no direct evidence that SB 4 will make the State safer. Rather, the State cites to statistics that unauthorized immigrants have committed crimes while present in Texas. *See* Doc. 91 at 110. Crucially, the State makes no effort to show that SB 4 will improve the crime rate.[9]

On the other hand, Austin and its co-plaintiffs have provided ample evidence that SB 4 will make Texas less safe. Victims of crime will not come forward to testify, and will not take advantage of available support services; witnesses will not cooperate; and successful community policing strategies will be sabotaged due to a breakdown in public trust.[10] Austin's expert conducted a statistical analysis of every so-called "sanctuary" county identified by the Department of Homeland Security, and found that the "sanctuaries" were safer than the others.[11]

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[9] In fact, an Immigration and Customs Enforcement (ICE) memorandum dated February 21, 2017 (which was recently released in response to a public information request), indicates that criminal conduct is not the focus of immigration enforcement. *See* "ICE Officers Told to Take Action Against All Undocumented Immigrants Encountered While on Duty," https://www.propublica.org/article/ice-officers-told-to-take-action-against-all-undocumented-immigrants (last accessed July 10, 2017). Austin asks the Court to take judicial notice of the February 21, 2017 memorandum, a true copy of which is attached as Exhibit 1.

[10] P-413 ¶¶ 8-9; P-406; P-412; P-303.

[11] P-423 ¶¶ 56-64 and Hearing Transcript at 189:9-191:10.

In sum, the plaintiffs' evidence undisputed shows that Texas cannot substantiate any legitimate governmental interest that supports enactment of SB 4. Accordingly, Austin is likely to prevail on its Home Rule claim, and the Court should enjoin enforcement of SB 4.

II. Texas' Evidence Reveals Fourth Amendment Deficiencies in SB 4's "Show Me Your Papers" Provision

By its letter, SB 4 will, with limited exceptions for crime victims or witnesses, prohibit Austin from enacting any policies (formal or informal) that prohibit or materially limit its police officers from inquiring into a lawful detainee's or arrestee's immigration status. TEX. GOV'T CODE § 752.051(4); TEX. CODE OF CRIM. PROC., ART. 2.13(d), (e). This provision will effectively prevent Austin—along with every other Texas city, county, and police force at an institution of higher education—from enacting policies that would permit officers to inquire into a detainee's immigration status only when there is reasonable suspicion to do so. In the absence of such a policy, Austin police officers will inevitably violate the Fourth Amendment rights of citizens when they, for example, unreasonably prolong a *Terry* stop for the sole purpose of inquiring into an assault suspect's immigration status without any reasonable basis to do so. *See Arizona*, 132 S.Ct. at 2509 ("Detaining individuals solely to verify their immigration status would raise constitutional concerns"). Therefore, SB 4 is constitutionally flawed and, if it is allowed to go into effect, Texas counties and cities will pay the price.

This inherent flaw of SB 4 becomes even more apparent in light of the evidence introduced by Texas at the preliminary injunction hearing. In support of its opposition, Texas introduced the declarations of Steven McGraw, the Director of the Texas Department of Public Safety (DPS); Bill E. Waybourn, Sheriff of Tarrant County, Texas; and Rand Henderson, Sheriff of Montgomery

County, Texas.[12] In similar declarations, each law enforcement official states that officers they manage may inquire into a detainee's immigration status only when doing so is based on reasonable suspicion that the detainee is in the country without lawful status.[13] Moreover, the McGraw Declaration includes an excerpt from DPS policy. DPS policy 98.03 provides that DPS officers will inquire into a detainee's immigration status when, in the course of investigating the underlying state law offense, the officer develops suspicion that the detainee does not have lawful immigration status.[14]

This evidence is remarkable not because it violates any constitutional or policing norms. To the contrary, these policies or statements seem to comport with the basic Fourth Amendment requirement that police officers cannot detain a person, or prolong that detention, without reasonable suspicion. *See, e.g.*, *United States v. Brigham*, 382 F.3d 500, 506 (5th Cir. 2004) (en banc). Instead, what makes these policies and statements illustrative is that local law enforcement officials (including Sheriffs Waybourn and Henderson) actually would violate SB 4 by requiring their officers to develop reasonable suspicion that a detainee might be undocumented before inquiring into the detainee's immigration status.[15]

The DPS policy, and the practice described by Sheriffs Waybourn and Henderson, violates SB 4 because it places a "material limit" on when officers can inquire into a detainee's immigration

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[12] D-1 (McGraw Dec.); D-5 (Waybourn Dec.); D-7 (Henderson Dec.).

[13] D-1, ¶ 13; D-5, ¶ 9; D-7, ¶ 9. The McGraw Declaration refers to detainees, whereas Sheriffs Waybourn and Henderson refer to persons. Presumably, any peace officer is permitted, during a consensual encounter, to inquire into any person's immigration status for any reason. This is because a strictly consensual encounter would not implicate the Fourth Amendment. *Florida v. Bostick*, 501 U.S. 429, 434 (1991). SB 4 is concerned with detainees. Accordingly, Austin presumes that Sheriffs Waybourn and Henderson are speaking, at least in part, as to how their deputies might question detainees.

[14] D-1, Ex. 3.

[15] Of course, DPS is not a "local entity" covered by SB 4. But if its policy were to adopted by a local entity, that policy would violate SB 4.

status. Specifically, under the policy, an officer may make the inquiry (and thereby prolong the detention) only when the officer has a reasonable suspicion that the detainee has unlawful immigration status. On the other hand, SB 4 provides that law enforcement agencies will violate SB 4 when they prohibit or materially limit officers from inquiring into the immigration status of any lawful detainee (save victims or witnesses). TEX. GOV'T CODE § 752.051(4); TEX. CODE OF CRIM. PROC. ART. 2.13(d),(e).

This analysis demonstrates that Texas law enforcement agencies will not be able to comply with SB 4 without their officers inevitably running afoul of the Fourth Amendment. Even sensible, constitutional limits on officers—like those adopted by DPS and espoused by Sheriffs Waybourn and Henderson—would violate SB 4. In fact, during the hearing, Texas' lawyers referenced the Arizona "show me your papers" law, SB 1070, arguing that SB 4 was not nearly as severe.[16] While it is true enough that SB 1070 goes further than SB 4 by requiring officers to make immigration status inquires of all detainees, it is also true that SB 1070 demands such inquires only "where reasonable suspicion exists that the person is an alien and is unlawfully present in the United States." ARIZ. REV. CIV. STATUTE 11-1051(B). SB 4, on the other hand, does not even permit law enforcement agencies to demand that officers have reasonable suspicion before making an immigration inquiry of a detainee. And it prohibits law enforcement agencies, like the Austin Police Department, from placing this reasonable and constitutional restriction on their officers – the very same restriction DPS places on its officers.[17] This flaw puts SB 4 into irreconcilable

[16] *See, e.g.* Hearing Transcript at 120:11-17 (arguing that SB 4 occupies a middle ground between 8 U.S.C. § 1373 and Arizona's SB 1070).

[17] Austin also supports the argument made separately, by the *El Cenizo* plaintiffs among others, that SB 4 effectively requires police officers to make immigration inquiries because individual officers are included within the definition of "local entities" and the penalties for non-compliance are severe.

conflict with the Fourth Amendment.[18] Accordingly, Austin respectfully asks the Court to issue a preliminary injunction against SB 4.

CONCLUSION

Austin asks the Court protect the people of Texas from the unconstitutional deprivations threatened by the State's pending enforcement of SB 4 by issuing a preliminary injunction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that I have served a copy of the foregoing pleading on all parties, or their attorneys of record, via the Court's ECF/CM system, in compliance with the Federal Rules of Civil Procedure, this 10th day of July, 2017.

/s/ Michael Siegel
MICHAEL SIEGEL

[18] Whereas the *Arizona* Court found that section 10-1051(B) of SB 1070 could survive a facial challenge, this provision of SB 4 cannot. Unlike with SB 1070, there is no way that a law enforcement agency could adopt a policy that permits officers to make an immigration inquiry only when doing so is supported by reasonable suspicion.