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, SHERIFF OF EL PASO COUNTY; JO ANN BERNAL, EL PASO COUNTY ATTORNEY in their official capacity; TEXAS ORGANIZING PROJECT EDUCATION FUND; and MOVE SAN ANTONIO,	§	Civil Action No: 5:17-CV-00459-OLG
	§	(Consolidated case)
CITY OF SAN ANTONIO, *et al.*,	§	
Plaintiffs,	§	Civil Action No: 5:17-CV-00489-OLG
	§	(Consolidated case)
v.	§	
THE STATE OF TEXAS, *et al.*,	§	
Defendants.	§	

CONSOLIDATED PLAINTIFFS EL PASO COUNTY, ET AL.'S POST-HEARING BRIEF IN SUPPORT OF THEIR APPLICATION FOR PRELIMINARY INJUNCTION

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SB 4 is the culmination of a deliberate campaign against Latino immigrants in Texas, who are the fastest growing ethnic minority group in the state and poised to come into a position of greater power in Texas. "In essence the State took away the Latinos' opportunity because Latinos were about to exercise it. This bears the mark of intentional discrimination that could give rise to an equal protection violation." *League of United Latin American Citizens v. Perry*, 548 U.S. 399, 440 (2006). It was fueled by an ugly national rise in nativist and anti-immigrant sentiment in recent years, but tailored to target persons of Latin American descent here in Texas.

The record evidence in this case, including the evidence presented to the Court at the Preliminary Injunction hearing, confirms that SB 4 was motivated, at least in part, by illicit racial animus. This discriminatory intent has been evident since the bill was proposed, lurking in contemporaneous statements of high-ranking Texas officials, coloring its consideration in the Texas Senate and its tumultuous debate in the Texas House of Representatives, and culminating in how SB 4 was signed into law before a national online audience amidst fervent opposition on the ground in Texas. Defendants failed to present, either in their written submission or at the hearing, any evidence that would support a legitimate policy rationale for the adoption of SB 4. The dearth of such evidence further confirms SB 4's invidious purpose.

Rather than reiterate arguments previously made before this Court, the Plaintiffs[1] write to respond to certain of Defendants' arguments that pertain specifically to their claims and to highlight salient evidentiary points that confirm that Plaintiffs have a substantial likelihood of success on the merits—particularly on Plaintiffs' Equal Protection Clause claim— and that SB 4

[1] This brief is submitted on behalf of El Paso County; Richard Wiles, Sheriff of El Paso County, in his official capacity; Jo Anne Bernal, County Attorney of El Paso County, in her official capacity; the Texas Organizing Project Education Fund, and MOVE San Antonio.

will cause irreparable harm to Plaintiffs and thousands of individuals in Texas. For these reasons, and for the reasons set forth by the other plaintiffs, the Court should enjoin SB 4 in its entirety.

ARGUMENTS AND EVIDENCE

I. Plaintiffs are Substantially Likely to Succeed on Their Claim that SB 4 Violates the Fourteenth Amendment's Equal Protection Clause.

A. Plaintiffs Have Shown That SB 4 Violates the Fourteenth Amendment's Equal Protection Clause.

Plaintiffs' submissions and the evidence presented at the June 26, 2017 hearing show that SB 4 violates the Fourteenth Amendment because it impermissibly disparately affects Latino Texans based on their ethnicity and was enacted, at least in part, with discriminatory intent.

B. Supplemental Evidence of Disparate Impact

The evidence presented thus far shows that SB 4 disproportionately and impermissibly targets and affects Latino Texans. Of the estimated 4.6 million foreign-born Texas residents, an estimated 3.2 million are Latino. El Paso County, et al.'s Memorandum in Support of Application for Preliminary Injunction, ECF 56-1, at 6. In El Paso, the Latino population comprises 82% of the total population. Decl. of Jo Anne Bernal, ECF 56-2, at 4; Hr'g Tr. 9:4 (June 26, 2017).

In the House Debate on SB 4, Chairman Charlie Geren equated Latino immigrants with undocumented immigrants—"illegals," as he derogatorily called them—when talking about the impetus for his sponsorship of SB 4. ECF 56-1 at 9; H.J., 85th Leg., R.S. S14-S15 (57th Legislative Day) (Tex. 2017). The House sponsor of SB 4 conceded both that the vast majority of immigrants in Texas are Hispanic and that law enforcement officers are not trained in immigration law or types of visas available in the United States. ECF 56-1 at 8-9. This conflation of Hispanic Texans and "illegals" shows that Chairman Geren, in supporting SB 4, saw no

difference between undocumented immigrants and Latino Texans, thus showing that the intent behind this bill is to target Latino Texans under the guise of race-neutral language. *See Lodge v. Buxton*, 639 F.2d 1358, 1363 (5th Cir.), *aff'd sub nom. Rogers v. Lodge*, 458 U.S. 613 (1982) (discriminatory motives are often "cleverly cloaked in the guise of propriety.").

At the hearing, El Paso County Attorney Jo Anne Bernal and Bexar County Judge Nelson Wolff explained this disparate impact based on their decades of experience as public servants. County Attorney Bernal explained that, in El Paso County, a vast majority of the applicants for protective orders are Latino, and about half are undocumented or of undetermined immigration status. Tr. 14:2-4.[2] Similarly, Judge Wolff testified that when 71,000 people in Bexar County are undocumented and 66,000 of them are Hispanic, "it would stand to reason … that [law enforcement officials] would ask a Hispanic. And, obviously, a Hispanic may have a little accent, a little darker skin. I call that racial profiling and so does the sheriff and so does the police chief." Tr. 221:25-222:5.

Defendants cannot seriously dispute that SB 4 will have a disparate impact on Latinos.

C. Additional Arlington Heights *evidence showing that SB 4 was adopted with a discriminatory purpose.*

1. Historical background of and atmosphere surrounding SB 4

SB 4 was not enacted in a vacuum. It is just the latest and harshest in a long line of state-level anti-immigrant legislation rooted in anti-Latino bias. SB 1070 in Arizona, for example, was directly rooted in fears of an increasing Latino population in the State, and the Supreme Court

[2] Count Attorney Bernal's sworn declaration explains how local law enforcement officers will have no choice but to engage in racial profiling because officers would be tasked with parsing and questioning Texans' compliance with federal immigration laws, which are based on nationality. ECF 56-3, at 5. Because officers are not trained in immigration law and the vast majority of Texas immigrants are Latino, officers will inevitably feel compelled to question Latinos on their immigration status. *See id.*

invalidated most of that law. *See Arizona v. United States*, 567 U.S. 387 (2012). In Alabama, the State tried to pass an "anti-immigrant" bill that was so clearly actually an anti-Latino bill, that U.S. District Judge Myron Thompson found the entire law likely discriminatory because of the numerous examples of lawmakers using ethnic stereotypes and using "Hispanic" and "illegal immigrant" interchangeably during the bill's debate.[3] SB 4 is similarly racially motivated, and is an attempt by Defendants to discriminate against Latinos under the guise of immigration enforcement legislation. This historical context shows that SB 4 was enacted with an impermissibly discriminatory intent.[4]

At the hearing, Representative Ana Hernandez emphasized that the Legislative Session leading up to the passage of SB 4 had an unusual focus on penalizing Latino immigrants, not only in the debate around SB 4, but also in the debate of other non-immigration related bills. Tr. at 155. In fact, after the incident in which Rep. Matt Rinaldi racially profiled Latino protesters at the Capitol and called ICE on them, Rep. Cesar Blanco received a call to his office in which the caller stated: "I stand with Matt Rinaldi and fuck the illegal alien spicks […] White power!"[5] This was the discriminatory and hateful anti-Latino environment in which SB 4 came to be.

2. Sequence of events leading to the law's enactment

The testimony of Rep. Hernandez, the declaration of former Representative Trey Martinez Fisher (Ex. P-213), and other evidence presented at the hearing show that the adoption

[3] *Alabama's Anti-Immigrant Law Dealt Yet Another Major Blow*, SOUTHERN POVERTY LAW CENTER, Dec. 11, 2011, https://www.splcenter.org/news/2011/12/12/alabama%E2%80%99s-anti-immigrant-law-dealt-yet-another-major-blow.

[4] *See also* ECF 56-1 at 11-13.

[5] Peter W. Stevenson, *A Texas Republican is accused of threatening to 'put a bullet in one of my colleagues' heads,* WASHINGTON POST, May 30, 2017, https://www.washingtonpost.com/news/the-fix/wp/2017/05/29/a-texas-republican-called-ice-on-protesters-then-lawmakers-started-to-scuffle/?utm_term=.ed9038cb59bb. *See also* https://twitter.com/CesarJBlanco/status/869402867052023808.

of SB 4 was a clear departure from established norms. Rep. Hernandez testified at length about the "racial tension" early on in the Legislative Session, and in particular, how the "the issue of immigration [was] injected into" unrelated topics from the outset. Tr. 155:20-156:5. Specifically, an amendment to a childcare reform bill would have prohibited monetary payments to undocumented caregivers, when the substance of the bill was wholly unrelated to immigration matters. Tr. 155:13-22.[6] Again, these events illustrate that SB 4's enactment was predicated on anti-Latino animus.

Former Rep. Martinez Fisher described the "truly bizarre and genuinely dangerous way" in which the Legislature handled SB 4, including its debate and amendments (*see* Sec. I.C.3, *infra*). Senator José Rodríguez, with years of experience in the Legislature, described the 2017 Legislative Session as "the most anti-Latino in modern Texas history." ECF 56-5, Decl. of Sen. José Rodríguez, ¶13. At the Preliminary Injunction hearing, counsel for Defendants strongly suggested that SB 4 directly targeted Travis County Sheriff Sally Hernandez. Tr. 134:17-25.[7]

3. Departures from the normal procedural sequence

Core procedural irregularities in the enactment of SB 4, both submitted as evidence and testified to at the hearing, further reveal the true discriminatory intent behind the law. *Veasey v.*

[6] During the debate of this specific amendment, at one point the proponent of the amendment was surrounded at the front microphone of the House chamber by White/Caucasian Members. Tr. 155:6-156:2. At the rear microphone, typically used to ask questions of the Member at the front microphone, a Latino representative who opposed to the amendment was surrounded by Latino and African-American Members. Tr. 156:2-5. This visual juxtaposition was emblematic of the intent behind SB 4.

[7] At the hearing, Counsel for Defendants purported to give rationales for the passing of SB 4, citing the Kate Steinle murder in San Francisco (in *California*, not Texas) and "public safety, because of the important debate on compliance with ICE detainers." Tr. 134:25-135:1. These post-enactment statements of counsel are belied by the record evidence and, regardless, are not at all probative of legislative intent.

Abbott, 830 F.3d 216, 238 (5th Cir. 2016), *cert. denied*, 137 S. Ct. 612 (2017).[8]

(i) *The Senate Process*

SB 4 was an exceptionally important and urgent bill to its proponents and their leadership. ECF 56-4, Decl. of Rep. E. Rodríguez, ¶ 5; ECF 56-5, ¶ 16. Normally, a bill is given a number in sequential order based on when it is filed.[9] The Speaker of the House and the Lieutenant Governor, however, traditionally assign low bill numbers to the bills that are their personal priorities. *Id*. SB 4's low number designation meant that the "show-me-your papers" bill was a priority for the Lt. Governor from the get-go.

The Texas Constitution strictly proscribes the timeframe for a regular legislative session. In addition to prohibiting either chamber from passing legislation during the first 60 days of a 140-day legislative session, the Constitution forbids any action from being taken on a bill other than introduction and referral to committee during the first thirty days. This includes a prohibition on committees holding hearings on a bill. The exception to this constitutional rule is that matters declared "emergency" by the Governor may be considered at any time during that 60 day period. *See* Tex. Const. Art. 3 § 5(b). On January 31, 2017, Governor Abbott, in an official message to the legislature, declared banning so-called "sanctuary cities" an emergency item.

In language that bore a striking resemblance to already filed SB 4, Governor Abbot listed "legislation relating to state or local government cooperation with federal immigration law or

[8] The *Veasey* Court analyzed "numerous and radical" departures from the regular process in the adoption of state law that may show discriminatory intent. 830 F.3d at 238. Many similar departures plagued SB 4's legislative process.

[9] Aman Batheja and Becca Aaronson, TEXAS TRIBUNE, *Here's a Look at What Happened With Straus' and Patrick's Priority Bills,* July 18, 2015, https://www.texastribune.org/2015/07/08/what-happened-patrick-and-straus-priority-bills/.

federal immigration officials" as one of four state "emergency matter[s]."[10] This allowed SB 4 to "cut in line" ahead of the bulk of legislation that was not an "emergency" item, thus bypassing the strict requirements other bills in Texas must go through and allowing SB 4 to be passed with extraordinary speed.

There is also ample evidence that the Governor's office was working closely with the Legislature and Lt. Governor Patrick to move SB 4 outside of typical channels. In addition to assigning SB 4 a low bill number and declaring it an emergency item, a troublesome sequence of events shows atypical efforts on behalf of both the Governor and the Legislature to set SB 4 for hearing and pass the bill as quickly as possible. On January 25, 2017, almost a full week *before* the Governor's January 31, 2017 designation of SB 4 as an emergency item, the Senate Committee on State Affairs posted its notice of their intent to consider SB 4 on February 2, 2017.[11] Had SB 4 not been designated an emergency item by the Governor before February 2, no action on SB 4 could have been taken in the State Affairs Committee. At the time the February 2 hearing was scheduled, SB 4 had not yet been designated an emergency item and therefore no action could have been taken on it. Thus, the Senate Committee on State Affairs clearly knew that SB 4 would indeed be designated as an emergency item *before* the Governor declared it as such. This backwards sequence shows close collusion between the Governor and the Legislature to push SB 4 through to passage.

But utilizing Constitutional and Senate rules in novel ways was not enough for the Texas Senate and Lt. Governor Patrick. The Senate went a step further and broke with both Senate

[10] Letter from Greg Abbott, Texas Governor, to Patsy Spaw, Texas Secretary of the Senate (January 31, 2017), *available at* http://www.lrl.state.tx.us/scanned/govdocs/Greg%20Abbott/2017/message01312017_immigration.pdf.

[11] Lt. Governor Patrick assigned SB 4 to the Senate Committee on State Affairs.

Rules and well-established practice to pass SB 4. On February 2, 2017, the Senate State Affairs Committee held a daylong committee hearing that included testimony from hundreds of opponents of the bill. ECF 56-5, ¶¶ 20-22. Only around 10 people testified in favor. *Id.*; Tr. 162:3.

As mentioned before, the denial of a seat at the table to Senators who opposed the bill was a departure from the Senate's long-standing practice. This limited the ability of Senators who opposed the bill to effectively test the evidence offered by witnesses, especially in light of the fact that the overwhelming majority of the committee favored the bill, as shown in the tally reporting SB 4 to the full Senate with the recommendation that it pass as substituted. Moreover, public debate on the bill was cut short. ECF 56-5, ¶ 23-27. These actions deviated from long-standing Senate practice to permit sufficient time for the full consideration of legislation.

Tellingly, the State Affairs Committee violated Senate Rules in order to meet and pass SB 4. Under Senate Rule 11.13, Senate committees may not meet to consider bills and resolutions when the Senate is in session, "except by unanimous consent of the members present."[12] The Senate Journal shows that on Wednesday, February 1, 2017 at 10:30 a.m., the Senate was called to order for the ninth legislative day. While awaiting the receipt of committee reports, the Senate remained in session from Wednesday, February 1 until Friday, February 3, 2017 at 1:47 p.m., when the ninth legislative day adjourned. *See* S.J., 85th Leg., R.S. 153-176 (Tex. 2017).[13] While the Senate was in session during the ninth legislative day, the Senate

[12] S. Res. 3, 85th Leg., R.S. (Tex. 2017) (*see* http://www.senate.state.tx.us/rules.php).

[13] A "legislative day" may extend over more than one calendar day. Senate Rule 5 contains the order of business for a new legislative day. On the two days following Wednesday, February 1, 2017 none of the required actions that would indicate new legislative days of session took place. Instead, the Senate remained in session by motion until the receipt of committee reports, finally adjourning on 1:47 p.m. on Friday. *See* S.J., 85th Leg., R.S. 158-176 (Tex. 2017). This is

Committee on State Affairs met to hold its public hearing and then passed SB 4 without obtaining unanimous consent.

When this violation of Senate Rules was brought to the attention of the body by Senator José Menéndez through a point of order,[14] Lt. Governor Patrick and his parliamentarian, in a completely unprecedented determination without support in any reported legislative precedent of the Texas Legislature or the United States Congress, told him that the body was in a state of "limbo," and rather than ruling on the point of order, asked Sen. Menéndez to withdraw it. *Id*. ¶ 29. "Limbo," whatever it may be, is not a technical term nor is it found in the Rules of the Texas Senate or in any other authority used by the Senate to determine questions of legislative procedure.[15] The Senate was in session when the committee met to consider SB 4, and the committee met without unanimous consent of the Senators—a consent that Senators representing Latino communities would have certainly withheld. Again, this kind of disregard for well-established Senate rules shows that SB 4 was backed by a nefarious purpose, and its proponents would see it passed, whatever it took.

One might wonder why the Senate would not simply adjourn on February 1, since the decision to stay in session on a single day precluded the hearing on SB 4 from being in

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appropriate given that proper practice dictates that a legislative day continues until terminated by adjournment. *See* 71 S. J. 2d C.S. 554 (1989), 5 Hinds § 6738-6739.

[14] "A point of order is an objection that the pending matter or proceeding is in violation of a [Senate] Rule." *See* Hugh L. Brady, TEXAS HOUSE PRACTICE ¶ 22 (3d ed. newly rev. 2017).

[15] Senate Rule 20.01 provides that "[t]he President of the Senate [e.g., the Lt. Governor] shall decide all questions not provided for by the standing Rules of Order of the Senate and Joint Rules of Order of both branches of the Legislature, according to parliamentary practice laid down by approved authors." This includes rulings by prior Lt. Governors; prior rulings of the Texas House Speaker; Congressional practice as reflected in, among other, the U.S. Senate Manual, Jefferson's Manual, and published Congressional precedents; and Mason's Manual of Legislative Procedure. *See* Hugh L. Brady & Ross O. Peavey, TEXAS SENATE PRACTICE ¶ 482 (1st ed. newly rev. 2017)

compliance with Senate rule 11.13, and the Senate did not convene or handle any business on February 2. Perhaps tellingly, on the final page of the 25-page Senate Journal for that legislative day (which spanned three full calendar days) was the receipt of the committee report for SB 4. *See* S.J., 85th Leg., R.S. 153-176 (Tex. 2017). The receipt of that report on Friday, while the Senate was in session, allowed SB 4 to be placed on the intent calendar by the Lt. Governor on the following Monday, again expediting the process for the bill at all costs and disregarding legislative rules.[16]

(ii) *The House of Representatives Process*

The serious departures from the regular legislative process continued in the House of Representatives. On April 24, the Chairman of the Calendars Committee sought full House approval of a so-called "calendar rule" for SB 4 that would require Members to pre-file their amendments before SB 4 was laid before the House for debate; this was an attempt to cut-off meaningful policy discussions regarding the bill.[17] ECF 56-4, ¶¶ 37-38; Tr. 164:15-23.

The proposed rule was called up for a vote just two days before SB 4's scheduled consideration date; given the short time-frame, it would give Members roughly 24 hours to draft and file amendments to a committee substitute that had rocketed out of Calendars. Since the House committee substitute was different from the Senate version, Members would have to work specifically with the House version to propose appropriate amendments. The hoped-for effect was to drastically reduce the number of ameliorative amendments that could be proposed and

[16] Senate Rule 5.14 states that any Senator "who desires [to place a bill on the intent calendar] shall give notice of such intent to the Secretary of the Senate, in a manner specified by the Secretary, not later than 3:00 p.m. on the last preceding calendar day that the Senate was in session."

[17] A "calendar rule" is typically sought to control and prepare for debate of the bill in question, as well as to pre-select amendments and their order.

shorten floor debate. It is exceedingly rare for a Calendars rule to be proposed for bills that are not related to tax, appropriations, and redistricting matters, which is why the rule for SB 4 required two-thirds of the Members present and voting for approval; it did not receive the required vote and thus failed. ECF 56-4, ¶ 38. The vote was reconsidered, and it failed again. *Id*. In order to reconsider a vote under Texas House Rules, a Member who was on the prevailing side (here one of the Members who opposed the calendar rule) must request the reconsideration. In this case, Representative Tony Tinderholt requested reconsideration. See H.J., 85th Leg., R.S. 1772-1778 (Tex. 2017). He and two other Members of the self-proclaimed "Freedom Caucus" (Representative Kyle Biedermann and Representative Briscoe Cain) each switched their vote upon reconsideration to support the calendar rule on SB 4. *Id.* This sudden change of heart to support the House leadership's attempt to limit debate on SB4 came from an unlikely source—namely, Members who typically opposed the leadership's attempts to limit amendments directly and vocally.[18] It is noteworthy that on SB 4, these Members found that, upon review, they supported this unique rule suspension. Again, the efforts to ram SB 4 through the process disregarded long-established rules and practice.

Regarding the House floor debate on SB 4, it should be noted that, in a radical departure from his current practice, the Speaker of the House presided over almost the entire debate himself and personally made the rulings on practically all of the points of order raised. Ordinarily, the Speaker presides intermittently during the day, with temporary presiding officers handling the vast bulk of the work. This departure shows the House leadership's clear intention to ensure the passage of SB 4 at any cost.

[18] *See* Patrick Svitek, *House GOP Tensions Come to a Head with 'Mother's Day Massacre'*, TEXAS TRIBUNE, May 12, 2017, https://www.texastribune.org/2017/05/12/house-gop-tensions-come-head-mothers-day-massacre/.

Rep. Hernandez testified at the hearing that she had never seen a bill with so much opposition pass so quickly through the legislative process, Tr. 161:20-162:17, a substantial departure from normal procedure. Ex. P-213 at ¶¶ 19-20. She further explained the summary dismissal of over seventy ameliorative amendments to SB 4 without any individual consideration. Tr. 163-164. Defendants attempt to portray this as "a courtesy to opponents of SB 4," because the House could have, instead, simply "foreclose[d] any vote on the pending amendments themselves." ECF 91 at 100. But Defendants miss the point: the significance of the collective rejection of these amendments is that dozens of ameliorative amendments were not considered individually at all, regardless of what specific procedure was used to achieve that result. This was one of the most egregious departures from normal procedure in the House consideration of SB 4, and one that Rep. Hernandez "had never seen … utilized before" in her twelve years as a State Representative. Tr. 163:14.

Even at this early stage of the case, there is substantial evidence of discriminatory intent: deviations from normal procedure that accompanied recent "sanctuary cities" bills; huddles of Members of the Legislature facing huddles of racial-minority Members; heckling of Latino Members by racial-majority Members; grossly disproportionate opposition to SB 4 compared to its support; failure to enforce the House and Senate Rules and established practices; and wholesale disregard for ameliorative amendments offered by Latino Members. *See* Ex. 213 at ¶¶ 65-71. All this evidence indicates that SB 4 was passed with discriminatory intent, and Plaintiffs have a substantial likelihood of success on their Fourteenth Amendment Equal Protection claim.

II. SB 4 Violates the First Amendment and Defendants Have Sued TOPEF in Retaliation.

A. Testimony at the Preliminary Injunction Hearing confirmed that SB 4 will impermissibly restrict public servants' freedom of speech.

The evidence presented at the injunction hearing further illustrated that SB 4 will significantly and unconstitutionally chill and restrict the freedom of speech of elected officials such as testifying witnesses El Paso County Attorney Jo Anne Bernal, Bexar County Judge Nelson Wolff, and San Antonio City Councilmember Rey Saldaña.

SB 4 prohibits local entities—including all their officers and employees—from "endors[ing] a policy under which the entity or department prohibits or materially limits the enforcement of immigration laws." Tex. Gov. Code § 752.053(a)(1). In addition to being unconstitutionally vague, *see* ECF 56-1 at 25-27, this prohibition chills the political speech of elected officials, which is a "a basic tenet of our constitutional democracy." *Cox v. Louisiana*, 379 U.S. 536, 552 (1965).

As El Paso County Attorney Jo Anne Bernal explained, SB 4 would prohibit her "essentially from speaking out against such a practice [of not enforcing immigration laws] because the bill … prohibits [her] from taking any action or speaking out against it or it prohibits [her] from endorsing any conduct which is contrary to the provisions of the bill." Tr. 16:2-7. Judge Wolff similarly described the "chilling effect on what [he] would be able to say" during the next re-election campaign regarding immigration enforcement, if SB 4 goes into force. Tr. 217:1-7. *Laredo Rd. Co. v. Maverick Cnty.*, 389 F.Supp. 2d 729, 748, n.20 (W.D. Tex. 2005) (preliminarily enjoining ordinance that limited protected speech). Councilmember Saldaña highlighted "one of the most concerning" aspects of SB 4 for him as an elected official:

> [I]t could be very difficult for me to withdraw my voice from a community that has given me my seat to speak on their behalf, and my experience has been that

> they have wanted me to speak up and be their voice. …[M]y side of town never had that voice, so it is incredibly important that the speech that I might have would be restricted in SB 4. We need to be able to speak our minds and speak our opinions; that means we are endorsing through public statements or adopting through our city budget." Tr. 245:11-20.

If allowed to go into force, SB 4 will irreparably harm the constitutionally-protected rights of these and other public officials. *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion). Despite Defendants' attempts to argue away SB 4's impermissible, content-based restraint on public officials' freedom to express their views, the law is already chilling that constitutional freedom.

B. Defendants retaliated against TOPEF in violation of the First Amendment

Defendants appear to—deliberately or not—misapprehend TOPEF's First Amendment retaliation argument. ECF 91, at 45-47. Defendants argue that the State's suing TOPEF in Travis County is not retaliation because Texas filed that "action *before* the El Paso plaintiffs' lawsuit here." ECF 91, at 45 (emphasis in original). But the relevant point in time for the retaliation analysis is not when Texas *filed* its lawsuit in Travis County, but rather when it sued *TOPEF*—and Defendants concede, as they must, that Texas sued TOPEF (or, as Defendants characterize it, "add[ed] as defendant") after TOPEF had engaged in protected First Amendment speech by challenging SB 4 in this Court. *See, e.g.*, *Anderson v. Davila*, 125 F.3d 148, 161 (3d Cir. 1997); *Harrison v. Springdale Water & Sewer Commission*, 780 F.2d 1422, 1428 (8th Cir. 1986). In other words, the retaliatory action is not the filing of the original lawsuit in Travis County, but rather adding TOPEF as a defendant in that action.[19]

[19] *See also Colson v. Grohman*, 174 F.3d 498, 508 (5th Cir.1999) ("[T]he First Amendment prohibits not only direct limitations on speech but also adverse government action against an individual because of her exercise of First Amendment freedoms."); *Pickering v. Board of Educ.*, 391 U.S. 563, 574–75, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968) (holding impermissible under the First Amendment the dismissal of a high school teacher for speaking on "issues of public importance").

Defendants are correct that retaliation is actionable when it is the "but-for cause" of official action. *Hartman v. Moore*, 547 U.S. 250, 256 (2006). And here, TOPEF challenging SB 4's constitutionality *was* the but-for cause of Texas suing TOPEF in Travis County: Put simply, had TOPEF not challenged SB 4 in this Court, Texas would not have sued TOPEF in Travis County. Defendants acknowledge as much when they explain that Texas "amended its complaint [in Travis County] to add as defendants entities that had challenged SB 4. …" ECF 91, at 45. That is, Texas sued TOPEF for no reason other than that TOPEF had exercised the petition rights of itself and its members by accessing the federal courts.

Despite Defendants' attempts to downplay the significance of their lawsuit against TOPEF, they cannot avoid the crucial fact that confirms the retaliatory nature of their actions: under no circumstances can TOPEF possibly violate SB 4, even if it were in force today. TOPEF is simply not an entity regulated by SB 4, and thus could not violate it. Tex. Gov. Code, § 752.051(5) (definition of "local entity").[20] There is no scenario under which TOPEF may be deemed to violate this law, and Texas' lawsuit against TOPEF is thus mere retaliation.

III. Plaintiffs' Fourth Amendment Claims are Properly Brought and SB 4 will Result in Unconstitutional Seizures.

A. Facial challenges to the Fourth Amendment are permitted and can succeed.

In relation to SB 4's ICE detainer mandate, Defendants insist that Plaintiffs cannot succeed on their facial challenge because Fourth Amendment rights are personal and "may not be asserted vicariously." ECF 91 at 67; *see also* Tr. 247:18. But Defendants ignore Supreme

[20] Indeed, in the context of the Travis County litigation TOPEF has notified Defendants that their lawsuit against TOPEF is not only frivolous but may also subject them to sanctions under Federal Rule of Civil Procedure 11(b), which TOPEF has reserved the right to seek.

Court precedent directly on point that explicitly allows facial challenges on Fourth Amendment grounds. *City of Los Angeles v. Patel*, 135 S. Ct. 2443, 2450, 192 L.Ed.2d 435 (2015).

In *Patel*, the Court "clarif[ied] that facial challenges under the Fourth Amendment are not categorically barred or especially disfavored." *Id*. at 2449. "Any claim to the contrary reflects a misunderstanding" of Supreme Court jurisprudence in this regard. *Id*. (citing *Sibron v. New York*, 392 U.S. 40 (1968)). Particularly where, as here, members of Plaintiffs TOPEF and MOVE would be subject to and harmed by these unreasonable seizures, Plaintiffs clearly have standing to challenge SB 4 facially on Fourth Amendment grounds. *Id*. Defendants' argument that Plaintiffs cannot mount a facial challenge to SB 4's ICE detainer mandate is simply contrary to the law. *Patel*, 135 S.Ct. at 2450-51.

B. SB 4 violates the Fourth Amendment

Defendants further assert—and argued at the hearing—that SB 4 cannot, on its face, violate the Fourth Amendment because there may be some constitutional applications of its detainer mandate. ECF 91 at 71; Tr. 247:18. Essentially, Defendants claim that because some ICE detainer requests may meet the probable cause standard, SB 4's mandate that *all* detainer requests be honored will result in some seizures that comply with the Fourth Amendment, and therefore SB 4 cannot be facially enjoined.[21] Defendants err.

[21] In this regard, Defendants mischaracterize what SB 4 does. They claim "SB4 merely requires that local officials comply with federal immigration detainer requests that are backed by a finding of probable cause by a federal official and are consistent with the Fourth Amendment." ECF 91, at 71. But the text of SB 4 contains no such requirements of probable cause or consistency with the Fourth Amendment. What SB 4 *does* require is that every law enforcement agency in the State "comply with, honor, and fulfill *any* request made in the detainer request provided by the federal government." Tex. Code Crim. P. § 2.251(a)(1) (emphasis added). Further, the definition of "immigration detainer request" makes clear that SB 4 contemplates compliance with requests beyond formal detainer requests, and even informal requests, since it defines detainer requests as "including"—and therefore not limited to—an "ICE Form I-247

When analyzing a facial challenge to a statute, courts look at whether the law is unconstitutional "in all of its applications." *Wash. State Grange v. Wash. State Republican Party,* 552 U.S. 442, 449 (2008). Importantly, however, "when assessing whether a statute meets this standard, the Court has considered only applications of the statute in which it actually authorizes or prohibits conduct." *Patel*, 135 S.Ct. at 2451. In facial Fourth Amendment challenges, "the proper focus of the constitutionality inquiry is searches [or seizures] that the law actually authorizes, not those for which it is irrelevant." *Id.* That is, if a seizure would take place regardless of SB 4's detainer mandate, then that seizure is not an "application" of the law for purposes of a facial analysis. The law "is measured for consistency with the Constitution by its impact on those whose conduct it affects… not [on those] for whom the law is irrelevant." *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 894 (1992).

Here, Defendants would have the Court focus the SB 4 analysis on ICE detainer request detentions supported by either criminal probable cause or by a warrant—*i.e.*, those for which SB 4 is irrelevant. *See* ECF 91 at 71. A detention based on criminal probable cause would be constitutional, and a law enforcement agency may choose to conduct the detention based on that probable cause, irrespective of SB 4. The constitutional "applications" that Defendants insist prevent facial relief against SB 4 "are irrelevant to [the] analysis because they do not involve actual applications of the statute." *Patel*, 135 S.Ct. at 2451.

In reality, however, SB 4 requires much more than that: it requires strict compliance with any and all detainer requests, formal or informal, regardless of whether they are backed by criminal probable cause or a warrant. Tex. Code Crim. P. § 2.251(a)(1); Tex. Gov. Code §

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document or a similar or successor form." Tex. Gov. Code § 772.0073(a)(2) (definition of "immigration detainer request"). *See also* Tr. 39:17-21.

772.0073(a)(2).[22] *Those* are the applications of the law that are relevant to the facial analysis, not the ones that comport with constitutional requirements. And in all of *those* applications, SB 4 will mandate seizures that violate the Fourth Amendment, and therefore can and should be facially enjoined.[23]

IV. SB 4 is Unconstitutionally Vague.

Defendants also claim that SB 4 cannot be invalidated on vagueness grounds because the law is not vague "in all applications." ECF 91 at 33-34 (citing *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 (1982)). As Defendants admit, that standard applies only when a statute does *not* implicate constitutionally-protected conduct. *Id*. at 34. But here, SB 4's vagueness implicates multiple constitutionally protected rights: public officials' freedom of speech and would-be detainees' right to be free from unreasonable seizures, among others. ECF 56-1 at 23, 31. Thus, Defendants' claim that SB 4 must be vague in all its applications in order for this Court to enjoin it must be rejected.

V. SB Will Irreparably Harm Plaintiffs.

As previously explained, SB 4 will inflict irreparable injury on Plaintiffs as a matter of law. *Elrod*, 427 U.S. at 373 (plurality opinion); *De Leon v. Perry*, 975 F. Supp. 2d 632, 663

[22] The only purported exception to complying with an ICE detainer request applies when the person being detained provides "proof that the person is a citizen or the United States or that the person has lawful immigration status…." Tex. Code Crim. P. § 2.251(b). As Plaintiffs have explained, that exception is so vague and impractical so as to be nearly meaningless. ECF 56-1 at 27-30.

[23] Further, Defendants' logic, if correct, "would preclude facial relief in every Fourth Amendment challenge to a statute" authorizing detentions without requiring a warrant or probable cause. *Patel*, 135 S.Ct. at 2451. That is reason alone to reject Defendants' argument. *See id*. Plaintiffs incorporate by reference their previous arguments and allegations regarding SB 4's violation of the Fourth Amendment. *See* ECF 56-1 at 31-33.

(W.D. Tex. 2014), *aff'd sub nom. De Leon v. Abbott*, 791 F.3d 619 (5th Cir. 2015). The testimony presented at the injunction hearing illustrated some of those harms concretely.

As the elected County Attorney for El Paso County, Jo Anne Bernal is the primary legal advisor to County entities, and her statutory duties include obtaining protective orders for victims of domestic violence, sexual assault, harassment, and stalking. Tr. 9:7-8, 13-23. El Paso County has adopted a written policy prohibiting its personnel from enforcing civil immigration law. Tr. 10:15-21, 11:4-12. The County adopted this policy exercising its policing discretion, and because based on El Paso's local prerogatives, such a policy strengthens bonds of trust between law enforcement and the community. Tr. 11:13-12:9. Similarly, Plaintiff and County Sheriff Richard Wiles's declaration, offered at the hearing, provides additional examples of irreparable injuries Plaintiffs will suffer if SB 4 is not enjoined, including the destruction of the chain of command in the Sheriff's Office and the frustration of El Paso County's duty to protect the El Paso community. Ex. P-214, ¶ 13-15. Once this trust is breached—such as when one officer asks about a victim's immigration status—"there really is no way to repair it." Tr. 16:12.

Moreover, as the ICE arrest incident at the El Paso courthouse showed, immigration enforcement in County facilities has already had a chilling effect on the number of victims seeking protective orders. Tr. 14:10-15:9. If SB 4 goes in force, victims will now fear every Sheriff's deputy and County employee they encounter at the courthouse, Tr. 15:10-16, and County Attorney Bernal and Sheriff Wiles will not be able to remedy that injury to community safety—the very safety they took an oath to protect. Tr. 16:12. SB 4 will injure Plaintiffs irreparably and should therefore be enjoined.

CONCLUSION

For the foregoing reasons, Plaintiffs have a substantial likelihood of success on the merits and respectfully request this Court to enjoin SB 4 in its entirety.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that, on July 10, 2017, I filed the foregoing Plaintiffs El Paso County, et al.'s Post-Hearing Brief in Support of their Application for Preliminary Injunction via the Court's ECF/CM system, which will serve a copy on all counsel of record.

/s/ Efrén C. Olivares

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