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

CITY OF EL CENIZO, TEXAS, *et al.*, Plaintiffs,	§	
v.	§	CIVIL ACTION NO. 5:17-cv-00404-OLG
THE STATE OF TEXAS, *et al.* Defendants.	§	

CITY OF DALLAS'S SUPPLEMENTAL BRIEF IN SUPPORT OF PLAINITFFS' APPLICATION FOR PRELIMINARY INJUNCTION

Now comes the City of Dallas ("Dallas"), and files this supplemental brief in support of the Plaintiffs' application for preliminary injunction and would show the Court the following:

I. Summary

SB4 becomes effective as Texas law on September 1, 2017. Dallas joins in support of the various Plaintiffs' and Intervenors' applications for preliminary injunction (*see El Cenizo* plaintiffs ECF Nos. 24, 24-1; *San Antonio* plaintiffs, ECF No. 55, 77, 77-1 to 77-8; *El Paso County* plaintiffs, ECF Nos. 56, 56-1-56-7; *City of Austin* plaintiff, ECF Nos. 57, 57-1 to 57-18; *Travis County* plaintiffs, ECF Nos. 58, 58-1). SB4 is a mandate by the Texas legislature to local governments to enforce federal immigration law, to remain silent and not criticize federal immigration law, and to ignore others' constitutional rights. Through its commands, SB4 strips local governments of discretion, shifts the cost of immigration law enforcement to local governments, and exposes local governments to liability for complying with SB4. SB4 is unconstitutional under the United States and Texas Constitutions. Plaintiffs and all local governments, including Dallas, will suffer irreparable harm if the Court does not enjoin the application and implementation of SB4.

II. Background

A. The Plaintiffs

There are five groups of Plaintiffs consisting of various local governments, elected officials, and civil rights, educational, and service organizations who requested a preliminary injunction. Initially, there were three separate lawsuits but the cases were consolidated.

The El Cenizo plaintiffs consist of the City of El Cenizo; its mayor, Raul Reyes; Maverick County Sheriff Tom Schmerber; Maverick County Constable Marion Hernandez; and Texas State League of United Latin American Citizens ("LULAC") (a non-profit civil rights organization). (ECF No. 31).

The El Paso plaintiffs consist of El Paso County, El Paso County Sheriff Richard Wiles, El Paso County Attorney Jo Anne Bernal, the Texas Organizing Project Education Fund ("TOPEF") (an education organization), and MOVE San Antonio ("MOVE") (a non-partisan nonprofit organization). (ECF No. 51).

The San Antonio plaintiffs include the City of San Antonio; its Council-member Rey Saldana; the Texas Association of Chicanos in Higher Education ("TACHE") (a Texas-wide professional association); La Union Del Pueblo Entero ("LUPE") (a community union); and Workers Defense Project ("WDP") (a low-income workers membership-based organization). (Civil Action No. 5:17-CV-00489-OLG, ECF No. 1) .

The Austin plaintiff is the City of Austin. (ECF No. 37).

The Travis County plaintiffs consist of Travis County, Travis County Judge Sarah Eckhardt, and Travis County Sheriff Sally Hernandez. (ECF No. 78).

The City of Dallas, the City of Houston, and the Texas Association of Hispanic County Judges and County Commissioners have also intervened as plaintiffs. (ECF Nos. 96, 139, 141). Collectively, the Plaintiffs and Intervenors are referred to as "the Plaintiffs."

B. The Defendants

Defendant State of Texas is a sovereign state of the United States of America. Defendant Greg Abbott is Texas's Governor and Defendant Ken Paxton is Texas' Attorney General and both are responsible for executing and defending the laws of the State of Texas and its Constitution. Hereafter the Defendants are collectively referred to as "the State Defendants."

The United States has filed a statement of interest. (ECF No. 90).

C. The Texas Law at Issue, SB4

The Texas legislature enacted and the Governor signed an act adding to and amending Texas statutes, generally referred to as Senate Bill Number 4 ("SB4"). Act of May 7, 2017, 85th Leg., R. S., S.B. 4. SB4 has two general prohibitions, a so-called "anti-sanctuary" provision and a provision requiring mandatory compliance with any federal immigration detainer request. The terms of SB4 have been detailed in earlier filings by all parties.

III. Plaintiffs' Have Standing to Litigate the Constitutionality of SB4

Federal courts have no subject-matter jurisdiction unless a case or controversy is presented by a party with standing to litigate. *See Bank of America Corp. v. City of Miami, Fla,* 137 S.Ct. 1296, 1302 (2017). The three requirements for standing are: (1) a plaintiff must have suffered an injury in fact which is concrete and particularized, actual or imminent, and not conjectural or hypothetical; (2) a plaintiff must show a causal connection between the injury and the conduct complained of; and (3) it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). The

State Defendants have not made a facial or factual challenge as to the standing of any of the plaintiffs.[1] Nonetheless, Dallas addresses that the pleadings and the evidence establish the Plaintiffs' standing.

An injury in fact can be established through an actual or a threatened injury resulting from the putatively illegal action. *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 (1973). A plaintiff may demonstrate standing to enjoin a statute before it becomes effective by showing "a credible threat of enforcement" or a "well-founded fear that the law will be enforced against them." *Susan B. Anthony List v. Driehaus*, 134 S.Ct. 2334, 2342 (2014); *Virginia v. American Booksellers Ass'n, Inc.*, 484 U.S. 383, 392-93 (1988). A plaintiff does not have to expose itself to liability before bringing suit to challenge the constitutionality of a law threatened to be enforced. *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 129 (2007). While a plaintiff's own action of not violating the questioned law may eliminate an imminent threat of prosecution, it does not eliminate Article III jurisdiction. *Id*. Standing exists if any perceived threat to the plaintiff is "sufficiently real and immediate to show an existing controversy." *O'Shea v. Littleton*, 414 U.S. 488, 496 (1974). Furthermore, a statute restricting First Amendment rights may cause harm without any enforcement by "chilling speech." *American Booksellers*, 484 U.S. at 393 ("[T]he alleged danger of this statute is, in large measure, one of self-censorship; a harm that can be realized even without an actual prosecution.").

Apart from First Amendment concerns, the dilemma posed by the coercion of putting the challenger to the choice between abandoning its rights or risking prosecution "is a dilemma that it

[1] The State Defendants contend that the Plaintiffs do not have standing to complain about the Fourth Amendment. (ECF No. 91 at 67-68). The claim is addressed below. They also claim San Antonio and its officials lack standing regarding the Contract Clause claim. (ECF No. 91 at 106-107). However, the claim is asserted by TACHE. (Civil Action No 17-cv-489, ECF No. 1 at 34)

was the very purpose of the Declaratory Judgment Act to ameliorate." *MedImmune*, 549 U.S. at 129. Injury may be inflicted by "the mere existence and threatened enforcement" of a statute. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 384–85 (1926). Where it is not fully clear what conduct is proscribed, a well-founded fear of enforcement may be based in part on a plaintiff's reasonable interpretation of what conduct is proscribed. *American Booksellers*, 484 U.S. at 392. Finally, the presence of one party with standing is sufficient to satisfy Article III's case or controversy requirement. *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 52 n. 2 (2006).

All of the local governments and the elected officials have articulated in their pleadings and the evidence establishes a well-founded fear that SB4 will being enforced against them. For example, several of these plaintiffs and their representatives alleged and testified about the confusion over the terms, duties, and restrictions contained within in SB4 and do not know how to comply with its terms and were fearful of some type of punitive measures be taken.[2] Additionally, they were afraid of being prosecuted for "endorsing" a policy that prohibited or materially limited the enforcement of immigration law and that they could be prosecuted for merely voicing opinions.[3] Further, the local governments and officials alleged and presented evidence that compliance with SB4 will force them to disregard the constitutional rights of others and expose

[2] (Pleadings: ECF No. 31 at 12; ECF No. 37 at 14-15; ECF No. 51 at 5, 21, 27; ECF No. 78 at 4-5, 11-12; ECF No. 96 at 4, 18-19; 139 at 28-29; Civil Action No. 17-CV-489, ECF No. 1 at 11-15, 33) (Evidence: Transcript 218-219; Plaintiffs' Exs. P-4 (pp.2-4); P-5 (pp. 3-4); P-7 (pp. 6-7); P-101 (pp. 9,10, 13-14); P-306 (p. 6); P-311 (¶12); P-413 (pp. 4,5)).

[3] (Pleadings: ECF No. 31 at 2-3, 11; ECF No. 37 at 15; ECF No. 51 at 20, 24, 25; ECF No. 78 at 4-5, 11; ECF No. 96 at 4; 19; 139 at 26; Civil Action No. 17-CV-489, ECF No. 1 at 3-4, 29-31). (Evidence: Transcript 16, 214-218, 244-245; Plaintiffs' Exs. P-4 (pp. 2,3); P-5 (p. 3); P-7 (p. 4); P-101 (pp. 14-15); P-303 (p. 8); P-305 (¶¶ 12-14); P-306 (pp. 4-6); P-413 (pp. 8-9).

the local governments and their public servants to liability for the denial of fundamental rights.[4] The local governments and officials alleged and presented evidence that the local governments had been already harmed and would be further harmed by SB4's implementation because of adverse effects on law enforcement; on the local and State economies; on the community because of decreased participation in health services, decreased attendance at schools, and decreased participation in social programs; will cost millions of dollars to implement; and will cause the loss of tax revenues.[5]

A well-founded fear is shown because SB4 is aimed at the governmental plaintiffs, who, if their interpretation of SB4 is correct, will either have to stand on their rights and suffer punitive measures or will have to concede to the violation of their duties and their own constitutional rights, violate the rights of others, incur costly compliance measures, and suffer resulting damages. *See American Booksellers*, 484 U.S. at 392. The mere existence of SB4 and its punitive measures are sufficient to establish a well-founded fear. Furthermore, the evidence suggests that the State Defendants intend to enforce SB4 to the fullest. Prior to SB4's enactment, the Governor withheld funding to Travis County because of his determination that it was a so-called sanctuary jurisdiction. (ECF No. 37 at 4[¶ 14]; ECF No. 78 at 8-9[¶¶ 32-33]; Civil Action No. 17-cv-489, ECF No. 1 at 15[¶ 58]). Also, the State Defendants attempted to launch a preemptive lawsuit

[4] (Pleadings: ECF No. 31 at 13); ECF No. 78 at 12); ECF No. 96 at 4; 14; Civil Action No. 17-CV-489, ECF No. 1 at 10-11, 13, 31-33). (Evidence: Transcript 16-17; Plaintiffs' Exs. P-1 (pp. 2-3); P-4 (p. 5); P-7 (p. 7); P-101 (pp. 10, 13); P-201 (pp. 4-5); P-303 (p. 4); P-305 (¶¶ 5-6); P-306 (pp. 7-8); P-311 (¶¶7-8); P-409 (pp. 1, 2, 4); P-413 (pp. 5, 8).

[5] (Pleadings: ECF No. 31 at 2, 4-5, 8-9; ECF No. 37 at 9-12; ECF No. 51 at 5, 11-12; ECF No. 78 at 10; ECF No. 96 at 4; 13-18; 139 at 13-20; Civil Action No. 17-CV-489, ECF No. 1 at 17, 23-27, 34). (Evidence: Transcript 13-14, 181-183, 188-189, 191-193, 207, 211-212, 219-222, 241-244; Plaintiffs' Exs. P-3 (pp. 2-4); P-4 (pp. 3, 4, 5); P-5 (pp. 4-5); P-7 (pp. 4-6); P-9 (¶¶ 9-18); P-101 (pp. 4-5, 10-13); P-201 (pp. 5-7); P-205 (pp. 3-5); P-303 (p. 3-5, 8); P-305 (¶¶ 8-11); P-306 (pp. 8-13); P-311 (¶¶ 4-7); P-314 (p. 2); P-315 (¶ 6); P-401 (pp. 3-8); P-409 (pp. 2-3); P-412 (p. 3); P-413 (pp. 7-8).

against some of the Plaintiffs to impose the State Defendants' interpretation of SB4 just asit went into effect. (Ex. P-201 at 4; ECF Nos. 14, 14,-1; 22, 22-1, 32-1; 91 at 28). The Plaintiffs consisting of local governments and the elected officials have all suffered an injury in fact.

Additionally, the various non-governmental entities, LULAC, TOPEF, MOVE, TACHE, LUPE, and WDP, have asserted and presented evidence that their members will have SB4 enforced against them or they will be harmed as local governments are forced to comply with SB4's requirements and as a result all of the non-governmental entities have been harmed. (*See e.g.* ECF No. 31 at 6-7, 14-15; ECF No. 51 at 2-3, 7-8, 18-20; Civil Action No. 17-cv-489, ECF No. 1 at 4, 27-28, 30-32, 34; Plaintiffs' Exs. P-6, P-203, P-204, P-306, P-307, P-308). These entities have also suffered an injury in fact. An association has standing to bring suit on behalf of its members when: its members would otherwise have standing to sue in their own right; the interests it seeks to protect are germane to the organization's purpose; and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977). These non-governmental entities have standing.

The pleadings and evidence also establish that SB4's implementation and enforcement are the cause of the current injuries suffered by the Plaintiffs and the cause of the threatened injuries. Plaintiffs' injuries will be redressed by a favorable decision because enforcement of SB4 will be enjoined, SB4 will be declared unconstitutional, and the injuries and harm caused by it will cease. Standing exists for seeking pre-enforcement declaratory and injunctive relief.

IV. Standards for Preliminary Injunction

For any plaintiff to obtain a preliminary injunction, it must establish (1) a likelihood of success on the merits; (2) a substantial threat of irreparable injury; (3) the threatened injury if the injunction is denied outweighs any harm that will result if the injunction is granted; and (4) the

grant of an injunction will not disserve the public interest. *Trottie v. Livingston*, 766 F.3d 450, 452 (5th Cir. 2014). The purpose of a preliminary injunction is to protect the status quo and to prevent irreparable harm until the respective rights of the parties can be determined during a trial on the merits. *City of Dallas v. Delta Air Lines, Inc.*, 847 F.3d 279, 285 (5th Cir. 2017). The requirements for a preliminary injunction have been satisfied.

V. There Is a Substantial Likelihood that the Plaintiffs Will Prevail on the Merits Because SB4 is Unconstitutional Because It Is Preempted by Federal Law

A. The standard for preemption.

The Supremacy Clause provides that federal law "shall be the supreme Law of the Land." U.S. Const. art. VI, cl. 2. Under this authority, Congress has the power to preempt state law. *Arizona v. United States*, 132 S.Ct. 2492, 2500 (2012). If Congress does not expressly command that state law is preempted, it may still do so in two different ways, field preemption and conflict preemption. *Id*., 132 S.Ct. at 2501.

First, with field preemption, states and localities may not regulate conduct in a field that Congress has determined "must be regulated by its exclusive governance." *Id*. "The intent to displace state law altogether can be inferred from a framework of regulation 'so pervasive ... that Congress left no room for the States to supplement it' or where there is a 'federal interest ... so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.'" *Id*. (*quoting Rice v. Santa Fe Elevator Corp*., 331 U.S. 218, 230, (1947)). It does not matter that state law does not conflict with federal law or that its intent was to complement federal law. *Id*., 132 S.Ct. at 2502-2503 ("where Congress occupies an entire field … even complementary regulation is impermissible").

Second, with conflict preemption, state and local laws are preempted "when they conflict with federal law." *Id*. "This includes cases where 'compliance with both federal and state regulations is a physical impossibility,' and those instances where the challenged state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Id*. (*citing Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). "What is a sufficient obstacle is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects." *Id*. (*quoting Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372 (2000)). For those areas that are conflict preempted, the conflict may arise from the imposition of different penalties than Congress selected for the same conduct. Even though a state or local law "attempts to achieve one of the same goals as federal law … it involves a conflict in the method of enforcement." *Arizona*, 132 S.Ct. at 2505.

B. Federal immigration law preempts state immigration law.

The federal government has "well-settled" and "broad, undoubted power" concerning immigration and aliens. *Arizona*, 132 S.Ct. at 2498. Immigration policy impacts trade, investment, tourism, diplomatic relations, the hopes of those seeking protection in the United States, the treatment of American citizens abroad, communications with other nations, and foreign relations. *Id*., at 2498-99. Federal governance of immigration and aliens is "extensive and complex" and "there are significant complexities involved in enforcing federal immigration law." *Id*. at 2499, 2506. Congress and the courts have already concluded that large swaths of "immigration law" have been preempted by federal law. For example, these include but are not limited to the following:

1. express preemption of any State or local imposing civil or criminal sanctions, with certain exceptions, upon those who employ, recruit, or refer employment of unauthorized aliens, 8 U.S.C. § 1324a(h)(2);
2. field preemption of the power to grant permission for an alien to remain or be expelled. *U. S. v. Alabama*, 691 F.3d 1269, 1293 (11th Cir. 2012).
3. field preemption regarding employment of illegal aliens, *Arizona*, 132 S.Ct. at 2503-2305;
4. field preemption of detention or arrest of aliens for violation of immigration laws, *id*. at 2506-2507;
5. field preemption of registration system of aliens, *Hines*, 312 U.S. at 67;
6. conflict preemption of creating criminal offenses for housing of non-citizens, *Villas at Parkside Partners v. City of Farmers Branch*, 726 F.3d 524, 529-30 (5th Cir. 2013);
7. field preemption of power to classify non-citizens including state judicial proceedings of whether landlord has leased to tenant lawfully present in the United States, *id*. at 536-37; and
8. field and conflict preemption of criminalizing the transporting, moving, concealing, harboring, or inducing "illegal alien" to enter a state, *Ga. Latino All. For Human Rights v. Governor of Ga*., 691 F.3d 1250, 1263-67 (11th Cir. 2012).

Additionally, Congress granted the executive branch vast power and authority as to immigration law. Section 1103 provides that the Secretary of Homeland Security "shall be charged with the administration and enforcement of this chapter and all other laws relating to immigration" except as provided by laws that relate the powers, functions, and duties conferred upon the President, Secretary of State and Department of State. 8 U.S.C. § 1103(a)(1). It continues that he has the power and duty to control and guard the U.S. borders and boundaries from illegal entry of aliens. *Id*., § 1103(a)(5). Finally,

> … the Constitution requires an uniform Rule of Naturalization; Congress has instructed that the immigration laws of the United States should be enforced vigorously and uniformly; and the Supreme Court has described immigration policy as a comprehensive and unified system.

Texas v. U.S., 809 F.3d 134, 187-88 (5th Cir. 2015) (quotations marks, emphasis, and footnotes omitted).

C. On its face SB4 is preempted because SB4 applies to all "immigration law" including those portions already found to be preempted and those that await future determination.

SB4 provides that a local government or one of its officials or employees shall not "adopt, enforce, or endorse a policy" that "prohibits or materially limits the enforcement of immigration laws." Tex. Gov't Code, § 752.053. Violations of the state law can result in civil penalties, writs, and removal from office. *Id.*, .055, .056, .0565. In order to determine if any part of SB4 is preempted, the analysis requires an identification of the specific component of federal law; a review of whether it imposes an express preemption, field preemption, or conflict preemption; and a comparison to the state law. *PLIVA, Inc. v. Mensing*, 564 U.S. 604, 611 (2011) ("Pre-emption analysis requires us to compare federal and state law."); *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373 (2000) ("What is a sufficient obstacle is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects").

SB4 makes any analysis impossible by its inclusion of all immigration law. Much of immigration law has already been determined to be preempted, including the enforcement and compliance scheme for various portions of immigration law. SB4's broad terms dictate compliance and new punishment for areas of the law that have already been preempted. On its face, SB4 is already preempted by Congress' express preemption and by field and conflict preemption in those areas that the courts have already found preempted by federal law. For those areas not already

found to be preempted, SB4's different "method of enforcement" than provided by federal law is also preempted. As a matter of law, SB4 has been preempted.

The State Defendants attempt to re-write SB4's broad prohibition to focus on specific portions of immigration law that they contend have not been preempted. Thus, they try to carve out and limit the preemption as to immigration law involving "the federal scheme for cooperative immigration enforcement" and the "detainer mandate." (ECF No. 91 at 29-51). SB4's language is not so narrow. All immigration law is subject to SB4's control and effect regardless of preemption. There is a substantial likelihood that the Plaintiffs will prevail in finding Section 752.053 is unconstitutional as being preempted by federal law.[6]

D. Portions of SB4 were cut and pasted from existing federal law.

One of SB4's provisions appears to have been cut and pasted from a federal statute with slight modifications. 8 U.S.C. § 1373(b) prohibits the restriction of sharing information regarding immigration status. Section 752.053(b)(2) is nearly identical but now creates new state law penalties for non-compliance. Congress has already occupied the field concerning the sending, maintaining, and exchanging of information on immigration status. SB4 imposes state civil penalties, writs, and removal from office even "in circumstances where federal officials in charge of the comprehensive scheme determine that prosecution would frustrate federal policies." *Arizona*, 132 S.Ct. at 2503. Further, violation of this federal law has its own set of possible federal consequences. *See* ECF No. 91 at 90, n. 44; *Co. of Santa Clara v. Trump*, Nos. 17-cv-485-WHO, 17-cv-574-WHO, 2017 WL 1459081, at **7-10 (N.D. Calif. April 25, 2017) (discussion regarding

[6] The problem with § 752.053's use of "immigration law" and preemption dovetails with the unconstitutional vagueness of SB4. How is a local government, official, or employee to know which part of immigration law not to materially limit? There is no meaningful way to know whether a compliance action is preempted until it is initiated by the State. Thus, there is no notice and no limitation of the State's discretion.

federal government's contention that violation of 8 U.S.C. § 1373 may result in loss of various federal grants). Even though SB4 may attempt to achieve a goal of federal law "it involves a conflict in the method of enforcement" and is therefore conflict preempted. *Arizona*, 132 S.Ct. at 2505. There is a substantial likelihood that the Plaintiffs will prevail in finding Section 752.053(b)(2) is unconstitutional as being preempted by federal law.

E. SB4 is otherwise preempted by the federal law.

Dallas joins the other Plaintiffs' arguments that SB4 is field and conflict preempted by federal law. (ECF No. 24-1 at 22-28; ECF No. 57 at 17-18; ECF No.77 at 44-49; ECF No. 144 at 3-6).

VI. There Is a Substantial Likelihood that the Plaintiffs Will Prevail on the Merits Because SB4 is an Unconstitutional Limit on Free Speech

Dallas joins the argument by the other Plaintiffs that Section 752.053(a)'s blanket prohibition against any local government official or employee endorsing any policy that would materially limit immigration law violates the First Amendment. (*See* ECF No. 24-1 at 37-43; ECF No. 77 at 35-41; ECF No. 56-1 at 23-27; ECF No. 57 at 10-12). Any argument by the State Defendants dismissing the concerns about the term "endorse" is refuted by other language in SB4.

SB4 provides that elected or appointed officials forfeit their office if they violate Section 752.053. Tex. Gov't Code, § 752.0565(a). This provision adds that the attorney general is to file a petition for removal if "presented with evidence, *including evidence of a statement by the public officer*, establishing probable grounds that the public officer engaged in conduct [violating § 752.053]." *Id.*, .0565(b) (emphasis added). SB4 specifically identifies free speech as the evidence to justify removal from office. The "core value of the Free Speech Clause of the First Amendment" is "[t]he public interest in having free and unhindered debate on matters of public importance."

Pickering v. Board of Ed. Of Twp. High Sch. Dist., 391 U.S. 563, 573 (1968). A public employee's First Amendment right to free speech is violated when he is punished for "exercise of his right to speak on issues of public importance." *Id*. at 574. SB4 punishes all local government officials and employees for speaking on the issue of immigration law.

Finally, the best indicator of just how the State Defendants view the term "endorse" and the broad proscriptions in SB4's is the State's preemptive lawsuit against some of the Plaintiffs. (*See* ECF Nos. 14, 14-1, 32, 32-1). As part of the basis of bringing the action, the State Defendants alleged that certain Plaintiffs were "publicly hostile" to cooperation with federal immigration enforcement. (Civil Action No. 17-cv-425, ECF No. 1 at 2[¶¶ 3-5]). Elsewhere they complained that "some local law enforcement entities and leaders voice opposition" to cooperating with federal immigration authorities. (*Id*. at 13 [¶ 102]). They complained that some Plaintiffs "*publicly endorse* and engage in patterns and practices of ignoring ICE detainer requests and not cooperating with federal officials." (*Id*. at 14, 15[¶¶ 104, 112]) (emphasis added). They further complained that some Plaintiffs had "publicly pronounced" a belief that ICE detainers are unconstitutional. (*Id*. at 21 [¶¶ 145, 147]). They also complained that representatives of some Plaintiffs had publicly asserted that SB4 was enacted with a discriminatory purpose. (*Id*. at 24[¶ 175]). When the State Defendants amended the original complaint to add other Plaintiffs as defendants, they added that one of the new defendants had said SB4 was pointless and another new defendant had "alleged that SB4 is 'dangerous and discriminatory' and that it 'opens up the door to racial profiling against Hispanics.'" (ECF No. 22-1 at 30[¶ 220], 31[¶ 231]). The State Defendants' allegations in their attempted preemptive lawsuit are a stark indicator that they found protected free speech to be offensive, was part of what was sought to be curtailed by SB4, and will be relied on to prosecute violations of SB4.

There is a substantial likelihood that the Plaintiffs will prevail because SB4 is an unconstitutional limitation on free speech.

VII. There Is a Substantial Likelihood that the Plaintiffs Will Prevail on the Merits Because SB4 is Void for Vagueness

Dallas joins the argument by the other Plaintiffs that SB4 is unconstitutionally vague. (*See* ECF No. 24-1 at 29-37; ECF No. 77 at 58-60; ECF No. 56-1 at 27-31. Dallas presents this additional argument limited to Section 752.053(a)(1).

A. The Standard for vagueness

A statute violates the Fourteenth Amendment's guarantee of due process if the statute is so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application." *Women's Med. Ctr. of Nw. Hous. v. Bell*, 248 F.3d 411, 421 (5th Cir. 2001). A statute is unconstitutionally vague if it fails to provide those targeted by the statute a reasonable opportunity to know what conduct is prohibited. *Id*. Fundamental fairness requires that persons should not be compelled to guess at their own peril as to the meaning and application of a statute. *Atkins v. Clements*, 529 F. Supp. 735, 743 (N.D. Tex. 1981).

A statute is also unconstitutionally vague if it is so indefinite that it allows arbitrary and discriminatory enforcement. *Women's Med. Ctr. of Nw. Hous. v. Bell*, 248 F.3d at 421. If a statute is "inherently standardless, enforceable only on the exercise of an unlimited, and hence arbitrary, discretion vested in the state" then it is unconstitutionally vague. *Id*. Arbitrary and discriminatory enforcement of the law can only be prevented by explicit standards for those who are to enforce or apply them. *Grayned v. City of Rockford*, 408 U.S. 104, 108–109 (1972). "A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an

ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory applications." *Id*.

The degree of tolerable vagueness and the relative importance of fair notice and fair enforcement depends on whether other important constitutionally protected rights are involved. *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498 (1982). If the statute potentially restricts the right of freedom of speech, then the standard is more stringent. *Hynes v. Mayor and Council of Borough of Oradell*, 425 U.S. 610, 620 (1976); *Hoffman Estates*, 455 U.S. at 499. As explained by the Supreme Court,

> where a vague statute abut(s) upon sensitive areas of basic First Amendment freedoms, it operates to inhibit the exercise of those freedoms. Uncertain meanings inevitably lead citizens to steer far wider of the unlawful zone ... than if the boundaries of the forbidden areas were clearly marked.

Grayned, 408 U.S. at 108–109 (quotations and citations omitted).

Likewise, a stricter standard applies if the statute involves criminal or quasi-criminal proceedings. *Women's Med. Ctr. of Nw. Hous. v. Bell*, 248 F.3d at 422. The law must give persons of ordinary intelligence a reasonable opportunity to know what is prohibited so they may act accordingly because "vague laws may trap the innocent by not providing fair warning." *Grayned*, 408 U.S. at 108–109.

In their response, the State Defendants reference cases involving economic regulations which involved a lesser standard. They also reference cases that hold that as part of facial challenge, the challenger must demonstrate that the law in impermissibly vague in all of its applications. (ECF No. 91 at 52-54). However, the test is to be applied to the law as it actually exists and not as the State Defendants attempt to reconstitute it. Furthermore, a law is considered

"vague in all its applications where it subjects the exercise of a right to an unascertainable standard or if, in other words, men of common intelligence must necessarily guess at its meaning." *United States v. Clark*, 582 F.3d 607, 612-13 (5th Cir. 2009) (quotation marks and citations omitted). Under that standard, SB4 is impermissibly vague in all of its applications.

B. Section 752.053 is unconstitutionally vague.

The central dictate of SB4's anti-sanctuary provision is that a local entity shall not "adopt, enforce, or endorse a policy" under which the public entity "prohibits or materially limits the enforcement of immigration laws." Tex. Gov't Code, § 752.053. Violations can result in the possible imposition of significant daily civil penalties, writs, and removal from office. *Id*., .055, .056, .0565. The consequences for non-compliance make this provision of SB4 subject to a stricter standard of definiteness as a quasi-criminal matter. Also, the use of the term "endorse" necessarily abuts freedom of speech, requiring a stricter standard.

The initial unconstitutional vagueness starts with the definition and use of "immigration laws." The State Defendants claim it is not vague and merely reference its definition. (ECF No. 91 at 57). However, the definition only adds to the vagueness as immigration laws is defined as Texas or federal laws "relating to aliens, immigrants, or immigration, including the federal Immigration and Nationality Act (8 U.S.C. Section 1101 et seq.)." Tex. Gov't Code, § 752.051(2). The State Defendants' response reflects the confusion and uncertainty as to the meaning of immigration law because local governments are left to guess what law is at issue. When arguing about preemption, the State Defendants urge that only congressional action be considered. (ECF No. 91 at 38). However, when discussing the legality of detainers from Fourth Amendment challenges, the State Defendants urge that ICE's policy should be considered. (*Id*. at 67). Elsewhere, they rely on an executive order. (*Id*. at 90). Their arguments acknowledge that what

constitutes "immigration law" is uncertain. For example, is "law" limited to statutes or does it include regulations in the Code of Federal Regulations; presidential orders; opinions, orders, and directives from federal officials; or caselaw? Coupled with the vagueness is that great portions of federal immigration law already preempt state law. Thus, a local government could violate SB4 by having a policy that says, because of preemption, local enforcement of that particular portion of immigration law is prohibited.

Apart from what constitutes the specific components of the law, the term "immigration laws" is equally vague and uncertain. It is a fairly accepted legislative practice for one statute to reference, incorporate, or make applicable another statute. *Trimmier v. Carlton*, 296 S.W. 1070, 1074 (Tex. 1927). However, there is no authority for incorporating an entire body of law. In *Road District No. 1, Jefferson County, Texas, v. Sellers, Attorney General*, 180 S.W.2d 138, 141 (Tex. 1944) the court, in discussing legislation by reference to other statutes, quoted with approval *State v. Frear*, 144 Wis. 79, 128 N.W. 1068, 1074 (1910). The court in the Wisconsin case noted that "people are obliged to obey the laws, and, in order that they may do so, they should be put in a position where they can ascertain what they are" and "a citizen should have quick and certain access to the written laws of his state so that he may know how to order his conduct." *Id.* SB4 prevents people from ascertaining just what law is to be obeyed. SB4 defines immigration law as any law, Texas or federal, that relates to "aliens, immigrants, or immigration" and it provides no meaningful notice and allows arbitrary decisions as to what is or is not immigration law and what enforcement can and cannot be prohibited or materially limited.

Likewise, the use of the undefined term "materially limits" provides no notice, guidance, or limitation. Dallas could find no other Texas statute that uses the phrase. Dallas could only locate one Texas case that used that term and its use provides no insight as to its meaning.

Celestino v. Mid-American Indem. Ins. Co., 883 S.W.2d 310, 313 (Tex. App.—Corpus Christi 1994, writ denied). Dallas could not locate a definition or use of the term in Black's Law Dictionary. The term is dependent on an entirely subjective criteria. The lack of definition of what constitutes "materially limits" gives no notice of what conduct is prohibited and grants the Attorney General unfettered power to decide what it means.

The vagueness problems with "endorse" have been previously explained. (ECF No. 24-1 at 39; ECF No. 56-1 at 28-29; ECF No. 77 at 38-41). However, the vagueness is not limited to that word. Even a phrase limited to barring the adopting or enforcing of a policy that prohibits enforcement of immigration law provides no notice and grants the Attorney General unlimited discretion to bring enforcement actions.

Compounding the problems with the terms "immigration law", "materially limits", and "endorse" are the defined terms "public entity" and "policy." "Public entity" is defined as a local government's governing body, its officials, or its employees. Tex. Gov't Code, § 752.051(5). "Policy" is defined as including a formal or informal, written or unwritten, rule, order, ordinance, or policy. *Id*., .051(6). Plugging in the definitions results in a literal reading that an employee can violate SB4 by publicly talking to himself about endorsing a rule against any aspect of immigration law. Further, SB4 is entirely unclear as to whether a violation by an employee makes the governing body personally liable or whether a violation by the governing body make the employee personally liable. The entire lack of clarity of just who can be liable for whose conduct gives no notice of what conduct is prohibited and grants the Attorney General arbitrary power to decide who should be responsible.

Adding to the confusion, SB4 provides for the imposition of civil penalties on a local government's governing body or one of its officials or employees for a violation of § 752.053, but

it does not say who may bring an action for civil penalties or in what court it should be brought. Tex. Gov't Code, § 752.056. It does not provide for any appeal. For civil penalties, there must be an intentional violation. *Id.*, .056(a). However, an official can be removed from office because of a mere violation, there is no scienter requirement. *Id.*, .0565.

SB4 subjects the exercise of Plaintiffs' rights to an unascertainable standard and the Plaintiffs and the courts must necessarily guess at its meaning. *United States v. Clark*, 582 F.3d at 612-13. SB4 delegates enforcement to the Attorney General "on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory applications." *Grayned*, 408 U.S. at 108–109.

C. SB4 conflicts with Article 2.132 of the Texas Code of Criminal Procedure.

The Texas legislature previously recognized the concern and damage to law enforcement based on claims of racial profiling. In 2001, it enacted article 2.132 of the Texas Code of Criminal Procedure which provides that the State and all counties and municipalities must adopt a detailed written policy on racial profiling. The policy must clearly define acts constituting racial profiling, strictly prohibit racial profiling, create and provide public education about a complaint process to handle accusations of racial profiling, and provide for corrective action against a peace officer found to have engaged in racial profiling. Tex. Code Crim. Pro., art. 2.132. The State Defendants rely on the statute to urge that the State disapproves of racial profiling, that SB4 does not prohibit local bans on racial profiling, and that SB4 itself prohibits unconstitutional discrimination. (ECF No. 91 at 26, 81, 83, 88, 107).

However, SB4 mandates that a local government may not formulate a policy to materially limit one of its peace officers from not inquiring into the legal status of a detained person even though such direction and policy will be necessary to comply with article 2.132's command to

create policies to prohibit racial profiling. The State Defendants offered no evidence disputing that the overwhelming, if not exclusive, circumstances in which a person's immigration status will come up will be with minorities. Local governments and their officials and employees are placed in a box: comply with Article 2.132 and violate SB4 or comply with SB4 and violate Article 2.132. SB4 is unconstitutionally vague because those subject to its penalties will not know what is and is not prohibited in light of the duties imposed to create polices to prevent racial profiling.

There is a substantial likelihood that local governments will prevail because SB4 is unconstitutional.

VIII. There Is a Substantial Likelihood that the Plaintiffs Will Prevail on the Merits Because SB4 Requires Unconstitutional Seizures

A. The Plaintiffs have standing to assert the Fourth Amendment.

Initially, the State Defendants argue that the Plaintiffs lack standing to complain about Fourth Amendment violations because Fourth Amendment rights are personal rights that may not be vicariously asserted. (ECF No. 91 at 67-68). The argument lacks merit.

First, the governmental Plaintiffs do not assert the rights of those who will detained. Rather, their claim is that SB4 will force the governmental Plaintiffs to cause injuries and damages to third parties who in turn seek recovery from the governmental Plaintiffs. The governmental Plaintiffs will themselves be harmed and injured by the operation of SB4.

Second, in *Cornerstone Christian Schools v. University Interscholastic League*, No. SA-07-CA-139-FB, 2008 WL 2097477 (W.D. Tex. Apr. 1, 2008) *aff'd in part and vacated in part on other grounds*, 563 F.3d 127 (5th Cir. 2009), the court rejected the contention that organizational standing could not be the basis to bring a Section 1983 action based on the violations of others' Fourth Amendment rights. *Cornerstone*, 2008 WL 2097477, at **5-6. The court relied on and

quoted *Heartland Academy Community Church v. Waddle*, 427 F.3d 525 (8th Cir. 2005). *Id.* In *Waddle*, the court rejected the contention that Fourth Amendment rights are personal and may not be vicariously asserted in the context of a civil cases. The court observed the statement concerning personal rights was made in the context of applying the exclusionary rule in a criminal case and added that the Supreme Court has never held that associational standing was not available to allege Fourth Amendment violations. *Id*. at 532. The *Waddle* court concluded associational standing was shown for the plaintiffs in that case.[7]

The State Defendants do not make any claim that the Plaintiffs lack organizational standing. Those subject to detention have standing to sue in their own right. The interests the Plaintiffs seek to protect are germane to each organization's purpose. Finally, neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

Third, in *Barrows v. Jackson*, 346 U.S. 249, 257 (1953), the Supreme Court recognized the general rule that one may not claim standing to vindicate the constitutional rights of some third party but "we believe the reasons which underlie our rule denying standing to raise another's rights, which is only a rule of practice, are outweighed by the need to protect the fundamental rights which would be denied by permitting the damages action to be maintained." In *Barrows*, a property owner challenged a restrictive covenant against sale of realty to non-Caucasians. As the State Defendants here urge as to Fourth Amendment rights, the defendants in *Barrows* argued equal protection was a personal right but the Supreme Court concluded, "This description of the right as

[7] As noted, the *Cornerstone* court concluded that associational standing was permissible for asserting Fourth Amendment claims but concluded that the plaintiff in the context of that case had failed to establish associational standing. *Cornerstone*, 2008 WL 2097477, at *7.

'personal,' when considered in the context in which it has been used, obviously has no bearing on the question of standing." *Id*. at 259. The Court continued:

> The law will permit respondent to resist any effort to compel her to observe such a covenant, so widely condemned by the courts, since she is the one in whose charge and keeping reposes the power to continue to use her property to discriminate or to discontinue such use. The relation between the coercion exerted on respondent and her possible pecuniary loss thereby is so close to the purpose of the restrictive covenant, to violate the constitutional rights of those discriminated against, that respondent is the only effective adversary of the unworthy covenant in its last stand. She will be permitted to protect herself and, by so doing, close the gap to the use of this covenant, so universally condemned by the courts.

Id. The governmental Plaintiffs find themselves in the same situation as the property owner in *Barrows*. They are forced by SB4's coercive punitive measures to violate the constitutional rights of others and be subject to liability for such violations. Plaintiffs represent the most effective adversary against SB4's reach, and they should also be able to protect themselves from its consequences and "close the gap" on unconstitutional seizures.

Finally, standing also exists by reason of the oaths that elected and appointed officials take to uphold the United States and Texas constitutions. (*E.g*. Plaintiffs' Ex. P-409 (p. 4)). In *Board of Education v. Allen*, 392 U.S. 236 (1968), school board plaintiffs had challenged the constitutionality of a statute. The Supreme Court observed that the school board plaintiffs had taken an oath to support the United States Constitution, they believed a statue was unconstitutional, and they had been placed in the position of having to choose between violating their oath or refusing to comply with the statute that would likely result in their expulsion from office and the loss of state funds for their school districts. The Supreme Court held there was no doubt that the

plaintiffs had standing. *Id*., 392 U.S. at 242 n. 5; s*ee also Baker v. Wade*, 743 F.2d 236, 242 (5th Cir. 1984). The Texas constitution requires all elected and appointed officials take an oath that "to the best of my ability [I will] preserve, protect, and defend the Constitution and laws of the United States and of this State." Tex. Const., art. 16, § 1. The governmental Plaintiffs are forced to either breach their oaths and violate the Texas and United States Constitutions, including the Fourth Amendment, and incur liability and damages or refuse to comply with SB4 and suffer civil penalties, removal from office, and/or jail. The Plaintiffs have standing.

B. SB4 will cause unconstitutional seizures.

SB4 forces local governments, their officials, and their employees to engage in unconstitutional seizures. First, it deprives local governments of any discretion and requires them to "comply with, honor, and fulfill any request" in any ICE immigration detainer request. Tex. Code Crim. Pro., art. 2.251. It further requires the local government's assistance and cooperation with federal immigration officers, including enforcement assistance. Tex. Gov't Code, § 752.053(b)(3). SB4 then forces local governments not to adopt any rule, order, or policy that could prevent unconstitutional seizures. *Id*., § 752.053(a), (b)(1), (b)(3). Dallas joins the arguments presented by the other plaintiffs. (ECF No. 24-1 at 39-43; ECF No. 56-1 at 31-33; ECF No. 57 at 12-15; ECF No. 77 at 41-44).

1. The detainer mandate will cause unconstitutional seizures.

This Court has determined that blind adherence to an ICE detainer request may result in an unconstitutional seizure. *Santoyo v. U.S*., Civil Action No. 5:16-CV-855-OLG, 2017 WL 2896021 (W.D. Tex. June 5, 2017). *See also Mercado v. Dallas County*, 2107 WL 169102, No. 3:15-CV-3481-D, 4008-D (N.D. Tex. Jan. 17, 2017); *Orellana v. Nobles Co*., No. 15-3852 ADM/SER, 2017 WL 72397 (D. Minn. Jan. 6, 2017); *Davila v. U.S*., Nos. 2:14-070, 2:13-00070, 2017 WL 1162912

(W.D. Penn. March 28, 2017). If the governmental Plaintiffs must follow SB4's command and comply with all ICE requests, then they will be sued like Dallas County, and may be found liable like Bexar County. If the governmental Plaintiffs refuse to engage in unconstitutional seizures then they will be subject to complaints, litigation, writs, civil penalties, and removal from office under SB4's punitive provisions. Even the threat or prospect of those punitive actions are chilling on local governments' actions. A statutory command that local governments must violate the federal and Texas constitutions and engage in unconstitutional seizures cannot stand.

In a footnote, the State Defendants contend that informal detainer requests such as phone calls will not occur and SB4's language refers only to detainer requests made in I-247 and other forms. (ECF No. 91 at 72, n. 28). SB4's language and ICE's history refutes both assertions.

First, Article 2.251 requires local governments to "comply with, honor, and fulfill any request made in the detainer request provided by the federal government." Tex. Code Crim. Pro., art. 2.251(a)(1). Section 752.053(b)(3) prevents local governments from directing a peace officer from not "assisting or cooperating with a federal immigration officer as reasonable or necessary, including providing enforcement assistance." Tex. Loc. Gov't § 752.053(b)(3). In an effort to limit the vagueness problem with this section, the State Defendants assert that the reasonableness and necessity of the assistance or cooperation is determined by ICE. (ECF No. 91 at 57). SB4 contains no limitation on the form or manner of detainer requests and the State Defendants concede that the required assistance or cooperation is determined by the federal government.

Second, caselaw establishes that ICE does, in fact, request that individuals be detained by telephone calls. For example, in *Davila v. United States*, Nos. 2:14-070, 2:13-cv-00070, 2017 WL 1162912, **2-3 (W.D. Pa. March 28, 2017), a local peace officer allegedly stopped a vehicle because the headlights were off. He subsequently inquired about immigration status of the driver

and passenger and contacted ICE by telephone. *Also see Davila v. Northern Regional Joint Police Bd.*, 979 F. Supp. 2d 612 (W.D. Pa. 2013). The ICE officer requested the officer detain both the driver and passenger and he would later fax formal detainer requests which he did. In the two opinions, the courts found that viable claims were stated against the local peace officer and the United States. *Davila*, 2017 WL 1162912, at *1, 16; *Davila* 979 F. Supp. 2d at 631-34.

In *Garcia v. Speldrich*, No. 13–CV–3182 (PJS/LIB), 2014 WL 3864493 (D. Minn. Aug. 6, 2014), conservation officers confronted a group of nine men hunting deer. Upon request, the men were able to produce hunting licenses and driver licenses except that one man provided a Mexican identification document listing a Minneapolis address but he had a non-resident hunting license. Based on that information, the officers contacted ICE by phone. The ICE officer talked with the nine men over the telephone and then the ICE officer directed the conservation officers to place five of the men into custody and formal detainers were subsequently issued. The men sued the conservation officers and the court denied the officers' motion to dismiss. The court concluded a claim was stated that the officers seized the men in violation of the Fourth Amendment when they were not allowed to leave until ICE finished its questioning. *Id*., 2014 WL 3064493 *7.

In *United States v. Argueta-Mejia*, 166 F. Supp. 3d 1216 (D. Colo. 2014) *aff'd* 615 Fed. App'x 485 (10th Cir. 2015), a local peace officer stopped a car because of traffic infractions. The infractions were not such as to have placed the driver in custody. *Id*. at 1219. The officer obtained a hit off the NCIC database that requested that ICE be contacted. The officer called ICE and was requested to hold the driver. *Id*. The officer said he would have otherwise let the driver go. *Id*. The court concluded that the officer lacked authority to arrest the driver and suppressed the evidence that arose from the stop. *Id*. at 1223-26.

The cases establish that detentions were the product of phone calls with ICE. Nowhere in their response do the State Defendants suggest that a local government may refuse such a request to detain made over the phone.

***2.* The prohibition of telling peace officers when inquiring into immigration status violates the Constitution will cause unconstitutional seizures.**

The other component of SB4 is a prohibition against telling peace officers when it is and when it is not appropriate to engage detainees about their immigration status. Tex. Gov't Code, § 752.053(b)(1) (A local government "may not prohibit or materially limit … a commissioned peace officer … from … inquiring into the immigration status of a person under lawful detention or arrest.").[8] Even the State Defendants do not contend that all inquiries into immigration status are lawful. The Supreme Court warned "detaining individuals solely to verify their immigration status would raise constitutional concerns." *Arizona*, 132 S.Ct. at 2509. A detention of a vehicle's occupants because a peace officer believes that the occupants are not legally present in the country, but has no probable cause to detain them for any other reason, is a violation of the occupants' Fourth Amendment rights. *Melendres v. Arpaio*, 989 F. Supp. 2d 822, 895 (D. Az. 2013) *aff'd in part and vacated in part for other reasons*, 784 F.3d 1254 (9th Cir. 2015). *See also Santos v. Frederick Cnty. Bd. of Comm'rs*, 725 F.3d 451, 465 (4th Cir. 2013).

Yet, SB4 mandates that local governments cannot tell or train their officers that inquires under certain circumstances will result in unlawful seizures. In their response, the State Defendants offer no suggestion on how it is possible to train and instruct officers to avoid

[8] SB4 defines "lawful detention" as "the detention of an individual" by a local government's governing body or one of its officials or employees. *Id.*, .051(4). It does not define lawful detention as a detention that is lawful. It must be presumed that the legislature carefully chose each word while purposefully omitting words not chosen. *TGS–NOPEC Geophysical Co. v. Combs*, 340 S.W.3d 432, 439 (Tex. 2011). The term must be read as any detention, lawful or not, when analyzing SB4's meaning and effect.

unconstitutional seizures and detentions without being able to tell them when and when not to make inquiries into immigration status. Local governments can be liable under 42 U.S.C. 1983 for a failure to train. *See City of Canton v. Harris*, 489 U.S. 378, 380 (1989). Legislatively mandating that local governments cannot train their officers and have policies as to proper detentions and questioning will necessarily result in unconstitutional seizures.

IX. There Is a Substantial Likelihood that the Plaintiffs Will Prevail on the Merits Because SB4 Violates Article I, Section 11 of the Texas Constitution.

With certain exceptions, the Texas Constitution provides that "all prisoners shall be bailable." Tex. Const. art. I, §§ 11 and 11a, 11b, 11c. The protections afforded by the Texas Constitution are not limited by any type of classification, except those subject to the exceptions contained in Sections 11a, 11b, and 11c. SB4 requires that a local government that has custody of a person subject to an ICE immigration detainer request must comply with, honor, and fulfill the request. Tex. Code Crim. Pro., art. 2.251. As the State Defendants admit, the detainer request is a request to continue to detain the individual in custody, without bail, for a period up to 48 hours. (*See* ECF No. 90 at 66, 70). From ICE's perspective, a detainer request is just that, a request. But SB4 converts the request to a mandate that requires local governments to comply with, honor, and fulfill any such request, which will result in the denial of bail and violate Section 11 of Article I of the Texas Constitution.

The State Defendants will no doubt argue that 48 hours is not such a long time to be confined without the opportunity to have bail. However, Texas statutes and caselaw do not support the argument. In *Sanders v. City of Houston*, 543 F. Supp. 694, 703-704 (S.D. Tex. 1982) *aff'd* 741 F.2d 1379 (5th Cir. 1984), the court enjoined the city from delaying more than 24 hours before

taking a detainee before a magistrate and held that the denial of bail beyond this permissible period of restraint violated the Texas Constitution's command that all prisoners shall be bailable.

Texas law defines an arrest warrant as a written order by a magistrate to take a person into custody. Tex. Code Crim. Pro., Art. 15.01. Thus, ICE detainers, whether or not supported by an "executive arrest warrant", are not arrest warrants for purposes of evaluating the requirements of Texas law. For those arrested without a warrant for a misdemeanor, they must be released on bond within 24 hours if not taken before a magistrate by that time. *Id*., art. 17.033(a). Those arrested without a warrant for a felony must be released within 48 hours of arrest if not taken before a magistrate. *Id*., .033(c).[9] Those arrested with or without a warrant must be taken before a magistrate without unnecessary delay but within 48 hours of arrest and allowed the opportunity to make bail. *Id*., art.'s 14.06, 15.17. What is an unnecessary delay depends on the facts of each case. *Moya v. State*, 426 S.W.3d 259, 263 (Tex. App.—Texarkana 2013, no pet.). A blanket requirement to comply will all ICE detainers and hold prisoners for up to 48 hours without taking those individuals before a magistrate and not granting them the opportunity to make bail violates the Texas constitution and the requirements of the Texas Code of Criminal Procedure.

X. There Is a Substantial Likelihood that the Plaintiffs Will Prevail on the Merits Because SB4 Violates Article 1, Section 30 of the Texas Constitution.

Article I, Section 30 of the Texas Constitution provides in part that "a crime victim has … (1) the right to be treated with fairness and with respect for the victim's dignity and privacy throughout the criminal justice process; and (2) the right to be reasonably protected from the accused throughout the criminal justice process." SB4 amended article 2.13 of the Texas Code of

[9] Also, Section 17.032 of the Texas Code of Criminal Procedure provides that a magistrate shall release a defendant on a personal bond unless the person is charged with or has been convicted of a violent offense or there are other mental health reasons not to release the person.

Criminal Procedure to provide that a peace officer investigating a criminal offense "may inquire as to the nationality or immigration status of a victim of or witness to the offense only if the officer determines that the inquiry is necessary to: (1) investigate the offense; or (2) provide the victim or witness with information about federal visas designed to protect individuals providing assistance to law enforcement. Tex. Code Crim. Pro., art. 2.13(d). The new provision continues that a peace officer is not prevented from "(1) conducting a separate investigation of any other alleged criminal offense; or (2) inquiring as to the nationality or immigration status of a victim of or witness to a criminal offense if the officer has probable cause to believe that the victim or witness has engaged in specific conduct constituting a separate criminal offense." *Id.*, art. 2.13(e).

These new provisions of SB4 are contrary to the Texas constitution's requirements that a victim be treated fairly with respect to the victim's privacy and dignity. The constitutional requirements apply to all victims, not just those with unquestioned immigration status. As the evidence established, the near universal law enforcement criticism of SB4 is that it will disrupt cooperation of minority and immigrant communities and make it that much harder for victims to come forward and further take part as witnesses. (*E.g.* Plaintiffs' Exs. P-2(A); P-2(C); P-2(D); P-4, p. 5; P-5, p. 4-5; P-101, pp. 5-6; P-201, p. 6-7; P-303, p. 5; P-413, p. 8). An authorization to inquire into a victim's immigration status to "investigate the offense" will result in an invasion of the victim's privacy and dignity. The problems with such authorization are compounded by SB4's command to local governments and their officials not to tell peace officers that inquiring into immigration status will violate a victim's right to be treated fairly with respect to the victim's dignity and privacy. *See* Tex. Gov't Code, § 752.053(b)(1).

SB4 ignores, disregards, and is contrary to the constitutional rights of crime victims.

XI. There Is a Substantial Likelihood that the Plaintiffs Will Prevail on the Merits Because SB4 Violates the Texas Constitution's Prohibition on Delegating Legislative Authority

The Texas Constitution prohibits the Texas legislature from delegating legislative power to any other body or authority. *Brown v. Humble Oil & Ref. Co.*, 83 S.W. 2d 935, 941 (Tex. 1935). The prohibition against delegating legislative authority applies to delegation of authority to other public entities, including the federal government. *Ex parte Elliott*, 973 S.W. 2d 737, 740-41 (Tex. App.—Austin 1998, pet. denied). Delegations are generally upheld if the delegating statute establishes reasonable standards to guide the other body to which the powers are delegated. *Id*., at 740. The determining factor is whether a court can discern a legislative limit to the other body's discretion through well-defined standards and rules in the delegating statute. *Id*.

In *Ex parte Elliott*, the issue involved a Texas statute that created a criminal offense of transporting hazardous materials. The statute then defined hazardous materials as defined by the Environmental Protection Agency under federal statutes, as amended. *Id*., at 738-39. The court recognized there may be an improper delegation if the Texas statute could be amended by subsequent federal changes to the definition of hazardous materials. *Id*. at 742-42. To avoid this result, the court construed the Texas statute as taking the definition as it existed when the statute was enacted and concluded "we do not construe, in this case, the adopting statute as attempting to adopt future laws, rules or regulations of the federal government." *Id*. at 742.

Unlike the construed statute in *Elliott*, SB4 impermissibly delegates legislative power to the federal government and provided no standards or rules that will limit the federal government's delegated authority. First, SB4 requires that local governments not adopt a policy that prohibits or materially limits the enforcement of federal immigration law. Tex. Gov't Code, § 752.053(a)(1). As the State Defendants' response indicates, federal immigration law is ill-defined,

changeable, and left to the complete discretion of the federal government. (*See* ECF No. 91 at 67-68, relying on an April 2, 2017 change to ICE's detainer policy in an attempt to limit Fourth Amendment violations; at 90, relying on an executive order regarding sanctuary cities.). SB4 gives the federal government unfettered discretion to change policies that require local action and to do so without any federal authorizing statute. The Texas legislature has delegated to the federal government complete discretion as to what local governments are to enforce and not enforce.

Second, SB4 requires that local governments not adopt a policy that prohibits or materially limits "assisting or cooperating with a federal immigration officer as reasonable or necessary, including providing enforcement assistance." Tex. Gov't Code, § 752.053(b)(3). The State Defendants acknowledge that what is reasonable or necessary is left to the complete discretion of the federal immigration officer. The State Defendants admit "SB4 does not require regulated entities to themselves affirmatively decide whether enforcement participation through assistance or cooperation is 'reasonable or necessary.' Rather, a request from a federal immigration officer for 'enforcement assistance' … puts covered entities on notice of when SB4's prohibition of blocking immigration-law enforcement activity comes into play." (ECF No. 91 at 57). Thus, the Texas legislature left it to the whim of an individual federal immigration officer as to what a local government must do in order to assist and cooperate. There is a complete absence of any standards or rules governing the delegated authority.[10] Furthermore, since the decision of what constitutes a reasonable and necessary request for assistance or cooperation is left to the individual requesting

[10] SB4 has another local government bar to policies regarding federal law enforcement officers entering and conducting enforcement activities at a jail. Tex. Gov't Code, § 752.053(b)(4). The State Defendants urge that the local governments are also subject to the direction of the federal immigration officer as to what is required. (ECF No. 91 at 57, n. 16). This too is an improper delegation of legislative authority.

federal immigration officer, it also means that the federal immigration officer controls the possible punishment that may be meted out against a local government, its officials, or employees.

Finally, SB4 requires that local governments must "comply with, honor, and fulfill any request in the detainer request provided by the federal government." Tex. Code Crim. Pro., art. 2.251(a)(1). Again, there are no standards and rules as to what constitutes a detainer request and the federal government is left to make it up as it goes. And as explained, what constitutes a request to detain will change and depend on an individual immigration officer's discretion without standards and rules.

With the passage of SB4, the Texas legislature abdicated its legislative duties and functions to the federal government and violated its constitutional responsibilities.

XII. The Plaintiffs Met Their Burden to Establish the Other Elements for a Preliminary Injunction

Dallas joins the argument of the other Plaintiffs that the evidence establishes the other equitable elements for a preliminary injunction. (*See* ECF No. 24-1 at 50-51; No. 56-1 at 33-34; No. 57 at 19-20; No. 77 at 63-69).

In their response, the State Defendants disputed that there was an irreparable injury. (ECF No. 91 at 111-112). The State Defendants first argued that SB4 did not order a new type of activity with unknown effects because state and local law-enforcement officials have been cooperating with federal immigration officials for years with no irreparable harm. (*Id.*). This argument does not address and does not dispute that the Plaintiffs established irreparable harm. Further, the argument misses one of the key problems with SB4. Cooperation entails the voluntary choice of working together with another. SB4 is not about cooperation or voluntary choice; it is a dictate

with severe punitive measures. If the State Defendants argument had merit, there would be no need for SB4. Instead, it represents a radical departure from existing law.

The State Defendants also argued that the claims of irreparable harm were undermined by the State's requirement to defend and indemnify as to claims based on complying with detainer requests. (ECF No. 91 at 111-12). However, the obligation to defend and indemnify is limited to detainer requests. Tex. Gov't Code, § 402.0241. It is further limited to "any action in any court" and requires the Attorney General's determination that the claim arose out of a claim involving a good-faith compliance with a detainer request. *Id*. It does not provide defense or indemnification for any of the irreparable harm caused by other portions of SB4. Furthermore, even if a blanket universal obligation to defend and indemnify had been provided, it would not have addressed all of the other irreparable injuries that SB4 will cause such as constitutional violations, compliance with a preempted law, adverse effects on law enforcement, damage to local economies, the loss of millions of dollars to implement, and the loss of tax revenues. (*See supra* at 5-7). The Plaintiffs established that they will be irreparably harmed if SB4 is not enjoined. During the preliminary injunction hearing, the State Defendants conceded that if SB4 would violate the U.S. or Texas constitutions, then there is irreparable harm. (Transcript 113, 248).

In their response, the State Defendants argued that the balance of harms favored the State because it will prevent the implementation of a statute as enacted by the representatives of the people. (ECF No. 91 at 112). This appears to the identical argument presented by the State in *De Leon v. Perry*, 975 F. Supp. 2d 632, 664 (W.D. Tex. 2014) *aff'd* 791 F.3d 619 (5th Cir. 2015) concerning Texas' ban on same-sex marriages. The Court rejected the argument noting that the Fourteenth Amendment was ratified and voted upon by the people, made law, and an individual's constitutional rights are not submitted to state vote and may not depend on the outcome of state

legislation. *Id*. The holding applies equally here as to all of the rights provided in the Bill of Rights. Additionally, the State Defendants can suffer no harm in not enforcing an unconstitutional and preempted statute. *See Ga. Latino Alliance*, 691 F.3d at 1268-69. The Plaintiffs established the balance of harms favor the granting of a preliminary injunction.

The State Defendants contend that a preliminary injunction would be a disservice to the public first because it would disrupt SB4's intention of promoting cooperation between law enforcement and federal immigration officials. (ECF No. 91 at 112). As discussed above, SB4 is not about cooperation and that was clearly not its intent.

The State Defendants next argue that injunctive relief would not promote the rule of federal and state law. *Id*. However, the rule of law is the federal immigration law that preempts SB4 and the constitutional rights protected by the United States and Texas constitutions.

The State Defendants' final argument is that injunctive relief will delay the beginning of community outreach "educating the public of local policies on immigration-status inquiries." *Id*. The argument is ironic since SB4 provided no funding for such community outreach. The irony continues because the outreach is limited to educating the public that a peace officer cannot inquire into the status of a victim or a witness except if necessary to investigate the offense or conducting a separate investigation of any other alleged criminal offense. Tex. Gov't Code, § 752.057(a)(1); Tex. Code Crim. Pro. Art. 2.13 (e)(3). Local governments are prohibited from having any outreach about a policy that prevents a peace officer from inquiring about status of persons in detention. Tex. Gov't Code, § 752.053(b)(1). The final irony is that the overwhelming evidence from peace officers is that immigration status inquiries are bad for public safety. (*See* Plaintiffs' Exs. P-2(A); P-2(C); P-2(D); P-4, p. 5; P-5, p. 4-5; P-101, pp. 5-6, 12-14; P-413, pp. 4, 6-8). Even the testimony from the three peace officers submitted by the State Defendants all said that their policies did not

allow inquiry into status unless there was a reasonable suspicion that the person was unlawfully present in the United States. (Defendants' Exs. D-1(Ex. 3); D-2, p. 3; D-3, p. 3). The State Defendants' argument provides no support that granting a preliminary injunction would be a disservice to the public.

The public will be served by not having a preempted and unconstitutional statue being enforced. *Georgia Latino Alliance*, 691 F.3d at 1268-69. The Plaintiffs established that the grant of an injunction will be a public service.

Conclusion and Prayer

The City of Dallas requests that the Court grant the Plaintiffs' applications for preliminary injunction and enjoin the implementation of SB4, in whole, or alternatively in part until trial and final judgment and grant the City of Dallas such other and further relief as the Court determines is just and proper.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on July 10, 2017, I electronically filed the foregoing document with the clerk of court for the United States District Court for the Western District of Texas using the electronic case failing system of the court. The electronic case filing system sent a "Notice of Electronic Filing" to all counsel of record who have consented in writing to accept this Notice as service of this document by electronic means.

s/ Charles S. Estee
CHARLES S. ESTEE