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

CITY OF EL CENIZO, TEXAS, et al., *Plaintiffs*, v. STATE OF TEXAS, et al. *Defendants*.	Civil Action No. 5:17-cv-404-OLG [Lead Case]
EL PASO COUNTY, et al., *Plaintiffs*, v. STATE OF TEXAS, et al., *Defendants*.	Civil Action No. 5:17-cv-459-OLG [Consolidated Case]
CITY OF SAN ANTONIO, et al., *Plaintiffs*, v. STATE OF TEXAS, et al. *Defendants*.	Civil Action No. 5:17-cv-489-OLG [Consolidated Case]

SUPPLEMENTAL BRIEF OF EL CENIZO PLAINTIFFS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTRODUCTION

Defendants do not defend the statute actually written by the legislature, and instead ignore significant parts of the statute or offer implausible interpretations of its language. *See, e.g.*, *Paxton v. City of Dallas*, 509 S.W.3d 247, 257-58 (Tex. 2017) ("We reject the limitations the Attorney General champions because they are not textually supportable."). Defendants also seek to convey the impression that SB 4 is a modest statute, but that cannot be squared with the text and structure of the law, or the law's extraordinary penalties. Ultimately, Defendants repeatedly fall back on the argument that the Court and Plaintiffs need not worry about the broad sweep of the law's text because the Attorney General would not bring a prosecution unless it were reasonable to do so. But officers and officials facing jail time, removal from office, and ruinous civil penalties cannot be made to rely on the discretionary goodwill of the Attorney General every time they make a decision that might be viewed as violating SB 4.[1]

ARGUMENT

I. THE DETAINER PROVISIONS VIOLATE THE FOURTH AMENDMENT.

SB 4's detainer provisions (Sections 2.01 and 5.02 of SB 4) mandate that local officials comply with ICE detainer requests, both formal and informal (which could be anything from a phone call to a verbal in-person request).[2] The *only* exception is where the detainee can produce

[1] In this reply brief, Plaintiffs address their likelihood of success on the merits. Plaintiffs' opening brief addressed the remaining factors for a preliminary injunction. With this brief, Plaintiffs are simultaneously filing a post-hearing Proposed Order.

[2] Defendants' suggestion that SB 4 reaches only formal requests on ICE forms (Opp. 54 n.28) is directly at odds with SB 4's text, which states that an "'[i]mmigration detainer request' means a federal government request to a local entity to maintain temporary custody of an alien, *including* a . . . Form I-247 document or a similar or successor form." Gov't Code § 772.0073(a)(2) (emphasis added). And ICE expressly permits these informal detention requests. U.S. Imm. & Customs Enforcement Policy No. 10074.2, ¶ 2.5 (effective Apr. 2, 2017).

documentation of citizenship or lawful immigration status. The detainer provisions violate the Fourth Amendment.

A. SB 4's Detainer Provisions Do Not Require Probable Cause of a Crime and Would Also Violate the Fourth Amendment Even if Probable Cause of a Crime Were Not Required.

SB 4's detainer provisions violate the Fourth Amendment for two separate reasons. First, the provisions mandate that local officials enforce detainers where the federal government has not alleged probable cause of a *crime*, but only probable cause of a civil immigration violation. *See Santoyo v. United States*, No. 16-855 (W.D. Tex. June 5, 2017).[3] Second, even assuming arguendo that local entities could be forced to honor detainers where there is only probable cause of a *civil* immigration violation, and not a crime, SB 4's detainer provisions would still violate the Fourth Amendment. That is because SB 4 mandates blind compliance with detainers and does so without permitting local entities even to determine whether probable cause of a *civil* immigration violation exists. *See* El Cenizo PI Br. 30-34, Dkt. 24-1 ("PI Br.").

1. Defendants claim that a local entity can be forced to honor a detainer even if there is no probable cause of a *crime*. But this Court has held otherwise. *Santoyo*, slip op. at 18; *see also Mercado v. Dallas Cty.*, 2017 WL 169102, at *7-9 (N.D. Tex. Jan. 17, 2017). *Santoyo* is thus dispositive because Defendants (and the United States) concede that the federal government's detainer requests are based on probable cause of a civil immigration violation, not a crime. Defendants argue, however, that *Santoyo* can be distinguished. The United States notes that the detainer in *Santoyo* was issued prior to ICE's recent detainer policy, which provides for the issuance of detainers with administrative warrants based on civil probable cause. U.S. Br. 32-33; *but see id.* at 9 n.9 (the policy does not apply to detainers issued by CBP). But, just as in

[3] Plaintiffs' opening brief did not discuss *Santoyo* because the decision had not yet been issued.

Santoyo, the new policy provides for detainers based only on probable cause of a *civil* immigration violation, whereas *Santoyo* held that there must be probable cause of a *crime*. ICE's new policy is thus unresponsive to this Court's ruling in *Santoyo*.[4]

2. Although *Santoyo* is dispositive here, SB 4's detainer provisions also violate the Fourth Amendment by mandating that local officials detain individuals without allowing them to assess for themselves whether there is even probable cause of a *civil* immigration violation. The Court should find SB 4 unconstitutional on this ground as well. Because compliance with a detainer involves a new arrest and detention, a local entity must satisfy itself that probable cause exists before it undertakes the new 48-hour detention. Yet, under SB 4, a local entity *must* honor detainers with the sole exception being where the detainee provides documentary proof of citizenship or lawful status. That means that local entities must honor detainers in a variety of circumstances where there will be uncertainty regarding whether probable cause of even a civil immigration violation exists. For example, SB 4 would require local officers to honor a detainer where the individual could not produce affirmative documentary proof of status—*even* in cases where the officer has reason to believe that the individual (whose family he may know from the community) is a citizen or has some form of lawful status.[5] It would also require local officials

[4] The United States also attempts to distinguish *Santoyo* on the ground that the 76 days of detention in that case were longer than the detainer form's 48-hour request. U.S. Br. 32. But this Court was very clear in *Santoyo* that its detainer holding requiring probable cause of a crime was explicitly limited to the initial "period of up to 48 hours," and was not based on the additional 74 days of detention. *Santoyo*, slip op. at 16, 18. Texas and the United States also rely on cases and statutes that address only *federal* arrest authority and do not mention state or local authority. Opp. 50-52; U.S. Br. 34-35 (citing, for example, 8 U.S.C. § 1226(a) and *Abel v. United States*, 362 U.S. 217 (1960)).

[5] For instance, an individual may have authority to remain in the country but not be carrying proof of that status at the time, or might not have even been given such a document. As the Bacon Declaration explains, there are close to 30 different immigration statuses that permit an individual to remain in the country, but not all of them come with documentation. Bacon Decl. ¶

to honor detainers even where the ICE form was filled out incorrectly because it lacked a signature or the required boxes were not checked. *See, e.g.*, *Groh v. Ramirez*, 540 U.S. 551, 563 (2004) (officers violated Fourth Amendment by executing warrant that was invalid on its face). Additionally, the detainer request may not come through an ICE form, but informally, making it virtually impossible for the local official to know whether requirements have been met. *See* PI Br. 31.

Defendants suggest that local entities can simply rely on ICE's assurance that probable cause of an immigration violation exists. Opp. 52-53; U.S. Br. 33-37. But SB 4 does not require local officers to receive an assurance of probable cause before arresting. More fundamentally, law enforcement officers cannot be made to outsource their independent duty to determine probable cause. *See, e.g.*, *Messerchmidt v. Millender*, 565 U.S. 535, 546-47 (2012) (holding that even for a judicial criminal warrant, arresting officers must determine whether it is reasonable to rely on the warrant's representation of probable cause); *Whiteley v. Warden, Wyo. State Penitentiary*, 401 U.S. 560, 568 (1971) ("[A]n otherwise illegal arrest cannot be insulated from challenge by the decision of the instigating officer to rely on fellow officers to make the arrest.").

Insofar as Defendants are relying on cases allowing officers to rely on their "fellow officers'" determination of probable cause, that reliance is misplaced. Opp. 52-53; U.S. Br. 35-37. Although the "fellow officer" rule allows an arresting officer to rely, under certain circumstances, on the probable cause determination made by another officer, arresting officers *must* be permitted to reject the determination of another officer where they have reason to believe the determination may be wrong. Otherwise they will be arresting and detaining

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9-11, 30, 61. Many citizens will also not be carrying documentary proof of citizenship. *See* Watson Decl. ¶ 26 (estimating that in Texas more than one million Latinos alone lack photo ID).

individuals for whom they have reason to doubt that probable cause exists. The fellow officer rule therefore cannot save SB 4's detainer provisions, which do not permit local officials any discretion to make their own probable cause determination (except in the one situation where the detainee was lucky enough to have affirmative documentary proof of status). *See, e.g.*, *Evett v. DETNTFF*, 330 F.3d 681, 688 (5th Cir. 2003) (fellow officer rule does not allow arresting officer to "disregard facts tending to dissipate probable cause"); *United States v. Webster*, 750 F.2d 307, 323-24 (5th Cir. 1984) (unreasonable to rely on request to carry out arrest because insufficient information was communicated); *United States v. Williams*, 2000 WL 1273407, at *6 (E.D. La. Sept. 5, 2000).

B. The Detainer Mandate Is Facially Invalid.

Defendants contend that Plaintiffs cannot succeed on a facial challenge because not all detainer requests will lack probable cause. Opp. 53-54; U.S. Br. 32-33. But the mere fact that *some* detainer requests may be supported by probable cause does not mean that the law survives a facial challenge. In any event, under SB 4, *every* detainer arrest *will* violate the Fourth Amendment. The Fourth Amendment has both substantive and procedural requirements. The substantive requirement is that an arrest and detention be supported by probable cause. To enforce that substantive requirement, the Fourth Amendment also requires, as a procedural matter, that officers in each case make a particularized inquiry to determine whether probable cause exists. *See Maryland v. Pringle*, 540 U.S. 366, 371, 373 (2003). SB 4, however, precludes local entities from undertaking their own particularized assessment (whether that probable cause inquiry relates to a criminal offense or a civil immigration offense). Thus, in *every* case under SB 4, there is a procedural violation of the Fourth Amendment.

The same was true in *City of Los Angeles v. Patel*, 135 S. Ct. 2443, 2449-52 (2015), where the Supreme Court found that the statute precluded the necessary procedural steps and accordingly invalidated the law *on its face*. *Patel* involved searches of hotel records, but did not authorize a procedure for hotel operators to object to the search in advance. Notably, the Court observed that, substantively, most searches would likely be perfectly lawful, and that the procedurally-required safeguard would be used only "in those rare instances where a hotel operator objects to" the search. *Id.* at 2453. The Court nonetheless invalidated the law on its face on the ground that it lacked the requisite procedural safeguards in every case. SB 4 goes even further than the law struck down in *Patel*. SB 4 not only *authorizes* detentions that lack the required procedural safeguard (a particularized assessment of probable cause by the local entity), but *requires* detention without that safeguard (since local entities *must* honor a detainer except in the event the detainee happens to have affirmative documentary proof of status). And SB 4's harsh penalties reinforce the need for facial invalidation.[6]

C. Plaintiffs Have Standing to Raise Fourth Amendment Challenges.

1. As the Supreme Court long ago made clear in *Board of Education of Central School District No. 1 v. Allen*, 392 U.S. 236, 241 n.5 (1968), officials have standing to raise constitutional claims where they are faced with the untenable choice of either: (1) complying with an unconstitutional law and thereby violating their oath to uphold the Constitution, or (2)

[6] Law enforcement officials can lose their jobs after mistakenly rejecting a detainer, even once, based on an incorrect belief that the person had proved lawful status. *See* Gov't Code § 752.053(b)(3) (cannot restrict "enforcement assistance"); *id.* § 752.0565(b) (no scienter required for removal). Texas claims that removal requires an intentional violation, Opp. 57 n.30, but the provision it cites, § 752.053(a)(3), only requires intent for a *department* to incur fines by *directly* violating the detainer mandate. Section 752.053(b)(3), by contrast, applies to *officials* who *instruct others* regarding detainers. And Texas does not dispute that officials can be removed from office for accidental violations of § 752.053(b).

abiding by their oath and refusing to comply with the law, thereby subjecting themselves to penalties for violating of the law. Here, the Plaintiff officials have each "taken an oath" to preserve, protect, and defend "the United States Constitution." *Allen*, 392 U.S. at 241 n.5; U.S. Const. art. VI; Tex. Const. art. XVI, § 1(a); Tex. Local Gov't Code §§ 22.005(a), 85.001(c), 86.002(b). Plaintiffs therefore have standing for the same reason the officials in *Allen* had standing: they must "choose between violating their oath" by enforcing an unconstitutional law or "taking a step—refusal to comply with [the law]"—that would subject them to harsh penalties. *Allen*, 392 U.S. at 241 n.5. Here, moreover, Plaintiffs not only face "expulsion from office," *id.*, but also crushing financial penalties and even jail time. "There can be no doubt that appellants thus have a 'personal stake in the outcome' of this litigation." *Id.*; *see also Baker v. Wade*, 743 F.2d 236, 241 n.21 (5th Cir. 1984), *on reh'g*, 769 F.2d 289 (5th Cir. 1985) (indicating that "oath of office and the threat of a contempt citation" is "sufficient to confer article III standing").[7]

Defendants misapprehend the nature of this standing doctrine in asserting that Plaintiffs' claims are subject to the prudential "general rule" that parties may not assert the rights of *third* parties. Opp. 49. The officers are asserting "their *own* constitutional right" not to be forced to violate their oath. *Regents of Univ. of Minn. v. NCAA*, 560 F.2d 352, 364 (8th Cir. 1977) (emphasis added), *abrogated on other grounds by NCAA v. Tarkanian*, 488 U.S. 179 (1988). The standing analysis set forth in *Allen* does not hinge on the rights of the detainees, but on an official's right not to be coerced into violating the Constitution. *See id*. (holding third-party standing doctrine inapplicable to claim that school administrators would be forced to violate students' due process rights).

[7] The serious threats Plaintiffs face are thus entirely different from cases in which the Fifth Circuit has held "the violation of one's oath *alone* is an insufficient injury" under *Allen*. *See, e.g.*, *Crane v. Johnson*, 783 F.3d 244, 253-55 (5th Cir. 2015) (dismissing baseless concern about employment sanctions) (emphasis added).

Moreover, even if the third-party doctrine did apply, it would be satisfied here. The Fourth Amendment and statutory rights of constituents in the officers' custody are "inextricably bound up with the activity the [plaintiffs] wish[] to pursue"—declining unlawful detainers. *Singleton v. Wulff*, 428 U.S. 106, 114 (1976); *see also Powers v. Ohio*, 499 U.S. 400, 414 (1991) (relying on a "congruence of interests"). Their constituents also face impediments to raising these rights on their own. Lawsuits to enjoin individual detainers face "imminent mootness," *Singleton*, 428 U.S. at 117, because the detention usually lasts fewer than 48 hours. And immigrants targeted by SB 4 "quite understandably have a desire to 'lay low' and not draw the attention to themselves that this suit would necessarily bring." *Exodus Refugee Immigration, Inc. v. Pence*, 165 F. Supp. 3d 718, 732 (S.D. Ind. 2016); *see also Singleton*, 428 U.S. at 117; Torres Supp. Decl. ¶ 16.[8]

2. In addition, Texas LULAC independently has standing. First, its members have been held on immigration detainers and are very likely to be held on detainers in the future because of SB 4's detainer mandate. *See Ass'n of Am. Physicians & Surgeons, Inc. v. Texas Med. Bd.*, 627 F.3d 547, 550 (5th Cir. 2010); Torres Supp. Decl. ¶ 5-6, 9. The interests LULAC advances here are clearly germane to its purpose, and there is no reason why individual members would need to participate at this stage. *See Ass'n of Am. Physicians*, 627 F.3d at 550-53; Torres Supp. Decl. ¶ 5-6, 9-11. Second, Texas LULAC also has standing because it will be harmed in its own right, as SB 4 will force it to divert resources from its existing work to increase education and other

[8] The Supreme Court has been "quite forgiving" in finding third-party standing "when enforcement of the challenged restriction *against the litigant* would result indirectly in the violation of third parties' rights." *Aid for Women v. Foulston*, 441 F.3d 1101, 1112 (10th Cir. 2006) (internal quotation marks omitted). SB 4 is highly unusual in punishing police officers, including with jail time, for failure to take actions that will lead to Fourth Amendment violations. The cases cited by Defendants do not involve similar circumstances. Opp. 49.

activities in response to increased imprisonment on detainers. *See* Torres Supp. Decl. ¶ 12-14; *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982).

II. SB 4 IS PREEMPTED.

A. SB 4 Is Preempted Because It Removes the Local Discretion Congress Intended to Preserve.

Congress often must make difficult choices about how forcefully to constrain regulated parties, constantly balancing competing objectives. State laws that conflict with Congress's "calibration of force" are preempted. *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 380 (2000). This kind of preemption does not require an explicit statutory statement that Congress intends to leave some conduct unregulated. Instead, it occurs whenever Congress regulates an activity in detail but decides to leave a portion unregulated—in other words, through "inaction joined with action." *Puerto Rico Dep't of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495, 503 (1988).[9] The "removal system Congress created" is exactly such a scheme. *Arizona v. United States*, 567 U.S. 387, 407 (2012).

As explained in Plaintiffs' opening brief (PI Br. 13-19), Congress enacted a careful scheme in which it *compelled* local entities to authorize participation in *only one* area: the sharing of citizenship and status information under 8 U.S.C. § 1373; *see* 8 U.S.C. § 1644. Under Section 1373, local officials are not directed to *seek* immigration information or make immigration inquiries. Rather, under Section 1373, a line-official who happens to obtain immigration information may, but need not, share that information with the federal government.

[9] This kind of preemption is common. *See, e.g.*, *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 425 (2003) (Congress sought voluntary compliance with insurance disclosure law); *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 879-82 (2000) (Congress sought to allow gradual and flexible phase-in of passive restraint standards); *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 167-68 (1989) (state could not "offer[] patent-like protection for ideas deemed unprotected under the present federal scheme"); *Graham v. Richardson*, 403 U.S. 365, 377 (1971) ("Congress ha[d] not seen fit to impose" a particular restriction on benefits for immigrants).

If line-officers do choose to share that information, a state or local subdivision may not prevent them from doing so. The upshot of Congress's decision to limit Section 1373 to information sharing, and no other activity, is three-fold.

1. SB 4's specific anti-sanctuary provision governing information sharing (Gov't Code § 752.053(b)(2)) is preempted because it regulates the same activity as Section 1373, but does so in a different manner. SB 4 imposes harsh penalties for violating the information sharing provision, while Section 1373 does not. That places SB 4's information sharing provision in conflict with the congressional scheme. PI Br. 15-16 (explaining that state laws that impose different penalties than federal law are preempted).

2. All of the remaining sanctuary and detainer provisions in SB 4 are preempted for a different but equally straightforward reason: they require local entities to participate in areas other than information sharing, and thus go beyond the activity Congress chose to regulate in Section 1373. Under SB 4, a local entity may not, for instance, prohibit line-officers from engaging in immigration enforcement, whether that entails immigration inquiries at traffic stops or any other type of participation.[10] But Congress made a specific decision in Section 1373 not to restrict local options in any area other than the sharing of information already in the possession of a local officer. In doing so, Congress balanced competing objectives and decided to leave local entities with broad discretion over how and when to use their resources for

[10] Texas maintains that SB 4 only prohibits "local *policies* that *categorically* ban cooperation." Opp. 4 (emphases added); *see id.* at 1, 9. But SB 4 manifestly goes further than simply banning policies in § 752.053(a). It also, in § 752.053(b), provides that a local entity may not limit anyone—including a single "commissioned peace officer" or "corrections officer"—from taking an enforcement action. Supervisors therefore face punishment any time they limit or prohibit an officer from undertaking some enforcement action. Indeed, elsewhere in its brief Texas ultimately admits that § 752.053(b) bars individual "actions" and "conduct," not just policies. Opp. 5, 38.

immigration enforcement. Because SB 4 eliminates that discretion, and imposes a Section 1373-type provision on *all* immigration enforcement activities, it is preempted.

Notably, Congress has frequently looked at whether to expand Section 1373 and remove local discretion in areas beyond information sharing, but has not done so. PI Br. 16 (listing prior failed bills). Whether to expand Section 1373 is a decision solely reserved to the federal government, and indeed Congress is currently considering whether to do so. *See* H.R. 3003, 115th Cong., 1st. Sess., June 22, 2017 (would expand Section 1373 and add financial penalties).

The legislative history of these prior unsuccessful proposals makes clear that one of the main reasons for their rejection has been to preserve local discretion, with opponents consistently citing the importance of allowing local officials to address local needs. *See, e.g.*, 161 Cong. Rec. H5414 (daily ed. July 23, 2015) (Sen. Edwards) (urging Senate to reject a bill similar to SB 4 because it would "undermine[] the policies that local communities have determined are appropriate for their localities"); 161 Cong. Rec. H5411(daily ed. July 23, 2015) (Sen. Polis) (opposing SB 4-type bill because it would "directly undermine[] the authority and judgment exercised by local law enforcement agencies," and because "decisions behind policing communities and ensuring public safety are made by those in [local] jurisdictions"); 161 Cong. Rec. S7302 (daily ed. Oct. 19, 2015) (statement of Chuck Canterbury, Nat'l Task Force to End Sexual and Domestic Violence Against Women) ("S. 2146 undermines policies that local jurisdictions have determined are . . . appropriate for their respective communities."); H.R. Rep. No. 113-678, pt. 1, at 229 (2014) (opposing SB 4-like bill because removing local discretion

"would result in widespread discrimination based on race, ethnicity, and national origin" and "decreased public safety in communities around the country").[11]

Texas is therefore wrong that Congress's *only* reason for refusing to extend Section 1373 was a desire to avoid testing constitutional limits. Opp. 15-16. In any event, Congress could have easily extended Section 1373 to additional kinds of information-sharing, or enforced it through certain penalties, without raising meaningfully different constitutional concerns. *See, e.g.*, 8 U.S.C. § 1231(i). But Congress instead chose a middle ground. Nor is Texas correct that the federal government cannot enforce Section 1373. Opp. 17-20. Section 1373 can be enforced the way countless other federal statutes are enforced: an injunctive action to compel compliance. The executive branch also claims it is enforceable through penalties. Dep't of Justice, *Dep't of Justice Sends Letter to Nine Jurisdictions Requiring Proof of Compliance with 8 U.S.C. § 1373*, Apr. 21, 2017.[12] Congress is entitled to choose whatever level of sanctions it deems appropriate—financial, injunctive, or even "a voluntary approach"—without state interference. *Garamendi*, 539 U.S. at 425 (holding that Congress's desire to seek voluntary compliance preempted any additional state penalties).

Significantly, Texas and the United States do not, and could not, contend that *Congress* has in fact required cooperation and assistance beyond information sharing. Instead, they offer

[11] Texas and the United States incorrectly maintain that those failed bills are irrelevant to the preemption analysis. Opp. 21-22; U.S. Br. 22 n.12. Yet the Supreme Court has repeatedly held that states may not supplement a congressional scheme by adding rules that "Congress specifically considered . . . but did not provide." *Three Affiliated Tribes of Fort Berthold Reservation v. World Eng'g*, 476 U.S. 877, 887 (1986). In *Arizona*, for instance, the Court held that Congress's decision *not* to impose sanctions on unauthorized workers preempted state laws that imposed similar sanctions. 567 U.S. at 403-07 (citing *Isla Petroleum*, 485 U.S. at 503). *See also Bonito Boats*, 489 U.S. at 167-68 (same).

[12] *Available at* https://www.justice.gov/opa/pr/department-justice-sends-letter-nine-jurisdictions-requiring-proof-compliance-8-usc-1373.

the following syllogism: (1) the State of Texas can choose to cooperate systematically on all immigration enforcement (even without entering into a formal agreement with the federal government under INA § 287(g), 8 U.S.C. § 1357(g)), and (2) Texas can then mandate that all cities and counties cooperate with the federal government, because cities and counties are mere political subdivisions of the State. The first proposition is addressed by other plaintiffs, who explain that wholesale cooperation on a systematic basis may be accomplished only through a formal agreement under § 1357(g) (a so-called 287(g) agreement). But even if the first proposition were correct, the second does not follow and is the fatal flaw in Defendants' argument. In carefully crafting the INA, Congress paid close attention to the role of *both* the States *and* political subdivisions and expressly mentioned both in numerous provisions of the immigration statute. PI Br. 4 n.1 (listing provisions). Indeed, Section 1373 itself refers to both states and "local government[s]." Thus, Congress did not simply leave it to the States to decide how immigration law would be enforced at the local level, but made a deliberate decision to leave both states and cities with discretion, recognizing the controversial, costly, and complicated nature of immigration enforcement. *See also* 8 U.S.C. § 1103(a)(10) (allowing local participation *only* "with the consent of the head of the department"); 8 U.S.C. § 1357(g)(1) (allowing local enforcement *only* "to the extent consistent" with "local law"); 8 U.S.C. § 1252c(a) (same). SB 4 is a backdoor run around Congress's decision not to eliminate the discretion of local jurisdictions to use their resources in the manner that best suits their needs.

3. Finally, the specific SB 4 provision governing immigration inquiries by line-officers (§ 752.053(b)(1)) is preempted for the *additional* reason that it mandates *unilateral* immigration enforcement by line-officers. Under SB 4, line-officers must now ask about immigration status whenever they detain someone, including during routine traffic stops. Texas seeks to soften the

impact of this provision by claiming that it does not require line-officers to make these inquiries, but only prevents local entities from preventing them from doing so. Opp. 4. But that would create a bizarre scheme in which a sheriff or police chief would have to deal with some of his officers routinely making immigration inquiries while others chose not to do so, leaving the community with no consistency. Thus, not surprisingly, that is not the scheme SB 4 creates. *See* Opp. 16, 56, 73 (describing SB 4's goal of statewide uniformity). SB 4 mandates that immigration inquiries be made.[13]

Texas and the United States[14] contend the Supreme Court's decision in *Arizona* upholding a state provision that required officers to verify immigration status saves SB 4's inquiry provision. But the Arizona provision simply instructed officers to do exactly what Congress had invited in Section 1373(c)—verify immigration status *with ICE*—and nothing more. *See Arizona*, 567 U.S. at 394, 412, 413 (provision simply required officers to "contact ICE," "communicate with ICE," and "verify [] immigration status with ICE"). Critically, the Arizona provision did not mandate that line-officers engage in questioning or inquiries as to a person's immigration status. SB 4, however, provides that local entities shall themselves make the immigration inquiry. And the Arizona provision was limited in a number of other ways that SB 4 is not. The Arizona provision required "reasonable suspicion" before an officer attempted to verify immigration-status information with ICE. SB 4, in contrast, has no such requirement,

[13] SB 4's definition of a "local entity" includes all "employees," which in turn obviously includes line-officers. Gov't Code § 752.051(5)(B). And because under SB 4 no "local entity" (*i.e.*, "employee") may engage in a "pattern or practice" of materially limiting immigration enforcement, an officer who routinely failed to inquire about immigration status whenever he detained an individual would plainly be violating the law.

[14] The Executive Branch's preemption arguments are entitled to no particular weight, as their rejection in both *Arizona* and *Whiting* makes clear. *Accord* Opp. 20 ("It is Congress—not the Executive—that has the power to pre-empt otherwise valid state laws.") (internal quotation marks and alterations omitted).

meaning that every motorist (and every passenger, *see Arizona v. Johnson*, 555 U.S. 323, 333 (2009); *Overshown v. State*, 329 S.W.3d 201, 207-09 (Tex. App. 2010)) may be harassed about immigration status—or, possibly, those motorists and passengers who "look" like immigrants. Further, and importantly, the Arizona provision, unlike SB 4, preserved significant local discretion by allowing officers and local agencies to limit status checks to situations where verification would be "practicable" and "reasonable." *Arizona*, 567 U.S. at 413-14. Additionally, the Arizona provision, in contrast to SB 4, imposed no penalties for failure to make immigration inquiries. In upholding the Arizona provision, the Supreme Court relied heavily on these features of the law, all of which are absent in SB 4. *Id.*[15]

B. The Detainer Mandate Is Also Preempted for the Additional Reason that It Requires Local Entities To Make Immigration Status Determinations.

SB 4's detainer mandate requires local officers to decide, on their own, whether a detainee is a U.S. citizen or "has provided proof" of "lawful immigration status." Tex. Code Crim. P. art. 2.251(b); *see* Opp. 31-33 (not disputing this point). If a detainee cannot provide that documentation, a local entity *must* comply with the detainer request. *See* Tex. Code Crim. P. art. 2.251(a). Because SB 4 requires a local entity to determine whether a detainee has a lawful immigration status, it is preempted under the settled rule that only the federal government may make status determinations. *Villas at Parkside Partners v. City of Farmer's Branch*, 726 F.3d 524, 536-37, 559 (5th Cir. 2013). Defendants argue, however, that SB 4 does not create its own immigration "classifications," but simply asks the local entity to make a determination

[15] Texas also points to a provision of Arizona law that limited sanctuary policies and imposed fines. Opp. 15, 27-28. But the Court in *Arizona* did not even *mention* those provisions, much less rule on their validity. In any event, the fine was not attached to § 2(B), the provision the Court upheld, and applied only to departments, whereas SB 4's penalties apply to individuals. *See* SB 1070 § 2(G), Ariz. Rev. Stat. Ann. § 11-1051(H).

whether the detainee has a lawful status under *federal* immigration law. Opp. 31-32. But that is a virtually impossible determination for a local entity to make on a routine basis. *See* Bacon Decl. ¶ 14-20. More fundamentally, the courts have already rejected this same argument. As the Fifth Circuit explained in *Farmer's Branch*, Congress has preempted laws that require a local entity to determine whether an individual has a lawful immigration status, even if they are using federal immigration classifications to make that determination. 726 F.3d at 536-37, 559 (striking down housing law that required state courts to determine whether an individual had a lawful federal immigration status); *see Chamber of Commerce v. Whiting*, 563 U.S. 582, 611 (2011) (upholding state law because it "relie[d] *solely* on the Federal Government's own determination of who is an unauthorized alien") (emphasis added).

Defendants also argue that the lawful status determination cannot be the basis for a preemption finding, because it is simply an exception to the detainer mandate and operates for the benefit of the detainee, allowing detainees who can prove lawful status to avoid detention. That is semantics. Without changing the substantive meaning or operation, the mandate could equally have been phrased to say that officers must honor a detainer *every time* the subject fails to prove citizenship or status. Moreover, if the exception were severed, the detainer mandate would be that much *more* unconstitutional under the Fourth Amendment, as it would require the detention of even those who actually could produce documentary proof of lawful status. Thus, the local status determination is not some minor exception—it is central to SB 4's operation.

* * *

In sum, SB 4 is preempted because (1) its information sharing provision (752.053(b)(2)) imposes different penalties than Section 1373, (2) the remaining provisions require more than just information sharing and thus go beyond the activity regulated by Section 1373, (3) the

provision governing immigration inquiries is preempted for the additional reason that it mandates *unilateral* local immigration enforcement, and (4) the detainer mandate requires local entities to make immigration status determinations and is thus unlawful for that additional reason.

III. SB 4 IS UNCONSTITUTIONALLY VAGUE.

A nearly unlimited set of actions could be said to "materially limit" immigration enforcement, making it impossible for police and officials to know when they will subject to penalties under SB 4. Indeed, the draconian penalties were undoubtedly intended to ensure that local officials would engage in immigration enforcement full tilt to avoid even the possibility of these penalties. Defendants argue that the phrase "materially limit" is not vague, but they fail even to acknowledge the Fifth Circuit's decision invalidating a functionally identical phase on vagueness grounds. *Int'l Soc'y for Krishna Consciousness v. Eaves*, 601 F.2d 809, 832 (5th Cir. 1979) (striking down law prohibiting actions that "hamper or impede" airport business).

Moreover, SB 4's long list of other prohibitions compounds its vagueness. *See* PI Br. 25-26. In *Krishna Consciousness*, the phrase "hamper or impede" *alone* was too vague to enforce. 601 F.2d at 823. SB 4 is much worse because it embeds the vague phrase "materially limit" in a series of escalating prohibitions, each one of which must "proscribe actions not already reached by the other" ones. *Id.* Thus, "materially limit" must mean an impediment short of an outright "prohibition," which is separately proscribed by SB 4. And officials must not only avoid actions that "materially limit" anyone's enforcement activities, Gov't Code § 752.053(a)(1), (b), but must also avoid informal or unwritten policies, *id.* § 752.051(6), "endorsing" such policies, *id.* § 752.053(a)(1), and, *in addition*, may not engage in any "pattern or practice" of limited enforcement, *id.* § 752.053(a)(2). *See Johnson v. United States*, 135 S. Ct. 2551, 2560 (2015)

("Each of the uncertainties in the residual clause may be tolerable in isolation, but their sum makes a task for us which at best could be only guesswork.") (citation and quotes omitted).[16]

Defendants also contend that SB 4's terms are not vague because those terms are used in other laws, Opp. 38, 39, but the Supreme Court rejected an identical argument in *Johnson*, noting that while "dozens of federal and state criminal laws use terms like 'substantial risk,'" they do so in different contexts that make the expression's meaning clear. 135 S. Ct. at 2561. Texas also argues that "materially limit" is not vague because it only covers policies "addressing immigration-law enforcement specifically, as opposed to routine police matters." Opp. 38. But the activities covered by SB 4 involve *both*. Officials have no idea if they must permit their officers to patrol border regions, respond to immigration-related tips, share home addresses with ICE, or monitor day laborers. Texas has said nothing to add any clarity to SB 4.

Ultimately, Defendants appear to recognize that the SB 4 is vague and thus fall back on the argument that the statute cannot be invalidated on its face because there are at least *some* applications of the statute that are clear. Opp. 33-36. But the Supreme Court has squarely foreclosed that argument as well. In *Johnson*, the Court invalidated the law *on its face* even though certain conduct "clearly falls within the provision's grasp." 135 S. Ct. at 2561. In rejecting the very argument Texas makes here, the Court explained that the "supposed requirement of vagueness in all applications is not a requirement at all, but a tautology." *Id.*

[16] Similarly, SB 4 requires local officials to predict the meaning of both "materially limit" *and* "assisting or cooperating" as "reasonable or necessary." Gov't Code § 752.053(b)(3). Defendants argue these phrases only require that officials *cooperate* in response to an explicit federal request. Opp. 39. But that reads the term "assisting" out of existence. Defendants also assert that "regulated entities" need not "decide whether enforcement participation" is "reasonable or necessary," because *every federal request* "puts covered entities on notice" that SB 4's penalties are hanging over their heads. *Id.* But Defendants cannot really mean to say that no local priority could be urgent enough to justify turning down a federal enforcement request.

Regulated parties cannot be forced to risk punishment without fair notice simply because the statute clearly applies *somewhere*. *Id.*

IV. THE ENDORSEMENT PROHIBITION VIOLATES THE FIRST AMENDMENT.

Defendants do not seriously contend that Texas could prevent an elected official from speaking out against local immigration enforcement. Opp. 41-45. Instead, Defendants assert that the Court should adopt "a narrower construction" of the word "endorse" that would not include speech and would avoid constitutional concerns. Specifically, Defendants ask the Court to interpret "endorse" to mean "sanction" which, "in turn, means . . . to ratify or authorize." Opp. 42-43. But courts do not use constitutional avoidance to revise statutes that threaten to chill constitutionally protected speech, because their "deterrent effect on legitimate expression is both real and substantial." *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 216 (1975). For that reason, the Fifth Circuit has recently followed "the Supreme Court's decision not to 'rely upon' the canon of constitutional avoidance in the overbreadth context." *Serafine v. Branaman*, 810 F.3d 354, 369 (5th Cir. 2016) (quoting *United States v. Stevens*, 559 U.S. 460, 481 (2010)).

Moreover, Defendants' revision would render the endorsement prohibition superfluous. SB 4 already prohibits what Texas proposes as its definition—"a use of official power . . . to ratify or authorize" a policy. Opp. 43. Using official power to "ratify or authorize" an impermissible policy means the same thing as "adopt[ing]" that policy or authorizing an impermissible "pattern or practice." *See* Gov't Code §§ 752.051(6), 752.053(a)(1) (officials may not even adopt an "informal, unwritten policy"); *id.* § 752.053(a)(2) (officials may not

countenance an impermissible "pattern or practice"). Texas has offered no examples of what "endorse" could mean that these other SB 4 provisions do not already cover.[17]

VI. SB 4 VIOLATES EQUAL PROTECTION.

Plaintiffs have adopted practices to *prevent* unconstitutional discrimination by limiting local involvement in immigration. PI Br. 34-35; Reyes Decl. ¶ 28; Schmerber Decl. ¶ 20; Gupta Decl. ¶ 10; Torres Decl. ¶ 11-13; Acevedo Decl. ¶ 9, 12, 17; *see also* S. Hernandez Decl. ¶ 50; Bernal Decl. ¶ 12; McManus Decl. ¶ 5; Saldaña Decl. ¶ 5. SB 4, however, eliminates these prophylactic measures. By doing so, SB 4 violates equal protection under the Supreme Court's political process cases. PI Br. 35-38. Defendants argue that the political process cases are limited to preventing state laws that directly authorize discrimination. Opp. 62. That is incorrect. This line of cases ensures that state laws do not foreclose local entities' ability to prevent discrimination in the *first* place where, as here, there is a real risk of discrimination occurring. Gupta Decl. ¶ 10. Indeed, that is precisely what Justice Kennedy made clear in the very case on which Defendants rely most heavily, *Schuette v. Coalition to Defend Affirmative Action*, 134 S. Ct. 1623, 1636 (2014) (plurality opinion) (Kennedy, J.) (holding that localities must be able to "*prevent* injury caused on account of race") (emphasis added).[18]

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[17] Indeed, in the case Texas cites for the meaning of endorse (Opp. 42), the court actually interpreted "endorse a candidate" to mean something whose prohibition in SB 4 would clearly violate the First Amendment—"a request or appeal for others to support" a limited enforcement policy. *In re Hecht*, 213 S.W.3d 547, 574 (Tex. Spec. Ct. Rev. 2006).

[18] Defendants also argue that SB 4 does not fall under the political process cases because SB 4 is about immigration and does not have "a racial focus" or "address a racial problem." Opp. 62 (citations and quotation marks omitted). But the Court in *Schuette* did not say that state laws were only invalid if they *explicitly* addressed race. Rather, it explained states could not preempt local policies when the state law carries "*the serious risk*, if not purpose, of causing specific injuries on account of race"). 134 S. Ct. at 1633. *See also Romer v. Evans*, 517 U.S. 620 (1996) (invalidating state law that did not address race at all).

CONCLUSION

The application for a preliminary injunction should be granted.

Dated: July 10, 2017

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, Lee Gelernt, hereby certify that on July 10, 2017 copies of this Supplemental Brief of El Cenizo Plaintiffs were electronically filed via the Court's CM/ECF system.

Dated: July 10, 2017

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

CITY OF EL CENIZO, TEXAS; MAYOR RAUL L. REYES, City of El Cenizo; MAVERICK COUNTY; MAVERICK COUNTY SHERIFF TOM SCHMERBER MAVERICK COUNTY CONSTABLE PRECINCT 3-1 MARIO A. HERNANDEZ; and TEXAS STATE LEAGUE OF UNITED LATIN AMERICAN CITIZENS, *Plaintiffs*, v. STATE OF TEXAS; GOVERNOR GREG ABBOTT, in his official capacity; and TEXAS ATTORNEY GENERAL KEN PAXTON, in his official capacity, *Defendants*.	Civil Action No. 5:17-cv-404-OLG [Lead case]
EL PASO COUNTY; RICHARD WILES, SHERIFF OF EL PASO COUNTY, in his official capacity; and the TEXAS ORGANIZING PROJECT EDUCATION FUND *Plaintiffs*, v. STATE OF TEXAS; GOVERNOR GREG ABBOTT; ATTORNEY GENERAL KEN PAXTON; and DIRECTOR STEVE MCCRAW, TEXAS DEPARTMENT OF PUBLIC SAFETY— in their official capacities, *Defendants*.	Civil Action No. 5:17-cv-459-OLG [Consolidated case]
CITY OF SAN ANTONIO, TEXAS; REY A. SALDANA, in his official capacity	

as San Antonio City Councilmember; TEXAS ASSOCIATION OF CHICANOS IN HIGHER EDUCATION; LA UNION DEL PUEBLO ENTERO; and WORKERS DEFENSE PROJECT,	:	
Plaintiffs,	:	
v.	:	
STATE OF TEXAS; GREG ABBOTT, in his official capacity as Governor of the State of Texas; KEN PAXTON, in his official capacity as Attorney General of Texas,	:	Civil Action No. 5:17-cv-489-OLG [Consolidated case]
Defendants.	:	

[SUPPLEMENTAL PROPOSED] ORDER GRANTING PLAINTIFFS' APPLICATION FOR PRELIMINARY INJUCTION

The Court has before it the Application for Preliminary Injunction ("Application") filed by Plaintiffs. Having considered the arguments raised by Plaintiffs and Defendants on the question of whether the requested preliminary injunction should issue, the Court determines as follows under Rule 65(d) of the Federal Rules of Civil Procedure:

1. Plaintiffs' Application for Preliminary Injunction is GRANTED.

2. Defendants are ENJOINED from enforcing any part of Senate Bill 4 pending a final judgment in this case.

3. The Court has determined that Plaintiffs are likely to prevail on the merits of their claims.

a. First, Plaintiffs have demonstrated a likelihood of success on the merits of their First Amendment challenge to Tex. Gov't Code § 752.053(a)(1) (Section 1.01 of SB 4), which provides that local entities may not "endorse" a policy that "prohibits or materially

limits the enforcement of immigration laws." Violation of the endorsement provision is punishable by civil fines and removal from office. *Id.* §§ 752.056, 752.0565. Individual Plaintiffs subject to this provision have expressed criticism of SB 4 and endorsed policies that limit local involvement in federal immigration enforcement. Schmerber Decl. (Ex. P-4) ¶ 9; M. Hernandez Decl. (Ex. P-5) ¶ 10; Reyes Decl. (Ex. P-7) ¶ 14; Prelim. Inj. Hr'g Tr. 15:2–16:8 (testimony of County Attorney Jo Anne Bernal); 214:11–219:2 (testimony of Judge Nelson Wolff), 244:24–245:20 (testimony of Councilmember Rey Saldaña). It is likely that Plaintiffs will prevail in their claim that the endorsement proscription is a ban on speech, discriminates on the basis of viewpoint, and violates the First Amendment. *See N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964); *Jenevein v. Willing*, 493 F. 3d 551, 557–58 (5th Cir. 2007).

b. Second, Plaintiffs have demonstrated a likelihood of success on the merits of their claim that SB 4's "sanctuary provisions"—Tex. Gov't Code § 752.053(a), (b) (Section 1.01 of SB 4)—are unconstitutionally vague and therefore violate the Fourteenth Amendment's guarantee of due process. A criminal or quasi-criminal law is unconstitutionally vague if it "(1) fails to provide those targeted by the statute a reasonable opportunity to know what conduct is prohibited, or (2) is so indefinite that it allows arbitrary and discriminatory enforcement." *Women's Med. Ctr. of Nw. Houston v. Bell*, 248 F.3d 411, 421 (5th Cir. 2001). The sanctuary provisions include vague instructions that local entities may not "materially limit" federal immigration enforcement, Tex. Gov't Code § 752.053(a)(1); may not engage in "pattern[s] or practice[s]" or "informal, unwritten polic[ies]" that "materially limit" federal immigration enforcement, *id.* §§ 752.051(6); 752.053(a)(2); and must provide "assistance" and "cooperation" to federal immigration officers as "reasona-

ble or necessary," *id.* § 752.053(b)(3). Violators are subject to fines and removal from office. Those Plaintiffs who are government officials make daily decisions about how to allocate resources within their agencies and guide the activities of their employees. Many common policing decisions will necessarily limit immigration enforcement actions. Schmerber Decl. (Ex. P-4) ¶ 19; Reyes Decl. (Ex. P-7) ¶¶ 18–19, 27; Prelim. Inj. Hr'g Tr. 11:19–13:3 (testimony of County Attorney Jo Anne Bernal), 235:19–236:19 (testimony of Councilmember Rey Saldaña). SB 4, however, provides local entities and officials insufficient notice as to which of these decisions will "materially limit" immigration enforcement and trigger penalties. Schmerber Decl. (Ex. P-4) ¶¶ 12–15; M. Hernandez Decl. (Ex. P-5) ¶¶ 10–13; Reyes Decl. (Ex. P-7) ¶¶ 16, 24, 27; S. Hernandez Decl. (Ex. P-101) ¶¶ 15, 29, 44–46; Bernal Decl. (Ex. P-201) ¶ 13. It is likely that Plaintiffs will prevail in their claim that the "sanctuary provisions" are unconstitutionally vague on their face and must, therefore, be enjoined. *See Johnson v. United States*, 135 S. Ct. 2551, 2561 (2015); *Int'l Soc'y for Krishna Consciousness v. Eaves*, 601 F.2d 809, 832 (5th Cir. 1979).

Similarly, Plaintiffs have demonstrated a likelihood of success on the merits of their claim that SB 4's "detainer mandate"—Tex. Code Crim. Proc. art. 2.251 (Section 2.01 of SB 4)—is unconstitutionally vague and violates the Fourteenth Amendment's guarantee of due process. The detainer mandate requires officers to honor all detention requests from federal immigration agents unless officers determine that the target is a U.S. citizen or has a "lawful immigration status." Tex. Code Crim. Proc. art. 2.251(b). Violating the mandate is a Class A Misdemeanor and exposes officials to removal from office. *See* Tex. Penal Code § 39.07 (Section 5.02 of SB 4); Tex. Local Gov't Code § 87.031(c) (Section 5.01 of SB 4). Neither federal law nor SB 4 defines "lawful immigration status," which is subject to multi-

ple possible interpretations. Bacon Decl. (Ex. P-1) ¶¶ 9–17, 20–90. It is difficult for local law enforcement to determine "lawful immigration status" because of the complexity of immigration law. Gupta Decl. (Ex. P-3) ¶ 7; Bacon Decl. (Ex. P-1) ¶¶ 14-16; Schmerber Decl. (Ex. P-4) ¶ 9, 18; M. Hernandez Decl. (Ex. P-5) ¶ 14; Acevedo Decl. (Ex. P-9) ¶ 18. Moreover, many people do not have identification that will reflect their immigration status, and even if they do, there is no single government document that can prove "lawful immigration status," because there is no single definition. Bacon Decl. (Ex. P-1) ¶¶ 9–17, 20–90. The provision is not severable, because it is the condition that determines whether the mandate applies, and because an exceptionless mandate would exacerbate the Fourth Amendment problems with the detainer mandate. It is therefore likely that Plaintiffs will prevail in their claim that the "detainer mandate" is unconstitutionally vague in violation of the Fourteenth Amendment. *See Women's Med. Ctr.*, 248 F.3d at 421.

c. Third, Plaintiffs have demonstrated a likelihood of success on the merits of their claim that SB 4's "sanctuary provisions" and "detainer mandate"—Tex. Gov't Code § 752.053(a)(1)–(2), (b) (Section 1.01 of SB 4); Tex. Code Crim. Proc. art. 2.251 (Section 2.01 of SB 4)—are preempted by federal law. The Immigration and Nationality Act contains a detailed scheme for the removal of non-citizens from the United States, which allows for limited participation by local law enforcement agencies. Within that scheme, Congress has restricted local agencies from blocking communication about citizenship and immigration status, but has otherwise chosen not to further restrict their discretion to tailor their participation to local needs. SB 4 conflicts with this system because it partially duplicates the federal scheme regarding information sharing but imposes different and harsher penalties than Congress chose and imposes a number of restrictions that Congress has expressly de-

clined to impose. *See Arizona v. United States*, 567 U.S. 387, 402, 404–05 (2012); *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 378–80 (2000); *Villas at Parkside Partners v. City of Farmer's Branch*, 726 F.3d 524, 529–31 (5th Cir. 2013).

SB 4's detainer mandate is preempted for the additional reason that it requires law enforcement agencies to honor all immigration detainer requests where the subject of the detainer cannot "provide[] proof" of citizenship or "lawful immigration status." Tex. Code Crim. Proc. art. 2.251(a)–(b). It relies on local officers making unilateral determinations of immigration status. The "federal immigration scheme . . . leaves no room for a determination of immigration status" by state or local officials. *Farmer's Branch*, 726 F.3d at 559 (Owen, J., concurring in part and dissenting in part); *see also Chamber of Commerce of U.S. v. Whiting*, 563 U.S. 582, 611 (2011).

d. Fourth, Plaintiffs have demonstrated a likelihood of success on the merits of their claim that SB 4's "detainer mandate"—Tex. Code Crim. Proc. art. 2.251 (Section 2.01 of SB 4)—violates the Fourth Amendment. Honoring a detainer constitutes "a new seizure for Fourth Amendment purposes," and must therefore be supported by probable cause. *Morales v. Chadbourne*, 793 F.3d 208, 217 (1st Cir. 2015). The requisite probable cause must be for a criminal offense. *Santoyo v. United States*, No. 16-855, Doc. 36 (W.D. Tex. June 5, 2017). But the detainer mandate requires local officers to honor detainers issued based on probable cause of a civil immigration offense only. Moreover, even if probable cause of a crime were not required, and all that was required was probable cause of a civil immigration violation, SB 4's detainer mandate would nonetheless violate the Fourth Amendment, because SB 4 requires local entities to honor detainers issued based on probable cause of a civil immigration offense only. It also requires them to honor detainers regardless of whether they believe

that there is probable cause to believe that the person is a removable non-citizen. The detainer mandate thus prevents arresting officers from fulfilling their constitutional duty to assess probable cause before making a new seizure. It is likely that Plaintiffs will prevail in their claim that the "detainer mandate" is facially invalid as a violation of the Fourth Amendment. *See City of Los Angeles v. Patel*, 135 S. Ct. 2443, 2449–51 (2015); *Maryland v. Pringle*, 540 U.S. 366, 371, 373 (2003).

e. Fifth, Plaintiffs have demonstrated a likelihood of success likelihood of success on the merits of their claim that the entirety of SB 4 violates the Equal Protection Clause of the Fourteenth Amendment. The Equal Protection Clause does not permit states to preempt local efforts to "address or prevent injury caused on account of race." *Schuette v. Coal. to Defend Affirmative Action*, 134 S. Ct. 1623, 1636 (2014) (plurality opinion). The governmental Plaintiffs, like other law enforcement agencies in Texas and across the country, have structured their agencies' involvement in the immigration removal system to guard against a well-documented likelihood of racial profiling if untrained local law enforcement officials must engage in immigration enforcement. *See* Bacon Decl. (Ex. P-1) ¶ 7; Gupta Decl. (Ex. P-3) ¶¶ 6, 10; Schmerber Decl. (Ex. P-4) ¶ 20; Torres Decl. (Ex. P-6) ¶¶ 11–13; Reyes Decl. (Ex. P-7) ¶ 28; Acevedo Decl. (Ex. P-9) ¶¶ 9, 12, 17; S. Hernandez Decl. (Ex. P-101) ¶ 50; Bernal Decl. (Ex. P-201) ¶ 12; McManus Decl. (Ex. P-303) ¶¶ 6, 9; Saldaña Decl. (Ex. P-305) ¶¶ 5, 7; Prelim. Inj. Hr'g Tr. 10:24–11:12 (testimony of County Attorney Jo Anne Bernal). States may not prohibit such efforts to prevent discrimination before it occurs. It is likely that Plaintiffs will prevail in their claim that SB 4 violates the Equal Protection Clause. *See Schuette*, 134 S. Ct. at 1631–36; *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457 (1982).

4. Plaintiffs have also established that there is a substantial threat that they will suffer irreparable injury if a preliminary injunction is not granted. Absent an injunction, the Plaintiffs who include government entities and officials will face numerous constitutional injuries, including the chilling of First Amendment rights and the inability to comply with their oath to follow the Constitution, including the Fourth Amendment requirement that arrests be justified by probable cause. The vague terms of the sanctuary provisions and detainer mandate will leave them uncertain as to how to implement or follow the law, and may subject them to civil and criminal penalties or removal from office. *See* Schmerber Decl. (Ex. P-4) ¶¶ 9, 10, 13, 17; M. Hernandez Decl. (Ex. P-5) ¶¶ 10–13; Reyes Decl. (Ex. P-7) ¶¶ 13, 15, 23–26; S. Hernandez Decl. (Ex. P-101) ¶¶ 35–37, 45, 51–52. Plaintiff LULAC will also suffer irreparable injury because its members face the prospect of unlawful detention and racial profiling. Torres Decl. (Ex. P-6) ¶¶ 11–13; Torres Supp. Decl. ¶¶ 6-10, 16. These constitutional injuries constitute per se irreparable harm. *Opulent Life Church v. City of Holly Springs, Miss.*, 697 F.3d 279, 295 (5th Cir. 2012). They are compounded by the injuries caused by the burden SB 4 will place on limited law enforcement resources, cutbacks to programs and activities dedicated to public safety, and a decrease in efficacy of government programs and public safety. *See* Schmerber Decl. (Ex. P-4) ¶¶ 11, 12; M. Hernandez Decl. (Ex. P-5) ¶¶ 15; Reyes Decl. (Ex. P-7) ¶¶ 16, 21, 24; S. Hernandez Decl. (Ex. P-101) ¶ 55; McManus Decl. (Ex. P-303) ¶ 5; Saldaña Decl. (Ex. P-305) ¶ 4, 13; Prelim. Inj. Hr'g Tr. 11:19–17:4 (testimony of County Attorney Jo Anne Bernal), 235:19–236:19, 238:25–242:21 (testimony of Councilmember Rey Saldaña), 210:24–211:1 (testimony of Judge Nelson Wolff).

5. The preliminary injunction will preserve the status quo, in which local officials are not mandated by state or federal law to engage in immigration enforcement as required by SB 4

and may use their discretion to determine the extent to which they wish to engage in immigration enforcement. The threatened injury to Plaintiffs thus outweighs any harm that might fall on the State of Texas from issuance of this injunction.

6. Issuance of this injunction will not disserve the public interest. The public has a substantial interest in ensuring that state laws are constitutional.

7. The Court exercises its discretion to not require Plaintiffs to provide security under Rule 65(c) of the Federal Rules of Civil Procedure. *Corrigan Dispatch Co. v. Casa Guzman, S.A.*, 569 F.2d 300, 303 (5th Cir. 1978).

Entered this _____ day of July, 2016.

_____
Hon. Orlando L. Garcia
UNITED STATES DISTRICT JUDGE

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

City of El Cenizo, Texas, Mayor Raul L. Reyes of City of El Cenizo, Maverick County, Maverick County Sheriff Tom Schmerber, Maverick County Constable Pct.3-1 Mario A. Hernandez, and League of United Latin American Citizens,	:	
Plaintiffs,	:	
v.	:	
	:	Civil Action No. 5:17-cv-404-OLG
State of Texas, Governor Greg Abbott (In His Official Capacity), and Texas Attorney General Ken Paxton (In His Official Capacity)	:	
Defendants.	:	

SUPPLEMENTAL DECLARATION OF LUPE TORRES

1. My name is Lupe Torres, and I serve as the State Director for Texas State LULAC, Inc. ("Texas LULAC").

2. This declaration is in addition to my prior declaration submitted in this case, dated June 3, 2017.

3. Texas LULAC has approximately 7,000 members statewide. Each member pays dues annually.

4. Texas LULAC has members who are undocumented. Others have at times lacked physical documentation of their immigration status, for example because such documents have been lost or were never supplied by the federal government.

5. Texas LULAC has members who have previously been held on immigration detainers. This can occur in a variety of contexts. For example, members have been arrested for minor traffic violations and subsequently held on immigration detainers.

6. There is an especially strong possibility that our members who have been previously subject to detainers will again have detainers placed on them. Individuals who are arrested for even minor crimes are more likely to be arrested again in the future.

7. Texas LULAC has approximately 200 members who live in Travis County. Some of those members are undocumented or have no physical documentation of their immigration status.

8. I understand that Travis County currently declines most detainer requests, but would be required to hold people on detainers if SB4 is allowed to go into effect.

9. SB4's detainer mandate provision will very likely cause our members to be held on detainers. It would take away discretion from officers to decide not to hold individuals on detainers. That will likely have a particularly large impact in places like Travis County, which currently declines most detainers. Our members in Travis County who would otherwise be released will now be held on immigration detainers.

10. Imprisonment on a detainer imposes serious harms on our members. In our members' experience, a local jail holding a person on an immigration detainer can lead to the following: the inability to effectively secure bond, because posting bond leads to transfer to ICE instead of release; prolonged time in jail, including up to 48 hours for ICE

to come pick the person up; and ineligibility for certain alternatives to jail, like jail diversion facilities. Because SB4 will cause more people to be held on detainers, it will cause these harms to our members.

11. Fear of being held on a detainer and transferred to federal custody will cause our members to change their behavior. Already, many of our members are afraid to drive or go out in public, seriously impairing their day-to-day activities. Particularly in places like Travis County, the detainer mandate will create more fear and dramatically alter peoples' lives in those ways.

12. I previously discussed the ways in which SB4 in general has forced and will force Texas LULAC to divert resources from our other work. Already, SB4 has forced Texas LULAC to dedicate significant time and financial resources to addressing fear, questions, and the need for public education about SB4 through town hall meetings, and community outreach. This has seriously impacted our ability to pursue Texas LULAC's various other priority areas of work, such as voting, education, housing, and health care.

13. The detainer mandate in particular will also force us to divert resources. For example, we anticipate beginning or increasing the following activities in areas like Travis County where more people will be held on detainers pursuant to SB4: Educating the public about immigration detainers, how to avoid arrest for minor violations, and what proof of lawful status individuals should carry to avoid detention under SB4; arranging legal services for individuals who would be released but instead will be held on

a detainer because of SB4; and assisting families of such individuals in locating and communicating with loved ones who are detained and transferred out of state because of a detainer.

14. Undertaking these activities will force us to divert resources from our other activities. For example, increased educational activities regarding immigration detainers in areas like Travis County will take significant resources. We will need to print and distribute flyers, rent space for meetings, and pay personnel. That money will need to be diverted from other activities, like our scholarship fund for college students and our voter registration efforts. Similarly, non-financial resources will need to be diverted. Churches sometimes donate space for a single day, for example, and we will need to reallocate that space from voter-registration efforts to detainer-education sessions.

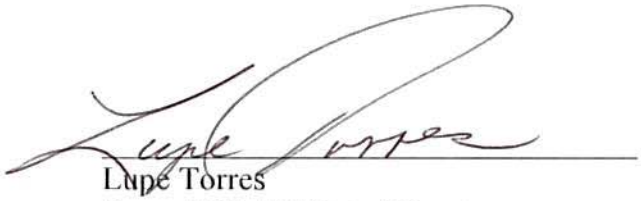
15. As an organization, we have a close relationship with our members. We advocate on their behalf, regularly seek out their concerns and interests and incorporate that information into our political, legal, and advocacy agendas, and provide information, education, and resources to members on a variety of topics. Our members trust Texas LULAC and look to us when they have concerns and problems arising from their immigration status.

16. Many of our members would face serious hindrances in challenging detention on immigration detainers because of SB4's detainer mandate. Our undocumented members are often afraid to assert their legal rights for fear of exposure or being taken advantage of because of their status. Many undocumented members do not

speak English well or at all; have limited education; and cannot afford to retain a lawyer to pursue a legal case. Also, because people are typically held on immigration detainers for 48 hours, our members would have great difficulty in filing and litigating a suit before they are transferred to immigration custody.

I declare under penalty of perjury of the laws of the United States that the foregoing is true and correct.

Executed July 10, 2017 in San Antonio, Texas.



Lupe Torres
Texas LULAC State Director