IN THE 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 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-OG [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-OG [Consolidated Case]

CITY OF SAN ANTONIO, TEXAS; REY A. SALDAÑA, 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 *Defendants*	)	Civil Action No. 5:17-CV-489-OG [Consolidated Case]

SUPPLEMENTAL MEMORANDUM OF LAW IN SUPPORT OF APPLICATION FOR PRELIMINARY INJUNCTION BY CITY OF SAN ANTONIO, TEXAS, REY A. SALDAÑA, TEXAS ASSOCIATION OF CHICANOS IN HIGHER EDUCATION, LA UNION DEL PUEBLO ENTERO, AND WORKERS DEFENSE PROJECT

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INTRODUCTION

At the June 26, 2017 preliminary injunction hearing, the Court heard evidence and argument establishing that plaintiffs are likely to succeed in their constitutional challenge to SB 4 and will suffer irreparable harm if the State is not enjoined from enforcing that legislation. The State of Texas presented no evidence of its own at the hearing and conceded that if SB 4 is constitutionally infirm in the ways plaintiffs allege, irreparable harm would be established.

In this post-hearing brief, the San Antonio Plaintiffs therefore do not further discuss irreparable harm, but instead focuses on four principal constitutional defects of SB 4 – the statute's violation of the Supremacy Clause and of the First, Fourth and Fourteenth Amendments.[1] We address the salient points in the 130 pages of briefing submitted by the State and the United States and show why their arguments cannot save SB 4.

First Amendment. The State concedes that the "endorse" provision of SB 4 violates the First Amendment if the term "endorse" is understood to refer to speech. The State invites the Court to adopt a different reading of that term, but the authorities the State cites do not support that reading. Nor is excising the term from the statute viable. Other parts of SB 4 also violate the First Amendment, including the "public statements" clause in the statute's penalty provision.

Supremacy Clause. The US concedes that federal immigration statutes establish a comprehensive scheme governing the interaction of federal, state and local authorities in enforcing immigration law. Both the US and the State nevertheless dispute that SB 4 is preempted, arguing that a narrow carve-out in 8 U.S.C. Section 1357(g)(10) permits states to pass legislation governing local enforcement of immigration law. But subsection (g)(10) cannot sustain the weight the US and the State would have it bear. Nor does *Arizona v. United States* save SB 4. SB 4 is analogous to the provisions held preempted in *Arizona*, and is distinguishable in critical ways from the single narrow provision that escaped preemption there.

Fourth Amendment. In seeking to show that SB 4 is consistent with Fourth Amendment

[1] The San Antonio Plaintiffs include the City of San Antonio, Rey A. Saldaña, Texas Association of Chicanos in Higher Education, La Union del Pueblo Entero, and Workers Defense Project.

limitations, the State and the US rely primarily on a new form ICE has begun to employ when making detainer requests, Form I-247. But nothing in SB 4 limits mandatory compliance with detainer requests to situations in which that form is used. And even if SB 4 were so limited, the new form would not cure the inherent Fourth Amendment problem, as it does not require a showing of *criminal* probable cause and cannot change the fact that state officials – as opposed to federal officials – lack the authority to detain individuals based on administrative warrants.

Fourteenth Amendment. Copious evidence presented before and during the hearing shows that SB 4 would prevent local entities from employing policies adopted to deter racial profiling. The State cannot refute this evidence and argues instead that SB 4 passes muster insofar as it contains no explicit racial classification. But the Supreme Court has held that when states act to block local anti-discrimination policies, the lack of explicit racial classification does not immunize their actions. Copious evidence also establishes that SB 4 was adopted with discriminatory intent.

DISCUSSION

I. SB 4 Violates The First Amendment

In response to the First Amendment challenge brought by virtually every plaintiff in this litigation, the State largely folds. Because it cannot dispute that banning speech criticizing enforcement of immigration law would violate the First Amendment, the State argues that the term "endorse" in Section 752.053(a) does not actually apply to speech. In the alternative, the State invites the Court to excise the word "endorse" from the statute. Neither approach works.

The State's interpretation of "endorse" is not credible. In an attempt to show that the word "endorse" does not implicate speech, the State cites a 1945 dictionary that, in its view, likens the term "endorse" to terms like "sanction" and "enact." State Br. at 41-45.[2] The current version of the dictionary on which the State relies, however, defines "endorse" – consistent with modern usage – as "approve openly, *endorse an idea*; *especially*: to express support or approval

[2] We refer to the brief submitted by the State and related defendants on June 23, 2017 as "State Br." We refer to the brief submitted by the United States on the same date as "US Br."

of publicly and definitely *endorse a mayoral candidate."* http://www.merriam-webster.com/dictionary/endorse (last visited July 7, 2017) (emphasis in original). This definition – the one that is extant – plainly shows that "endorse" encompasses speech.

The State also argues that "endorse" should be interpreted synonymously with the two other actions prohibited by Section 752.053(a)(1) – "adopt" and "enforce," which, according to the State, do not implicate speech. State Br. at 43. But no canon of construction instructs courts to interpret adjacent words in the same sentence of a statute as having identical meaning. Indeed, the applicable rules of construction lead to the opposite result, counseling courts to give meaning to each word so as to avoid surplusage. *See, e.g., United States v. Koss*, 831 F.3d 259, 264 (5th Cir. 2016) ("If possible, every word and every provision [of an enactment] is to be given effect . . . . None should needlessly be given an interpretation that causes it to duplicate another provision or to have no consequence") (citing Antonin Scalia and Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 174 (2012)), *cert. denied*, 137 S. Ct. 1812 (2017).

Excising the word "endorse" cannot save SB 4. Implicitly recognizing that SB 4's endorsement prohibition is unconstitutional, the State asks the Court to fix the problem by striking the word "endorse." Even if permitted, this would be insufficient. Other language in SB 4 also runs afoul of the First Amendment. Most glaringly, SB 4 directs the attorney general to commence proceedings to remove an elected official from office "if presented with evidence, *including evidence of a statement by the public officer*, establishing probable grounds that the public officer engaged in conduct described by Subsection (a)." SB 4 § 752.0565 (emphasis added). Excising the word "endorse" from SB 4 would not change the fact that an impermissible prohibition on certain "statements" – that is, speech – is woven into the statutory scheme, including its penalty provisions.

Nor *could* the Court excise "endorse" from SB 4, even if this were otherwise a viable solution. In *Serafine v. Branaman*, another case involving a statute that violated the First Amendment, the Fifth Circuit rejected defendants' invitation to rewrite the statute to make it constitutional, noting that a court is "bound by the statute as the legislature fashioned it." 810

F.3d 354, 366 (5th Cir. 2016). The Fifth Circuit further explained that it was "mindful of the Supreme Court's decision not to rely upon the canon of constitutional avoidance in the overbreadth context," and that "courts should impose a limiting construction on a statute *only* if it is readily susceptible to such a construction." *Id.* at 369 (internal quotation marks and citations omitted). Because the "plain text" of the *Serafine* statute rendered it unconstitutional, the court declined to give it "an additional extra-textual limiting construction in a frantic attempt to rescue it." *Id.* The same result should follow here.

II. SB 4 Is Preempted

As the San Antonio Plaintiffs have discussed, SB 4 is both field preempted and conflict preempted. The State and the US dispute this, but their analysis in many ways confirms it.

A. SB 4 Is Field Preempted

With respect to field preemption, the US *agrees* that the Immigration and Nationality Act contains a comprehensive scheme regulating the relationship between federal and local immigration enforcement. The US nevertheless argues that states are free to legislate in this area in light of 8 U.S.C. Section 1357(g)(10). But that provision, which narrowly permits state or local officials to communicate and cooperate with federal immigration enforcement personnel on an ad hoc basis, does not come close to bearing the weight the US seeks to place on it.

The State takes a different approach, arguing that SB 4 is not preempted because it is aimed not at aliens but at law enforcement personnel. In this way, the State says, SB 4 is akin to Section 2(B) in *Arizona v. United States*, 567 U.S. 387 (2012). But SB 4 is critically different from Section 2(B), and the *Arizona* decision cannot save it.

1. Section 1357(g)(10) Confirms That SB 4 Is Preempted.

In arguing that SB 4 is not subject to field preemption, the US concedes much of what it purports to dispute. Field preemption exists where Congressional 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." *Arizona*, 567 U.S. at 399 (citations omitted). In this case, the issue is not immigration generally nor even immigration enforcement but rather *the way in*

which local authorities may work with federal authorities in enforcing immigration law. And in this area, the US *acknowledges* that Congress has enacted a complex and "comprehensive" set of provisions, including those governing "state and local cooperation in enforcement of the INA." US Br. at 2-11, 16-24. The US also recognizes, as it must, that unilateral enforcement of immigration law by state or local officials is preempted. Hrg. Tr. at 140, 148 (Ex. A hereto).

The US nevertheless maintains that SB 4 is not preempted because it comes within the exception of Section 1357(g)(10). That subsection holds that, notwithstanding other provisions of Section 1357(g), state and local officials may communicate and cooperate with federal immigration authorities without the need for a written agreement with the Attorney General.

The US takes subsection (g)(10) out of context and greatly overstates its effect. Section 1357(g)(10), like Section 1357(g) as a whole, is one segment in an intricate web of detailed statutory provisions that regulate state and local involvement in immigration enforcement activities, and that delegate authority to enforce federal immigration law only in narrow and carefully defined circumstances. *See, e.g.*, 8 U.S.C. § 1324(c) (providing state and local authority to enforce alien harboring provisions); 8 U.S.C. § 1103(a)(10) (providing state and local authority to enforce immigration laws during a mass influx); 8 U.S.C. § 1252c (providing for state and local authority to enforce criminal illegal reentry provisions with prior status confirmation from INS); 8 U.S.C. § 1357(g) (providing for state and local authority to enforce immigration law pursuant to a written agreement). Through these provisions, Congress has created a comprehensive regime for immigration enforcement and has carefully delineated the circumstances in which state and local officials may participate. *See Arizona*, 567 U.S. at 403 (explaining that a comprehensive federal framework "leads to the conclusion" that the government has occupied a field). This regime – the INA – displaces state law on the subject.

Indeed, even if Section 1357 were the *only* federal law on the subject, it would confirm that Congress has occupied the field of regulating state and local officers' involvement in immigration enforcement. Section 1357 begins with a detailed and interrelated set of provisions allowing the Attorney General to designate particular *federal* officers to engage in carefully

defined enforcement activities.[3] Section 1357(g) then authorizes the Attorney General to work with state and local officials in specified circumstances, pursuant to a written agreement that identifies the particular officers who may participate, in particular ways, after appropriate training, under the direction and control of federal authorities, and only to the extent permitted by "local law." 8 U.S.C. § 1357(g)(1)-(9). Against this backdrop, Section 1357(g)(10) simply provides that the other provisions of the statute are not to be construed as requiring a written agreement authorizing communication or cooperation with the Attorney General in certain areas.

Contrary to what the US argues, this narrow provision does not "invite" states to pass broad legislation like SB 4 or to issue directives to local law enforcement. Subsection (g)(10) nowhere empowers states to permit (or require) untrained and unsupervised local officers to engage in enforcement activities, as SB 4 does. Indeed, the suggestion that subsection (g)(10) invites such broad state action is nonsensical; the exception would swallow the rule. Under the State's and the US's reading, subsection (g)(10) would enable state or local officials to engage in far more extensive enforcement activities *without* a written agreement than they could with such an agreement. Even more bizarrely, under the State's and the US's reading, state and local officials operating under subsection (g)(10) would have greater authority and autonomy than *federal* officials, who must abide by the restrictions in Section 1357(a). *See* n.3. This cannot have been Congress's intent.

The State maintains that its incursion into this field is nevertheless permitted when it is borne in mind that Congress may not, consistent with the Tenth Amendment, "commandeer" state resources for federal enforcement objectives. According to the State, subsection (g)(10) was crafted to permit states to do what Congress was constitutionally barred from doing. State Br. at 15-16, 20-21. This argument is difficult to credit. It is inconsistent with the existence of

[3] *See, e.g.*, § 1357(a) (authority to "interrogate any alien . . . as to his right to be or to remain in the United States"); 8 U.S.C. § 1357(a)(2), (4) (authority to make an "arrest" for violations of the federal immigration laws in specific circumstances); 8 U.S.C. § 1357(a)(3) (authority to "search for aliens" in specific circumstances); 8 U.S.C. § 1357(c) (authority to "conduct a search, without warrant," of upon "reasonable cause" to suspect grounds to deny admission).

Section 1373, in which Congress required state and local governments to provide information to ICE, without any apparent Tenth Amendment concerns. The legislative history of Section 1357 also reveals that Congress was grappling with a much different set of issues – indeed, with the same policy considerations concerning federal and local enforcement that SB 4 now purports to resolve in a different way. For example, Representative Latham sought an amendment that would have allowed the Justice Department to give local officials "the authority to seek, apprehend, and detain[ ] illegal aliens" without many of the conditions required under Section 1357(g). 142 Cong. Rec. H 2475, 2476-77 (1996). In response, other representatives raised concerns about local officials engaging in those activities without training and oversight.[4] Meanwhile, Representative Jackson-Lee expressed concern about preserving trust between local authorities and the communities they serve:

> I know how important it is for local law enforcement to establish trust with all of the ethnic and minority groups and communities in their cities. . . . It is dangerous to put immigration authority in these local law enforcements [sic] so that they cannot do their real job, which is to protect those communities and . . . engender trust in the community so that they can get the job done. . . . This is not the direction we should send local law enforcement, to make them the entrappers of individuals who may look different or speak a different language.

Id. at 2478. The terms of this debate show anything *but* an intention to "invite" states to legislate new policies in this field. Instead, they show that Congress considered the same policy issues at stake in SB 4 – whether local officials may appropriately enforce federal immigration law without federal training or supervision, and whether they may do so without losing the trust of their communities. Congress resolved these policy matters by crafting a narrow exception to the written agreement and supervision requirements of Section 1357(g)(1)-(9), to extend only to communication with federal officials and cooperation with their efforts. This carefully calibrated provision, together with the numerous other statutes addressing state and local law enforcement,

[4] *See id.* at 2477 (statement of Rep. Becerra) ("A law enforcement officer with the border patrol is taught and trained on how to conduct himself. . . . [A]s someone who is a member of an ethnic minority, it disturbs me when I hear that we will now have people who are not trained to do a specific type of law enforcement work out there doing something which has in the past caused harm, injury, and discrimination against certain classes of individuals.")

confirms that Congress has comprehensively legislated the matter of state and local collaboration with federal immigration enforcement. *Supra* at 5-6 & n.3.

The State also argues that it may enter this field because it has authority as a sovereign to police local entities, which are subservient to the State. However true this may be as a general matter, it cannot take precedence over federal preemption law. In the area of immigration enforcement, Congress plainly recognized state and local governments as separate entities. Among other things, a host of statutes – including those on which the State and the US rely in contesting preemption – address state and local law or states and their subdivisions separately.[5] Because Congress has separately regulated the activities of local entities in the area of cooperative immigration enforcement, it has left no room for the states to do so.

2. ***Arizona* Does Not Save SB 4.**

The State contends that SB 4 survives preemption because it addresses law enforcement officials rather than aliens directly, and thus is analogous to Section 2(B) in *Arizona*. State Br. at 26-27. But the two statutes are critically different. Section 2(B) is a narrow provision: It requires state officers to perform immigration status checks of a detained person during a lawful detention or after release. "The accepted way to perform these status checks is to contact ICE, which maintains a database of immigration records." 567 U.S. at 411. Section 2(B) is a limited mandate about communication that interlocks directly with federal mechanisms.

SB 4, of course, is far broader and is in no way bounded by existing federal structures or constitutional safeguards. SB 4 purports to dictate the relationship between federal and local law enforcement across a wide range of activities. It governs what local officials may say about

[5] *E.g.*, 8 U.S.C. § 1373(a) ("a Federal, State, or local government entity or official may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, the Immigration and Naturalization Service information regarding the citizenship or immigration status, lawful or unlawful, of any individual"); 8 U.S.C. § 1644 ("no State or local government entity may be prohibited, or in any way restricted, from sending to or receiving from the Immigration and Naturalization Service information regarding the immigration status, lawful or unlawful, of an alien in the United States"); 8 U.S.C. § 1357(g)(10) ("Nothing in this subsection shall be construed to require an agreement . . . in order for any officer or employee of a State or political subdivision of a State" to communicate or cooperate with the Attorney General in specified ways).

immigration enforcement, what policies they may adopt on the subject, which enforcement actions they may prohibit and which actions they must allow. It also authorizes line officers to investigate and in certain instances determine immigration status and does not subject those activities to federal guidance. Nothing in the *Arizona* Court's discussion of Section 2(B) indicates that such broad regulation of local enforcement survives field preemption.

The US acknowledges in this case that a "comprehensive federal statutory regime" already "contemplates state and local cooperation in enforcement of the INA" – and that SB 4 addresses precisely the same subject. Under *Arizona*, such "complementary" state laws – even if they are "parallel to federal standards," which SB 4 is not – cannot survive if the federal government occupies the field. 567 U.S. at 401. That is the case here.

B. **Each Of SB 4's Core Provisions Is Also Conflict Preempted.**

Section 752.053. As discussed, Congress struck a careful balance in Section 1357(g) and other provisions of the INA, authorizing local officials to enforce federal immigration law only under narrowly drawn circumstances, only on a voluntary basis, and always directed or supervised by the federal government. Section 752.053 upsets this balance by eliminating policies that prohibit or even limit local enforcement activities. As a result, it strips away the safeguards of federal training and supervision and gives local officials unilateral discretion to enforce federal immigration law. This directly conflicts with Congress's scheme.

Both the US and the State again argue that this fits within Section 1357(g)(10). But nothing in that subsection authorizes the enactment of state legislation to control local officials in matters of immigration enforcement. Subsection (g)(10) permits local officials to communicate and cooperate in prescribed ways with federal officials without a written agreement – nothing more. Section 752.053, by contrast, requires local entities to permit their officers to engage in a broad range of enforcement activities. SB 4 thus falls far outside the scope of Section 1357(g)(10). It similarly conflicts with 8 U.S.C. Sections 1373 and 1644, which make mandatory only the sharing of records between local and federal officials.

Again as with field preemption, the US and the State seek to analogize SB 4 to Section

2(B) in *Arizona*. But the statutes are not analogous at all. Section 2(B) narrowly specifies that a detained individual's immigration status "shall be verified with the federal government" pursuant to federal law. Ariz. Rev. Stat. § 11-1051(B). By its terms, local officials are required to find out from ICE what ICE has determined about the individual's status; they are not authorized to determine lawful status on their own or otherwise initiate unsupervised enforcement activities.

Section 752.053 is fundamentally different. It requires local entities to permit their officers to engage in "the enforcement of immigration laws" and to "inquir[e] into the immigration status of a person under a lawful detention or under arrest," all without consultation with ICE, and without any guidance as to how to evaluate or respond to the information elicited. The statute further allows local officials to make independent inquiries and to determine for themselves whether individuals have lawful status. The statute thus puts local officers in the position of unilaterally initiating and leading enforcement activities – something the US has *conceded* is preempted. Hrg. Tr. at 140, 148; *see also Arizona,* 567 U.S. at 413 ("it would disrupt the federal framework to put state officers in the position of holding aliens in custody for possible unlawful presence without federal direction and supervision . . . . [The] program put in place by Congress does not allow state or local officers to adopt this enforcement mechanism").

Nothing in *Arizona* permits a law like SB 4. In holding that Section 2(B) did not conflict with federal law, all the Supreme Court determined was that the federal scheme allowed for "a policy requiring state officials to contact ICE as a routine matter." *Arizona*, 567 U.S. at 413. It did not hold that federal law leaves room for a policy allowing local officials to conduct independent inquiries of detained individuals or to follow up those inquiries in unspecified ways.

In reality, SB 4 is analogous to a different provision of the Arizona statute – Section 6, which empowered local officials to arrest individuals they determined to be removable. Section 6 was preempted because it provided "greater authority" to untrained local officials than Congress had given to trained officers under federal law and allowed local officials to engage in enforcement activities "without any input from the Federal Government." *Id.* at 409. SB 4, as discussed above, does the same. SB 4 goes beyond the limited circumstances of Section 1357(g)

and impermissibly allows "local officials to engage in enforcement activities as a general matter." *Id.* Because this necessarily "creates an obstacle to the full purposes and objects of Congress" in specifying more limited areas for local participation in immigration enforcement, *id.* at 411, SB 4, like Section 6, is conflict preempted.

Penalty provisions. As the Court knows, SB 4 imposes harsh penalties both for purported violations of Section 752.053 and for purported violations of the detainer provision. Both sets of penalties conflict with federal law by penalizing what federal law permits. As discussed, local cooperation with federal immigration enforcement is almost entirely voluntary under federal law; the sole exception is Section 1373, which requires information sharing. SB 4 makes mandatory what would otherwise be voluntary, and imposes severe sanctions – including removal from office and jail time – for noncompliance. This is at the very least a "conflict in the method of enforcement" or "conflict in technique," which is "fully as disruptive to the system Congress erected as conflict in overt policy." *Id.* at 407. As both the Fifth Circuit and the Supreme Court have emphasized, "conflict is imminent when two separate remedies are brought to bear on the same activity." *Villa at Parkside Partners v. City of Farmers Branch*, 726 F.3d 524, 530 (5th Cir. 2013) (en banc plurality) (discussing Supreme Court precedent).

The State suggests that the absence of comparable penalty provisions in federal immigration law *permits* state sanctions, and reflects only that the Tenth Amendment prevented Congress from demanding cooperation from local law enforcement. This is wrong for at least two reasons. First, *Arizona* confirms that the lack of penalties in a federal law does not mean that states are always free to fill any perceived gap. *See* 567 U.S. at 403 (federal law preempts state provision that creates "a state criminal prohibition were no federal counterpart exists"). Second, as discussed above, the existence of Section 1373 confirms that Congress did not believe the Tenth Amendment was an obstacle to federal statutes requiring local law enforcement to permit communication with the federal government. Because the harsh penalty provisions of SB 4 constitute a technique for enforcing federal immigration law that conflicts with the framework

for voluntary participation Congress has constructed, the penalty provisions are preempted.[6]

Detainer provisions. Finally, SB 4's detainer provisions cannot survive conflict preemption. Like Section 752.053, these provisions convert what is voluntary under federal law – compliance with ICE requests – into a mandatory duty, the purported breach of which is punishable by jail time. The detainer provisions also require untrained law enforcement officers to consider whether a person "has lawful immigration status in the United States" for the purpose of deciding whether to release that person from detention. SB 4 Art. 2.251(b). Both the Supreme Court and the Fifth Circuit have held that a state or local law is preempted when it requires non-federal officials to make determinations of federal immigration status. *Arizona*, 567 U.S. at 408-09; *Farmers Branch*, 726 F.3d at 531-34 (law preempted where local actors would need to determine whether non-citizens are "lawfully present") (plurality op.).

The State argues that the local determination of "lawful immigration status" required by SB 4 is not preempted because it is purely "ameliorative" – that is, it can only help individuals otherwise subject to an ICE detainer, since they will be released if they can produce papers demonstrating their lawful status. State Br. at 32. The State also argues that to the extent the "lawful immigration status" provision is problematic, it can simply be excised. *Id.* at 32-33. This misses the point. As discussed above in connection with SB 4's unconstitutional restriction of speech, courts must take statutes as the legislature has fashioned them, and may not rewrite them at will. In any event, removing the "lawful immigration status" provision would simply

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[6] The State argues that SB 4's penalty provisions escape conflict preemption under *Whiting*, in which the Supreme Court upheld an Arizona law that permitted the state to revoke the licenses of business that knowingly employed unauthorized workers. State Br. at 18, 28-29 (citing *Chamber of Commerce of U.S. v. Whiting*, 563 U.S. 582 (2011)). What the State leaves out, however, is that the federal statute at issue in *Whiting specifically reserved* to the states the authority to impose sanctions in the form of license revocation. 563 U.S. at 595, 600-01. The State does not and cannot point to any comparable penalty savings clause in the statutes at issue here.

The State also argues that a second provision at issue in *Whiting* shows that SB 4 is not preempted – the provision requiring employers to use the federal E-Verify database to confirm a worker's eligibility for hire. State Br. at 28-29. But SB 4 goes far beyond requiring local officials to consult federal databases. SB 4 requires local entities to permit their officers to make immigration status determinations on their own and otherwise engage broadly in "the enforcement of immigration laws." SB 4 § 752.053(a)(1).

create new and even starker preemption and Fourth Amendment problems. It would heighten the preemption problem insofar as local officials could be punished for releasing even detainees who were able to make a persuasive showing that they were not legitimately subject to an ICE detainer request. And it would heighten the Fourth Amendment problem by subjecting such detainees to additional restraint, notwithstanding their ability to persuade local officials that they should be released. Thus, while the "ameliorative" clause is not sufficient to cure the multiple constitutional infirmities in the detainer provision, excising the clause would plainly make matters worse. It does not provide a way around conflict preemption.

III. SB 4 Violates The Fourth Amendment.

The San Antonio Plaintiffs have shown that SB 4 violates the Fourth Amendment in two ways. First, Section 2.01 forces local officials to hold individuals without probable cause of a crime and beyond the time they would otherwise be released. Second, Section 752.053 permits local police to question and hold individuals for civil immigration violations without criminal probable cause so long as they believe they are assisting federal agents.

The State and the US contend that these issues are insignificant because the federal government has now adopted a new form for detainer requests, Form I-247, which includes what they view as "procedural safeguards." US Br. at 30-33; State Br. at 52-53. For numerous reasons, Form I-247 does not cure the Fourth Amendment violation. The form has no application under Section 752.053, in which local officers in the field are permitted to make immigration inquiries and hold individuals for suspected immigration offenses without federal interaction and without Fourth Amendment protections. And in the context of detainer requests, nothing limits the obligations of local officials to situations in which Form I-247 is used. Rather, local officials must comply with "any" detainer request "including" – but not limited to – requests made by means of the new form. SB 4 § 2.01, Art. 2.251(a)(1) & § 772.0073(2). Form I-247 is listed as an *example* of a detainer request in SB 4, but nothing excludes other kinds of detainer requests, including those that contain none of the "procedural safeguards" purportedly embodied in Form I-247. Indeed, nothing in SB 4 excludes informal or oral requests, and the

State's suggestion that the use of such requests would "buck[] existing ICE policy" is cold comfort in this setting. State Br. at 54. Whether or not a detainer request complies with "existing ICE policy," local officials face jail time if they decline to comply with it.[7]

But even if SB 4's detainer provisions were limited to situations in which Form I-247 is used, SB 4 would violate the Fourth Amendment. The US does not and cannot dispute that the form requires only probable cause of removability, not criminal probable cause. US Br. at 33. This is critical: "Because civil immigration violations do not constitute crimes, suspicion or knowledge that an individual has committed a civil immigration violation, by itself, does not give a law enforcement officer probable cause to believe that the individual is engaged in criminal activity." *Santos v. Frederick Cty. Bd. of Comm'rs*, 725 F.3d 451, 465 (4th Cir. 2013). By the same token, "[d]etaining individuals solely to verify their immigration status would raise constitutional concerns . . . [as, for example, a] seizure that is justified solely by the interest in issuing a warning ticket to the driver can become unlawful if it is prolonged beyond the time reasonably required to complete that mission." *Arizona*, 567 U.S. at 396 (internal citations omitted); *see also Mercado v. Dallas Cty.*, 2017 WL 169102, at *7 (N.D. Tex. Jan. 17, 2017) (knowledge of a civil ICE detainer alone does not give state officers probable cause "to detain the plaintiffs after they were otherwise eligible for release").

Even if local officials could detain an individual based on a civil immigration probable cause determination, moreover, the Fourth Amendment problem would remain. The probable cause determination under Form I-247 is made not by the local official required to hold an individual but instead by the federal employee making the detainer request. The State argues that the knowledge of the latter can be imputed to the former through the doctrine of "collective knowledge," but that doctrine applies only where there is "some degree of communication

[7] It is also dubious that an informal request would in fact be contrary to ICE policy, given that the cited policy does not, for example, preclude a local agency from "detaining an alien while an ICE immigration officer responds to the scene." Dep't of Homeland Sec., ICE, Pol. No. 10074.2: Issuance of Immigration Detainers by ICE Immigration Officers, § 2.5 (Apr. 2, 2017), available at: https://www.ice.gov/detainer-policy.

between the arresting officer and an officer who has knowledge of all the necessary facts." *United States v. Ibarra*, 493 F.3d 526, 530 (5th Cir. 2007). SB 4 requires no such communication, and mandates compliance with *all* detainer requests, regardless of whether communication has occurred. The required compliance would impermissibly result in a situation in which "individuals who are the subjects of ICE detainers are detained by [local] officials who make no assessment, and have no knowledge, regarding whether probable cause exists that those individuals have committed *any crime*." *Trujillo Santoyo v. United States*, No. 5:16-CV-855-OLG, slip op. at 13 (W.D. Tex. June 5, 2017) (emphasis added).

The "collective knowledge" doctrine is also inapplicable in this setting because federal and state officials simply have different degrees of authority in detaining individuals suspected of immigration violations. The State and the US cite decisions holding that that *federal* officers may rely on administrative immigration warrants to arrest suspected aliens, but those authorities do not suggest that *state* officers may also do so without violating the Constitution.[8] To the contrary: "Federal law specifies limited circumstances in which state officers may perform the functions of an immigration officer." *Arizona*, 567 U.S. at 408. Indeed, as the Supreme Court has made clear in the context of preemption, "it would disrupt the federal framework to put state officers in the position of holding aliens in custody for possible unlawful presence without federal direction and supervision." *Id.* at 413. Local officers do not have the authority to enforce federal civil immigration law absent an authorizing agreement pursuant to Section 287(g) of the INA. *Melendres v. Arpaio*, 695 F.3d 990, 1001 (9th Cir. 2012).[9]

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[8] *Compare Abel v. United States*, 362 U.S. 217 (1960) (individual arrested by INS pursuant to an administrative warrant); *Lopez v. United States INS*, 758 F.2d 1390 (10th Cir. 1985) (driver's license confiscated by INS officers); and *Moreno v. Napolitano*, 213 F. Supp. 3d 999 (2016) (challenging INS detention procedures) *with Cervantez v. Whitfield*, 776 F.2d 556, 559-60 (5th Cir. 1985) (noting that "local law enforcement agencies do not have authority to question, arrest, or detain persons solely on the grounds that they may be deportable aliens").

[9] ICE's own website confirms that administrative warrants are to be used not by state officials but by "[a]ny immigration officer." Dep't of Homeland Sec., ICE, Form I-200: Warrant for Arrest of Alien and Form I-205: Warrant of Removal/Deportation, https://www.ice.gov/detainer-policy. Additionally, the Code of Federal Regulations limits officers who are "authorized and designated to exercise the power . . . to execute warrants of arrest for administrative immigration violations" to "immigration officers who have successfully completed basic immigration law

The State next argues that SB 4 "merely codifies" the premise, discussed in *Arizona*, that local officers may cooperate with federal immigration officials carrying out enforcement activities, including taking those suspected of being unauthorized into custody. State Br. at 50 (citing *Arizona*, 567 U.S. at 408-11). That premise, of course, is already codified in *federal* law; as the *Arizona* Court discussed, it is covered by Section 1357(g). 567 U.S. at 408-09. In discussing that statute, the *Arizona* Court nowhere suggested that local officials may detain individuals suspected of immigration violations on the same grounds that federal officials may do so. The Court made the opposite point: that local officials may *not* enforce federal immigration laws, save in the carefully delineated circumstances set forth by statute, in which local officers may be in effect deputized to carry out certain federal functions pursuant to a formal written agreement, training and supervision. *Id.* at 410 (no "coherent understanding" of Section 1357(g) would permit "the unilateral decision of state officers to arrest an alien for being removable absent any . . . instruction from the Federal Government"). Section 1357(g) does not provide that an officer working outside the Section 287(g) program has the same authority to detain suspected individuals that federal officials have, or that such detention somehow falls outside of ordinary Fourth Amendment protections. SB 4 does not "codify" anything in *Arizona* or Section 1357. It goes well beyond existing law in allowing local officials to enforce immigration law unilaterally and to hold individuals in the absence of criminal probable cause.[10]

Finally, both the State and the US invite the Court to dismiss plaintiffs' Fourth

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enforcement training" and are expressly listed in the statute. 8 C.F.R. § 287.5. The Immigration and Nationality Act similarly lists the limited circumstances in which "[s]tate and local law enforcement officials are authorized to arrest and detain an individual" – and tellingly, the list contains no reference to administrative warrants. 8 U.S.C. § 1252c.

[10] To the extent that the State seeks to analogize SB 4 to Section 2(B), the statute that survived preemption in *Arizona*, that analogy is as defective in the Fourth Amendment as in the preemption context. Section 2(B) required local officials only to check an individual's status through ICE's database during or after a lawful detention in which they had "reasonable suspicion," and only to make a "reasonable attempt" in doing so. 567 U.S. at 411. The statute also required implementation "in a manner consistent with federal laws regulating immigration, protecting the civil rights of all persons and respecting the privileges and immunities of United States citizens." *Id.* SB 4 contains no such constitutional safeguards. It requires that persons be held regardless of whether the circumstances are reasonable, and irrespective of their civil rights.

Amendment challenge because it is a purportedly premature facial attack on SB 4. State Br. at 57; US Br. at 30. But "facial challenges under the Fourth Amendment are not categorically barred or especially disfavored." *City of Los Angeles v. Patel*, 135 S. Ct. 2443, 2449 (2015). The State quotes the *Patel* Court's observation that the standard governing facial challenges is the "most exacting" it applies, but ignores the subsequent statement that in light of this standard, plaintiffs need only demonstrate the unconstitutionality of a law with respect to "those whose conduct it affects . . . . The proper focus of the constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant." *Id.* at 2451 (internal citations omitted). The Court illustrated this principle by reference to *Casey*, in which it struck down a law requiring women to notify their husbands before obtaining abortions, and rejected the argument that the challenge was improper because most women would voluntarily do so anyway. *Id.* (discussing *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 894 (1992)). That example shows why a facial challenge is warranted here. While the record demonstrates that local officials often comply voluntarily with detainer requests even absent SB 4, the law would reach those cases in which officers would *not* otherwise comply. It is this application that the Court must focus on under *Patel*, and it is this application that violates the Fourth Amendment.[11]

IV. SB 4 Violates The Equal Protection Clause Of The Fourteenth Amendment.

As the San Antonio Plaintiffs discussed in their opening brief, SB 4 denies Latinos equal protection because it prevents the implementation of anti-discrimination policies needed to prevent racial profiling in the enforcement of immigration laws. Substantial evidence shows that local officials across Texas have adopted policies to prevent impermissible racial profiling by limiting local immigration enforcement activity, and that these policies are absolutely necessary to preserve constitutional protections.[12] Both the case law and official government reports

[11] The State's argument that plaintiffs must establish that SB 4 is unconstitutional under every conceivable circumstance was expressly rejected by *Patel*; the Court explained that this approach "would preclude facial relief in every Fourth Amendment challenge to a statute . . . ." *Id.* at 2451.

[12] *E.g.*, McManus Dec. ¶¶ 6-7, 9-10; Hrg. Tr. at 8, 11-12, 65-66; Harmon Dec. ¶¶ 6-8.

confirm this.[13] There is also no question but that SB 4 will force local entities to abandon these policies. *E.g.*, McManus Dec. ¶¶ 5-7, 21-22. Tellingly, the State barely attempts to refute this evidence, instead advancing two counterfactual notions – that local anti-discrimination policies are unnecessary in light of state law, and that these policies will survive SB 4. State Br. at 63. The State does not explain how either of these things – let alone both – could be true.[14]

State laws that preempt local jurisdictions from adopting or implementing anti-discrimination policies are unconstitutional. *Schuette v. Coal. to Defend Affirmative Action*, 134 S. Ct. 1623, 1633 (2014); *Romer v. Evans,* 517 U.S. 620 (1996); *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457 (1982); *Reitman v. Mulkey*, 387 U.S. 369 (1967). The State contends that this line of cases is inapposite because SB 4 does not explicitly refer to race or other impermissible classifications. But this was no less true in the cases the State seeks to distinguish. The amendment at issue in *Reitman* blocked housing laws aimed at preventing racial discrimination, and was found to violate equal protection despite the fact that there was no explicit mention of race. 387 U.S. at 375-79. The state law at issue in *Seattle* blocked local busing plans intended to ameliorate racial discrimination, but also made no mention of race. And *Romer* did not involve a suspect class at all, let alone statutory language referring to such a class. 517 U.S. at 632.[15] The absence of language specifically targeting race in SB 4 thus does

[13] *Melendres v. Arpaio*, 989 F. Supp. 2d 822, 903-04 (D. Ariz. 2013); Dep't of Homeland Sec., Office of the Inspector Gen., *The Performance of 287(g) Agreements*, OIG-10-63 at 25-27 (2010); Gustavo Valdes & Thom Patterson, *Feds Accuse North Carolina Sheriff's Office of Racial Profiling*, CNN (Sept. 20, 2012) at http://www.cnn.com/2012/09/20/justice/north-carolina-justice-immigration.

[14] The State points to statements made during the Senate debate on SB 4 to the effect that Latinos are not disproportionately subjected to traffic stops. *Id.* at 67-68. Even if that were relevant, it shows nothing about the discriminatory impact SB 4 will have. Nor does it negate the evidence presented by plaintiffs establishing the justification for existing policies limiting local enforcement of immigration laws.

[15] The State also relies on cites *Washington v. Davis*, 426 U.S. 229 (1976), which it claims stands for the proposition that "disparate racial impact is not a constitutional violation." State Br. at 66. But the challenged state action in that case – an employment test that white applicants passed in disproportionate numbers – bears no relation to SB 4. The employment test placed no burdens on local anti-discrimination policies; nor was there an allegation of discriminatory intent, as it was "undisputed that the [employer] had systematically and affirmatively sought to enroll black officers . . . ." *Id.* at 235. SB 4 falls squarely within the political process line of cases because it

not immunize it from an equal protection challenge. What is significant for equal protection purposes is that SB 4 was designed to – and will – lead to the revocation of policies intended to protect Latinos and non-citizens from discrimination.

SB 4 also fails under *Arlington Heights*, which sets forth a multi-factor test to determine whether legislation was passed with discriminatory intent. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264-68 (1977). Substantial evidence on each of the relevant factors shows discriminatory intent here.[16] *First*, SB 4 will undeniably "bear[ ] more heavily on one race than another," disproportionately affecting Latinos who will be targeted for immigration enforcement regardless of their actual immigration status.[17] *Second*, Texas has a long history of purposeful discrimination against Latinos.[18] *Third*, the legislative history is rife with expressions of discriminatory intent, including scapegoating immigrants as criminals, targeting protestors as illegal immigrants, and threatening violence against people based on race.[19] *Fourth*, there were significant deviations from normal process in the enactment of SB 4, including the designation of the bill as an emergency item for the purpose of "allowing lawmakers to vote on it faster and lessen the chance of resistance" – a particularly significant factor given widespread opposition to the bill.[20] Indeed, several legislators observed that their votes against amendments exempting children were "bad votes" that they wished they "didn't have to" make. Bernal Dec. ¶ 13. Other

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undermines existing local anti-discrimination policies and inhibits the functioning of local political processes. *Washington* does not.

[16] A complete description of the factors appears on page 38 of the San Antonio Plaintiffs' pre-hearing brief. We refer to the factors in shorthand fashion here.

[17] Bernal Dec. ¶ 3, Saldaña Dec. ¶ 5, McManus Dec. ¶ 6; Valdez-Cox Dec. ¶ 10; Blanco Decl. ¶¶ 15-16.

[18] *See, e.g.*, *Perez v. Abbott*, – F. Supp. 3d – , 2017 WL 1450121 (W.D. Tex. Apr. 20, 2017); *Perez v. Abbott*, – F. Supp. 3d –, 2017 WL 1787454 (W.D. Tex. May 2, 2017); *Veasey v. Abbott*, – F. Supp. 3d – , 2017 WL 1315593 (S.D. Tex. Apr. 10, 2017); *LULAC v. Perry*, 548 U.S. 399, 439 (2006); *Hernandez v. Texas*, 347 U.S. 475 (1954).

[19] Blanco Dec. ¶¶ 3, 5, 7, 14, 17; Bernal Dec. ¶¶ 18-19, 23-24; Moody Dec. ¶¶ 8, 10, 12; Romero Dec. ¶ 4; Moreno Dec.; Ex. 1-B; Ex. 1-G; Ex. 1-H; Ex 1-J, Ex. 1-K.

[20] *See, e.g.,* Ex. 1-O & Ex. 1-D (noting that on February 2, 2017, over 1000 registered against the bill and only 21 people registered in favor of it) and Ex. 1-F (noting that on March 15, 2017, over 465 people gathered to testify against the bill and only 11 registered in support).

legislators equated non-citizens with "dangerous criminals," or described immigrants as "those who commit terrible crimes." *Supra* n.19.

None of this is remedied by the fact that racial profiling is nominally prohibited by Texas law or by the boilerplate language in SB 4 prohibiting discrimination. That fig-leaf language, which carries no enforcement mechanism, cannot change the fact that SB 4 prohibits implementation by local authorities of the very policies necessary to prevent profiling and discrimination in the enforcement of immigration laws.

The State disputes the San Antonio Plaintiffs' showing on the *Arlington Heights* factors, compiling a 15-page defense of the procedures that led to SB 4's enactment. But *Arlington Heights* "demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." 429 U.S. at 266. Under this holistic analysis, the State's effort to paper over a history of discrimination by dismissing all examples as either too "distant" or still "pending" can have little impact. State Br. at 75. SB 4 was enacted against the background of widely acclaimed local efforts to combat racial discrimination in local immigration policies. *E.g.*, McManus Decl. ¶¶ 15-16; *cf. Reitman*, 387 U.S. at 374. In targeting these policies, SB 4 removes protection from racial minorities, meanwhile threatening the officials who promulgate or enforce the policies with removal from office. While the State plucks statements from the legislative session to support its benign view of these events, the overwhelming evidence – from the Governor's comments to the racially hostile legislative atmosphere to statements about "bad votes" – exposes discriminatory intent under *Arlington Heights*.

CONCLUSION

For the reasons set forth above, SB 4 is unconstitutional under the Supremacy Clause and the First, Fourth and Fourteenth Amendments. Additional constitutional and statutory defects are described in our June 19, 2017 memorandum. Based on the these briefs and supporting declarations and on the evidence and arguments presented at the June 26, 2017 hearing, the San Antonio Plaintiffs request that the Court enjoin the State from enforcing SB 4 in its entirety.

Dated: July 10, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of July, 2017, I served a copy of the foregoing document on all counsel registered to receive NEFs through this Court's CM/ECF system. All attorneys who are not registered to receive NEFs have been served via email.

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EXHIBIT A

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

CITY OF EL CENIZO, TEXAS, ET AL,)
Plaintiffs,)
)
CITY OF AUSTIN, ET AL,) No. 5:17-CV-404-OLG
Plaintiff-Intervenors,) Consolidated Lead Case
vs.)
) San Antonio, Texas
STATE OF TEXAS, ET AL,) June 26, 2017
Defendants.)

TRANSCRIPT OF PRELIMINARY INJUNCTION HEARING
BEFORE THE HONORABLE ORLANDO L. GARCIA
UNITED STATES DISTRICT JUDGE

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THE COURT: -- for the circumstances you have raised in your pleading. Is she here now?

MR. GARZA: She is, Your Honor.

THE COURT: Okay. Let's bring her up now.

MR. GARZA: Yes, Your Honor.

COURTROOM DEPUTY: Please raise your right hand.

(Oath administered to the witness.)

COURTROOM DEPUTY: Thank you. Have a seat.

THE COURT: And, Mr. Garza, you will have a time not to exceed 15 minutes.

MR. GARZA: Thank you, Your Honor.

THE COURT: Let's go.

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DIRECT EXAMINATION

BY MR. GARZA:

Q. Ms. Bernal, would you -- where do you reside?

A. El Paso County.

Q. And how long have you lived in El Paso County?

A. I was born and raised there. I lived there most of my 56 years.

Q. And you went to school in El Paso County?

A. Yes, I did.

Q. And where did you attend college?

A. Undergraduate, University of Texas.

Q. And law school?

officers had pulled over a bus and were asking the immigration status of people that were riding on the bus. We were sued in federal court.

We entered into a settlement agreement. As a part of the settlement agreement, El Paso County agreed that it would not enforce civil immigration law, so as part of our settlement agreement, we also agreed to adopt a written policy. So the El Paso County Sheriff's Department has a written policy to that effect and the County Attorney's Office has a similar policy which prohibits the enforcement of immigration law. I employ five peace officers, all of whom are bound by this policy.

THE COURT: And let me ask you, ma'am, what is the rationale for that policy? In other words, you are telling me that the sheriff or sheriff deputies cannot ask immigration status questions?

THE WITNESS: (Witness nods head.)

THE COURT: Go ahead.

THE WITNESS: Correct. El Paso County Sheriff Richard Wiles, myself, as a community strongly believe in both community policing and community prosecution. I do not believe, El Paso County does not believe that it can effectively protect the citizens of El Paso if local law enforcement is involved in enforcing immigration law.

For example, what we see is that the immigrant

community, the undocumented community, in particular, is reluctant to come forward as a witness, as a victim, to report crime if their interaction with local law enforcement will subject them to separation from their family or deportation.

So what happens is it creates, frankly, a less safe community. It empowers those people that are committing crimes against immigrants and it makes El Paso a less safe community, and that was the basis for entering into both the settlement agreement and the adoption of the written policies.

THE COURT: And is that interest greater than determining the immigrant status of a person?

THE WITNESS: I think it is greater for El Paso County, for myself and for those people who are not charged with enforcing immigration law. For the federal government, obviously, they are interested and enforcing federal immigration law is a greater interest perhaps to them than our local concerns. Our local concerns, however, are front-line community safety. That is not the same concern that the federal government shares, I believe.

THE COURT: All right. Go ahead, Mr. Garza.

BY MR. GARZA:

Q. As the policies are currently written for both the county attorney and the sheriff, do you view those as inconsistent with the requirements of SB 4?

A. I do. I do not believe that, as an elected official, that

requiring the county to comply 100 percent of the time with detainer requests. And even the new form, which is not the subject of the Trujillo case, but is the new form that came out -- that started to be used in April, does not provide probable cause that a criminal offense has been committed.

It is roughly the same check boxes that communicate that the federal government believes that an individual is subject to removal proceedings. It simply does not satisfy the requirements of the Fourth Amendment as recognized by this Court and Trujillo.

And Bexar County officials, the jailer, the sheriff will face up to a one year in jail penalty under SB 4 for not complying with what he understands to be his obligations under the Fourth Amendment. So that is one type of conflict preemption.

Another one that we would like to point out, Mr. Gelernt talked about what happens when you place jail officials in the shoes of immigration agents, as SB 4 does by requiring them to review immigration documents produced by the detainee to make a required determination under SB 4, whether to release this person anyway, even if they are subject to a detainer.

And one of those things is a driver's license and then it is just sort of a wide open category of whatever the person is going to try to interpret. And, yes, Farmers Branch

in Arizona v. U.S. says that local officials cannot perform these functions of reviewing immigration documents and making immigration determinations, because they don't necessarily understand them.

I would like to talk for a moment about the flip side of the problem. Your Honor is familiar with the situation where somebody might come in to a jail, a legal permanent resident with a green card, with a driver's license, and ICE places a detainer because ICE has concluded that the person is subject to removal proceedings, despite the fact that they have all of this paperwork. Under SB 4, the jailer is required to release the individual.

THE COURT: Because he has a license?

MS. PERALES: Because he has a driver's license and a green card. Now, ICE may have determined that he has committed an offense that renders him removable and intends to place him into proceedings, which is why ICE has sent the detainer over, but SB 4 says: No, this person must be released.

So SB 4 is conflict preempted running in two directions, Your Honor. It forces local jailers to hang on to people when they shouldn't, but it also forces local jailers to release people when the federal government would otherwise want to have them kept in custody for that 48 hours, and that thwarts federal objectives and creates a conflict preemption

Arizona held.

Arizona simply held that state authority to do so and, as I understand it, Texas has indicated that its state and local officers have authority to make civil immigration arrests, at least in response to the federal government's request that they do so.

What Arizona does is say inherent state authority to participate, to cooperate is preempted so long as it is done unilaterally but where -- and I am quoting from the Supreme Court, or at least I am paraphrasing -- it is done at the request, direction or authorization of the federal government, or in the Supreme Court's words, the request, invitation, authorization or other direction or instruction; it is perfectly legitimate.

So the state authority to act in that area, once the request is proffered, which it has been here, is not preempted. So, really, Arizona controls both the inquiries. I will talk for a minute about information sharing and then get to the detainer issue, because that has separate Fourth Amendment issues.

Arizona, as counsel for Texas indicated, SB 1070 had a provision with penalties directed at state officers, as opposed to aliens. Really, the key issue in Arizona is, are the states criminalizing the acts of alienage? Are they augmenting what the federal government has already done?

instance of a detainer they have honored, where there hasn't been evidence of a crime. They don't say that. They don't mean to say that. I don't read them to be saying that, but if that is what they are saying, well --

One other point on this race issue that came up, just as a point of clarity. Again, I don't understand SB 4 to be authorizing rogue state or local officers to wake up in the morning and say, "I am going to raid this house today."

I mean, if they did say that, that would be preempted, because that is not at the direction or request of the federal government. That being said, if the federal government reaches out and says, "Here is a detainer for this specific individual; we would like to know when he is released; we would like to know -- we would like you to hold him for us temporarily," when they respond to that, that is absolutely permissible.

Just one other point on the Fourth Amendment, if I may. So as Mr. Starr mentioned, the Abel case from 1960, I think really just sort of resolves the issue. There is really not much more to say about whether administrative warrants, the system of administrative warrants that Congress set up is lawful or unlawful.

It is lawful. It has, quote, the sanction of time. Congress, going back to 1790s, have statutes allowing for administrative arrests of aliens.

--*-*-*-*-*-*

UNITED STATES DISTRICT COURT)

WESTERN DISTRICT OF TEXAS)

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter. I further certify that the transcript fees and format comply with those prescribed by the Court and the Judicial Conference of the United States.

Date signed: July 1, 2017.

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