

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

CITY OF EL CENIZO, TEXAS,
et al.,

Plaintiffs,

V.

**THE CITY OF HOUSTON,
TEXAS,**

Intervenor

V.

THE STATE OF TEXAS, *et. al.*

Defendants.

[illegible]

C.A.No.5:17-CV-00404-OLG
(Lead Case)

C.A.No.5:17-CV-00459-OLG
(Consolidated Case)

C.A.No.5:17-CV-00489-OLG
(Consolidated Case)

**CITY OF HOUSTON’S MEMORANDUM IN SUPPORT OF PLAINTIFFS’
MOTIONS AND/OR APPLICATIONS FOR PRELIMINARY INJUNCTION**

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iv
INTRODUCTION	1
STANDARDS GOVERNING PRELIMINARY INJUNCTIONS.....	4
SENATE BILL 4.....	5
ARGUMENT	8
I. SB4 IS PREEMPTED BY FEDERAL LAW	8
A. Federal Preemption Principles Governing this Case	8
B. SB4 Directly and/or Impliedly Conflicts with § 1357(g)’s Scheme to Ensure That Those Functioning as Immigration Officers are Trained, Certified, and Carefully-Supervised by the U.S. Attorney General	12
1. Subsection 1357(g)’s Local Enforcement Scheme.....	12
2. SB4 Conflicts with and Impermissibly Skews the Scheme of Federal Immigration Enforcement Set Forth in § 1357(g).....	21
C. Texas’ and the Government’s Preemption Responses are Misdirected, Baseless, or Both	24
1. No Deference is Due the Government’s Views on SB4’s Preemptive Effect or Its Statement of Interest.....	24
2. SB4’s Penalties and Mandates Are Not Merely a “Matter of Internal State Management”.....	25
3. The Government’s “Cooperation” Arguments Ignore the Operative Provisions of § 1357(g) and its Own Guidance	29
4. The Government’s Argument that Federal Law is Not in Conflict with SB4 Because It Does Not Prohibit Inquiring About Immigration Status is Misdirected.....	33
II. SB4 VIOLATES THE HOME-RULE PROVISIONS OF TEXAS CONSTITUTION ART. XI, § 5	35

III.	SB ₄ VIOLATES THE FIRST AMENDMENT AND TEXAS CONSTITUTION ART. I, § 8	37
IV.	SB ₄ VIOLATES THE FOURTH AMENDMENT AND THE TEXAS CONSTITUTION, ART. I, § 9	38
V.	SB ₄ VIOLATES THE FOURTEENTH AMENDMENT EQUAL PROTECTION AND DUE PROCESS CLAUSES AND TEXAS CONSTITUTION ARTS. I, §§ 3 & 9	38
	PRAYER FOR RELIEF	39
	CERTIFICATE OF SERVICE	41

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Altria Grp., Inc. v. Good</i> , 555 U.S.70 (2008).....	9
<i>Anderson v. Edwards</i> , 514 U.S. 143 (1995).....	11
<i>Buckman v. Plaintiffs’ Legal Comm.</i> , 531 U.S. 341 (2001)	10, 11, 22, 23
<i>Chapman v. Hous. Welfare Rights Org.</i> , 441 U.S.600 (1979)	28
<i>City of Hugo v. Nichols (Two Cases)</i> , 656 F.3d 1251 (10th Cir. 2011)	28
<i>City of Richardson v. Responsible Dog Owners</i> , 794 S.W.2d 17 (Tex. 1990).....	36
<i>Columbus v. Ours Garage & Wrecker Service, Inc.</i> , 536 U.S.424 (2002).....	26
<i>Commissions Imp. Exp. S.A. v. Republic of the Congo</i> , 757 F.3d 321 (D.C. Cir. 2014)	33
<i>Crosby v. Nat’l Foreign Trade Council</i> , 530 U.S.363 (2000).....	10
<i>Dallas Merch. ’s & Concessionaire’s Ass’n v. City of Dallas</i> , 852 S.W.2d 489 (Tex. 1993).....	35
<i>De Canas v. Bica</i> , 424 U.S. 351 (1976)	12
<i>Donelon v. La. Div. of Admin. Law ex rel. Wise</i> , 522 F.3d 564 (5th Cir. 2008)	27
<i>Ex parte Young</i> , 209 U.S.123 (1908)	28

<i>Fla. Lime & Avocado Growers, Inc. v. Paul</i> , 373 U.S. 132 (1963)	9
<i>Ga. Latino All. for Human Rights v. Governor of Georgia</i> , 691 F.3d 1250 (11th Cir. 2012)	11
<i>Galarza v. Szalczyk</i> , 745 F.3d 634 (3d Cir. 2014)	15
<i>Geier v. Am. Honda Motor Co.</i> , 529 U.S. 861 (2000)	9, 25
<i>Green v. Mansour</i> , 474 U.S. 64 (1985)	28
<i>Hillsborough Cty. v. Automated Med. Labs., Inc.</i> , 471 U.S. 707 (1985)	9
<i>Hines v. Davidowitz</i> , 312 U.S. 52 (1941)	9
<i>Hotel & Motel Ass’n of Oakland v. City of Oakland</i> , 344 F.3d 959 (9th Cir. 2003)	11
<i>Jones v. Rath Packing Co.</i> , 430 U.S. 519 (1977)	9
<i>Koog v. United States</i> , 79 F.3d 452 (5th Cir. 1996)	26, 33
<i>Medtronic, Inc. v. Lohr</i> , 518 U.S. 470 (1996)	8
<i>Mercado v. Dallas Cty.</i> , 2017 WL 169102 (N.D. Tex. Jan. 17, 2017).....	15
<i>Monk v. Wyeth Pharm., Inc.</i> , SA-16-CV-1273-XR, 2017 WL 2063008 (W.D. Tex. May11, 2017).....	11
<i>Motor Coach Employees v. Lockridge</i> , 403 U.S. 274 (1971)	32
<i>Perdue v. Wyeth Pharm., Inc.</i> , 209 F. Supp. 3d 847 (E.D.N.C. 2016)	11, 22

<i>PLIVA, Inc. v. Mensing</i> , 564 U.S. 604 (2011)	24
<i>Rogers v. Brockette</i> , 588 F.2d 1057 (5th Cir. 1979), <i>cert. denied</i> 444 U.S. 827 (1979)	27
<i>Savage v. Jones</i> , 225 U.S. 501 (1912)	10
<i>Sears, Roebuck & Co. v. San Diego Cty. Dist. Council of Carpenters</i> , 436 U.S. 180-94 (1978)	9
<i>Speaks v. Kruse</i> , 445 F.3d 396 (5th Cir. 2006)	4
<i>United States v. Arizona</i> , 567 U.S. 387 (2012)	passim
<i>United States v. Arizona</i> , 641 F.3d 339 (9th Cir. 2011), <i>aff'd in part, rev'd in part</i> , 567 U.S. 387 (2012)	13
<i>United States v. Salerno</i> , 481 U.S. 739 (1987)	11
<i>Wash. State Grange v. Wash. State Republican Party</i> , 552 U.S. 442 (2008)	11
<i>Weber v. Anheuser-Busch, Inc.</i> , 348 U.S. 468 (1955)	9
<i>Williams v. Mayor</i> , 289 U.S. 36 (1933)	27
<i>Wis. Public Intervenor v. Mortier</i> , 501 U.S. 597 (1991)	25, 26
<i>Wyeth v. Levine</i> , 555 U.S. 555 (2009)	8, 9, 24, 25
 Constitution and Statutes	
Texas Const. art. XI, § 5	35
8 U.S.C. § 1357	passim

Tex. Code Crim. P. § 2.13	7
Tex. Gov’t Code § 311.021	15
Tex. Gov’t Code § 311.023	15
Tex. Gov’t Code § 402.0241	7
Tex. Gov’t Code § 752.051	5
Tex. Gov’t Code § 752.053	5, 6, 39
Tex. Gov’t Code § 752.055	6, 39
Tex. Gov’t Code § 752.056	6
Tex. Gov’t Code § 752.0565	6
Tex. Penal Code § 12.21	7

Other Authorities

8 C.F.R. § 287.7	15
Fed. R. Evid. 201	5, 16
Amasa M. Eaton, <i>The Right to Local Self-Government</i> , 13 Harv. L. Rev. 441 (Feb. 1900)	28
Annie Decker, <i>Preemption Conflation: Dividing the Local from the State in Congressional Decision Making</i> , 30 Yale L. & Policy Rev. 321 (Spring 2012)	28
Jake Sullivan, <i>Comment, The Tenth Amendment and Local Government</i> , 112 Yale L.J. 1935 (May 2003)	28
Richard Briffault, <i>Our Localism: Part I—The Structure of Local Government Law</i> , 90 Colum. L. Rev. 1 (1990)	28
U.S. Dep’t of Homeland Security, <i>Guidance on State and Local Governments’ Assistance in Immigration Enforcement and Related Matters</i> 7 (July 16, 2015)	passim

City Charter

Houston, Tex., <i>City Charter</i> , Art. II, § 2(a)	39
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Houston, Tex., <i>City Charter</i> , Art. II, § 2(b).....	39
Houston, Tex., <i>City Charter</i> , Art. V, <i>et seq</i>	39

Plaintiff/Intervenor the CITY OF HOUSTON (“Houston”) files this its Memorandum in Support of the Motions and/or Applications for Preliminary Injunction of the cities of El Cenizo [Dkt. 24], El Paso [Dkts. 56 & 56-1], Austin [Dkt. 57], and San Antonio [Dkt. 77], pursuant to this court’s briefing order, dated June 30, 2017. In support thereof, Houston would show as follows:

INTRODUCTION

Senate Bill 4’s (“SB4”) constitutionality and this court’s decision whether to grant a preliminary injunction turn, in large part, upon this court’s willingness to suspend reality, ignore or rewrite numerous provisions of the existing immigration laws, and embrace a cynical myth: that holding Texas peace officers and elected and appointed officials hostage to bankrupting fines and draconian penalties, including summary removal from office, does not make anything they are asked or allowed to do under SB4 mandatory. In fact, Defendants, the State of Texas (“Texas”) and United States (“the Government”), contend that SB4 does nothing more than require “cooperation” with federal immigration authorities. Paraphrasing “Cool Hand Luke,” it is as if, surveying the vast field of Texas police officers and chiefs, city council members, mayors, and city managers, jail administrators, and city, county, and district attorneys that SB4 would hold captive, the Governor announced: “what we’ve got here is a failure to cooperate.”

Fortunately, this court does not have the luxury of pretending what is, isn’t.

Although Houston intervened in these consolidated lawsuits too late to file its own application for preliminary injunction, this court has generously permitted Houston to join in those applications and motions filed by other plaintiffs and to file

its own brief in support of those motions. To that end, Houston seeks to do three things: 1) to supplement the core arguments made by other plaintiffs in their applications and demonstrate why plaintiffs more than meet the standards required for a successful, pre-enforcement, facial challenge to the key provisions of SB4; 2) to address the misdirected and/or baseless arguments Texas and the Government have made but that other plaintiffs may not have not fully addressed; and 3) to adopt the First Amendment and Texas Constitution Art. I, § 8; Fourth Amendment and Texas Constitution, Art. I, § 9; and Fourteenth Amendment Equal Protection and Due Process Clauses and Texas Constitution Art. I, §§ 3 & 9 arguments made by several other cities in their applications/motions here.

To these ends, Houston argues first that the operative provisions of SB4 are conflict and/or impliedly preempted by federal law, specifically, by the carefully-crafted local immigration enforcement regime established by 8 U.S.C. § 1357. For example, under § 1357(a)(1), the routine inquiries into a detainee's immigration status that SB4 requires are functions only federal immigration officers perform. Under § 1357(g), these functions may only be routinely performed by local police under contracts with the federal government that ensure federal training, certification, and ongoing federal supervision. SB4 requires none of those things. Subsection 1357(g)(5) grants to cities and to the U.S. Attorney General the power to specify in such contracts whether the enforcement activities that local governments will undertake will be mandatory or optional. SB4 gives Texas that authority to wield with a sledge-hammer.

By fundamentally changing the relationship between federal and local governments in immigration enforcement and the methods that may be used to ensure local compliance, SB4 directly and/or impliedly conflicts with 8 U.S.C. § 1357(g)'s detailed scheme to ensure that those who routinely function as immigration officers are trained, certified, and carefully-supervised by the U.S. Attorney General.

Nothing in Texas' and the Government's preemption responses changes this result. First, the U.S. Supreme Court has held that no deference is due the Government's Statement of Interest or views on SB4's preemptive effect it contains because its Statement starkly diverges from DHS' prior pronouncements. Second, a review of SB4, federal immigration statutes, and federalism cases reveals that Defendants' argument that SB4's penalties and mandates are merely a "matter of internal state management" is without merit. Likewise, Defendants' "cooperation" arguments ignore the operative provisions of § 1357(g) and DHS' own Guidance for State and Local Governments. Third, Defendants' argument that federal law is not in conflict with SB4 because it does not prohibit inquiring about immigration status is at odds with the plain language of both SB4 and the federal immigration laws.

In addition to its preemption, SB4 is also constitutionally infirm because it violates the home-rule provisions of the Texas Constitution Art. XI, § 5.

While it was abundantly clear at this court's June 26 hearing that SB4 is a cruel and ill-considered solution in search of a problem, Houston seeks to confirm once and for all that is also facially unconstitutional. Because a careful analysis of SB4 and the

immigration laws it purports to enforce reveals that it is, Houston asks that this court enter a preliminary injunction enjoining its enforcement, in whole or in part.

STANDARDS GOVERNING PRELIMINARY INJUNCTIONS

To grant preliminary injunction, this court must find that plaintiffs have established: (1) a substantial likelihood of success on the merits; (2) a substantial threat of irreparable injury if the injunction is not issued; (3) that, if the injunction is denied, the threatened injury outweighs any harm that will result if the injunction is granted; and (4) that the grant of an injunction will not disserve the public interest.¹

Because Houston entered the case too late to include exhibits to support requirements 2-4, with one exception, it will rely on evidence other plaintiffs provided in declarations, live testimony, and written evidence at the court's hearing on June 26. Houston would, however, call the court's attention to the Declaration of Art Acevedo, Houston's Police Chief, Dkt. 99-2, which it filed prior to the hearing along with its Motion to Intervene and proposed complaint, and that Plaintiffs jointly listed as Exhibit P-9 for that hearing.² It is attached as Exh. A and described where relevant. It more than demonstrates that Houston, like other Texas cities, faces a substantial threat of irreparable injury if the injunction is not issued; that, if the injunction is denied, the threatened injury outweighs any harm that will result if the injunction is granted; and that the grant of an injunction will not disserve the public interest.

¹ *Speaks v. Kruse*, 445 F.3d 396, 400 (5th Cir. 2006).

² See Dkt. 123 [Exh. P- 9].

In this memorandum, however, Houston will focus on satisfying the first prong of the preliminary injunction test: demonstrating a substantial likelihood of success on the merits.

SENATE BILL 4³

SB4 improperly and unconstitutionally changes the existing obligations of municipalities under federal immigration law, transforming them from voluntary and cooperative to mandatory, and subjecting lawmakers and law enforcement officers alike to draconian penalties, not just for violations, but for merely speaking in opposition to the policies SB4 embodies.

SB4's Article 1 amends the Texas Government Code. New § 752.053 requires that "local entities," which, among other things, it defines as city and county governing bodies, officers, and their employees, sheriffs, and county, city, and district attorneys, are prohibited from "adopting, enforcing, or endorsing" a policy, which can include "an informal, unwritten policy," that prohibits or "materially limits" the enforcement of "immigration laws," as demonstrated by "pattern or practice."⁴ SB4 then prohibits these local entities from adopting policies that prohibit or materially limit a police officer from inquiring into the immigration status of a person under lawful detention or under arrest, *id.* at § 752.053(b)(1); inquiring into the detainee's place of birth, *id.* at § 752.053(b)(2); sending that information to United States Citizenship and

³ A copy of the enrolled version of Senate Bill 4 is attached as Exh. B for the Court's convenience. The court is asked to take judicial notice of its provisions. *See* Fed. R. Evid. 201.

⁴ Tex. Gov't Code §§ 752.051(5) (definitions); 752.053(a).

Immigration Services (“USCIS”), Immigration Customs Enforcement (“ICE”), or any other federal agency, *id.* at § 752.053(b)(2)(A); assisting or cooperating with a federal immigration officer, *id.* at § 752.053(b)(3); and/or allowing the federal government access to a jail to enforce federal immigration law. *Id.* at § 752.053(b)(4).

While § 752.054 ostensibly prohibits discrimination, it allows any citizen to file a complaint against any local entity alleging violations of 752.053. *Id.* at § 752.055(a). It then authorizes the Attorney General to seek equitable relief from such violations. *Id.* at § 752.055(b). Subsection 752.056, in turn, provides for civil penalties against local entities found by a court to have violated § 752.053. Each day is a separate violation. *Id.* at § 752.056(b). These escalating civil penalties include exorbitant fines of between \$1,000.00 and \$1,500.00 for the first day of a violation, and, thereafter, between \$25,000 and \$25,500 per day for every subsequent violation. *Id.* at § 752.056. Finally, § 752.0565 provides that elected or appointed officials may be removed from office if they violate § 752.053. Proof sufficient to remove an official need only be “a statement by the public officer.” *Id.* at § 752.0565(b).

Article 2 amends the Texas Code of Criminal Procedure. Art. 2.251(a) mandates that law enforcement agencies that have “custody” of a person subject to a detainer request “shall comply with, honor and fulfill any request made in the detainer request,” whether or not the officer or entity has made any determination that it was issued with probable cause or with any underlying criminal charges [other than immigration offenses] to justify continued detention. However, art 2.251(b) suspends

that duty when the person in custody has provided proof of citizenship or lawful immigration status based on certain government-issued identification.

Article 3 further amends the Texas Government Code. It provides that the Attorney General “shall defend” a local entity sued for complying with an immigration detainer request but only if the Attorney General “determines that the cause of action arises out of a claim involving the local entity’s good-faith compliance with an immigration detainer request.” Tex. Gov’t Code § 402.0241(b). The subsection thus consigns the decision to provide a defense and reimbursement of any judgment to the discretion of the Texas Attorney General, adding an additional means by which Texas can coerce compliance by cities. Only if he or she opts to defend the city will Texas be responsible for any judgment or fees. *Id.* at § 402.0241(c). If the Attorney General turns the case down, however, or if the claim does not qualify for defense, a city is on its own.

Article 5 amends the Local Government and Penal Codes to create a new crime. Under Tex. Penal Code § 39.07, as amended, a sheriff’s, police chief’s, constable’s, or jail administrator’s knowing failure to comply with an immigration detainer request is a Class A misdemeanor, which is punishable by up to a year in jail. *See id.* at § 12.21.

Article 6 amends the Code of Criminal Procedure. It provides that police officers may inquire into the nationality or immigration status of a crime victim or witness if the officer determines, among other things, that the inquiry is necessary to investigate the offense. Tex. Code Crim. P. § 2.13(d)(1).

ARGUMENT

I. SB4 IS PREEMPTED BY FEDERAL LAW⁵

SB4 violates the Supremacy Clause of the United States Constitution because it directly conflicts with multiple federal statutes, regulations promulgated by the Department of Homeland Security, and executive orders of the President.

Although Houston adopts the preemption arguments made and evidence submitted by the cities of El Cenizo and Austin in connection with their motions/applications for preliminary injunction, it will focus here on how SB4 directly and/or impliedly conflicts with federal law.

A. Federal Preemption Principles Governing this Case

The authority of federal law to preempt and thus to supersede state law derives from the Supremacy Clause of the U.S. Constitution, art. VI, cl. 2. In determining whether state law is preempted, courts “must be guided by two cornerstones of our pre-emption jurisprudence. First, ‘the purpose of Congress is the ultimate touchstone in every pre-emption case.’”⁶ Second, “[i]n all pre-emption cases, and particularly in those in which Congress has ‘legislated ... in a field which the States have traditionally occupied’ ... we ‘start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.’”⁷ Federal preemption jurisprudence thus permits three kinds of

⁵ The Application for Preliminary Injunction filed by the City of El Cenizo, *et al.*, raises preemption arguments that encompass those Houston makes here. See Dkt. 24-1, at 13-19.

⁶ *Wyeth v. Levine*, 555 U.S. 555, 565 (2009) (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)).

⁷ *Wyeth*, 555 U.S. at 565 (quoting *Lohr*, 518 U.S. at 485).

preemption: express preemption, field preemption, and conflict preemption.⁸ Houston arguments here are directed only to conflict preemption.

Where, as here, conflict preemption has been asserted, federal law supersedes state law only to the extent the two conflict. This can occur in two ways: 1) where it is impossible for a private party to comply with both state and federal requirements;⁹ or 2) where state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”¹⁰

Unlike express and field preemption, conflict preemption turns on the identification of an “actual conflict,” not on any express statement of preemptive intent.¹¹ Instead, “Congress may indicate pre-emptive intent through a statute’s express language or through its structure and purpose.”¹² As the Court explained: “in each case, the pertinent inquiry is whether the two potentially conflicting statutes were ‘brought to bear on precisely the same conduct.’”¹³

⁸ See, e.g., *Hillsborough Cty. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 713 (1985). Express preemption applies where Congress, through a statute’s express language, declares its intent to displace state law. *Id.* Field preemption applies where “the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.” *Id.*

⁹ See, e.g., *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963).

¹⁰ *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941); see *Wyeth*, 555 U.S. at 563-64.

¹¹ *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 884 (2000).

¹² *Altria Grp., Inc. v. Good*, 555 U.S. 70, 76 (2008) (citing *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977)).

¹³ *Sears, Roebuck & Co. v. San Diego Cty. Dist. Council of Carpenters*, 436 U.S. 180, 193-94 (1978) (quoting *Weber v. Anheuser-Busch, Inc.*, 348 U.S. 468, 479 (1955); see also *Wyeth*, 555 U.S. at 583 (Thomas, J., concurring) (“where state and federal law ‘directly conflict,’ state law must give way”).

By contrast, “frustration of purpose” or implied conflict preemption may exist even when there is no direct conflict. Preemptive intent, however, is drawn from the language of statute itself and its structure and purposes. As one court explained:

What is a sufficient obstacle is a matter of judgment, to be informed by *examining the federal statute as a whole and identifying its purpose and intended effects*: ‘For when the question is whether a Federal act overrides a state law, the entire scheme of the statute must of course be considered and that which needs must be implied is of no less force than that which is expressed. *If the purpose of the act cannot otherwise be accomplished—if its operation within its chosen field else must be frustrated and its provisions be refused their natural effect*—the state law must yield to the regulation of Congress within the sphere of its delegated power.’¹⁴

There is also a variation on frustration of purpose/implied conflict preemption that was tailor-made for this case. It is based on the U.S. Supreme Court’s decision in *Buckman v. Plaintiffs’ Legal Comm.*, 531 U.S. 341 (2001). *Buckman* dealt with “fraud-on-the-FDA” claims involving a medical device manufacturer allegedly using fraudulent representations to obtain U.S. Food and Drug Administration (“FDA”) approval for a device. The plaintiffs brought state-law claims against the consultants who made the misrepresentations to FDA. *Id.* at 345-46. Recognizing that state-law claims for fraud-on-the-FDA conflicted with federal law because they skew “a somewhat delicate balance of statutory objectives” advanced by FDA, the Court found that the plaintiffs’ state-law claims were preempted. *Id.* at 348. The Court explained that state-law claims

¹⁴ *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 373 (2000) (quoting *Savage v. Jones*, 225 U.S. 501, 533 (1912)) (emphasis supplied).

that exist “solely by virtue” of federal regulatory requirements are preempted.¹⁵ *Buckman*’s preemptive effect has been extended far beyond its original context.¹⁶

Preemption, as asserted by Houston and other plaintiffs here, is a facial challenge,¹⁷ which ordinarily requires little or no factual evaluation, and is, therefore, an appropriate ground for seeking an injunction in this pre-enforcement stage. Unlike the preemption challenge to § 2(B) in *U.S. v. Arizona*, Houston’s preemption challenge is not to the likely scope of detention, an inquiry the Court found premature.¹⁸ Instead, Houston’s challenge more closely resembles the Government’s preemption challenge to §§ 5(C) and 6 in *Arizona*, both of which the Court found impliedly conflict-preempted. This inquiry involved a careful examination of the plain language and structure and purposes of the statutes to determine if a preemptive conflict, direct or implied, existed.¹⁹ That is what Houston has attempted to do for the court here.

¹⁵ *Id.* at 352-53; *see also* *Perdue v. Wyeth Pharm., Inc.*, 209 F. Supp. 3d 847, 851 (E.D.N.C. 2016) (holding that a state law claim is preempted under *Buckman* if “the existence of these federal enactments is a critical element in [plaintiff’s] case,’ and [if] a plaintiff’s claims ‘exist solely by virtue of the FDCA ... requirements.’” *Id.* (quoting *Buckman*, 531 U.S. at 352)).

¹⁶ *See, e.g.,* *Perdue*, 209 F. Supp. 3d at 851-52; *Monk v. Wyeth Pharm., Inc.*, SA-16-CV-1273-XR, 2017 WL 2063008, at *4 (W.D. Tex. May 11, 2017).

¹⁷ *See United States v. Salerno*, 481 U.S. 739, 745 (1987) (in facial challenges, challenger must establish that no set of circumstances exists under which the challenged act would be valid). The Supreme Court has called into question the continuing validity of the *Salerno* rule in the context of First Amendment challenges, like the one here. *See, e.g., Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 339, n.6 (2008). In cases involving federal preemption of an ordinary state statute, however, the rule applies. *See Hotel & Motel Ass’n of Oakland v. City of Oakland*, 344 F.3d 959, 971 (9th Cir. 2003). (quoting *Salerno*, 481 U.S. at 745); *see also Anderson v. Edwards*, 514 U.S. 143, 155 n.6 (1995) (applying *Salerno* to a federal preemption [facial] challenge to a state statute).

¹⁸ 567 U.S. 387, 414-15 (2012); *see also Ga. Latino All. for Human Rights v. Governor of Georgia*, 691 F.3d 1250, 1267-68 (11th Cir. 2012).

¹⁹ *See Arizona*, 567 U.S. at 406.

Contrary to the groundless assertion made by amicus, Immigration Reform Law Institute, in its brief in support of Texas, there is no special, heightened requirement for or prohibition on finding preemption of state statutes that conflict with immigration laws.²⁰ Moreover, the Institute did not address the conflict preemption arguments Houston makes here and did not address implied conflict preemption at all. Its arguments thus misfire here.

B. SB4 Directly and/or Impliedly Conflicts with § 1357(g)’s Scheme to Ensure That Those Functioning as Immigration Officers are Trained, Certified, and Carefully-Supervised by the U.S. Attorney General

1. Subsection 1357(g)’s Local Enforcement Scheme²¹

8 U.S.C. § 1357(g)(1) provides that, “*Notwithstanding section 1342 of Title 31, the Attorney General may enter into a written agreement with a State, or any political subdivision of a State, pursuant to which an officer or employee of the State or subdivision, who is determined by the Attorney General to be qualified to perform a function of an immigration officer ... may carry out such function at the expense of the State or political subdivision and to the extent consistent with State and local law.*” Subsection 1357(g)(9), provides, however, that “nothing in this subsection shall be construed *to require* any State or political subdivision of a State to enter into an agreement with the Attorney General under this subsection.” *Id.* (emphasis supplied).

²⁰ See Dkt. 137, at 7-8. Instead, the footnote the Institute mis-cites from *De Canas v. Bica*, 424 U.S. 351, 357 n.5 (1976), says nothing more remarkable than that “conflicting law ... should be pre-empted ... ‘only to the extent necessary to protect the achievement of the aims of the federal law’ and reconciled, *if possible*.”²⁰ Grounded in notions of constitutional avoidance, that rule governs every conflict preemption scenario.

²¹ A copy of 8 U.S.C. § 1357 is attached as Exh. C for the court’s convenience.

Subsection 1357(g)(5) governs the content of such agreements and is particularly important for this case. It provides that any written agreement must specify “the specific powers and duties that *may be, or are required to be, exercised or performed* by the individual, the duration of the authority of the individual, and the position of the agency of the Attorney General who is required to supervise and direct the individual.”²² Thus, the plain language of the statute indicates that Congress intended for the decision whether local officers’ immigration enforcement activities would be mandatory or optional to be the sole province of the U.S. Attorney General based on his or her agreement with *local* decision-makers. SB4 takes that power for the State.

Subsection 1357(g) is expressly made subject to 31 U.S.C. § 1342, which is the general prohibition on the federal government’s receiving free services. It provides, in relevant part, that an “officer or employee of the United States Government ... *may not accept voluntary [free] services for either government or employ personal services exceeding that authorized by law* except for emergencies involving the safety of human life or the protection of property.” *Id.* (emphasis supplied). Routine immigration enforcement and, in particular, routine enforcement of ICE detainer requests, which are addressed to individuals who have *already* been “detained” by law enforcement or are already in “custody” does not constitute such an emergency.

In addition, § 1357(g) itself also contains a similar prohibition: “the Attorney General may not accept a service under this subsection if the service will be used to

²² *Id.* (emphasis supplied) (cited in *United States v. Arizona*, 641 F.3d 339, 348 (9th Cir. 2011), *aff’d in part, rev’d in part*, 567 U.S. 387 (2012)).

displace any Federal employee.” *Id.* at § 1357(g)(6). In other words, the federal government is not permitted to use borrowed local police officers to avoid hiring the ICE and DHS employees it needs. Together, subsections 1357(g)(6) and 1342 make clear that the Government may not legally accept, cannot require that local government finance, or that local law enforcement officers *perform the functions of immigration officers* on a routine, systematic basis without a contract.

This is not to say, as Texas argued at the June 26 hearing, that Houston law enforcement officers would have been barred from reporting to ICE Osama bin Laden’s undocumented presence in the Houston Police Department lobby in the absence of a § 1357(g)(1) contract. Subsection 1357(g)(10), read properly, in context, and within the structure and purposes of § 1357(g), provides for just such contingencies. Likewise, 8 U.S.C. § 1373, which provides for cooperation and communication between state law enforcement and federal immigration authorities, would also cover such a contingency.

While ignoring these readily-available “cooperation” provisions in response to Houston’s preemption argument, Texas and the Government nevertheless rely almost exclusively upon §§ 1357(g)(10) and 1373 in arguing that all that SB4 requires is mere cooperation and communication and that nothing in SB4 implicates or requires that a local officer perform the functions of immigration officers. Thus, they argue that there is no need for the kind of agreement § 1357(g) envisions. This court, however, cannot

properly read these provisions in a vacuum to nullify the remainder of § 1357(g) and allow routine performance of immigration officer functions without a contract.²³

First, the Government's and Texas' reading of § 1357(g)(10) is belied by the plain language of SB4. Under § 1357(a)(1), immigration officer functions include the "power without a warrant to interrogate any alien or person believed to be an alien as to his right to be or remain in the United States." This function corresponds directly with SB4's [amended Tex. Gov't Code] § 753.053(b)(1), which provides that cities "may not prohibit or materially limit" their officers from "inquiring into the immigration status of a person under lawful arrest or detention." Thus, under SB4, both immigration officers and local police have the "power to interrogate" regarding immigration status.

Subsection 1357(g)(1) also lists as a function of immigration officers the "detention of aliens in the United States." This function likewise corresponds directly to SB4's [amended Tex. Code Crim. P.] art. 2.251(a)(1), which provides that law enforcement agencies "shall comply with, honor, and fulfill any request made in the [ICE] detainer requests provided by the federal government." Compliance with such detainer "request" is currently voluntary.²⁴ It is, therefore, false to argue, as both Texas

²³ Tex. Gov't Code §§ 311.021(2) ("the entire statute is intended to be effective"); 311.023(5) (in construing a statute, court may consider the "consequences of a particular construction"). The Texas Code Construction Act applies when a federal court is interpreting a Texas statute.

²⁴ See *Galarza v. Szalczyk*, 745 F.3d 634, 643 (3d Cir. 2014) (compliance with detainer request is not mandatory); *Mercado v. Dallas Cty.*, 2017 WL 169102, *16 (N.D. Tex. Jan. 17, 2017) (same); 8 C.F.R. § 287.7(a) ("detainer is a request that such agency advise the Department, prior to the release of the alien ...").

and the Government do, that, under SB4, local police will not perform immigration officer functions but will only “cooperate” with and assist them.

SB4 itself also differentiates between the power to interrogate and the ability to cooperate, communicate, and assist. SB4’s amended Tex. Gov’t Code §753.053(b)(1), empowers officers to inquire “into the immigration status of a person under lawful arrest or detention.” By contrast, § 753.053(b)(3), addresses “assisting and cooperating with federal immigration officers.” Because the Texas Legislature itself treats cooperation and assistance as something separate and distinct from inquiring as to immigration status, this Court may not conflate the two as Defendants suggest.

Subsection’s 1357(g)(6)’s and 1342’s real import then is in restraining Texas’ and the Government’s expansive interpretation of §§ 1357(g)(10) and 1373 as permitting systematic enforcement of immigration laws without a written agreement. Yet there are other reasons for this court to reject the Government’s and Texas’ reading. First, it is undercut by the Government’s own explanation of the purpose of § 1357(g)(10) in its Guidance to State and Local Government’s Assistance in Immigration Enforcement, which is attached as Exh. D here.²⁵ It explains:

As contemplated by this provision [(g)(10)], DHS has invited and accepted the assistance of state and local law enforcement personnel in a variety of contexts that lie outside of the written agreements provided for by paragraphs (1) - (9) of subsection 1357(g), such as through BESTs, the Criminal Alien Program, Fugitive Operations Task Forces, and

²⁵ See U.S. Dep’t of Homeland Security (“DHS”), *Guidance on State and Local Governments’ Assistance in Immigration Enforcement and Related Matters* 7 (July 16, 2015), available at <https://www.dhs.gov/publication/guidance-state-and-local-governments-assistance-immigration-enforcement-and-related>. The court is asked to take judicial notice of this published, government document that is currently available on the DHS website. See Fed. R. Evid. 201.

Operation Community Shield. Moreover, *state and local law enforcement officers render assistance to DHS on a case-by-case basis as immigration matters come to their attention in the performance of their regular duties under state or local law.*

Id. (emphasis supplied). In the Government's view then, § 1357(g)(10) is reserved for special federal programs and case-by-case assistance. Nothing in its *own* explanation would allow for the systematic subversion of the rest of § 1357(g).

Second, the Ninth Circuit also embraced Houston's more cabined reading of § 1357(g)(10) in a part of its opinion that was not raised, briefed, or decided in the Supreme Court.²⁶ It explained:

Although this language, read alone, is broad, we must interpret Congress' intent in adopting subsection (g)(10) in light of the rest of § 1357(g). Giving subsection (g)(10) the breadth of its isolated meaning would completely nullify the rest of § 1357(g), which demonstrates that Congress intended for state officers to aid in federal immigration enforcement only under particular conditions, including the [U.S.] Attorney General's supervision. *Subsection (g)(10) does not operate as a broad alternative grant of authority for state officers to systematically enforce the INA outside of the restrictions set forth in subsections (g)(1)-(9).*

The inclusion of the word 'removal'²⁷ in subsection (g)(10)(B) supports our narrow interpretation of subsection (g)(10). Even state and local officers authorized under § 1357(g) to investigate, apprehend, or detain immigrants do not have the authority to remove immigrants; removal is exclusively the purview of the federal government. By including 'removal' in § 1357(g)(10)(B), we do not believe that Congress intended to grant states the authority to remove immigrants. Therefore, the inclusion of 'removal' in the list of ways that a state may 'otherwise []

²⁶ A quick review of the Government's Brief in the Supreme Court indicates that it dropped its preemption argument under § 1357(g) in favor of one obliquely addressing deferred action programs, after the decision in the Ninth Circuit. *See State of Arizona v. United States of America*, 2012 WL 939048, *44-45 (2012) (Brief of the United States); *see also State of Arizona v. United States of America*, 2012 WL 1332574, *1 (2012) (Brief of Petitioners) (petitioners did not address this argument or the Ninth Circuit's discussion of it in their brief or petition).

²⁷ DHS' Guidance makes exactly the same argument. *See DHS, supra* note 25, at 9.

cooperate with the Attorney General,' indicates that subsection (g)(10) does not permit states to opt out of subsections (g)(1)-(9) and systematically enforce the INA in a manner dictated by state law, rather than by the Attorney General. We therefore interpret subsection (g)(10)(B) to mean that when the Attorney General calls upon state and local law enforcement officers—or such officers are confronted with the necessity—to cooperate with federal immigration enforcement on an incidental and as needed basis, state and local officers are permitted to provide this cooperative help without the written agreements that are required for systematic and routine cooperation. Similarly, we interpret subsection (g)(10)(A) to mean that state officers can communicate with the Attorney General about immigration status information that they obtain or need in the performance of their regular state duties. *But subsection (g)(10)(A) does not permit states to adopt laws dictating how and when state and local officers must communicate with the Attorney General regarding the immigration status of an individual. Subsection (g)(10) does not exist in a vacuum; Congress enacted it alongside subsections (g)(1)-(9) and we therefore interpret subsection (g)(10) as part of a whole, not as an isolated provision with a meaning that is unencumbered by the other constituent parts of § 1357(g).*

In sum, 8 U.S.C. § 1357(g) demonstrates that Congress intended for state officers to systematically aid in immigration enforcement only under the close supervision of the Attorney General—to whom Congress granted discretion in determining the precise conditions and direction of each state officer's assistance. We find it particularly significant for the purposes of the present case that this discretion includes the Attorney General's ability to make an individual officer's immigration-enforcement duties permissive or mandatory. 8 U.S.C. § 1357(g)(5).²⁸

²⁸ *Arizona*, 641 F.3d at 349-50 (emphasis supplied). The court thus found impliedly preempted Section 2(B) of the Arizona law, which is quite similar to the enforcement provisions of SB4. It explained:

Section 2(B) sidesteps Congress' scheme for permitting the states to assist the federal government with immigration enforcement. Through Section 2(B), Arizona has enacted a mandatory and systematic scheme that conflicts with Congress' explicit requirement that in the '[p]erformance of immigration officer functions by State officers and employees,' such officers 'shall be subject to the direction and supervision of the Attorney General.' 8 U.S.C. § 1357(g)(3). *Section 2(B) therefore interferes with Congress' scheme because Arizona has assumed a role in directing its officers how to enforce the INA. We are not aware of any INA provision demonstrating that Congress intended to permit states to usurp the Attorney General's role in directing state enforcement of federal immigration laws.*

Id. Emphasis supplied.

This reading is not inconsistent with the Supreme Court’s determination in *Arizona* that §§ 1357(g)(10) and 1373 evince Congressional intent to encourage cooperation, such that the “federal scheme thus leaves room for a [statewide] policy requiring state officials *to contact ICE* as a routine matter.” 567 U.S. at 413 (emphasis supplied). As demonstrated, even the Texas Legislature, in drafting SB4, recognized a distinction and reflected in its text the notion that police cooperation, coordination, and contact with ICE are not the same thing as officers stepping into the shoes of immigration officers to perform immigration officers’ statutory functions on a routine basis. More important, the Government’s *own* Guidance make this distinction crystal clear. It states:

there is an important distinction between communication of alien-status information between a state or local government and DHS, and the original acquisition of information by the state or local officer from an individual. The terms ‘[t]o communicate’ and ‘report’ in 8 U.S.C. §1357(g)(10)(A) encompass only the specific act of exchanging information with DHS; *that provision does not, in itself, provide a state or local officer with additional authority to investigate an individual’s immigration status so as to acquire information that might be communicated to DHS.* Nor does 8 U.S.C. § 1373, by itself, provide the state or local officers with that additional authority.²⁹

As a result, nothing in *Arizona* precludes Houston’s interpretation of §1357(g)(10).

Finally, Houston’s interpretation is supported by Congress’ apparent purpose in requiring contracts with local governments before local officers are permitted routinely to perform immigration officer functions. Under § 1357(g), the federal government may ultimately be held liable for those who act as its immigration officers. The use of

²⁹ See DHS, *supra* note 25, at 12 (emphasis supplied).

contracts necessarily identifies and limits the universe of those for whom the federal government may become responsible. To that end, Subsection 1357(g)(2) requires that any local police officer carrying out such functions, not only “be knowledgeable in federal immigration law,” but the contract “shall contain a *written certification that the officers or employees performing the function under the agreement have received adequate training regarding the enforcement of relevant Federal immigration laws.*”³⁰ Indeed, such officer “*shall be subject to the direction and supervision of the Attorney General*” who “*is required to supervise and direct the individual*” per specific provisions in the agreement. *Id.* at § 1357(g)(3) & (5). These provisions make clear that, although local police officers will be acting under color of federal law, he or she “shall not be treated as a Federal employee for any purpose other than for purposes of chapter 81 of Title 5 (relating to compensation for injury) and sections 2671 through 2680 of Title 28 (relating to tort claims).” *Id.* at § 1357(g)(7) & (8). Finally, no such police officer may displace a federal employee, such as a current or future employee of ICE. *Id.* at § 1357(g)(6).

These exacting requirements demonstrate that it is almost unimaginable that the Congress would have authorized the wide-ranging immigration enforcement by local police officers across Texas that SB4 requires without § 1357(g)’s requisite ongoing supervision, training, or certification by the U.S. Attorney General.

³⁰ 8 U.S.C. § 1357(g)(2) (emphasis supplied).

2. SB4 Conflicts with and Impermissibly Skews the Scheme of Federal Immigration Enforcement Set Forth in § 1357(g)

SB4 directly conflicts with the immigration enforcement scheme set forth in § 1357(g) by 1) mandating that local police officers perform immigration officer functions even though it is a violation of federal law for ICE, DHS, or any other federal government agency to accept such services without paying for them; 2) creating an unfunded mandate in violation of 31 U.S.C.A. § 1342; 3) mandating that local police officers and cities provide services federal law expressly makes voluntary; 3) punishing civilly, criminally, and with forfeiture of office the failure to provide services federal law expressly makes voluntary; 4) subjecting the federal government, without its permission or authorization, to liability by forcing local police officers to act under color of federal law without providing the training or supervision required by federal law from federal law enforcement agencies; 5) eliminating the knowledge, training, and supervision requirements mandated for those acting as federal immigration officers under federal law; 6) in violation of federal law, displacing federal workers who ICE and DHS might otherwise have hired in Texas to enforce the federal immigration laws; and, most important, 7) depriving cities of the statutory choice whether they will mandatorily or voluntarily enforce federal immigration law.

In addition or in the alternative, for the same reasons, SB4 frustrates the purposes of § 1357(g) and “skews” improperly and irrevocably the “delicate balance of statutory objectives” it sets forth to ensure that those who enforce the immigration

laws are highly trained, certified, and carefully supervised by federal authorities.³¹ Moreover, as in *Buckman*, SB4 exists “solely by virtue” of the federal immigration laws. As a result, the requirements and punishments it imposes on law enforcement officers, agencies and public officials are preempted.³²

There can be no doubt that SB4’s operative provisions are at least impliedly preempted. Indeed, the *Government itself* states in its Guidance that, “through these and other cooperative arrangements [under § 1357(g)], state and local governments have been able to assist DHS in a manner that conforms to *DHS’s balanced administration of a complex immigration scheme and that is consistent with DHS’s specific priorities and approach.*”³³

More important, SB4 imposes precisely the kind of mandatory local regime that the Government itself has deemed to be in conflict with both the federal immigration laws, its carefully-crafted enforcement scheme, and its immigration enforcement goals. As the Government itself explains in its Guidance, currently available on its website:

In requiring ‘cooperation,’ the INA thus requires that a state or local law enforcement officer who assists DHS officers in their enforcement of the immigration laws must at all times have the freedom to adapt to federal priorities and direction and conform to federal discretion, *rather than being subject to systematic mandatory state or local directives that may work at odds with DHS.* Although a similar lack of receptiveness to federal priorities might pervade even a system that gives officers discretion, *any such state*

³¹ See *Buckman*, 561 U.S. at 348 (“The balance sought by the Administration can be skewed by allowing [such] claims ...”).

³² *Id.* at 352-53; see also *Perdue*, 209 F. Supp. 3d at 851 (E.D.N.C. 2016) (holding that a state law claim is preempted under *Buckman* if “the existence of these federal enactments is a critical element in [plaintiff’s] case,’ and [if] a plaintiff’s claims ‘exist solely by virtue of the FDCA ... requirements.’” *Id.* (quoting *Buckman*, 531 U.S. at 352)).

³³ See DHS, *supra* note 25, at 7 (emphasis supplied).

*or local government-directed mandate would necessarily function as a parallel or contradictory direction, in competition with the Secretary's direction, as to how to enforce immigration law, thereby eroding the federal government's exclusive authority over immigration enforcement. Where inconsistent with federal priorities, a mandatory directive would force the Federal Government to divert resources away from the enforcement priorities it has set. Even if a state or local mandatory directive matches the federal priorities in place at the time of adoption, federal priorities and the manner in which they are applied can, and do, change. In fact, over the past two years, the federal immigration enforcement priorities and the manner in which they are applied have been significantly revised. While any mandatory scheme raises these concerns, they are particularly pressing where state or local mandates are codified because such codified laws are by their nature more difficult to adjust to respond to changing priorities of the Federal Government.*³⁴

Because SB4 conflicts with or skews § 1357(g)'s delicate balance of statutory objectives to utilize only certified-trained, knowledgeable, closely-supervised (by federal officials) immigration officers to enforce federal immigration law, federal law preempts Art. 2.251 [Code of Criminal Procedure], § 39.07 [Texas Penal Code], § 87.031 [Local Gov't Code], and §§ 752.053(a), (b)(1), (b)(2)(B). 752.055, 752.056, 752.0565 [Gov't Code] of SB4. These provisions are, therefore, of no effect.³⁵

There is no set of circumstance under which SB4 could operate constitutionally. Since Houston is not the federal government, it does not currently provide training to its elected or appointed officials, or employees, including its police officers, regarding federal immigration enforcement.³⁶ Even if Houston did provide some immigration enforcement training, however, it could never mandate the U.S. Attorney General's

³⁴ DHS, *supra* note 25, at 9-10.

³⁵ See *Buckman*, 531 U.S. at 348.

³⁶ Houston, however, does provide training and policies regarding probable cause, warrants, and lawful searches and seizures unrelated to federal immigration law. See Exh. A, ¶¶ 16-17.

training, direct supervision of its officers, or require that he or she certify them as trained.³⁷ Moreover, SB4 could never provide the choice to local governments that §1357(g)(5) provides as to whether local enforcement will be mandatory or voluntary. Finally, SB4 deprives cities and the federal government of the ability to prevent a finding of liability against them for torts and similar claims or to have the federal government take legal responsibility when local police act as immigration officers. *Id.* The listed provisions of SB4 are, therefore, preempted.

C. Texas’ and the Government’s Preemption Responses are Misdirected, Baseless, or Both

Both Texas and the Government offer similar responses to Plaintiffs’ various preemption arguments.³⁸ None has merit.

1. No Deference is Due the Government’s Views on SB4’s Preemptive Effect or Its Statement of Interest

It is well-settled that where, as here, the federal government has so dramatically changed its position [at least in its Statement of Interest] with regard to the constitutionality of state laws, its views on the preemptive effect of federal statutes are entitled to no deference whatsoever. In *Wyeth v. Levine*, 555 U.S. at 581, the Supreme Court held that “the United States’ amicus brief is similarly *undeserving of deference*.” *Id.* (emphasis supplied). It explained: “Unlike the Government’s brief in *Geier v. American*

³⁷ See *PLIVA, Inc. v. Mensing*, 564 U.S. 604, 623-24 (2011) (“[w]hen a party cannot satisfy its state duties without the Federal Government’s special permission and assistance, which is dependent on the exercise of judgment by a federal agency, that party cannot independently satisfy those state duties for pre-emption purposes”).

³⁸ Texas will also have the opportunity to respond to the arguments Houston makes here under the court’s June 30 briefing order.

Honda Motor Co., 529 U.S. 861 (2000), which explained the effects of state law on the DOT’s regulation in a manner consistent with the agency’s prior accounts ... the Government’s explanation of federal drug regulation *departs markedly* from the FDA’s understanding at all times relevant to this case.”³⁹

Here, the Government’s Guidance, *see supra* note 25, demonstrate its long-standing interpretation of the federal immigration laws. Its Statement of Interest, however, departs markedly from those views. This court should, therefore, disregard it here, along with the Government’s views on the preemptive effect of SB4 on the federal immigration laws it contains. If, however, this court gives the Government’s statement any deference Houston would respond as follows:

2. SB4’s Penalties and Mandates Are Not Merely a “Matter of Internal State Management”

Both Texas and the Government argue that the penalties and mandates SB4 imposes do not create a preemption issue but create only a “matter of state management;” therefore, “a state may direct the operations of its officials and discipline them for failing to comply with the *state* direction without implicating federal preemption principles or requiring federal approval.”⁴⁰ Nothing in *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597 (1991), which the Government cites for this notion, supports it, including the language it quotes and takes badly out of context. Instead, all of the cases the Government cites address whether, without an explicit reference to

³⁹ *Wyeth*, 555 U.S. at 581 (emphasis supplied).

⁴⁰ Statement of Interest of the United States [Doc. 90] (“Statement of Interest”) at 22 (emphasis supplied).

political subdivisions in the statute, cities can assert federal statutory rights delegated to states.⁴¹ Thus, in *Mortier*, a case seeking to hold state and local pesticide regulations preempted by federal law, the Court *upheld* local governments' power to regulate pesticides, a power granted specifically to states, because the application of ordinary preemption principles did not reveal an unconstitutional conflict. The case does not discuss in any manner a state's disciplining a city like an errant schoolchild.

Second, the Fifth Circuit has held, in the very cases the Government cites, that similar encroachment upon local authority was *not* the minimal management of state affairs the Government would dismiss here. To the contrary, in *Koog*, 79 F.3d at 461 (emphasis supplied), the Fifth Circuit explained:

our understanding of the principles of federalism does not permit us to characterize the Brady [gun control] Act as a 'minimal interference with state functions.' *We do not consider it a minimal interference when a local sheriff or chief of police is offered no choice but to devote purely local manpower and monetary resources to check the backgrounds of countless applicants for handgun purchases.*

Worse, in a footnote to its Statement of Interest, the Government cites an 84-year old Supreme Court case apparently to preserve the argument that cities somehow

⁴¹ Indeed, the very sentence before the one quoted by the Government states: "Properly read, the statutory language tilts in favor of local regulation." *Id.* at 607. *See also Columbus v. Ours Garage & Wrecker Service, Inc.*, 536 U.S. 424, 433 (2002) ("[r]eading § 14501(c)'s set of exceptions [some including political subdivisions and some not] in combination ... we conclude that the statute does not provide the requisite 'clear and manifest indication that Congress sought to supplant local authority'"); *Koog v. United States*, 79 F.3d 452, 460 (5th Cir. 1996) (in a case involving challenge by local law enforcement officers to the mandates of *federal* gun control law, the court held such mandates unconstitutional in part, stating merely that states have a say in the matter). Neither case, however, stands for the proposition that cities have no rights to complain of draconian state penalties for failure to comply with *federal* direction or of the unconstitutionality or preemption of state law that directly affects them.

lack standing to sue the states that “created” them.⁴² The Government’s argument, however, misstates binding federal law in the Fifth Circuit.

In *Rogers v. Brockett*, 588 F.2d 1057 (5th Cir. 1979), *cert. denied* 444 U.S. 827 (1979), the court held that a school district could bring an action, alleging federal preemption, against the State of Texas and others to challenge the constitutionality of state statutes that required certain districts to participate in federal-subsidized breakfast programs. Addressing cases like *Williams v. Mayor*, the court explained:

The Supreme Court itself said, in a somewhat different context from that facing us here, that ‘*a correct reading of the seemingly unconfined dicta of Hunter and kindred cases is not that the State has plenary power to manipulate in every conceivable way, for every conceivable purpose, the affairs of its municipal corporations, but rather that the State’s authority is unrestrained by the particular prohibitions of the Constitution considered in those cases.*’ *Gomillion v. Lightfoot*, 364 U.S. 339, 344, 81 S. Ct. 125, 128, 5 L. Ed. 2d 110 (1960). We agree. *We think these cases are substantive interpretations of the constitutional provisions involved; we do not think they hold that a municipality never has standing to sue the state of which it is a creature.* In fact, correctly interpreted, these cases do not deal with “standing,” in the sense in which we use the term, at all.

Id. at 1068 (emphasis supplied). More recently, the Fifth Circuit has reaffirmed that, “although some circuits have followed a per se rule that political subdivisions may not sue their parent states under any constitutional provision, *that is not the rule in this circuit.*”⁴³

Equally important, cities’ ability to assert challenges under the Supremacy Clause is particularly important where, as here, the remedy sought is only prospective

⁴² *Id.* at 22, n.13, citing *Williams v. Mayor*, 289 U.S. 36, 40 (1933).

⁴³ *Donelon v. La. Div. of Admin. Law ex rel. Wise*, 522 F.3d 564, 568 (5th Cir. 2008).

injunctive relief, not money damages. As the Court explained in *Green v. Mansour*, 474 U.S. 64, 68 (1985) “the availability of prospective relief of the sort awarded in *Ex parte Young* gives life to the Supremacy Clause. Remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law.”⁴⁴

Finally, Houston has standing to assert federal preemption against Texas because of the Supremacy Clause’s unique nature. “The Supremacy Clause is ‘not a source of any federal rights’ but rather operat[es] to ‘secure federal rights by according them priority whenever they come in conflict with state law.’ That is, a plaintiff alleging a Supremacy Clause claim is actually alleging a right under some other federal law, which trumps a contrary state law by operation of the Supremacy Clause.”⁴⁵

⁴⁴ *Id.* at 68 (citing *Ex parte Young*, 209 U.S. 123, 155-56, 159 (1908)).

⁴⁵ *City of Hugo v. Nichols (Two Cases)*, 656 F.3d 1251, 1256 (10th Cir. 2011) (quoting *Chapman v. Hous. Welfare Rights Org.*, 441 U.S. 600, 613 (1979)). There is also a good argument, made in learned treatises and academic articles, that cities also possess independent constitutional status under the Tenth Amendment to the U.S. Constitution, which reserves powers not delegated to the United States “to the States, respectively, or to the people.” (Emphasis supplied). Under long-standing principles of statutory construction, “the people” in this context must mean something other than the states. The phrase also cannot be treated as mere constitutional surplusage. At the time the Constitution was drafted, Thomas Jefferson, Alexis de Toqueville, and others considered cities and town to be “little republics,” “repositories of popular sovereignty through which citizens decided the most fundamental political questions.” Jake Sullivan, *Comment, The Tenth Amendment and Local Government*, 112 Yale L.J. 1935, 1940 & n.31 (May 2003). Several influential writers have, therefore, posited that the Tenth Amendment’s reference “to the people” was to cities and towns because it “presupposed the existence of cities and towns as important political communities through which people expressed their will and exercised various powers.” *Id.* at 1941 & n.34 (emphasis in original), (citing Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 Colum. L. Rev. 1, 89 (1990)); see also Annie Decker, *Preemption Conflation: Dividing the Local from the State in Congressional Decision Making*, 30 Yale L. & Policy Rev. 321, 350 (Spring 2012) (citing Sullivan and others, she argues that “the Tenth Amendment can be read to preserve the right of local self-determination, seeing local governments as the best vehicle for expression of the people’s will. Similarly, looking beyond the Constitution’s textual silence, others have argued that local governments have a form of sovereignty apart from the states”); Amasa M. Eaton, *The Right to Local Self-Government*, 13 Harv. L. Rev. 441 (Feb. 1900) (arguing that cities and towns reserved their right to self-government long before the Constitution was drafted).

3. The Government’s “Cooperation” Arguments Ignore the Operative Provisions of § 1357(g) and its Own Guidance

The Government’s preemption arguments, at pages 20-21 of its Statement of Interest, like Texas’s arguments in its memorandum, and the arguments of both at the court’s hearing, suggest that there is no conflict between SB4 and federal immigration law because all SB4 requires is the mere cooperation and communication already provided for in § 1357(g)(10). To embrace this argument, this court must believe that the rest of § 1357(g)’s requirements have somehow been nullified by § 1357(g)(10) and that SB4’s punitive provisions are actually toothless. Moreover, this court must also believe that SB4 requires something that the Government would consider to be “cooperation” under the federal immigration laws. None of these assumptions is grounded in reality or federal law.

First, as set forth in Section I(B)(1) above, the Government’s expansive interpretation of § 1357(g)(10) runs counter to the plain language of § 1357(g), its structure and purposes, bedrock principles of statutory interpretation, the Government’s own Guidance, and the Ninth Circuit. Subsection 1357(g)(10) simply cannot be read properly to negate all the other subsections of § 1357(g). Yet that is precisely how the Government and Texas would interpret the provision here.

Second, also as set forth above, SB4 expressly empowers local officers to perform the functions of immigration officers, not merely to cooperate and communicate with them. The Texas Legislature made this distinction clear when it separated those functions in Tex. Gov’t Code § 753.053(b)(1), which empowers

officers to inquire “into the immigration status of a person under lawful arrest or detention” and, § 753.053(b)(3), which addresses “assisting and cooperating with federal immigration officers.” Moreover, § 1357(a)(1) sets forth the functions of immigration officers and SB4 requires that local officers perform them on a regular and systematic basis. That is not cooperation: it is conscription.

Third, the Government’s own published Guidance, earlier versions of which were cited in *Arizona*, 567 U.S. at 410, eviscerate its arguments here. First, its definition of “cooperate” in § 1357(g)(10)(B) *excludes the very activities SB4 requires*. For example, its Guidance defines the term “cooperate” as

the rendering of assistance by state and local officers to federal officials, *in the latter officials’ enforcement* of the INA, in a manner that maintains the ability to conform to the policies and priorities of DHS and that ensures that individual state and local officers are at all times in a position to be—and, when requested, are in fact—*responsive to the direction and guidance of federal officials charged with implementing and enforcing the immigration laws*.⁴⁶

More important, the Government *does not* consider it “cooperation” when a state or local government thwarts its goals, schemes, or processes as SB4 inevitably does.

[t]o constitute genuine cooperation as contemplated by 8 U.S.C. § 1357(g)(10), state or local governments *must not systematically act in a way that conflicts with the policies or priorities set by the Federal Government or limits the ability of the Federal Government to exercise discretion under federal law whenever it deems appropriate*. States may not act with the aim or effect of altering the Federal Government’s prioritization or balancing of different goals—*such as by effectively compelling the Federal Government to address certain ends or by furthering those ends while disregarding others*, or by attempting to frustrate the Federal Government’s accomplishment of one end to advance other ends. *In other words, when states attempt to act in the immigration arena, their actions cannot disrupt or interfere with the Federal Government’s pursuit of its multiple, inter-related goals.*

⁴⁶ DHS, *supra* note 25, at 8 (emphasis supplied).

Id. at 10 (emphasis supplied). Most important, in discussing the need for federal primacy in immigration enforcement, the Government’s Guidance states:

The INA’s ‘cooperation’ requirement means that a state or local government may not adopt its own mandatory set of directives to implement the state’s own enforcement policies, because such a mandate would serve as an obstacle to the ability of individual state and local officers to cooperate with federal officers administering federal policies and discretion as the circumstances require. *State or local laws or actions that are not responsive to federal control or direction, or categorically demand enforcement in such a way as to deprive the Federal Government—and state and local officers—of the flexibility and discretion that animates the Federal Government’s ability to globally supervise immigration enforcement, do not constitute the requisite ‘cooperation’ within the meaning of 8 U.S.C. § 1357(g)(10)(B), even if the state or local government’s own purpose is to enforce federal immigration law.*

Id. at 8 (emphasis supplied). The Government reinforces this notion in the website’s language introducing this document. It states: “*for a state or local government to act systematically on a matter that affects immigration enforcement, however, that action has to be consistent with the comprehensive regulatory regime of the INA, which requires such state enforcement efforts be responsive to the policies and priorities set by DHS.*”⁴⁷ There is, therefore, nothing about what SB4 actually does— turn Texas’ local law enforcement officers into a rump federal enforcement force, far outside the purview of DHS and not trained or supervised by them—that would constitute “cooperation” under even the Government’s own definition of the term.

In this regard, in its Statement, the Government rewrites § 1357(g)(10) to assume that the cooperation required is cooperation between individual officers *and*

⁴⁷ DHS, *supra* note 25 (website introduction) (emphasis supplied).

ICE and its individual agents. The statute, however, refers to cooperation and communication *with the Attorney General*. They are not the same thing. The Government's Guidance make clear that § 1357(g)(10) merely reinforces federal *policy-making* primacy. "The text of the statute [§ 1357(g)] makes clear that state and local governments may not adopt and implement their own enforcement programs based on their own assessment of what is appropriate for administering the INA, separate and apart from what the Secretary has established and oversees. Thus 8 U.S.C. § 1357(g)(10)(B) refers to states cooperating '*with the [Secretary]*' (emphasis in original), the federal officer charged by Congress with the administration of the INA."⁴⁸

Fourth, although the Government glosses over the mandatory character of the alleged "cooperation" coerced here, § 1357(g)(5), which requires U.S. Attorney General and cities to decide jointly what enforcement activities will be mandatory or voluntary, and the Supremacy Clause do not. Indeed, courts have found conflict preemption where only the *technique* of enforcement varied.

In *Arizona*, for example, the court found § 5(C) of the state's immigration law preempted on its face, even though it attempted to achieve the same goals as federal law, because it involved a conflict in the *method* of enforcement.⁴⁹ The Court recognized that a "[c]onflict in technique can be fully as disruptive to the system Congress erected as conflict in overt policy."⁵⁰ That is particularly true where, as here,

⁴⁸ *Id.* at 8-9.

⁴⁹ *Arizona*, 567 U.S. at 406.

⁵⁰ *Id.* (citing *Motor Coach Employees v. Lockridge*, 403 U.S. 274, 287 (1971)).

Texas purports to do in SB4 what the federal government is absolutely, constitutionally prohibited from doing: mandating that local authorities enforce federal law.⁵¹ By nullifying § 1357(g)(5)'s choice of mandatory or voluntary enforcement activities, § 1357(g)'s voluntary contracts, and substituting draconian penalties to ensure compliance, SB4 substantially changes the techniques Texas and the Government may use to enforce locally federal immigration laws. Thus, even if Texas is right about cooperation—and it is not—SB4's operative provisions are *still* preempted.

Texas' cannot escape the mandatory nature of SB4—and preemption—by claiming that prohibiting a prohibition on immigration inquiries, combined with extraordinarily stiff penalties for any infraction, including barring speech critical of SB4 or the policies it mandates, somehow renders a police officer's inquiry into a person's immigration status voluntary, cooperative, or anything but the product of the rankest, most naked kind of coercion. Instead, by changing so dramatically the method by which local governments must deal with federal immigration enforcement, the Texas Legislature has doomed SB4 to inevitable preemption.

4. The Government's Argument that Federal Law is Not in Conflict with SB4 Because It Does Not Prohibit Inquiring About Immigration Status is Misdirected

In its final preemption response, the Government claims that *Arizona* permits a law that imposes a mandatory obligation to inquire about immigration status. *It doesn't*.

⁵¹ See *Koog*, 79 F.3d at 461 (“we believe that permitting Congress to circumvent the coercion principle by issuing commands directly to state and local officials critically diminishes the separate and sovereign dignity of the States recognized by New York”); see also *Commissions Imp. Exp. S.A. v. Republic of the Congo*, 757 F.3d 321, 326 (D.C. Cir. 2014) (citing *Arizona*).

First, *Arizona*'s § 2(B) differs from SB4's § 752.053 in that § 2(B) left considerable discretion in the hands of local officers to make "reasonable attempts" to determine immigration status based upon a "reasonable suspicion" that the person was unlawfully in the United States. 567 U.S. at 411. SB4 includes no such provisions and, in fact, would impose harsh penalties on any lawmaker or supervisor who would allow such discretion. Instead, status checks under SB4 are effectively mandatory in virtually all circumstances. *Arizona* never countenanced SB4's unyielding requirements.

Second, in the Supreme Court, the Government's objection to SB4 was not that it conflicted with the enforcement scheme set forth in § 1357(g). Although it had raised that argument in the Ninth Circuit, by the time the case reached the Supreme Court, the Government focused on § 2(B)'s interference with its deferred action programs and other enforcement *priorities*. *Id.* at 412. As a result, the Court focused more on the communication requirement of § 2(B) than on the mandatory inquiry provision and concluded that "the federal scheme thus leaves room for a policy requiring state officials *to contact* ICE as a routine matter." *Id.* at 413 (emphasis added).

The Government's own Guidance, however, makes clear that such routine *contact* is not equivalent to routine *interrogation* about immigration status.

there is an important distinction between communication of alien-status information between a state or local government and DHS, and the original acquisition of information by the state or local officer from an individual. The terms '[t]o communicate' and 'report' in 8 U.S.C. 1357(g)(10)(A) encompass only the specific act of exchanging information with DHS; that provision does not, in itself, provide a state or local officer with additional authority to investigate an individual's immigration status so as to acquire

*information that might be communicated to DHS. Nor does 8 U.S.C. § 1373, by itself, provide the state or local officers with that additional authority.*⁵²

Thus, nothing in *Arizona* authorizes the mandatory, routine interrogation about immigration status that SB4 requires.

II. SB4 VIOLATES THE HOME-RULE PROVISIONS OF TEXAS CONSTITUTION ART. XI, § 5⁵³

The Court may take judicial notice that Houston is a home-rule city.⁵⁴ Its charter describes the procedure under which local officials, including a Mayor and City Council, are elected and removed from office.⁵⁵ It also reserves to Houston and its governing body all constitutional home-rule authority, including the discretion to allocate resources and determine its own priorities in promoting the welfare, health, prosperity, comfort, public safety, and convenience of all Houstonians.⁵⁶

Under the Texas Constitution, art. XI, § 5, home-rule cities such as Houston possess the full power of self-government and “look to the Legislature not for grants of power, but only for limitations on their power.”⁵⁷ Unlike the federal Supremacy clause, however, the State of Texas, under art. XI, § 5, may not simply legislate and expect

⁵² See DHS, *supra* note 25, at 12.

⁵³ The motion/application of the City of Austin raises a home-rule argument that would encompass Houston’s argument here. See Dkt. 57, at 18-19.

⁵⁴ See, e.g., Houston, Tex., *City Charter*, Art. II, § 2(b).

⁵⁵ *Id.* at Art. V, *et seq.*

⁵⁶ *Id.* at Art. II, § 2(a).

⁵⁷ See *Dallas Merch. ’s & Concessionaire’s Ass’n v. City of Dallas*, 852 S.W.2d 489, 490-91 (Tex. 1993).

cities to defer.⁵⁸ Instead, a city must defer only to the extent that its law conflicts with the state statute.

The State of Texas has imposed no regulations of its own that conflict with those imposed by municipalities. Instead, the State of Texas now purports to tell municipalities *how to exercise power* that was conferred on them by the federal government and the State Constitution *that the cities still retain*. The Texas Constitution's home-rule provision does not permit such micro-management.

SB4 and, in particular, § 752.0565 [Gov't Code] of SB4, entitled "Removal from Office," also violates the Home Rule provision of the Texas Constitution, art. XI, § 5, by improperly denying Houston the power of self-government, including the right to elect and remove local officials, by misusing and misapplying *quo warranto* proceedings in a situation for which they were never intended or suited.

SB4 also violates art. XI, § 5, by improperly infringing Houston's right to determine for itself how to exercise its own police power. Under the Houston City Charter, art. XVI, § 1: "The City of Houston shall have power by ordinance duly passed to establish and maintain the City Police Department, prescribe the duties of policemen and regulate their conduct." In addition, art. VI, § 7a gives Houston's mayor the power to appoint and remove heads of departments.

Pursuant to such provisions, § 34-22 of Houston's Code of Ordinances states: "There is hereby created the office of the chief of police in the police department of the

⁵⁸ *City of Richardson v. Responsible Dog Owners*, 794 S.W.2d 17, 19 (Tex. 1990).

city. The chief of police shall be appointed by the mayor and confirmed by the city council. Subject only to the orders and actions of the city council and mayor, the chief of police shall be the executive officer and director of the police department. He shall have management of the department, shall exercise all of the functions assigned to the department, and shall carry out the provisions of law and of ordinances with respect to such functions.”

Neither the United States nor Texas Constitutions grant the Texas Legislature any authority to regulate the immigration status of foreign nationals. To the extent that SB4 seeks to regulate the manner in which Houston provides for the public health and safety of all of its residents and visitors, including foreign nationals, SB4 is an unconstitutional violation of Houston’s home-rule authority.

Finally, by arbitrarily imposing unduly burdensome and oppressive harms on Houston, its officials, its employees, and its residents, and by substantially restricting protected conduct including freedoms of expression, association, and travel, SB4 is not rationally related to any legitimate governmental interest.

III. SB4 VIOLATES THE FIRST AMENDMENT AND TEXAS CONSTITUTION ART. I, § 8

Houston adopts the First Amendment and Texas constitutional equivalents’ arguments and evidence submitted by the cities of El Cenizo, El Paso, Austin, and San Antonio in connection with their motions/applications for preliminary injunction. SB4 violates the constitutional provisions because it penalizes the protected speech of local officials who “endorse” a “policy,” even an “informal, unwritten policy,” that

would contradict SB4's mandates, and is unconstitutionally overbroad by including vague terms, such as "materially limit," "custody," "endorse," "informal or unwritten policy," Houston asks the court to enjoin SB4, and, in particular, §§ 752.053(a)(1), 752.055-56, 752.0565 [Gov't Code] of SB4, as violative of the First Amendment, as applied to the States through the Fourteenth Amendment, and art. I, § 8 of the Texas Constitution.

IV. SB4 VIOLATES THE FOURTH AMENDMENT AND THE TEXAS CONSTITUTION, ART. I, § 9

Houston adopts the Fourth Amendment arguments and evidence submitted by the cities of El Cenizo and El Paso in connection with their application for preliminary injunction. In particular, Houston is aware the El Cenizo plaintiffs are addressing the question of cities' standing to raise Fourth Amendment issues, Houston agree with and adopts their view that plaintiffs standing to raise these issues because police officials cannot be made to choose between complying with SB4 and violating the Fourth Amendment, on the one hand, or disobeying SB4 and subjecting themselves to jail and removal from office, on the other.

V. SB4 VIOLATES THE FOURTEENTH AMENDMENT EQUAL PROTECTION AND DUE PROCESS CLAUSES AND TEXAS CONSTITUTION ARTS. I, §§ 3 & 9

Houston adopts the Fourteenth Amendment Equal Protection and Due Process, and Texas equivalents' arguments and evidence submitted by the cities of El Cenizo and El Paso in connection with their application for preliminary injunction.

SB4 and, in particular, § 752.053(b) [Gov't Code] of SB4, impermissibly invites police officers to engage in unconstitutional investigative practices, including profiling based upon race, ethnicity, national origin, and perceived status. SB4 prevents all legislative, executive, or judicial action at the local level that is designed to protect or even guide individual police officers in enforcing laws affecting immigrants as such. Because SB4 fails to present any cognizable Guidance for enforcement of suspected civil immigration violations, SB4's purported "savings clause," *id.* at § 752.059, is illusory. SB4 cannot be constitutionally applied and should be enjoined in its entirety.

As set forth in in El Paso's application, SB4's citizen reporting provision, § 752.055, treats citizens and lawful immigrants differently, according privileges to citizens alone. There is no constitutional basis for this discriminatory treatment. Moreover, state-compelled enforcement of federal immigration laws is not a compelling interest that justifies such race-based discrimination. SB4 is not narrowly-tailored, and is not the least restrictive means of achieving the requisite governmental interest, if any.

There is likewise no rational basis for removing immigration enforcement from any control or guidance by police, chiefs, sheriffs, other local leaders, ICE itself, or the U.S. Attorney General as provided by contract by federal law. *See* 8 U.S.C. § 1357(g). This is a narrowly-tailored alternative that avoids the constitutional infirmities of SB4.

PRAYER FOR RELIEF

The City of Houston respectfully request that the court enter a preliminary injunction barring Texas from enforcing SB4 in whole or in part.

Respectfully submitted,

CITY OF HOUSTON LEGAL DEPARTMENT

By: /s/ Collyn A. Peddie

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*Pending Pro Hac Vice Permission ***

CERTIFICATE OF SERVICE

I hereby certify that on July 10th, 2017, I served the following attorneys with a true and correct copy of the foregoing document in accordance with *Rule 5(b) of the Federal Rules of Civil Procedure*.

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Exh. A

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

City of El Cenizo, Texas, *et al.*

Plaintiffs,

Travis County, *et al.*

Plaintiff-Intervenors,

V.

State of Texas, *et al.*

Defendants.

§ § § § § § § § § § § §

Civil Case No. 5:17-cv-404-OG

DECLARATION OF ART ACEVEDO

Background on Houston and Chief Acevedo

1. My name is Art Acevedo, and I am currently the Chief of Police for the City of Houston, Texas. I was sworn in as Chief of Police for the City of Houston on November 30, 2016.
2. I have over 30 years of law enforcement experience. Prior to my appointment as Houston's Chief of Police, I served as the Chief of Police for the City of Austin in 2007. I began my law enforcement career in 1986 as a field patrol officer in East Los Angeles with the California Highway Patrol. I rose through those ranks and was named Chief of the California Highway Patrol in 2005.

3. I have a Bachelor's of Science Degree in Public administration from the University of La Verne in California.
4. The City of Houston is the fourth most populous city in the nation with a population of over 2.3 million residents. Its population is comprised of citizens, non-citizens, legal residents, visitors and nondocumented immigrants.
5. The safety of the people of Houston is paramount. To that end, the Houston Police Department ("HPD") works extremely hard to build and maintain trust, communication, and strong relationships with the communities it is sworn to serve. As Chief, I lead a department of 5,200 sworn law enforcement officers and 1,200 civil support personnel. On average, HPD annually responds to 1.2 million calls for service, makes 400,000 traffic stops and actively investigates 150,000 crimes. HPD works tirelessly to make our community safer by arresting those who commit criminal actions that threaten our community—regardless of their immigration status.
6. HPD works cooperatively with our federal partners, including Immigration and Customs Enforcement, to disrupt violent street gangs that threaten our communities. We work in conjunction with all federal agencies to arrest those who are involved in human trafficking. If federal agencies file criminal charges on any person, HPD will arrest the subject regardless of immigration status.

SB 4

7. I have read Texas Senate Bill 4 ("SB 4"), and based on my extensive experience in law enforcement, I have many concerns regarding this law, some of which I put forth before the state legislature prior to SB4 becoming law.

8. I believe that all the City of Houston is safer when everyone, regardless of immigration status, feels safe interacting with law enforcement. Broad rules, such as those imposed by SB4, that push local law enforcement to take a more active role in immigration enforcement will further strain the relationship between local law enforcement and the diverse communities in Houston.
9. I am proud of the hard work that HPD does to keep the City of Houston safe. I am concerned that SB4 will lead to officers inquiring about the immigration status of every person they encounter, or worse, only inquiring about the immigration status of persons based on their appearance. And if it does, it will deter witnesses and victims from assisting our officers in apprehending those who commit crimes, as I explain in more detail below.
10. In addition, law enforcement professionals must be able to direct the efforts of its officers to meet the needs of the community it serves. SB4 prohibits policies that would allow law enforcement professionals from determining the best use of its limited manpower. This bill would take away the ability of police chiefs to prioritize their enforcement efforts, which impedes HPD in its mission to make the community safer. For example, SB4 states that a law enforcement agency may not “prohibit or discourage” an employee from taking certain actions in detaining someone to further inquire about immigration status, or contacting ICE. Therefore, with the language of the bill, a police chief will be potentially violating the law if he or she deploys that officer to address a burglary in progress rather than investigating a purely civil offense of illegal presence in the country. While both are important, it needs to be the chief of police that addresses the resources of the department.

SB 4 Undermines Public Safety by Making Victims Afraid to Report Crimes and Witnesses Afraid to Cooperate in Prosecution of Those Crimes

11. Law enforcement agencies such as HPD have worked extremely hard to build trust and a spirit of cooperation with immigration groups through community based policing and outreach programs. Broad mandates for local law enforcement to take a more active role in immigration enforcement will further strain the relationship between local law enforcement and the diverse communities they serve. This will lead to less cooperation from members of the community and foster a belief that these communities cannot seek assistance from police for fear of being subjected to immigration status investigation.
12. SB4 will harm the community policing efforts of my office. Officers may start inquiring about the immigration status of every person they encounter, or worse, inquire about the immigration status of people based on their appearance. An undocumented immigrant will not come forward and provide needed assistance and cooperation if he or she is concerned that they will be deported or subject to an immigration status investigation. Distrust and fear of contacting or assisting the police has already become evident among even legal immigrants. Legal immigrants are beginning to avoid contact with the police for fear that they themselves or undocumented family members or friends may become subject to immigration enforcement.
13. Such a divide between the local police and immigrant groups will result in increased crime against immigrants and in the broader community, create a class of silent victims, and eliminate the potential for assistance from immigrants in solving crimes or

preventing crime. If we don't arrest criminals who victimize our immigrant communities, we allow them to remain free to victimize every one of us. HPD has found that the number of Hispanics reporting rapes has dropped 43 percent compared to the same time last year, with a 13 percent drop in other violent crimes. That's compared to an 8.2 percent increase in non-Hispanic victims reporting rapes and an 11.7 percent increase in non-Hispanics reporting other violent crime. When undocumented immigrants are afraid to report a crime for fear of police handing them over to ICE, that means a criminal goes free to prey on more people.

14. When it comes to crime, we are in this together, regardless of race, sex, religion or national origin. SB4 will make our communities more dangerous, not safer. It's concerning for me that the state, seeks to criminalize leadership in our cities and seeks to control our police departments.

Required Immigration Enforcement Activities and Impact on HPD Officers Who are Not Trained in Immigration Law or Immigration Enforcement

16. To the extent that SB4 seeks to address immigration enforcement in the state of Texas, forcing local law enforcement agents to become immigration agents is not the solution. HPD officers are very well trained on the laws that they enforce. Our department's requirements for training even go above the Texas Commission on Law Enforcement (TCOLE) standards. However, HPD does not train on immigration law.
17. Because HPD officers are not trained in determining a person's immigration status, which in my experience is a very complicated determination, I believe that officers may inevitably rely on race and ethnicity, and will unlawfully prolong detentions because of

this practice. Even if trained, there will be an increase in the risk of these kinds of violations, and members of the community will still fear interaction with law enforcement.

18. Because of the mandates of SB4, HPD will be forced to expend additional resources, that are already stretched as it is, to train officers on immigration law and supervising officers on those aspects of the job. HPD should be committing itself and its resources to training officers in laws and responsibilities to stop the violent crimes happening in our communities and protecting those who cannot protect themselves.

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

Executed on this 23rd day of June, 2017.



Art Acevedo
Chief of Police, Houston Police Department

Exh. B

S.B. No. 4

AN ACT

relating to the enforcement by campus police departments and certain local governmental entities of state and federal laws governing immigration and to related duties and liability of certain persons in the criminal justice system; providing a civil penalty; creating a criminal offense.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

ARTICLE 1. POLICIES OF AND GRANT PROGRAMS FOR LOCAL ENTITIES AND
CAMPUS POLICE DEPARTMENTS

SECTION 1.01. Chapter 752, Government Code, is amended by adding Subchapter C to read as follows:

SUBCHAPTER C. ENFORCEMENT OF STATE AND FEDERAL IMMIGRATION LAWS BY
LOCAL ENTITIES AND CAMPUS POLICE DEPARTMENTS

Sec. 752.051. DEFINITIONS. In this subchapter:

(1) "Campus police department" means a law enforcement agency of an institution of higher education.

(2) "Immigration laws" means the laws of this state or federal law relating to aliens, immigrants, or immigration, including the federal Immigration and Nationality Act (8 U.S.C. Section 1101 et seq.).

S.B. No. 4

higher education as defined by Section 61.003, Education Code.

(4) "Lawful detention" means the detention of an individual by a local entity, state criminal justice agency, or campus police department for the investigation of a criminal offense. The term excludes a detention if the sole reason for the detention is that the individual:

(A) is a victim of or witness to a criminal offense; or

(B) is reporting a criminal offense.

(5) "Local entity" means:

(A) the governing body of a municipality, county, or special district or authority, subject to Section 752.052;

(B) an officer or employee of or a division, department, or other body that is part of a municipality, county, or special district or authority, including a sheriff, municipal police department, municipal attorney, or county attorney; and

(C) a district attorney or criminal district attorney.

(6) "Policy" includes a formal, written rule, order, ordinance, or policy and an informal, unwritten policy.

Sec. 752.052. APPLICABILITY OF SUBCHAPTER. (a) This subchapter does not apply to a hospital or hospital district created under Subtitle C or D, Title 4, Health and Safety Code, a

S.B. No. 4

1 Constitution, to the extent that the hospital or hospital district
2 is providing access to or delivering medical or health care
3 services as required under the following applicable federal or
4 state laws:

5 (1) 42 U.S.C. Section 1395dd;

6 (2) 42 U.S.C. Section 1396b(v);

7 (3) Subchapter C, Chapter 61, Health and Safety Code;

8 (4) Chapter 81, Health and Safety Code; and

9 (5) Section 311.022, Health and Safety Code.

10 (b) Subsection (a) excludes the application of this
11 subchapter to a commissioned peace officer:

12 (1) employed by a hospital or hospital district during
13 the officer's employment; or

14 (2) commissioned by a hospital or hospital district.

15 (c) This subchapter does not apply to a commissioned peace
16 officer employed or contracted by a religious organization during
17 the officer's employment with the organization or while the officer
18 is performing the contract.

19 (d) This subchapter does not apply to a school district or
20 open-enrollment charter school, including a peace officer employed
21 or contracted by a district or charter school during the officer's
22 employment with the district or charter school or while the officer
23 is performing the contract. This subchapter does not apply to the

S.B. No. 4

1 (e) This subchapter does not apply to the public health
2 department of a local entity.

3 (f) This subchapter does not apply to:

4 (1) a community center as defined by Section [571.003](#),
5 Health and Safety Code; or

6 (2) a local mental health authority as defined by
7 Section [531.002](#), Health and Safety Code.

8 Sec. 752.053. POLICIES AND ACTIONS REGARDING IMMIGRATION
9 ENFORCEMENT. (a) A local entity or campus police department may
10 not:

11 (1) adopt, enforce, or endorse a policy under which
12 the entity or department prohibits or materially limits the
13 enforcement of immigration laws;

14 (2) as demonstrated by pattern or practice, prohibit
15 or materially limit the enforcement of immigration laws; or

16 (3) for an entity that is a law enforcement agency or
17 for a department, as demonstrated by pattern or practice,
18 intentionally violate Article 2.251, Code of Criminal Procedure.

19 (b) In compliance with Subsection (a), a local entity or
20 campus police department may not prohibit or materially limit a
21 person who is a commissioned peace officer described by Article
22 [2.12](#), Code of Criminal Procedure, a corrections officer, a booking
23 clerk, a magistrate, or a district attorney, criminal district

S.B. No. 4

1 under a lawful detention or under arrest;

2 (2) with respect to information relating to the
3 immigration status, lawful or unlawful, of any person under a
4 lawful detention or under arrest, including information regarding
5 the person 's place of birth;

6 (A) sending the information to or requesting or
7 receiving the information from United States Citizenship and
8 Immigration Services, United States Immigration and Customs
9 Enforcement, or another relevant federal agency;

10 (B) maintaining the information; or

11 (C) exchanging the information with another
12 local entity or campus police department or a federal or state
13 governmental entity;

14 (3) assisting or cooperating with a federal
15 immigration officer as reasonable or necessary, including
16 providing enforcement assistance; or

17 (4) permitting a federal immigration officer to enter
18 and conduct enforcement activities at a jail to enforce federal
19 immigration laws.

20 (c) Notwithstanding Subsection (b)(3), a local entity or
21 campus police department may prohibit persons who are employed by
22 or otherwise under the direction or control of the entity or
23 department from assisting or cooperating with a federal immigration

S.B. No. 4

1 under the direction or control of the entity or department may not
2 consider race, color, religion, language, or national origin while
3 enforcing immigration laws except to the extent permitted by the
4 United States Constitution or Texas Constitution.

5 Sec. 752.055. COMPLAINT; EQUITABLE RELIEF. (a) Any
6 citizen residing in the jurisdiction of a local entity or any
7 citizen enrolled at or employed by an institution of higher
8 education may file a complaint with the attorney general if the
9 person asserts facts supporting an allegation that the entity or
10 the institution 's campus police department has violated Section
11 752.053. The citizen must include a sworn statement with the
12 complaint stating that to the best of the citizen 's knowledge, all
13 of the facts asserted in the complaint are true and correct.

14 (b) If the attorney general determines that a complaint
15 filed under Subsection (a) against a local entity or campus police
16 department is valid, the attorney general may file a petition for a
17 writ of mandamus or apply for other appropriate equitable relief in
18 a district court in Travis County or in a county in which the
19 principal office of the entity or department is located to compel
20 the entity or department that is suspected of violating Section
21 752.053 to comply with that section.

22 (c) An appeal of a suit brought under Subsection (b) is
23 governed by the procedures for accelerated appeals in civil cases

S.B. No. 4

1 police department that is found by a court of law as having
2 intentionally violated Section 752.053 is subject to a civil
3 penalty in an amount:

4 (1) not less than \$1,000 and not more than \$1,500 for
5 the first violation; and

6 (2) not less than \$25,000 and not more than \$25,500 for
7 each subsequent violation.

8 (b) Each day of a continuing violation of Section 752.053
9 constitutes a separate violation for the civil penalty under this
10 section.

11 (c) The court that hears an action brought under Section
12 752.055 against the local entity or campus police department shall
13 determine the amount of the civil penalty under this section.

14 (d) A civil penalty collected under this section shall be
15 deposited to the credit of the compensation to victims of crime fund
16 established under Subchapter B, Chapter 56, Code of Criminal
17 Procedure.

18 (e) Sovereign immunity of this state and governmental
19 immunity of a county and municipality to suit is waived and
20 abolished to the extent of liability created by this section.

21 Sec. 752.0565. REMOVAL FROM OFFICE. (a) For purposes of
22 Section 66.001, Civil Practice and Remedies Code, a person holding
23 an elective or appointive office of a political subdivision of this

S.B. No. 4

1 to which Subsection (a) applies if presented with evidence,
2 including evidence of a statement by the public officer,
3 establishing probable grounds that the public officer engaged in
4 conduct described by Subsection (a). The court in which the
5 petition is filed shall give precedence to proceedings relating to
6 the petition in the same manner as provided for an election contest
7 under Section 23.101.

8 (c) If the person against whom an information is filed based
9 on conduct described by Subsection (a) is found guilty as charged,
10 the court shall enter judgment removing the person from office.

11 Sec. 752.057. COMMUNITY OUTREACH POLICY. (a) Each law
12 enforcement agency that is subject to the requirements of this
13 subchapter may adopt a written policy requiring the agency to
14 perform community outreach activities to educate the public that a
15 peace officer may not inquire into the immigration status of a
16 victim of or witness to an alleged criminal offense unless, as
17 provided by Article 2.13, Code of Criminal Procedure, the officer
18 determines that the inquiry is necessary to:

19 (1) investigate the offense; or
20 (2) provide the victim or witness with information
21 about federal visas designed to protect individuals providing
22 assistance to law enforcement.

23 (b) A policy adopted under this section must include

S.B. No. 4

1 (2) sexual assault, including those receiving
2 services under a sexual assault program, as those terms are defined
3 by Section 420.003.

4 SECTION 1.02. Subchapter A, Chapter 772, Government Code,
5 is amended by adding Section 772.0073 to read as follows:

6 Sec. 772.0073. ENFORCEMENT OF IMMIGRATION LAW GRANT
7 PROGRAM. (a) In this section:

8 (1) "Criminal justice division" means the criminal
9 justice division established under Section 772.006.

10 (2) "Immigration detainer request" means a federal
11 government request to a local entity to maintain temporary custody
12 of an alien, including a United States Department of Homeland
13 Security Form I-247 document or a similar or successor form.

14 (3) "Immigration laws" means the laws of this state or
15 federal law relating to aliens, immigrants, or immigration,
16 including the federal Immigration and Nationality Act (8 U.S.C.
17 Section 1101 et seq.).

18 (4) "Local entity" means a municipality or county.

19 (b) The criminal justice division shall establish and
20 administer a competitive grant program to provide financial
21 assistance to local entities to offset costs related to:

22 (1) enforcing immigration laws; or

23 (2) complying with, honoring, or fulfilling

S.B. No. 4

1 (3) criteria for evaluating grant applications and
2 awarding grants;

3 (4) guidelines related to grant amounts; and

4 (5) procedures for monitoring the use of a grant
5 awarded under this section and ensuring compliance with any
6 conditions of the grant.

7 (d) The criminal justice division may use any revenue
8 available for purposes of this section.

9 ARTICLE 2. DUTIES OF LAW ENFORCEMENT AGENCIES AND JUDGES

10 SECTION 2.01. Chapter 2, Code of Criminal Procedure, is
11 amended by adding Article 2.251 to read as follows:

12 Art. 2.251. DUTIES RELATED TO IMMIGRATION DETAINER
13 REQUESTS. (a) A law enforcement agency that has custody of a
14 person subject to an immigration detainer request issued by United
15 States Immigration and Customs Enforcement shall:

16 (1) comply with, honor, and fulfill any request made
17 in the detainer request provided by the federal government; and

18 (2) inform the person that the person is being held
19 pursuant to an immigration detainer request issued by United States
20 Immigration and Customs Enforcement.

21 (b) A law enforcement agency is not required to perform a
22 duty imposed by Subsection (a) with respect to a person who has
23 provided proof that the person is a citizen of the United States or

S.B. No. 4

1 amended by adding Article 42.039 to read as follows:

2 Art. 42.039. COMPLETION OF SENTENCE IN FEDERAL CUSTODY.

3 (a) This article applies only to a criminal case in which:

4 (1) the judgment requires the defendant to be confined
5 in a secure correctional facility; and

6 (2) the defendant is subject to an immigration
7 detainer request.

8 (b) In a criminal case described by Subsection (a), the
9 judge shall, at the time of pronouncement of a sentence of
10 confinement, issue an order requiring the secure correctional
11 facility in which the defendant is to be confined and all
12 appropriate government officers, including a sheriff, a warden, or
13 members of the Board of Pardons and Paroles, as appropriate, to
14 require the defendant to serve in federal custody the final portion
15 of the defendant 's sentence, not to exceed a period of seven days,
16 following the facility 's or officer 's determination that the change
17 in the place of confinement will facilitate the seamless transfer
18 of the defendant into federal custody. In the absence of an order
19 issued under this subsection, a facility or officer acting under
20 exigent circumstances may perform the transfer after making the
21 determination described by this subsection. This subsection
22 applies only if appropriate officers of the federal government
23 consent to the transfer of the defendant into federal custody under

S.B. No. 4

1 soon as the information becomes available. The judge retains
2 jurisdiction for the purpose of issuing an order under this
3 article.

4 (d) For purposes of this article, "secure correctional
5 facility" has the meaning assigned by Section 1.07, Penal Code.

6 ARTICLE 3. DEFENSE OF LOCAL ENTITIES BY ATTORNEY GENERAL

7 SECTION 3.01. Subchapter B, Chapter 402, Government Code,
8 is amended by adding Section 402.0241 to read as follows:

9 Sec. 402.0241. DEFENSE OF LOCAL ENTITIES IN SUITS RELATED
10 TO IMMIGRATION DETAINER REQUESTS. (a) In this section, "local
11 entity" has the meaning assigned by Section 752.051.

12 (b) The attorney general shall defend a local entity in any
13 action in any court if:

14 (1) the executive head or governing body, as
15 applicable, of the local entity requests the attorney general's
16 assistance in the defense; and

17 (2) the attorney general determines that the cause of
18 action arises out of a claim involving the local entity's
19 good-faith compliance with an immigration detainer request
20 required by Article 2.251, Code of Criminal Procedure.

21 (c) If the attorney general defends a local entity under
22 Subsection (b), the state is liable for the expenses, costs,
23 judgment, or settlement of the claims arising out of the

S.B. No. 4

general under Subsection (b).

ARTICLE 4. SURETY BOND

SECTION 4.01. Article 17.16, Code of Criminal Procedure, is amended by amending Subsection (a) and adding Subsection (a-1) to read as follows:

(a) A surety may before forfeiture relieve the surety of the surety's undertaking by:

(1) surrendering the accused into the custody of the sheriff of the county where the prosecution is pending; or

(2) delivering to the sheriff of the county in which the prosecution is pending and to the office of the prosecuting attorney an affidavit stating that the accused is incarcerated in:

(A) federal custody, subject to Subsection (a-1);

(B) ~~in~~ the custody of any state; or

(C) ~~in~~ any county of this state.

(a-1) For purposes of Subsection (a)(2), the surety may not be relieved of the surety's undertaking if the accused is in federal custody to determine whether the accused is lawfully present in the United States.

ARTICLE 5. PROHIBITED CONDUCT BY SHERIFF OR CONSTABLE

SECTION 5.01. Section 87.031, Local Government Code, is amended by adding Subsection (c) to read as follows:

S.B. No. 4

Section 39.07 to read as follows:

Sec. 39.07. FAILURE TO COMPLY WITH IMMIGRATION DETAINER REQUEST. (a) A person who is a sheriff, chief of police, or constable or a person who otherwise has primary authority for administering a jail commits an offense if the person:

(1) has custody of a person subject to an immigration detainer request issued by United States Immigration and Customs Enforcement; and

(2) knowingly fails to comply with the detainer request.

(b) An offense under this section is a Class A misdemeanor.

(c) It is an exception to the application of this section that the person who was subject to an immigration detainer request described by Subsection (a)(1) had provided proof that the person is a citizen of the United States or that the person has lawful immigration status in the United States, such as a Texas driver's license or similar government-issued identification.

ARTICLE 6. INQUIRY BY PEACE OFFICER REGARDING IMMIGRATION OR NATIONALITY OF CRIME VICTIM OR WITNESS

SECTION 6.01. Article 2.13, Code of Criminal Procedure, is amended by adding Subsections (d) and (e) to read as follows:

(d) Subject to Subsection (e), in the course of investigating an alleged criminal offense, a peace officer may

S.B. No. 4

1 (2) provide the victim or witness with information
2 about federal visas designed to protect individuals providing
3 assistance to law enforcement.

4 (e) Subsection (d) does not prevent a peace officer from:

5 (1) conducting a separate investigation of any other
6 alleged criminal offense; or

7 (2) inquiring as to the nationality or immigration
8 status of a victim of or witness to a criminal offense if the
9 officer has probable cause to believe that the victim or witness has
10 engaged in specific conduct constituting a separate criminal
11 offense.

12 ARTICLE 7. SEVERABILITY AND EFFECTIVE DATE

13 SECTION 7.01. It is the intent of the legislature that every
14 provision, section, subsection, sentence, clause, phrase, or word
15 in this Act, and every application of the provisions in this Act to
16 each person or entity, are severable from each other. If any
17 application of any provision in this Act to any person, group of
18 persons, or circumstances is found by a court to be invalid for any
19 reason, the remaining applications of that provision to all other
20 persons and circumstances shall be severed and may not be affected.

21 SECTION 7.02. This Act takes effect immediately if it
22 receives a vote of two-thirds of all the members elected to each
23 house, as provided by Section 39, Article III, Texas Constitution.

S.B. No. 4

President of the Senate

Speaker of the House

I hereby certify that S.B. No. 4 passed the Senate on February 8, 2017, by the following vote: Yeas 20, Nays 10; and that the Senate concurred in House amendments on May 3, 2017, by the following vote: Yeas 20, Nays 11.

Secretary of the Senate

I hereby certify that S.B. No. 4 passed the House, with amendments, on April 27, 2017, by the following vote: Yeas 94, Nays 53, one present not voting.

Chief Clerk of the House

Approved:

Date

Governor

Exh. C

§ 1357. Powers of immigration officers and employees, 8 USCA § 1357



KeyCite Yellow Flag - Negative Treatment

Proposed Legislation

United States Code Annotated

Title 8. Aliens and Nationality (Refs & Annos)

Chapter 12. Immigration and Nationality (Refs & Annos)

Subchapter II. Immigration

Part IX. Miscellaneous

8 U.S.C.A. § 1357

§ 1357. Powers of immigration officers and employees

Effective: August 12, 2006

[Currentness](#)**(a) Powers without warrant**

Any officer or employee of the Service authorized under regulations prescribed by the Attorney General shall have power without warrant--

- (1) to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States;
- (2) to arrest any alien who in his presence or view is entering or attempting to enter the United States in violation of any law or regulation made in pursuance of law regulating the admission, exclusion, expulsion, or removal of aliens, or to arrest any alien in the United States, if he has reason to believe that the alien so arrested is in the United States in violation of any such law or regulation and is likely to escape before a warrant can be obtained for his arrest, but the alien arrested shall be taken without unnecessary delay for examination before an officer of the Service having authority to examine aliens as to their right to enter or remain in the United States;
- (3) within a reasonable distance from any external boundary of the United States, to board and search for aliens any vessel within the territorial waters of the United States and any railway car, aircraft, conveyance, or vehicle, and within a distance of twenty-five miles from any such external boundary to have access to private lands, but not dwellings, for the purpose of patrolling the border to prevent the illegal entry of aliens into the United States;
- (4) to make arrests for felonies which have been committed and which are cognizable under any law of the United States regulating the admission, exclusion, expulsion, or removal of aliens, if he has reason to believe that the person so arrested is guilty of such felony and if there is likelihood of the person escaping before a warrant can be obtained for his arrest, but the person arrested shall be taken without unnecessary delay before the nearest available officer empowered to commit persons charged with offenses against the laws of the United States; and

§ 1357. Powers of immigration officers and employees, 8 USCA § 1357

(5) to make arrests--

(A) for any offense against the United States, if the offense is committed in the officer's or employee's presence, or

(B) for any felony cognizable under the laws of the United States, if the officer or employee has reasonable grounds to believe that the person to be arrested has committed or is committing such a felony,

if the officer or employee is performing duties relating to the enforcement of the immigration laws at the time of the arrest and if there is a likelihood of the person escaping before a warrant can be obtained for his arrest.

Under regulations prescribed by the Attorney General, an officer or employee of the Service may carry a firearm and may execute and serve any order, warrant, subpoena, summons, or other process issued under the authority of the United States. The authority to make arrests under paragraph (5)(B) shall only be effective on and after the date on which the Attorney General publishes final regulations which (i) prescribe the categories of officers and employees of the Service who may use force (including deadly force) and the circumstances under which such force may be used, (ii) establish standards with respect to enforcement activities of the Service, (iii) require that any officer or employee of the Service is not authorized to make arrests under paragraph (5)(B) unless the officer or employee has received certification as having completed a training program which covers such arrests and standards described in clause (ii), and (iv) establish an expedited, internal review process for violations of such standards, which process is consistent with standard agency procedure regarding confidentiality of matters related to internal investigations.

(b) Administration of oath; taking of evidence

Any officer or employee of the Service designated by the Attorney General, whether individually or as one of a class, shall have power and authority to administer oaths and to take and consider evidence concerning the privilege of any person to enter, reenter, pass through, or reside in the United States, or concerning any matter which is material or relevant to the enforcement of this chapter and the administration of the Service; and any person to whom such oath has been administered, (or who has executed an unsworn declaration, certificate, verification, or statement under penalty of perjury as permitted under [section 1746 of Title 28](#)) under the provisions of this chapter, who shall knowingly or willfully give false evidence or swear (or subscribe under penalty of perjury as permitted under [section 1746 of Title 28](#)) to any false statement concerning any matter referred to in this subsection shall be guilty of perjury and shall be punished as provided by [section 1621 of Title 18](#).

(c) Search without warrant

Any officer or employee of the Service authorized and designated under regulations prescribed by the Attorney General, whether individually or as one of a class, shall have power to conduct a search, without warrant, of the person, and of the personal effects in the possession of any person seeking admission to the United States, concerning whom such officer or employee may have reasonable cause to suspect that grounds exist for denial of admission to the United States under this chapter which would be disclosed by such search.

§ 1357. Powers of immigration officers and employees, 8 USCA § 1357

(d) Detainer of aliens for violation of controlled substances laws

In the case of an alien who is arrested by a Federal, State, or local law enforcement official for a violation of any law relating to controlled substances, if the official (or another official)--

(1) has reason to believe that the alien may not have been lawfully admitted to the United States or otherwise is not lawfully present in the United States,

(2) expeditiously informs an appropriate officer or employee of the Service authorized and designated by the Attorney General of the arrest and of facts concerning the status of the alien, and

(3) requests the Service to determine promptly whether or not to issue a detainer to detain the alien,

the officer or employee of the Service shall promptly determine whether or not to issue such a detainer. If such a detainer is issued and the alien is not otherwise detained by Federal, State, or local officials, the Attorney General shall effectively and expeditiously take custody of the alien.

(e) Restriction on warrantless entry in case of outdoor agricultural operations

Notwithstanding any other provision of this section other than paragraph (3) of subsection (a), an officer or employee of the Service may not enter without the consent of the owner (or agent thereof) or a properly executed warrant onto the premises of a farm or other outdoor agricultural operation for the purpose of interrogating a person believed to be an alien as to the person's right to be or to remain in the United States.

(f) Fingerprinting and photographing of certain aliens

(1) Under regulations of the Attorney General, the Commissioner shall provide for the fingerprinting and photographing of each alien 14 years of age or older against whom a proceeding is commenced under [section 1229a](#) of this title.

(2) Such fingerprints and photographs shall be made available to Federal, State, and local law enforcement agencies, upon request.

(g) Performance of immigration officer functions by State officers and employees

§ 1357. Powers of immigration officers and employees, 8 USCA § 1357

- (1) Notwithstanding [section 1342 of Title 31](#), the Attorney General may enter into a written agreement with a State, or any political subdivision of a State, pursuant to which an officer or employee of the State or subdivision, who is determined by the Attorney General to be qualified to perform a function of an immigration officer in relation to the investigation, apprehension, or detention of aliens in the United States (including the transportation of such aliens across State lines to detention centers), may carry out such function at the expense of the State or political subdivision and to the extent consistent with State and local law.
- (2) An agreement under this subsection shall require that an officer or employee of a State or political subdivision of a State performing a function under the agreement shall have knowledge of, and adhere to, Federal law relating to the function, and shall contain a written certification that the officers or employees performing the function under the agreement have received adequate training regarding the enforcement of relevant Federal immigration laws.
- (3) In performing a function under this subsection, an officer or employee of a State or political subdivision of a State shall be subject to the direction and supervision of the Attorney General.
- (4) In performing a function under this subsection, an officer or employee of a State or political subdivision of a State may use Federal property or facilities, as provided in a written agreement between the Attorney General and the State or subdivision.
- (5) With respect to each officer or employee of a State or political subdivision who is authorized to perform a function under this subsection, the specific powers and duties that may be, or are required to be, exercised or performed by the individual, the duration of the authority of the individual, and the position of the agency of the Attorney General who is required to supervise and direct the individual, shall be set forth in a written agreement between the Attorney General and the State or political subdivision.
- (6) The Attorney General may not accept a service under this subsection if the service will be used to displace any Federal employee.
- (7) Except as provided in paragraph (8), an officer or employee of a State or political subdivision of a State performing functions under this subsection shall not be treated as a Federal employee for any purpose other than for purposes of chapter 81 of Title 5 (relating to compensation for injury) and [sections 2671 through 2680 of Title 28](#) (relating to tort claims).
- (8) An officer or employee of a State or political subdivision of a State acting under color of authority under this subsection, or any agreement entered into under this subsection, shall be considered to be acting under color of Federal authority for purposes of determining the liability, and immunity from suit, of the officer or employee in a civil action brought under Federal or State law.
- (9) Nothing in this subsection shall be construed to require any State or political subdivision of a State to enter into an

§ 1357. Powers of immigration officers and employees, 8 USCA § 1357

agreement with the Attorney General under this subsection.

(10) Nothing in this subsection shall be construed to require an agreement under this subsection in order for any officer or employee of a State or political subdivision of a State--

(A) to communicate with the Attorney General regarding the immigration status of any individual, including reporting knowledge that a particular alien is not lawfully present in the United States; or

(B) otherwise to cooperate with the Attorney General in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States.

(h) Protecting abused juveniles

An alien described in [section 1101\(a\)\(27\)\(J\)](#) of this title who has been battered, abused, neglected, or abandoned, shall not be compelled to contact the alleged abuser (or family member of the alleged abuser) at any stage of applying for special immigrant juvenile status, including after a request for the consent of the Secretary of Homeland Security under [section 1101\(a\)\(27\)\(J\)\(iii\)\(I\)](#) of this title.

CREDIT(S)

(June 27, 1952, c. 477, Title II, ch. 9, § 287, 66 Stat. 233; [Pub.L. 94-550](#), § 7, Oct. 18, 1976, 90 Stat. 2535; [Pub.L. 99-570](#), Title I, § 1751(d), Oct. 27, 1986, 100 Stat. 3207-47; [Pub.L. 99-603](#), Title I, § 116, Nov. 6, 1986, 100 Stat. 3384; [Pub.L. 100-525](#), §§ 2(e), 5, Oct. 24, 1988, 102 Stat. 2610, 2615; [Pub.L. 101-649](#), Title V, § 503(a), (b)(1), Nov. 29, 1990, 104 Stat. 5048, 5049; [Pub.L. 102-232](#), Title III, § 306(a)(3), Dec. 12, 1991, 105 Stat. 1751; [Pub.L. 104-208](#), Div. C, Title I, § 133, Title III, § 308(d)(4)(L), (e)(1)(M), (g)(5)(A)(i), Sept. 30, 1996, 110 Stat. 3009-563, 3009-618, 3009-619, 3009-623; [Pub.L. 109-162](#), Title VIII, § 826, Jan. 5, 2006, 119 Stat. 3065; [Pub.L. 109-271](#), § 6(g), Aug. 12, 2006, 120 Stat. 763.)

[Notes of Decisions \(311\)](#)

8 U.S.C.A. § 1357, 8 USCA § 1357

Current through P.L. 115-40. Also includes P.L. 115-42 and 115-43. Title 26 current through 115-43.

Exh. D

U.S. Department of Homeland Security
Washington, DC 20528



**Homeland
Security**

GUIDANCE ON STATE AND LOCAL GOVERNMENTS' ASSISTANCE IN IMMIGRATION ENFORCEMENT AND RELATED MATTERS

Summary

The Department of Homeland Security (DHS) provides this guidance on assistance furnished by state and local law enforcement officers to DHS in its enforcement of the Nation's immigration laws. This guidance primarily concerns assistance by such officers in the enforcement of the civil provisions of the Immigration and Nationality Act (INA), 8 U.S.C. §§ 1101 *et seq.*, specifically, cooperation in the identification, apprehension, detention, and removal of aliens who are unlawfully present. In light of laws passed by several states addressing the involvement by state and local law enforcement officers in federal enforcement of immigration laws, DHS concluded that this guidance would be appropriate to set forth DHS's position on the proper role of state and local officers in this context.

DHS has long viewed state and local governments as valuable partners that can serve a helpful role in assisting DHS in fulfilling its responsibilities with respect to immigration enforcement. DHS continues to welcome that participation and does not intend by this guidance to disturb the longstanding pattern of cooperation on a day-to-day basis with state and local law enforcement agencies. For a state or local government to act systematically¹ on a matter that affects immigration enforcement, however, that action has to be consistent with the comprehensive regulatory regime of the INA, which requires such state enforcement efforts to constitute cooperation, and therefore also requires such efforts to be responsive to the policies and priorities set by DHS.

This guidance first sets out general legal principles that govern the respective roles of the Federal Government and the states in immigration matters. It then discusses the specific provisions of the INA that address the manner in which state and local officers may assist DHS in immigration enforcement. The guidance explains that systematic state or local government actions will conflict with the INA with respect to the identification, apprehension, detention, and removal of aliens if state or local law enforcement officers do not act in accordance either with a statutory provision or agreement with DHS providing them with express authority for their actions, or with 8 U.S.C. § 1357(g)(10)(B), which authorizes state and local governments to "*cooperate* with the [Secretary of Homeland Security] in the identification, apprehension,

¹ In referring to "systematic" actions of state and local governments, we mean regular or repeated activity that is undertaken pursuant to or consistent with some governing principles or standards, whether formal or informal—such as state or local laws, written or unwritten agency policy, training guidelines, or standard operating procedures. The term "systematic" is intended to be in contrast with occasional, sporadic, or irregular activity that may happen from time to time in an official's discretion or as the need arises in the course of an official's regular duties.

detention, or removal of aliens not lawfully present in the United States” (emphasis added). Under that provision, a state or local government’s action must constitute genuine *cooperation* with DHS to avoid infringing on the Federal Government’s authority. Applying that basic requirement, the guidance provides non-exhaustive lists of examples of state and local government actions related to immigration enforcement that are permissible and examples that would infringe on the Federal Government’s authorities and discretion.²

I. GENERAL LEGAL PRINCIPLES

A. Responsibilities of the Federal Government over Immigration

Congress’s power over immigration and naturalization derives from the U.S. Constitution’s Commerce Clause, U.S. Const. Art. I, § 8, cl. 3, related constitutional authorities concerning foreign relations, and its power to “establish an uniform Rule of Naturalization.” U.S. Const. Art. I, § 8, cl. 4. Authority to regulate immigration and matters concerning aliens in or seeking to enter the United States is vested with the Federal Government. *See, e.g., Toll v. Moreno*, 458 U.S. 1, 10 (1982); *De Canas v. Bica*, 424 U.S. 351, 354 (1976). Control of immigration is a “fundamental sovereign attribute.” *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 210 (1953). As the Supreme Court has explained, the Nation’s immigration policy “is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations [and] the war power,” and “so exclusively entrusted to the political branches” of the National Government as “to be largely immune from judicial inquiry or interference.” *Harisiades v. Shaughnessy*, 342 U.S. 580, 588-89 (1962).

The primary means by which the Federal Government exercises this authority is through the INA, which is a comprehensive statute that addresses virtually all matters related to immigration.³ *See Chamber of Commerce v. Whiting*, 131 S. Ct. 1968, 1973 (2011) (the INA “established a ‘comprehensive federal statutory scheme for regulation of immigration and naturalization’ and set ‘the terms and conditions of admission to the country and the subsequent treatment of aliens lawfully in the country’” (quoting *De Canas*, 424 U.S. at 353, 359)); *Elkins v. Moreno*, 435 U.S. 647, 664 (1978) (describing the INA “as a comprehensive and complete code covering all aspects of admission of aliens to this country”).

² Given its statutory and regulatory authority over immigration and naturalization matters, as well as its longstanding experience and expertise in enforcing the Nation’s immigration laws, DHS is uniquely situated to interpret the INA and determine what actions assist and what actions undermine its efforts. DHS accordingly issues this memorandum pursuant to the Secretary’s authority to issue such instructions and to take such other actions as she deems necessary for carrying out her authority in the enforcement of laws relating to the immigration and naturalization of aliens. 8 U.S.C. § 1103(a)(3).

³ This is not to suggest that the INA is the only statute by which the Federal Government has exercised its authority to regulate immigration or matters concerning aliens. Various other federal statutes address discrete aspects related to aliens and immigration. Although the focus of this guidance is on the INA because it is the primary statute in this field, the background principles discussed in this introduction are equally applicable to other federal laws that concern aliens and immigration. *Cf.* 8 U.S.C. § 1101(a)(17) (defining the term “immigration laws” as including the INA “and all laws, conventions, and treaties of the United States relating to the immigration, exclusion, deportation, expulsion, or removal of aliens”).

The INA allocates various responsibilities for its implementation and enforcement to the President and a number of Executive Branch officials, including the Secretary of Homeland Security, the Attorney General, and the Secretary of State. *See* 8 U.S.C. § 1103(a)(1); *Sale v. Haitian Centers Council, Inc.*, 508 U.S. 155, 171-72 (1993) (noting, in a pre-DHS case, distribution of authority under the INA to various federal officials). The Secretary of Homeland Security is responsible, among other duties, for enforcing the civil provisions of the INA, including those involving the investigation, arrest, and detention of aliens who are subject to removal; for instituting and prosecuting removal proceedings before the Department of Justice’s Executive Office for Immigration Review (EOIR); for the actual removal of aliens; for developing and implementing national immigration policies and priorities; and for assisting the Attorney General in enforcing the criminal provisions of the INA. *See* 8 U.S.C. § 1103(a)(1); *see also* 6 U.S.C. §§ 202(5) (providing DHS with the authority to “establish[] national immigration enforcement policies and priorities”); 271(a)(3)(D) (providing DHS with the authority to “establish national immigration services policies and priorities”).

The INA’s text and underlying congressional intent reveal a complex and multi-faceted set of objectives relating to various aspects of the immigration and naturalization system. The Federal Government has not adopted a one-dimensional focus in which the sole considerations for those who violate restrictions related to the entry and presence of aliens are removal, sanctions, or both. To be sure, removal and sanctions are significant elements of the purposes and objectives as defined by Congress and DHS. *See, e.g.*, 8 U.S.C. §§ 1182(a)(6)(A) (providing ground of removability for aliens who are present in the United States without being admitted or paroled); 1227(a)(1)(B) (providing ground of removability for aliens who are present in the United States in violation of law after being admitted); 1325 (providing criminal prohibition for aliens entering or attempting to enter the United States in violation of law). But these ends are to be pursued consistently and simultaneously with several others. For example, the Federal Government seeks to be welcoming to those aliens who are in the United States legally and to protect them from undue harassment. *See Hines v. Davidowitz*, 312 U.S. 52, 73 (1941). Even for those aliens present in the United States without lawful immigration status, the Federal Government has extended various humanitarian protections. *See, e.g.*, 8 U.S.C. §§ 1158 (asylum); 1254a (temporary protected status); 1227(a)(1)(E)(iii) (humanitarian waiver of deportability to assure family unity); 1229b(b) (cancellation of removal); 1182(d)(5) (parole); 1101(a)(15)(T) (visas for certain victims of human trafficking); and 1101(a)(15)(U) (visas for certain victims of criminal activity who have suffered substantial physical or mental abuse). In its administration and enforcement of the INA, DHS also may properly consider issues of foreign relations, as well as the potential impact of certain enforcement techniques or initiatives on citizens and lawfully present aliens or on federal, state, and local law enforcement efforts under other laws. DHS’s administration and enforcement of the INA necessarily reflect and embody these multiple and sometimes competing goals. Moreover, DHS must act within the constraints of limited resources and therefore must carefully prioritize its efforts in order to carry out its mandate.⁴

⁴ *See, e.g.*, Memorandum from John Morton, Director, U.S. Immigration and Customs Enforcement, titled “Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens” (June 17, 2011), available at <http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf>; Memorandum from John Morton, Director, U.S. Immigration and Customs Enforcement, titled “Civil Immigration

Whenever authority to enforce *any* Act of Congress is assigned to officers of the Executive Branch, the responsible officers are understood to be vested with broad and presumptively unreviewable discretion in deciding whether and how to enforce the Act in given circumstances. That is true whether the agency is invoking criminal, civil, or administrative process. *See, e.g., Heckler v. Chaney*, 470 U.S. 821, 831-32 (1985). The Supreme Court has recognized that prosecutorial discretion is especially important in the immigration enforcement context. *Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471, 489 (1999) (observing that prosecutorial discretion has long been “a special province of the Executive,” and finding that the considerations underlying such prerogative “are greatly magnified in the deportation context”); *see also United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 543 (1950) (noting that discretion is essential in the administration of the immigration laws, as “flexibility and the adaptation of the congressional policy to infinitely variable conditions constitute the essence of the program”); *Matter of E-R-M- & L-R-M-*, 25 I. & N. Dec. 520, 522-24 (BIA 2011) (discussing the broad authority DHS has in exercising its prosecutorial discretion in initiating removal proceedings). By charging DHS with primary responsibility for enforcement of federal immigration laws, Congress intended for DHS to use its expertise in calibrating its actions so as to ensure the varied and sometimes competing objectives involved in immigration are appropriately balanced.

Consistent with the broad range of enforcement discretion infused in the INA, U.S. Immigration and Customs Enforcement (ICE) agents and officers, U.S. Customs and Border Protection (CBP) agents and officers, and U.S. Citizenship and Immigration Services (USCIS) officers appropriately exercise discretion in their daily activities in the field. DHS agents, officers, and attorneys also exercise discretion in deciding whether to institute charges against an alien or what charges to bring, whether to oppose applications for discretionary relief, and whether and when to execute a removal order. These and other exercises of discretion by ICE, CBP, and USCIS agents and officers are, of course, subject to the supervision and control of superior DHS officials and, ultimately, the Secretary.

B. General Principles Governing Assistance by State and Local Officers in Immigration Enforcement

DHS has long viewed state and local governments as valuable partners that can provide meaningful assistance to DHS with respect to immigration matters. Although only the Federal Government may establish national immigration policy and the comprehensive schemes for administering and enforcing that policy, state and local governments undoubtedly have legitimate interests in certain matters concerning aliens and retain, under their reserved powers, some authority to act on certain matters that may affect aliens and immigration. *See De Canas*, 424 U.S. at 355 (acknowledging that not “every state enactment which in any way deals with aliens is a regulation of immigration and thus per se pre-empted by [the Federal Government’s] constitutional power, whether latent or exercised.”). State governments do not have authority, however, to directly regulate aliens and immigration, *id.* at 358, such as by determining which

Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens” (Mar. 2, 2011), available at <http://www.ice.gov/doclib/news/releases/2011/110302washingtondc.pdf>.

aliens may be admitted to the United States or by setting the terms and conditions under which those aliens may remain. Moreover, state and local governments must be careful to ensure that their actions do not infringe upon the comprehensive regulatory regime of the INA. For a state or local government to act on a matter that affects aliens and immigration, that action cannot interfere with the Federal Government's authority to administer the INA.

The Constitution assigns responsibility for the regulation of immigration to the National Government because it concerns not a single state, but an aspect of the external relations of the Nation as a whole—in particular, the admission and treatment in the United States of the citizens or subjects of other nations. As with other matters concerning the Nation's external relations, the actions of "a single State" "can, at her pleasure, embroil us in disastrous quarrels with other nations." *Chy Lung v. Freeman*, 92 U.S. 275, 280 (1875). For "[e]xperience has shown that international controversies of the gravest moment, sometimes even leading to war, may arise from real or imagined wrongs to another's subjects inflicted, or permitted, by a government." *Hines*, 312 U.S. at 64. Reflecting these sensitivities, states also may not effect the "[l]egal imposition of distinct, unusual and extraordinary burdens and obligations upon aliens" or those believed to be aliens. *Id.* at 65-66.

Under the Supremacy Clause of the U.S. Constitution, U.S. Const. Art. VI, cl. 2, the judgments of the Federal Government in the execution of federal law must prevail over those of the states. *See City of New York v. United States*, 179 F.3d 29, 35 (2d Cir. 1999) (finding that two governments "cannot work without informed, extensive, and cooperative interaction of a voluntary nature between sovereign systems for the mutual benefit of each system. . . . The potential for deadlock . . . inheres in dual sovereignties, but the Constitution has resolved that problem in the Supremacy Clause . . ."). Accordingly, to the extent that state or local involvement in a federal area is appropriate, such involvement must be consistently cooperative with federal efforts. In fact, in the long experience of DHS (and the Immigration and Naturalization Service before it), the on-the-ground assistance rendered by state and local governments to federal immigration enforcement officers has often been of this cooperative nature, with the former deferring to federal officers in deciding whether or how to proceed under the INA in particular cases or with respect to particular aliens when questions arise. That relationship is also reflected in the formation of task forces that include DHS officers and state and local law enforcement officers, such as Border Enforcement Security Task Forces (BESTs). It is also found in more informal, flexible interactions where state and local law enforcement assist federal authorities in issues related to immigration enforcement that arise through their routine local law enforcement duties. Where state and local officers and DHS officers work closely together, often along the U.S. border, state and local officers are responsive to the requests, needs, and guidance of the federal agency.⁵

⁵ The Federal Government may, at times, take a secondary, supporting role to a state enforcement effort that is primarily aimed at enforcing state law. State and local law enforcement officers may seek assistance in a state-led operation aimed at carrying out a state's own police powers, but request DHS assistance based on the knowledge that they may encounter an immigration issue in the course of that operation. Where DHS assists in these situations, DHS may take a secondary role in the overall operation, but the primary and lead role on any federal immigration issues encountered in the course of the operation.

As explained below, these principles regarding the relationship between DHS and state and local officers in the enforcement of federal immigration law are embodied in the INA itself.

II. INA PROVISIONS SPECIFICALLY GOVERNING SYSTEMATIC ASSISTANCE BY STATE AND LOCAL OFFICERS

As noted above, DHS has long viewed state and local governments as valuable partners that can provide meaningful assistance to DHS in fulfilling its responsibilities with respect to enforcing the immigration laws. Those governments, however, must be careful to ensure that their actions do not infringe upon the comprehensive regulatory regime of the INA, including its vesting of enforcement authority and discretion in the Secretary, or upon the Federal Government's constitutional authority over foreign affairs. That is especially true with respect to the identification, apprehension, detention, and removal of aliens not lawfully present in the United States.⁶

A. The General Statutory Framework Governing Assistance by State and Local Officers and Employees

The basic premises of the relationship between federal officials and state and local law enforcement officers are embodied in federal law, which identifies and defines the role of state and local officers who assist federal officers in the identification, apprehension, detention, and removal of aliens under the INA. Congress has explicitly authorized state and local law enforcement officers to participate in enforcement actions in specified circumstances. *See, e.g.*, 8 U.S.C. §§ 1324(c) (providing that arrests for violation of the INA's criminal prohibitions against smuggling, transporting or harboring aliens may be made not only by federal immigration officers, but also by "all other officers whose duty it is to enforce criminal laws"); 1252c (authorizing state and local law enforcement officials to arrest aliens who are unlawfully present in the United States and were previously removed after being convicted of a felony but only if they have confirmed the status of such aliens with ICE); 1103(a)(10) (granting power to DHS to authorize state and local law enforcement officers, when an "actual or imminent mass influx of aliens . . . presents urgent circumstances requiring an immediate Federal response," to perform functions of federal immigration officers). Outside of such specific authorizations, 8 U.S.C. § 1357(g), entitled "Performance of immigration officer functions by State officers and employees," recognizes two additional avenues for state and local law enforcement officers to provide assistance to federal officials in enforcing the INA and identifies the permissible contours of that assistance.⁷

First, 8 U.S.C. § 1357(g) allows DHS to enter into a written agreement with a state or a

⁶ As the focus of this guidance is on state government actions related to the enforcement of restrictions imposed by the Federal Government on which aliens may enter the United States and the conditions under which aliens are permitted to remain, we do not address provisions in federal law concerning the authority of state governments to take actions relating to the grant or denial of certain benefits, services, or privileges to particular classes of aliens.

⁷ In addition to authorizing cooperation between state and local law enforcement and federal officials on immigration enforcement, Congress has also specifically prohibited state or local governments from restricting communication with the Federal Government regarding immigration status of individuals. *See* 8 U.S.C. §§ 1373(a)-(b); 1644.

political subdivision, to enlist its voluntary assistance in the performance of various tasks relating to the “investigation, apprehension, or detention of aliens in the United States.” 8 U.S.C. § 1357(g)(1). Where this process is utilized, the state or political subdivision’s officers’ activities are limited both by the terms of the agreement—a so-called “287(g) Agreement”—and by the INA itself, which, among other conditions, requires that the state and local law enforcement officers who are conducting immigration enforcement operations are “qualified to perform a function of an immigration officer,” have “knowledge of, and adhere to, Federal law relating to the function,” and “have received adequate training regarding the enforcement of relevant Federal immigration laws.” 8 U.S.C. § 1357(g)(1) and (2). Just as critically, all functions performed under a 287(g) Agreement “shall be subject to the direction and supervision of the [Secretary].” 8 U.S.C. § 1357(g)(3). Exercising its authority under subsection 1357(g), DHS has entered into cooperative agreements with more than 60 state and local law enforcement agencies to allow appropriately trained and supervised state and local officers to perform enumerated immigration-related functions. These agreements have been designed to ensure that those officers exercise immigration enforcement authority in a manner that is consistent with the multi-faceted federal objectives and priorities, and do so under federal supervision to preserve the flexibility and discretion called for under federal law.

Second, paragraph (10) of subsection 1357(g) allows state and local officers to participate in certain aspects of the enforcement of immigration laws outside of a formal written agreement, through formal or informal “cooperat[ion] with the [Secretary].” Paragraph (10) states:

Nothing in this subsection shall be construed to require an agreement under this subsection in order for any officer or employee of a State or political subdivision of a State -- (A) to communicate with the [Secretary] regarding the immigration status of any individual, including reporting knowledge that a particular alien is not lawfully present in the United States; or (B) otherwise to cooperate with the [Secretary] in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States.

As contemplated by this provision, DHS has invited and accepted the assistance of state and local law enforcement personnel in a variety of contexts that lie outside of the written agreements provided for by paragraphs (1) - (9) of subsection 1357(g), such as through BESTs, the Criminal Alien Program, Fugitive Operations Task Forces, and Operation Community Shield. Moreover, state and local law enforcement officers render assistance to DHS on a case-by-case basis as immigration matters come to their attention in the performance of their regular duties under state or local law.

Through these and other cooperative arrangements, state and local governments have been able to assist DHS in a manner that conforms to DHS’s balanced administration of a complex immigration scheme and that is consistent with DHS’s specific priorities and approach. In the next section, this memorandum elaborates upon the meaning of this requirement for state and local officers and employees to “cooperate” with the Secretary.

B. Interpretation of “Cooperate”

Under the INA, an officer or employee of a state or political subdivision of a state may,

without a written agreement with the Department, “cooperate with the [Secretary] in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States.” 8 U.S.C. § 1357(g)(10)(B). The term “cooperate” is not defined in Section 1357, but the content of the term follows from federal primacy in the administration and enforcement of the immigration laws and from the text and overall structure of the INA. Based on those sources, the Department interprets the term “cooperate” in subparagraph 1357(g)(10)(B) to mean **the rendering of assistance by state and local officers to federal officials, in the latter officials’ enforcement of the INA, in a manner that maintains the ability to conform to the policies and priorities of DHS and that ensures that individual state and local officers are at all times in a position to be—and, when requested, are in fact—responsive to the direction and guidance of federal officials charged with implementing and enforcing the immigration laws.**

1. Cooperation Requires Federal Primacy in Immigration Enforcement

Consistent with the Constitution’s vesting of authority over immigration policy and regulation with the Federal Government and Congress’s vesting of enforcement authority and discretion with the Secretary, DHS must have exclusive authority to set enforcement priorities and to determine how best to allocate DHS’s resources. Federal primacy also requires that DHS be able to effectuate the enforcement discretion that the INA vests in the Secretary, and that state and local law enforcement officers systematically assisting DHS in enforcing the INA be in a position to conform to and effectuate that discretion as well. The INA’s “cooperation” requirement means that a state or local government may not adopt its own mandatory set of directives to implement the state’s own enforcement policies, because such a mandate would serve as an obstacle to the ability of individual state and local officers to cooperate with federal officers administering federal policies and discretion as the circumstances require. State or local laws or actions that are not responsive to federal control or direction, or categorically demand enforcement in such a way as to deprive the Federal Government—and state and local officers—of the flexibility and discretion that animates the Federal Government’s ability to globally supervise immigration enforcement, do not constitute the requisite “cooperation” within the meaning of 8 U.S.C. § 1357(g)(10)(B), even if the state or local government’s own purpose is to enforce federal immigration law.

Against this backdrop, for state and local law enforcement officers to “cooperate” with the Secretary (within the meaning of 8 U.S.C. § 1357(g)(10)(B)) in rendering assistance to DHS officers, those officers must at all times be in a position to be—and, when requested, must in fact be—responsive to federal enforcement discretion, and their assistance must be rendered within any parameters set by DHS so that DHS can exercise control over enforcement and has the flexibility to respond to changing considerations.

2. The INA Confirms that Where a State or Local Government Would Participate Systematically in the Identification, Apprehension, Detention, or Removal of Aliens, the State or Local Action Must Be Responsive to Federal Direction

The text of the statute makes clear that state and local governments may not adopt and implement their own enforcement programs based on their own assessment of what is

appropriate for administering the INA, separate and apart from what the Secretary has established and oversees. Thus, 8 U.S.C. § 1357(g)(10)(B) refers to the states cooperating “*with the [Secretary]*” (emphasis added), the federal officer charged by Congress with the administration of the INA.

The requirement of some measure of federal control is also confirmed by paragraph 1357(g)(10)’s reference to “cooperat[ion]” in the “removal” of aliens not lawfully present. It is clear that state and local officers have no authority to remove an alien from the United States, or to institute or conduct proceedings to that end. Inclusion of this function as part of the four-step enforcement process described in paragraph (10) of Section 1357(g) signifies that nature of “cooperation” that is required with respect to the process as a whole—with the Secretary having the leading and primary role.

This interpretation of “cooperate” is further confirmed by considering the statutory context in which the word “cooperate” appears, as well as the constitutional background against which the INA was enacted (wherein, as explained above, the Federal Government and not the states is assigned responsibility over immigration policy and foreign affairs). Subparagraph 1357(g)(10)(B) concerns cooperation by state and local officers in the “identification, apprehension, detention, [and] removal of aliens not lawfully present in the United States.” But this provision is part of a broader statutory scheme that balances this function (*i.e.*, removal of aliens not lawfully present) against numerous complementary or even competing aims, as noted above. When DHS acts to enforce restrictions related to the entry of aliens, it does so respecting these complementary and competing aims. The United States has ongoing relationships with foreign nations and is mindful as to how it exercises its immigration authority because of the potential consequences for those relationships, and because of the potential for foreign governments to take reciprocal or retaliatory measures against U.S. nationals abroad. State and local officers must retain the requisite freedom to conform to the discretion of federal authorities, so that they do not take actions that frustrate federal objectives and discretion and that any actions they do take are consistent with applicable conditions under federal law, regulations, and procedures.

In requiring “cooperation,” the INA thus requires that a state or local law enforcement officer who assists DHS officers in their enforcement of the immigration laws must at all times have the freedom to adapt to federal priorities and direction and conform to federal discretion, rather than being subject to systematic mandatory state or local directives that may work at odds with DHS. Although a similar lack of receptiveness to federal priorities might pervade even a system that gives officers discretion, any such state or local government-directed mandate would necessarily function as a parallel or contradictory direction, in competition with the Secretary’s direction, as to how to enforce immigration law, thereby eroding the federal government’s exclusive authority over immigration enforcement. Where inconsistent with federal priorities, a mandatory directive would force the Federal Government to divert resources away from the enforcement priorities it has set. Even if a state or local mandatory directive matches the federal priorities in place at the time of adoption, federal priorities and the manner in which they are applied can, and do, change. In fact, over the past two years, the federal immigration

enforcement priorities and the manner in which they are applied have been significantly revised.⁸ While any mandatory scheme raises these concerns, they are particularly pressing where state or local mandates are codified because such codified laws are by their nature more difficult to adjust to respond to changing priorities of the Federal Government.

3. Cooperation is Not Limited to a Particular Form

The Federal Government may work with state and local governments in various ways, as it currently does, so their participation is not restricted to a particular form. The federal oversight role may range from express, direct involvement—such as DHS officers participating in a joint task force with state and local law enforcement officers—to implied, indirect involvement—such as DHS officers sharing information or general advice and guidance with state and local law enforcement officers. The “cooperation” requirement, however, does not necessarily require *ex ante* permission from the Federal Government for state and local law enforcement personnel to assist in immigration enforcement. Paragraph 1357(g)(10) recognizes that formal authorization is not required before every instance of such cooperation. And the INA’s requirement that the assistance rendered by state and local officers be cooperative or responsive to federal priorities and exercise of discretion likewise does not require affirmative authorization in advance or federal involvement in every single act of assistance. DHS may choose to confine its role simply to establishing a general program under which a state or local officers may act repeatedly in a manner that is consistent with that program and with the policy or direction set by the Federal Government as it relates to the program. And DHS may elect to invite and accept—as it traditionally has—individual instances of assistance by state and local officers that arise out of the performance of their regular duties under state and local law.

But to constitute genuine cooperation as contemplated by 8 U.S.C. § 1357(g)(10), state or local governments must not systematically act in a way that conflicts with the policies or priorities set by the Federal Government or limits the ability of the Federal Government to exercise discretion under federal law whenever it deems appropriate. States may not act with the aim or effect of altering the Federal Government’s prioritization or balancing of different goals—such as by effectively compelling the Federal Government to address certain ends or by furthering those ends while disregarding others, or by attempting to frustrate the Federal Government’s accomplishment of one end to advance other ends. In other words, when states attempt to act in the immigration arena, their actions cannot disrupt or interfere with the Federal Government’s pursuit of its multiple, interrelated goals. Rather, for those actions to qualify as cooperation, they must assist the Federal Government in accomplishing its goals.

⁸ See, e.g., Memorandum from John Morton, Director, U.S. Immigration and Customs Enforcement, titled “Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens” (June 17, 2011), available at <http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf>; Memorandum from John Morton, Director, U.S. Immigration and Customs Enforcement, titled “Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens” (Mar. 2, 2011), available at <http://www.ice.gov/doclib/news/releases/2011/110302washingtondc.pdf>.

4. Communication with the Federal Government About Immigration Status

The provisions of the INA addressing communications by state and local officers with DHS are consistent with and reinforce the foregoing interpretation of “cooperate.” Communications between state and local officers and the Secretary regarding the immigration status of an individual are addressed by both 8 U.S.C. § 1357(g)(10)(A) and 8 U.S.C. § 1373. State and local actions pursuant to these provisions that are taken in connection with assisting DHS in enforcement of federal immigration laws—and specifically, in connection with assisting DHS in the identification, apprehension, detention, or removal of unlawfully present aliens—as distinguished from the state or local government’s own purposes, must, like actions taken pursuant to 8 U.S.C. § 1357(g)(10)(B), be done in “cooperation” with the Secretary. Neither provision gives state or local officials authority to use these communications in a systematic manner for the investigation and apprehension of aliens in ways that are not coordinated with and responsive to federal priorities and discretion.

Subparagraph (10)(A) of subsection 1357(g) permits state and local officers “to communicate with the [Secretary] regarding the immigration status of an individual, including reporting knowledge that a particular alien is not lawfully present in the United States.” This provision must be read in light of subparagraph 1357(g)(10)(B), which immediately follows and provides for state and local officers to “*otherwise cooperate*” with the Secretary, without a written agreement. Because the INA thus deems communications referred to in subparagraph (A) to be another form of “cooperation” of the sort referred to in subparagraph (B), the interpretation of “cooperate” set forth above applies equally to communications by state and local officers on immigration status (made pursuant to subparagraph 1357(g)(10)(A)) as it does to other state and local efforts to participate “in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States” (pursuant to subparagraph 1357(g)(10)(B)).

Section 1373 recognizes state authority to request information from the Federal Government “regarding the immigration status, lawful or unlawful, of any individual,” and further obligates DHS to “respond to an inquiry by a Federal, State, or local government agency, seeking to verify or ascertain the citizenship or immigration status of any individual within the jurisdiction of the agency for any purpose authorized by law, by providing the requested verification or status information.” 8 U.S.C. § 1373(b)-(c). Section 1373 thus permits state and local governments to make inquiries on specific aliens and requires DHS to respond to such individual requests.

Section 1373 was enacted by Congress at the same time as paragraph 1357(g)(10), *see* Omnibus Consolidated Appropriations Act, 1997, Pub. L. 104-208, §§ 133, 642 (1996), and therefore the two provisions should be read consistently with each other. *See Wood v. A. Wilbert’s Sons Shingle & Lumber Co.*, 226 U.S. 384, 389 (1912) (separate parts of the same enactment should be read as to not conflict and should be construed such that “each [part has] its proper application, distinct from and harmonious with that of the other.”). When these provisions are read together, 8 U.S.C. § 1373 ensures that no external restriction on the communications between government entities will prevent state and local officers from cooperatively assisting the Federal Government under 8 U.S.C. § 1357(g)(10). *See* 8 U.S.C. § 1373(a)-(b).

Further, a state or local government may use the procedures described by subsection 1373(c) to promote *bona fide* state interests—for example, investigating identity fraud or ensuring eligibility for certain state benefits. But when a state or local government utilizes section 1373 to systematically assist in the “identification, apprehension, detention, or removal of aliens not lawfully present in the United States,” such assistance efforts must be “cooperative” pursuant to the requirements of paragraph 1357(g)(10). In other words, while state and local governments are authorized under section 1373 to inquire into immigration status on individual cases, state and local governments cannot mandate the use of the procedures described by that section for purposes of enforcing the INA’s immigration provisions in a manner that conflicts with policies and priorities of DHS. Any such state-directed mandate would function as direction designed to compete with the Secretary’s direction as to how to enforce immigration law, thereby impermissibly challenging the Federal Government’s exclusive authority over immigration enforcement, interfering with federal enforcement discretion, and forcing the Federal Government to divert resources away from the enforcement priorities it has set.

Finally, there is an important distinction between communication of alien-status information between a state or local government and DHS, and the original acquisition of information by the state or local officer from an individual. The terms “[t]o communicate” and “report” in 8 U.S.C. 1357(g)(10)(A) encompass only the specific act of exchanging information with DHS; that provision does not, in itself, provide a state or local officer with additional authority to investigate an individual’s immigration status so as to acquire information that might be communicated to DHS. Nor does 8 U.S.C. § 1373, by itself, provide the state or local officers with that additional authority. A state or local officer’s ability to acquire such information as to immigration status, therefore, must derive from another source – for example, when the officer is acting pursuant to a written agreement or otherwise in cooperation with the Secretary under 8 U.S.C. § 1357(g), or when the officer learns of information incidentally in the performance of regular police functions.

III. PRACTICAL APPLICATION

To better illustrate the application of the principles discussed above, including the definition of the term “cooperate” in 8 U.S.C. § 1357(g)(10)(B) and the general immigration and preemption principles under which this statutory provision operates, below are some examples of state and local government actions categorized based on whether they are permissible or whether they would infringe on the Federal Government’s authorities. In reviewing this list, there are several critical factors to bear in mind.

First, this is a *non-exhaustive* list that is intended to provide a select few examples of the above guidance in practice. The fact that a state or local government’s contemplated actions do not have an analogue on this list does not have any bearing on whether such actions would be permissible cooperation or impermissible.

Second, a state and local government’s actions always *must be considered in their precise context*. The below examples are hypotheticals that are divorced from any particular state or local statutory regime or operational practice. Merely because a state or local government takes some action that bears a resemblance to one of the examples below does not mean that the

Federal Government may not reach the opposite conclusion as to the permissibility of that state or local action based on the exact wording and structure of the statute in question, the relationship of that state or local action to other state or local actions, the impact of that state or local action on U.S. foreign affairs, or the means by which the state or local government acts in practice.

Third, the definition of “cooperate” in 8 U.S.C. § 1357(g)(10)(B) as described above controls, not the examples below. A state or local government’s actions must **maintain the ability to conform to the policies and priorities of DHS and ensure that individual state and local officers are at all times in a position to be—and, when requested, are in fact—responsive to the exercise of direction and guidance of the federal officials charged with implementing and enforcing the immigration laws.**

A. Cooperation and Other Permissible Actions

- State and local law enforcement officers participating in joint task forces with DHS immigration officers (among other possible U.S. and international partners), where one purpose of the task force includes identifying and apprehending individuals suspected of being in violation of federal immigration law.
- State and local law enforcement officers providing assistance to DHS immigration officers in the execution of a civil or criminal search or arrest warrant for individuals suspected of being in violation of federal immigration law—for example, by providing tactical officers to join the federal officials during higher risk operations, or providing perimeter security for the operation (*e.g.*, blocking off public streets).
- State and local governments providing state equipment, facilities, or services for use by federal immigration officials for official business.
- Where independent state or local law grounds provide a basis for doing so, state and local law enforcement officers seizing evidence or initiating a stop of an individual at the request of DHS immigration officers where the seizure or stop would aid an ongoing federal investigation into possible violations of federal immigration law.
- Allowing federal immigration officials access to state and local facilities for the purpose of identifying detained aliens who are held under the state or local government’s authority, but who also may be of interest to the Federal Government.
- Where state government officials learn in the normal course of state business of possible violations of federal immigration law, referring those possible violations to DHS immigration officials on a case-by-case basis.

- State or local governments sharing information related to immigration matters with DHS—whether this occurs by state or local governments utilizing standing information-sharing programs established by DHS, developing relationships with local DHS offices through which information is shared on a regular basis, or making calls to DHS on a case-by-case basis.
- A state or local government exercising certain immigration authorities delegated to it by DHS pursuant to a written agreement.

B. Impermissible Actions

- State and local governments attempting to independently remove an alien from the United States or imposing sanctions on an alien due to a suspected violation of federal immigration law.
- State and local governments establishing programs under which aliens currently in foreign countries may seek permission to enter the United States, or state or local governments independently facilitating the entry of aliens into the United States.
- State governments mandating that state or local law enforcement officers inquire into the immigration status of a specified group or category of individuals.
- State governments requiring aliens, because of their status as aliens, to perform certain tasks or satisfy certain criteria that the INA and federal law neither requires nor expressly authorizes, in order for those aliens to avoid sanctions by state officials.
- State or local governments creating state prohibitions or imposing civil or criminal sanctions for conduct that is within the scope of the INA, even if not prohibited by the INA—for example, penalizing aliens present in the United States without lawful status, penalizing aliens who are in violation of federal registration requirements, or prohibiting aliens who do not have work authorization from the Federal Government to seek work within a state.
- State or local government officials consistently referring certain classes of individuals or matters to DHS for some action to such an extent as to risk burdening limited DHS resources and personnel either after being asked by DHS not to refer those matters or where such referrals fall outside of DHS priorities.
- State and local governments creating a program that authorizes aliens to work in their jurisdictions without regard to whether the aliens have work authorization from the Federal Government.
- State and local governments proscribing or penalizing the use of consular

identification cards or other documents, in circumstances where their use would be reasonably related to fulfilling the United States' treaty-based obligation to inform arrested or detained aliens that they may have their country's embassy or consulate notified, and that officials from the embassy or consulate must be allowed access to them upon request.

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

CITY OF EL CENIZO, TEXAS,
et al.,

Plaintiffs,

V.

**THE CITY OF HOUSTON,
TEXAS,**

Intervenor

V.

THE STATE OF TEXAS, *et. al.*

Defendants.

C.A.No.5:17-CV-00404-OLG
(Lead Case)

C.A.No.5:17-CV-00459-OLG
(Consolidated Case)

**C.A.No.5:17-CV-00489-OLG
(Consolidated Case)**

**CITY OF HOUSTON’S MEMORANDUM IN SUPPORT OF PLAINTIFFS’
MOTIONS AND/OR APPLICATIONS FOR PRELIMINARY INJUNCTION**

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iv
INTRODUCTION	1
STANDARDS GOVERNING PRELIMINARY INJUNCTIONS.....	4
SENATE BILL 4.....	5
ARGUMENT	8
I. SB4 IS PREEMPTED BY FEDERAL LAW	8
A. Federal Preemption Principles Governing this Case	8
B. SB4 Directly and/or Impliedly Conflicts with § 1357(g)’s Scheme to Ensure That Those Functioning as Immigration Officers are Trained, Certified, and Carefully-Supervised by the U.S. Attorney General	12
1. Subsection 1357(g)’s Local Enforcement Scheme.....	12
2. SB4 Conflicts with and Impermissibly Skews the Scheme of Federal Immigration Enforcement Set Forth in § 1357(g).....	21
C. Texas’ and the Government’s Preemption Responses are Misdirected, Baseless, or Both	24
1. No Deference is Due the Government’s Views on SB4’s Preemptive Effect or Its Statement of Interest.....	24
2. SB4’s Penalties and Mandates Are Not Merely a “Matter of Internal State Management”.....	25
3. The Government’s “Cooperation” Arguments Ignore the Operative Provisions of § 1357(g) and its Own Guidance	29
4. The Government’s Argument that Federal Law is Not in Conflict with SB4 Because It Does Not Prohibit Inquiring About Immigration Status is Misdirected.....	33
II. SB4 VIOLATES THE HOME-RULE PROVISIONS OF TEXAS CONSTITUTION ART. XI, § 5	35

III.	SB4 VIOLATES THE FIRST AMENDMENT AND TEXAS CONSTITUTION ART. I, § 8	37
IV.	SB4 VIOLATES THE FOURTH AMENDMENT AND THE TEXAS CONSTITUTION, ART. I, § 9	38
V.	SB4 VIOLATES THE FOURTEENTH AMENDMENT EQUAL PROTECTION AND DUE PROCESS CLAUSES AND TEXAS CONSTITUTION ARTS. I, §§ 3 & 9	38
	PRAYER FOR RELIEF	39
	CERTIFICATE OF SERVICE	41

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Altria Grp., Inc. v. Good</i> , 555 U.S.70 (2008).....	9
<i>Anderson v. Edwards</i> , 514 U.S. 143 (1995).....	11
<i>Buckman v. Plaintiffs’ Legal Comm.</i> , 531 U.S. 341 (2001)	10, 11, 22, 23
<i>Chapman v. Hous. Welfare Rights Org.</i> , 441 U.S.600 (1979)	28
<i>City of Hugo v. Nichols (Two Cases)</i> , 656 F.3d 1251 (10th Cir. 2011)	28
<i>City of Richardson v. Responsible Dog Owners</i> , 794 S.W.2d 17 (Tex. 1990).....	36
<i>Columbus v. Ours Garage & Wrecker Service, Inc.</i> , 536 U.S.424 (2002).....	26
<i>Commissions Imp. Exp. S.A. v. Republic of the Congo</i> , 757 F.3d 321 (D.C. Cir. 2014)	33
<i>Crosby v. Nat’l Foreign Trade Council</i> , 530 U.S.363 (2000).....	10
<i>Dallas Merch. ’s & Concessionaire’s Ass’n v. City of Dallas</i> , 852 S.W.2d 489 (Tex. 1993).....	35
<i>De Canas v. Bica</i> , 424 U.S. 351 (1976)	12
<i>Donelon v. La. Div. of Admin. Law ex rel. Wise</i> , 522 F.3d 564 (5th Cir. 2008)	27
<i>Ex parte Young</i> , 209 U.S.123 (1908)	28

<i>Fla. Lime & Avocado Growers, Inc. v. Paul</i> , 373 U.S. 132 (1963)	9
<i>Ga. Latino All. for Human Rights v. Governor of Georgia</i> , 691 F.3d 1250 (11th Cir. 2012)	11
<i>Galarza v. Szalczyk</i> , 745 F.3d 634 (3d Cir. 2014)	15
<i>Geier v. Am. Honda Motor Co.</i> , 529 U.S. 861 (2000)	9, 25
<i>Green v. Mansour</i> , 474 U.S. 64 (1985)	28
<i>Hillsborough Cty. v. Automated Med. Labs., Inc.</i> , 471 U.S. 707 (1985)	9
<i>Hines v. Davidowitz</i> , 312 U.S. 52 (1941)	9
<i>Hotel & Motel Ass’n of Oakland v. City of Oakland</i> , 344 F.3d 959 (9th Cir. 2003)	11
<i>Jones v. Rath Packing Co.</i> , 430 U.S. 519 (1977)	9
<i>Koog v. United States</i> , 79 F.3d 452 (5th Cir. 1996)	26, 33
<i>Medtronic, Inc. v. Lohr</i> , 518 U.S. 470 (1996)	8
<i>Mercado v. Dallas Cty.</i> , 2017 WL 169102 (N.D. Tex. Jan. 17, 2017).....	15
<i>Monk v. Wyeth Pharm., Inc.</i> , SA-16-CV-1273-XR, 2017 WL 2063008 (W.D. Tex. May11, 2017).....	11
<i>Motor Coach Employees v. Lockridge</i> , 403 U.S. 274 (1971)	32
<i>Perdue v. Wyeth Pharm., Inc.</i> , 209 F. Supp. 3d 847 (E.D.N.C. 2016)	11, 22

<i>PLIVA, Inc. v. Mensing</i> , 564 U.S. 604 (2011)	24
<i>Rogers v. Brockette</i> , 588 F.2d 1057 (5th Cir. 1979), <i>cert. denied</i> 444 U.S. 827 (1979)	27
<i>Savage v. Jones</i> , 225 U.S. 501 (1912)	10
<i>Sears, Roebuck & Co. v. San Diego Cty. Dist. Council of Carpenters</i> , 436 U.S. 180-94 (1978)	9
<i>Speaks v. Kruse</i> , 445 F.3d 396 (5th Cir. 2006)	4
<i>United States v. Arizona</i> , 567 U.S. 387 (2012)	passim
<i>United States v. Arizona</i> , 641 F.3d 339 (9th Cir. 2011), <i>aff'd in part, rev'd in part</i> , 567 U.S. 387 (2012)	13
<i>United States v. Salerno</i> , 481 U.S. 739 (1987)	11
<i>Wash. State Grange v. Wash. State Republican Party</i> , 552 U.S. 442 (2008)	11
<i>Weber v. Anheuser-Busch, Inc.</i> , 348 U.S. 468 (1955)	9
<i>Williams v. Mayor</i> , 289 U.S. 36 (1933)	27
<i>Wis. Public Intervenor v. Mortier</i> , 501 U.S. 597 (1991)	25, 26
<i>Wyeth v. Levine</i> , 555 U.S. 555 (2009)	8, 9, 24, 25
 Constitution and Statutes	
Texas Const. art. XI, § 5	35
8 U.S.C. § 1357	passim

Tex. Code Crim. P. § 2.13	7
Tex. Gov’t Code § 311.021	15
Tex. Gov’t Code § 311.023	15
Tex. Gov’t Code § 402.0241	7
Tex. Gov’t Code § 752.051	5
Tex. Gov’t Code § 752.053	5, 6, 39
Tex. Gov’t Code § 752.055	6, 39
Tex. Gov’t Code § 752.056	6
Tex. Gov’t Code § 752.0565	6
Tex. Penal Code § 12.21	7

Other Authorities

8 C.F.R. § 287.7	15
Fed. R. Evid. 201	5, 16
Amasa M. Eaton, <i>The Right to Local Self-Government</i> , 13 Harv. L. Rev. 441 (Feb. 1900)	28
Annie Decker, <i>Preemption Conflation: Dividing the Local from the State in Congressional Decision Making</i> , 30 Yale L. & Policy Rev. 321 (Spring 2012)	28
Jake Sullivan, <i>Comment, The Tenth Amendment and Local Government</i> , 112 Yale L.J. 1935 (May 2003)	28
Richard Briffault, <i>Our Localism: Part I—The Structure of Local Government Law</i> , 90 Colum. L. Rev. 1 (1990)	28
U.S. Dep’t of Homeland Security, <i>Guidance on State and Local Governments’ Assistance in Immigration Enforcement and Related Matters</i> 7 (July 16, 2015)	passim

City Charter

Houston, Tex., <i>City Charter</i> , Art. II, § 2(a)	39
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Houston, Tex., <i>City Charter</i> , Art. II, § 2(b).....	39
Houston, Tex., <i>City Charter</i> , Art. V, <i>et seq</i>	39

Plaintiff/Intervenor the CITY OF HOUSTON (“Houston”) files this its Memorandum in Support of the Motions and/or Applications for Preliminary Injunction of the cities of El Cenizo [Dkt. 24], El Paso [Dkts. 56 & 56-1], Austin [Dkt. 57], and San Antonio [Dkt. 77], pursuant to this court’s briefing order, dated June 30, 2017. In support thereof, Houston would show as follows:

INTRODUCTION

Senate Bill 4’s (“SB4”) constitutionality and this court’s decision whether to grant a preliminary injunction turn, in large part, upon this court’s willingness to suspend reality, ignore or rewrite numerous provisions of the existing immigration laws, and embrace a cynical myth: that holding Texas peace officers and elected and appointed officials hostage to bankrupting fines and draconian penalties, including summary removal from office, does not make anything they are asked or allowed to do under SB4 mandatory. In fact, Defendants, the State of Texas (“Texas”) and United States (“the Government”), contend that SB4 does nothing more than require “cooperation” with federal immigration authorities. Paraphrasing “Cool Hand Luke,” it is as if, surveying the vast field of Texas police officers and chiefs, city council members, mayors, and city managers, jail administrators, and city, county, and district attorneys that SB4 would hold captive, the Governor announced: “what we’ve got here is a failure to cooperate.”

Fortunately, this court does not have the luxury of pretending what is, isn’t.

Although Houston intervened in these consolidated lawsuits too late to file its own application for preliminary injunction, this court has generously permitted Houston to join in those applications and motions filed by other plaintiffs and to file

its own brief in support of those motions. To that end, Houston seeks to do three things: 1) to supplement the core arguments made by other plaintiffs in their applications and demonstrate why plaintiffs more than meet the standards required for a successful, pre-enforcement, facial challenge to the key provisions of SB4; 2) to address the misdirected and/or baseless arguments Texas and the Government have made but that other plaintiffs may not have not fully addressed; and 3) to adopt the First Amendment and Texas Constitution Art. I, § 8; Fourth Amendment and Texas Constitution, Art. I, § 9; and Fourteenth Amendment Equal Protection and Due Process Clauses and Texas Constitution Art. I, §§ 3 & 9 arguments made by several other cities in their applications/motions here.

To these ends, Houston argues first that the operative provisions of SB4 are conflict and/or impliedly preempted by federal law, specifically, by the carefully-crafted local immigration enforcement regime established by 8 U.S.C. § 1357. For example, under § 1357(a)(1), the routine inquiries into a detainee's immigration status that SB4 requires are functions only federal immigration officers perform. Under § 1357(g), these functions may only be routinely performed by local police under contracts with the federal government that ensure federal training, certification, and ongoing federal supervision. SB4 requires none of those things. Subsection 1357(g)(5) grants to cities and to the U.S. Attorney General the power to specify in such contracts whether the enforcement activities that local governments will undertake will be mandatory or optional. SB4 gives Texas that authority to wield with a sledge-hammer.

By fundamentally changing the relationship between federal and local governments in immigration enforcement and the methods that may be used to ensure local compliance, SB4 directly and/or impliedly conflicts with 8 U.S.C. § 1357(g)'s detailed scheme to ensure that those who routinely function as immigration officers are trained, certified, and carefully-supervised by the U.S. Attorney General.

Nothing in Texas' and the Government's preemption responses changes this result. First, the U.S. Supreme Court has held that no deference is due the Government's Statement of Interest or views on SB4's preemptive effect it contains because its Statement starkly diverges from DHS' prior pronouncements. Second, a review of SB4, federal immigration statutes, and federalism cases reveals that Defendants' argument that SB4's penalties and mandates are merely a "matter of internal state management" is without merit. Likewise, Defendants' "cooperation" arguments ignore the operative provisions of § 1357(g) and DHS' own Guidance for State and Local Governments. Third, Defendants' argument that federal law is not in conflict with SB4 because it does not prohibit inquiring about immigration status is at odds with the plain language of both SB4 and the federal immigration laws.

In addition to its preemption, SB4 is also constitutionally infirm because it violates the home-rule provisions of the Texas Constitution Art. XI, § 5.

While it was abundantly clear at this court's June 26 hearing that SB4 is a cruel and ill-considered solution in search of a problem, Houston seeks to confirm once and for all that is also facially unconstitutional. Because a careful analysis of SB4 and the

immigration laws it purports to enforce reveals that it is, Houston asks that this court enter a preliminary injunction enjoining its enforcement, in whole or in part.

STANDARDS GOVERNING PRELIMINARY INJUNCTIONS

To grant preliminary injunction, this court must find that plaintiffs have established: (1) a substantial likelihood of success on the merits; (2) a substantial threat of irreparable injury if the injunction is not issued; (3) that, if the injunction is denied, the threatened injury outweighs any harm that will result if the injunction is granted; and (4) that the grant of an injunction will not disserve the public interest.¹

Because Houston entered the case too late to include exhibits to support requirements 2-4, with one exception, it will rely on evidence other plaintiffs provided in declarations, live testimony, and written evidence at the court's hearing on June 26. Houston would, however, call the court's attention to the Declaration of Art Acevedo, Houston's Police Chief, Dkt. 99-2, which it filed prior to the hearing along with its Motion to Intervene and proposed complaint, and that Plaintiffs jointly listed as Exhibit P-9 for that hearing.² It is attached as Exh. A and described where relevant. It more than demonstrates that Houston, like other Texas cities, faces a substantial threat of irreparable injury if the injunction is not issued; that, if the injunction is denied, the threatened injury outweighs any harm that will result if the injunction is granted; and that the grant of an injunction will not disserve the public interest.

¹ *Speaks v. Kruse*, 445 F.3d 396, 400 (5th Cir. 2006).

² See Dkt. 123 [Exh. P- 9].

In this memorandum, however, Houston will focus on satisfying the first prong of the preliminary injunction test: demonstrating a substantial likelihood of success on the merits.

SENATE BILL 4³

SB4 improperly and unconstitutionally changes the existing obligations of municipalities under federal immigration law, transforming them from voluntary and cooperative to mandatory, and subjecting lawmakers and law enforcement officers alike to draconian penalties, not just for violations, but for merely speaking in opposition to the policies SB4 embodies.

SB4's Article 1 amends the Texas Government Code. New § 752.053 requires that "local entities," which, among other things, it defines as city and county governing bodies, officers, and their employees, sheriffs, and county, city, and district attorneys, are prohibited from "adopting, enforcing, or endorsing" a policy, which can include "an informal, unwritten policy," that prohibits or "materially limits" the enforcement of "immigration laws," as demonstrated by "pattern or practice."⁴ SB4 then prohibits these local entities from adopting policies that prohibit or materially limit a police officer from inquiring into the immigration status of a person under lawful detention or under arrest, *id.* at § 752.053(b)(1); inquiring into the detainee's place of birth, *id.* at § 752.053(b)(2); sending that information to United States Citizenship and

³ A copy of the enrolled version of Senate Bill 4 is attached as Exh. B for the Court's convenience. The court is asked to take judicial notice of its provisions. *See* Fed. R. Evid. 201.

⁴ Tex. Gov't Code §§ 752.051(5) (definitions); 752.053(a).

Immigration Services (“USCIS”), Immigration Customs Enforcement (“ICE”), or any other federal agency, *id.* at § 752.053(b)(2)(A); assisting or cooperating with a federal immigration officer, *id.* at § 752.053(b)(3); and/or allowing the federal government access to a jail to enforce federal immigration law. *Id.* at § 752.053(b)(4).

While § 752.054 ostensibly prohibits discrimination, it allows any citizen to file a complaint against any local entity alleging violations of 752.053. *Id.* at § 752.055(a). It then authorizes the Attorney General to seek equitable relief from such violations. *Id.* at § 752.055(b). Subsection 752.056, in turn, provides for civil penalties against local entities found by a court to have violated § 752.053. Each day is a separate violation. *Id.* at § 752.056(b). These escalating civil penalties include exorbitant fines of between \$1,000.00 and \$1,500.00 for the first day of a violation, and, thereafter, between \$25,000 and \$25,500 per day for every subsequent violation. *Id.* at § 752.056. Finally, § 752.0565 provides that elected or appointed officials may be removed from office if they violate § 752.053. Proof sufficient to remove an official need only be “a statement by the public officer.” *Id.* at § 752.0565(b).

Article 2 amends the Texas Code of Criminal Procedure. Art. 2.251(a) mandates that law enforcement agencies that have “custody” of a person subject to a detainer request “shall comply with, honor and fulfill any request made in the detainer request,” whether or not the officer or entity has made any determination that it was issued with probable cause or with any underlying criminal charges [other than immigration offenses] to justify continued detention. However, art 2.251(b) suspends

that duty when the person in custody has provided proof of citizenship or lawful immigration status based on certain government-issued identification.

Article 3 further amends the Texas Government Code. It provides that the Attorney General “shall defend” a local entity sued for complying with an immigration detainer request but only if the Attorney General “determines that the cause of action arises out of a claim involving the local entity’s good-faith compliance with an immigration detainer request.” Tex. Gov’t Code § 402.0241(b). The subsection thus consigns the decision to provide a defense and reimbursement of any judgment to the discretion of the Texas Attorney General, adding an additional means by which Texas can coerce compliance by cities. Only if he or she opts to defend the city will Texas be responsible for any judgment or fees. *Id.* at § 402.0241(c). If the Attorney General turns the case down, however, or if the claim does not qualify for defense, a city is on its own.

Article 5 amends the Local Government and Penal Codes to create a new crime. Under Tex. Penal Code § 39.07, as amended, a sheriff’s, police chief’s, constable’s, or jail administrator’s knowing failure to comply with an immigration detainer request is a Class A misdemeanor, which is punishable by up to a year in jail. *See id.* at § 12.21.

Article 6 amends the Code of Criminal Procedure. It provides that police officers may inquire into the nationality or immigration status of a crime victim or witness if the officer determines, among other things, that the inquiry is necessary to investigate the offense. Tex. Code Crim. P. § 2.13(d)(1).

ARGUMENT

I. SB4 IS PREEMPTED BY FEDERAL LAW⁵

SB4 violates the Supremacy Clause of the United States Constitution because it directly conflicts with multiple federal statutes, regulations promulgated by the Department of Homeland Security, and executive orders of the President.

Although Houston adopts the preemption arguments made and evidence submitted by the cities of El Cenizo and Austin in connection with their motions/applications for preliminary injunction, it will focus here on how SB4 directly and/or impliedly conflicts with federal law.

A. Federal Preemption Principles Governing this Case

The authority of federal law to preempt and thus to supersede state law derives from the Supremacy Clause of the U.S. Constitution, art. VI, cl. 2. In determining whether state law is preempted, courts “must be guided by two cornerstones of our pre-emption jurisprudence. First, ‘the purpose of Congress is the ultimate touchstone in every pre-emption case.’”⁶ Second, “[i]n all pre-emption cases, and particularly in those in which Congress has ‘legislated ... in a field which the States have traditionally occupied’ ... we ‘start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.’”⁷ Federal preemption jurisprudence thus permits three kinds of

⁵ The Application for Preliminary Injunction filed by the City of El Cenizo, *et al.*, raises preemption arguments that encompass those Houston makes here. *See* Dkt. 24-1, at 13-19.

⁶ *Wyeth v. Levine*, 555 U.S. 555, 565 (2009) (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)).

⁷ *Wyeth*, 555 U.S. at 565 (quoting *Lohr*, 518 U.S. at 485).

preemption: express preemption, field preemption, and conflict preemption.⁸ Houston arguments here are directed only to conflict preemption.

Where, as here, conflict preemption has been asserted, federal law supersedes state law only to the extent the two conflict. This can occur in two ways: 1) where it is impossible for a private party to comply with both state and federal requirements;⁹ or 2) where state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”¹⁰

Unlike express and field preemption, conflict preemption turns on the identification of an “actual conflict,” not on any express statement of preemptive intent.¹¹ Instead, “Congress may indicate pre-emptive intent through a statute’s express language or through its structure and purpose.”¹² As the Court explained: “in each case, the pertinent inquiry is whether the two potentially conflicting statutes were ‘brought to bear on precisely the same conduct.’”¹³

⁸ See, e.g., *Hillsborough Cty. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 713 (1985). Express preemption applies where Congress, through a statute’s express language, declares its intent to displace state law. *Id.* Field preemption applies where “the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.” *Id.*

⁹ See, e.g., *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963).

¹⁰ *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941); see *Wyeth*, 555 U.S. at 563-64.

¹¹ *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 884 (2000).

¹² *Altria Grp., Inc. v. Good*, 555 U.S. 70, 76 (2008) (citing *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977)).

¹³ *Sears, Roebuck & Co. v. San Diego Cty. Dist. Council of Carpenters*, 436 U.S. 180, 193-94 (1978) (quoting *Weber v. Anheuser-Busch, Inc.*, 348 U.S. 468, 479 (1955); see also *Wyeth*, 555 U.S. at 583 (Thomas, J., concurring) (“where state and federal law ‘directly conflict,’ state law must give way”).

By contrast, “frustration of purpose” or implied conflict preemption may exist even when there is no direct conflict. Preemptive intent, however, is drawn from the language of statute itself and its structure and purposes. As one court explained:

What is a sufficient obstacle is a matter of judgment, to be informed by *examining the federal statute as a whole and identifying its purpose and intended effects*: ‘For when the question is whether a Federal act overrides a state law, the entire scheme of the statute must of course be considered and that which needs must be implied is of no less force than that which is expressed. *If the purpose of the act cannot otherwise be accomplished—if its operation within its chosen field else must be frustrated and its provisions be refused their natural effect*—the state law must yield to the regulation of Congress within the sphere of its delegated power.’¹⁴

There is also a variation on frustration of purpose/implied conflict preemption that was tailor-made for this case. It is based on the U.S. Supreme Court’s decision in *Buckman v. Plaintiffs’ Legal Comm.*, 531 U.S. 341 (2001). *Buckman* dealt with “fraud-on-the-FDA” claims involving a medical device manufacturer allegedly using fraudulent representations to obtain U.S. Food and Drug Administration (“FDA”) approval for a device. The plaintiffs brought state-law claims against the consultants who made the misrepresentations to FDA. *Id.* at 345-46. Recognizing that state-law claims for fraud-on-the-FDA conflicted with federal law because they skew “a somewhat delicate balance of statutory objectives” advanced by FDA, the Court found that the plaintiffs’ state-law claims were preempted. *Id.* at 348. The Court explained that state-law claims

¹⁴ *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 373 (2000) (quoting *Savage v. Jones*, 225 U.S. 501, 533 (1912)) (emphasis supplied).

that exist “solely by virtue” of federal regulatory requirements are preempted.¹⁵ *Buckman*’s preemptive effect has been extended far beyond its original context.¹⁶

Preemption, as asserted by Houston and other plaintiffs here, is a facial challenge,¹⁷ which ordinarily requires little or no factual evaluation, and is, therefore, an appropriate ground for seeking an injunction in this pre-enforcement stage. Unlike the preemption challenge to § 2(B) in *U.S. v. Arizona*, Houston’s preemption challenge is not to the likely scope of detention, an inquiry the Court found premature.¹⁸ Instead, Houston’s challenge more closely resembles the Government’s preemption challenge to §§ 5(C) and 6 in *Arizona*, both of which the Court found impliedly conflict-preempted. This inquiry involved a careful examination of the plain language and structure and purposes of the statutes to determine if a preemptive conflict, direct or implied, existed.¹⁹ That is what Houston has attempted to do for the court here.

¹⁵ *Id.* at 352-53; *see also* *Perdue v. Wyeth Pharm., Inc.*, 209 F. Supp. 3d 847, 851 (E.D.N.C. 2016) (holding that a state law claim is preempted under *Buckman* if “the existence of these federal enactments is a critical element in [plaintiff’s] case,’ and [if] a plaintiff’s claims ‘exist solely by virtue of the FDCA ... requirements.’” *Id.* (quoting *Buckman*, 531 U.S. at 352)).

¹⁶ *See, e.g.,* *Perdue*, 209 F. Supp. 3d at 851-52; *Monk v. Wyeth Pharm., Inc.*, SA-16-CV-1273-XR, 2017 WL 2063008, at *4 (W.D. Tex. May 11, 2017).

¹⁷ *See United States v. Salerno*, 481 U.S. 739, 745 (1987) (in facial challenges, challenger must establish that no set of circumstances exists under which the challenged act would be valid). The Supreme Court has called into question the continuing validity of the *Salerno* rule in the context of First Amendment challenges, like the one here. *See, e.g.,* *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 339, n.6 (2008). In cases involving federal preemption of an ordinary state statute, however, the rule applies. *See Hotel & Motel Ass’n of Oakland v. City of Oakland*, 344 F.3d 959, 971 (9th Cir. 2003). (quoting *Salerno*, 481 U.S. at 745); *see also* *Anderson v. Edwards*, 514 U.S. 143, 155 n.6 (1995) (applying *Salerno* to a federal preemption [facial] challenge to a state statute).

¹⁸ 567 U.S. 387, 414-15 (2012); *see also* *Ga. Latino All. for Human Rights v. Governor of Georgia*, 691 F.3d 1250, 1267-68 (11th Cir. 2012).

¹⁹ *See Arizona*, 567 U.S. at 406.

Contrary to the groundless assertion made by amicus, Immigration Reform Law Institute, in its brief in support of Texas, there is no special, heightened requirement for or prohibition on finding preemption of state statutes that conflict with immigration laws.²⁰ Moreover, the Institute did not address the conflict preemption arguments Houston makes here and did not address implied conflict preemption at all. Its arguments thus misfire here.

B. SB4 Directly and/or Impliedly Conflicts with § 1357(g)’s Scheme to Ensure That Those Functioning as Immigration Officers are Trained, Certified, and Carefully-Supervised by the U.S. Attorney General

1. Subsection 1357(g)’s Local Enforcement Scheme²¹

8 U.S.C. § 1357(g)(1) provides that, “*Notwithstanding section 1342 of Title 31, the Attorney General may enter into a written agreement with a State, or any political subdivision of a State, pursuant to which an officer or employee of the State or subdivision, who is determined by the Attorney General to be qualified to perform a function of an immigration officer ... may carry out such function at the expense of the State or political subdivision and to the extent consistent with State and local law.*” Subsection 1357(g)(9), provides, however, that “nothing in this subsection shall be construed *to require* any State or political subdivision of a State to enter into an agreement with the Attorney General under this subsection.” *Id.* (emphasis supplied).

²⁰ See Dkt. 137, at 7-8. Instead, the footnote the Institute mis-cites from *De Canas v. Bica*, 424 U.S. 351, 357 n.5 (1976), says nothing more remarkable than that “conflicting law ... should be pre-empted ... ‘only to the extent necessary to protect the achievement of the aims of the federal law’ and reconciled, *if possible*.”²⁰ Grounded in notions of constitutional avoidance, that rule governs every conflict preemption scenario.

²¹ A copy of 8 U.S.C. § 1357 is attached as Exh. C for the court’s convenience.

Subsection 1357(g)(5) governs the content of such agreements and is particularly important for this case. It provides that any written agreement must specify “the specific powers and duties that *may be, or are required to be, exercised or performed* by the individual, the duration of the authority of the individual, and the position of the agency of the Attorney General who is required to supervise and direct the individual.”²² Thus, the plain language of the statute indicates that Congress intended for the decision whether local officers’ immigration enforcement activities would be mandatory or optional to be the sole province of the U.S. Attorney General based on his or her agreement with *local* decision-makers. SB4 takes that power for the State.

Subsection 1357(g) is expressly made subject to 31 U.S.C. § 1342, which is the general prohibition on the federal government’s receiving free services. It provides, in relevant part, that an “officer or employee of the United States Government ... *may not accept voluntary [free] services for either government or employ personal services exceeding that authorized by law* except for emergencies involving the safety of human life or the protection of property.” *Id.* (emphasis supplied). Routine immigration enforcement and, in particular, routine enforcement of ICE detainer requests, which are addressed to individuals who have *already* been “detained” by law enforcement or are already in “custody” does not constitute such an emergency.

In addition, § 1357(g) itself also contains a similar prohibition: “the Attorney General may not accept a service under this subsection if the service will be used to

²² *Id.* (emphasis supplied) (cited in *United States v. Arizona*, 641 F.3d 339, 348 (9th Cir. 2011), *aff’d in part, rev’d in part*, 567 U.S. 387 (2012)).

displace any Federal employee.” *Id.* at § 1357(g)(6). In other words, the federal government is not permitted to use borrowed local police officers to avoid hiring the ICE and DHS employees it needs. Together, subsections 1357(g)(6) and 1342 make clear that the Government may not legally accept, cannot require that local government finance, or that local law enforcement officers *perform the functions of immigration officers* on a routine, systematic basis without a contract.

This is not to say, as Texas argued at the June 26 hearing, that Houston law enforcement officers would have been barred from reporting to ICE Osama bin Laden’s undocumented presence in the Houston Police Department lobby in the absence of a § 1357(g)(1) contract. Subsection 1357(g)(10), read properly, in context, and within the structure and purposes of § 1357(g), provides for just such contingencies. Likewise, 8 U.S.C. § 1373, which provides for cooperation and communication between state law enforcement and federal immigration authorities, would also cover such a contingency.

While ignoring these readily-available “cooperation” provisions in response to Houston’s preemption argument, Texas and the Government nevertheless rely almost exclusively upon §§ 1357(g)(10) and 1373 in arguing that all that SB4 requires is mere cooperation and communication and that nothing in SB4 implicates or requires that a local officer perform the functions of immigration officers. Thus, they argue that there is no need for the kind of agreement § 1357(g) envisions. This court, however, cannot

properly read these provisions in a vacuum to nullify the remainder of § 1357(g) and allow routine performance of immigration officer functions without a contract.²³

First, the Government's and Texas' reading of § 1357(g)(10) is belied by the plain language of SB4. Under § 1357(a)(1), immigration officer functions include the "power without a warrant to interrogate any alien or person believed to be an alien as to his right to be or remain in the United States." This function corresponds directly with SB4's [amended Tex. Gov't Code] § 753.053(b)(1), which provides that cities "may not prohibit or materially limit" their officers from "inquiring into the immigration status of a person under lawful arrest or detention." Thus, under SB4, both immigration officers and local police have the "power to interrogate" regarding immigration status.

Subsection 1357(g)(1) also lists as a function of immigration officers the "detention of aliens in the United States." This function likewise corresponds directly to SB4's [amended Tex. Code Crim. P.] art. 2.251(a)(1), which provides that law enforcement agencies "shall comply with, honor, and fulfill any request made in the [ICE] detainer requests provided by the federal government." Compliance with such detainer "request" is currently voluntary.²⁴ It is, therefore, false to argue, as both Texas

²³ Tex. Gov't Code §§ 311.021(2) ("the entire statute is intended to be effective"); 311.023(5) (in construing a statute, court may consider the "consequences of a particular construction"). The Texas Code Construction Act applies when a federal court is interpreting a Texas statute.

²⁴ See *Galarza v. Szalczyk*, 745 F.3d 634, 643 (3d Cir. 2014) (compliance with detainer request is not mandatory); *Mercado v. Dallas Cty.*, 2017 WL 169102, *16 (N.D. Tex. Jan. 17, 2017) (same); 8 C.F.R. § 287.7(a) ("detainer is a request that such agency advise the Department, prior to the release of the alien ...").

and the Government do, that, under SB4, local police will not perform immigration officer functions but will only “cooperate” with and assist them.

SB4 itself also differentiates between the power to interrogate and the ability to cooperate, communicate, and assist. SB4’s amended Tex. Gov’t Code §753.053(b)(1), empowers officers to inquire “into the immigration status of a person under lawful arrest or detention.” By contrast, § 753.053(b)(3), addresses “assisting and cooperating with federal immigration officers.” Because the Texas Legislature itself treats cooperation and assistance as something separate and distinct from inquiring as to immigration status, this Court may not conflate the two as Defendants suggest.

Subsection’s 1357(g)(6)’s and 1342’s real import then is in restraining Texas’ and the Government’s expansive interpretation of §§ 1357(g)(10) and 1373 as permitting systematic enforcement of immigration laws without a written agreement. Yet there are other reasons for this court to reject the Government’s and Texas’ reading. First, it is undercut by the Government’s own explanation of the purpose of § 1357(g)(10) in its Guidance to State and Local Government’s Assistance in Immigration Enforcement, which is attached as Exh. D here.²⁵ It explains:

As contemplated by this provision [(g)(10)], DHS has invited and accepted the assistance of state and local law enforcement personnel in a variety of contexts that lie outside of the written agreements provided for by paragraphs (1) - (9) of subsection 1357(g), such as through BESTs, the Criminal Alien Program, Fugitive Operations Task Forces, and

²⁵ See U.S. Dep’t of Homeland Security (“DHS”), *Guidance on State and Local Governments’ Assistance in Immigration Enforcement and Related Matters* 7 (July 16, 2015), available at <https://www.dhs.gov/publication/guidance-state-and-local-governments-assistance-immigration-enforcement-and-related>. The court is asked to take judicial notice of this published, government document that is currently available on the DHS website. See Fed. R. Evid. 201.

Operation Community Shield. Moreover, *state and local law enforcement officers render assistance to DHS on a case-by-case basis as immigration matters come to their attention in the performance of their regular duties under state or local law.*

Id. (emphasis supplied). In the Government's view then, § 1357(g)(10) is reserved for special federal programs and case-by-case assistance. Nothing in its *own* explanation would allow for the systematic subversion of the rest of § 1357(g).

Second, the Ninth Circuit also embraced Houston's more cabined reading of § 1357(g)(10) in a part of its opinion that was not raised, briefed, or decided in the Supreme Court.²⁶ It explained:

Although this language, read alone, is broad, we must interpret Congress' intent in adopting subsection (g)(10) in light of the rest of § 1357(g). Giving subsection (g)(10) the breadth of its isolated meaning would completely nullify the rest of § 1357(g), which demonstrates that Congress intended for state officers to aid in federal immigration enforcement only under particular conditions, including the [U.S.] Attorney General's supervision. *Subsection (g)(10) does not operate as a broad alternative grant of authority for state officers to systematically enforce the INA outside of the restrictions set forth in subsections (g)(1)-(9).*

The inclusion of the word 'removal'²⁷ in subsection (g)(10)(B) supports our narrow interpretation of subsection (g)(10). Even state and local officers authorized under § 1357(g) to investigate, apprehend, or detain immigrants do not have the authority to remove immigrants; removal is exclusively the purview of the federal government. By including 'removal' in § 1357(g)(10)(B), we do not believe that Congress intended to grant states the authority to remove immigrants. Therefore, the inclusion of 'removal' in the list of ways that a state may 'otherwise []

²⁶ A quick review of the Government's Brief in the Supreme Court indicates that it dropped its preemption argument under § 1357(g) in favor of one obliquely addressing deferred action programs, after the decision in the Ninth Circuit. *See State of Arizona v. United States of America*, 2012 WL 939048, *44-45 (2012) (Brief of the United States); *see also State of Arizona v. United States of America*, 2012 WL 1332574, *1 (2012) (Brief of Petitioners) (petitioners did not address this argument or the Ninth Circuit's discussion of it in their brief or petition).

²⁷ DHS' Guidance makes exactly the same argument. *See DHS, supra* note 25, at 9.

cooperate with the Attorney General,' indicates that subsection (g)(10) does not permit states to opt out of subsections (g)(1)-(9) and systematically enforce the INA in a manner dictated by state law, rather than by the Attorney General. We therefore interpret subsection (g)(10)(B) to mean that when the Attorney General calls upon state and local law enforcement officers—or such officers are confronted with the necessity—to cooperate with federal immigration enforcement on an incidental and as needed basis, state and local officers are permitted to provide this cooperative help without the written agreements that are required for systematic and routine cooperation. Similarly, we interpret subsection (g)(10)(A) to mean that state officers can communicate with the Attorney General about immigration status information that they obtain or need in the performance of their regular state duties. *But subsection (g)(10)(A) does not permit states to adopt laws dictating how and when state and local officers must communicate with the Attorney General regarding the immigration status of an individual. Subsection (g)(10) does not exist in a vacuum; Congress enacted it alongside subsections (g)(1)-(9) and we therefore interpret subsection (g)(10) as part of a whole, not as an isolated provision with a meaning that is unencumbered by the other constituent parts of § 1357(g).*

In sum, 8 U.S.C. § 1357(g) demonstrates that Congress intended for state officers to systematically aid in immigration enforcement only under the close supervision of the Attorney General—to whom Congress granted discretion in determining the precise conditions and direction of each state officer's assistance. We find it particularly significant for the purposes of the present case that this discretion includes the Attorney General's ability to make an individual officer's immigration-enforcement duties permissive or mandatory. 8 U.S.C. § 1357(g)(5).²⁸

²⁸ *Arizona*, 641 F.3d at 349-50 (emphasis supplied). The court thus found impliedly preempted Section 2(B) of the Arizona law, which is quite similar to the enforcement provisions of SB4. It explained:

Section 2(B) sidesteps Congress' scheme for permitting the states to assist the federal government with immigration enforcement. Through Section 2(B), Arizona has enacted a mandatory and systematic scheme that conflicts with Congress' explicit requirement that in the '[p]erformance of immigration officer functions by State officers and employees,' such officers 'shall be subject to the direction and supervision of the Attorney General.' 8 U.S.C. § 1357(g)(3). *Section 2(B) therefore interferes with Congress' scheme because Arizona has assumed a role in directing its officers how to enforce the INA. We are not aware of any INA provision demonstrating that Congress intended to permit states to usurp the Attorney General's role in directing state enforcement of federal immigration laws.*

Id. Emphasis supplied.

This reading is not inconsistent with the Supreme Court’s determination in *Arizona* that §§ 1357(g)(10) and 1373 evince Congressional intent to encourage cooperation, such that the “federal scheme thus leaves room for a [statewide] policy requiring state officials *to contact ICE* as a routine matter.” 567 U.S. at 413 (emphasis supplied). As demonstrated, even the Texas Legislature, in drafting SB4, recognized a distinction and reflected in its text the notion that police cooperation, coordination, and contact with ICE are not the same thing as officers stepping into the shoes of immigration officers to perform immigration officers’ statutory functions on a routine basis. More important, the Government’s *own* Guidance make this distinction crystal clear. It states:

there is an important distinction between communication of alien-status information between a state or local government and DHS, and the original acquisition of information by the state or local officer from an individual. The terms ‘[t]o communicate’ and ‘report’ in 8 U.S.C. §1357(g)(10)(A) encompass only the specific act of exchanging information with DHS; *that provision does not, in itself, provide a state or local officer with additional authority to investigate an individual’s immigration status so as to acquire information that might be communicated to DHS.* Nor does 8 U.S.C. § 1373, by itself, provide the state or local officers with that additional authority.²⁹

As a result, nothing in *Arizona* precludes Houston’s interpretation of §1357(g)(10).

Finally, Houston’s interpretation is supported by Congress’ apparent purpose in requiring contracts with local governments before local officers are permitted routinely to perform immigration officer functions. Under § 1357(g), the federal government may ultimately be held liable for those who act as its immigration officers. The use of

²⁹ See DHS, *supra* note 25, at 12 (emphasis supplied).

contracts necessarily identifies and limits the universe of those for whom the federal government may become responsible. To that end, Subsection 1357(g)(2) requires that any local police officer carrying out such functions, not only “be knowledgeable in federal immigration law,” but the contract “shall contain a *written certification that the officers or employees performing the function under the agreement have received adequate training regarding the enforcement of relevant Federal immigration laws.*”³⁰ Indeed, such officer “*shall be subject to the direction and supervision of the Attorney General*” who “*is required to supervise and direct the individual*” per specific provisions in the agreement. *Id.* at § 1357(g)(3) & (5). These provisions make clear that, although local police officers will be acting under color of federal law, he or she “shall not be treated as a Federal employee for any purpose other than for purposes of chapter 81 of Title 5 (relating to compensation for injury) and sections 2671 through 2680 of Title 28 (relating to tort claims).” *Id.* at § 1357(g)(7) & (8). Finally, no such police officer may displace a federal employee, such as a current or future employee of ICE. *Id.* at § 1357(g)(6).

These exacting requirements demonstrate that it is almost unimaginable that the Congress would have authorized the wide-ranging immigration enforcement by local police officers across Texas that SB4 requires without § 1357(g)’s requisite ongoing supervision, training, or certification by the U.S. Attorney General.

³⁰ 8 U.S.C. § 1357(g)(2) (emphasis supplied).

2. SB4 Conflicts with and Impermissibly Skews the Scheme of Federal Immigration Enforcement Set Forth in § 1357(g)

SB4 directly conflicts with the immigration enforcement scheme set forth in § 1357(g) by 1) mandating that local police officers perform immigration officer functions even though it is a violation of federal law for ICE, DHS, or any other federal government agency to accept such services without paying for them; 2) creating an unfunded mandate in violation of 31 U.S.C.A. § 1342; 3) mandating that local police officers and cities provide services federal law expressly makes voluntary; 3) punishing civilly, criminally, and with forfeiture of office the failure to provide services federal law expressly makes voluntary; 4) subjecting the federal government, without its permission or authorization, to liability by forcing local police officers to act under color of federal law without providing the training or supervision required by federal law from federal law enforcement agencies; 5) eliminating the knowledge, training, and supervision requirements mandated for those acting as federal immigration officers under federal law; 6) in violation of federal law, displacing federal workers who ICE and DHS might otherwise have hired in Texas to enforce the federal immigration laws; and, most important, 7) depriving cities of the statutory choice whether they will mandatorily or voluntarily enforce federal immigration law.

In addition or in the alternative, for the same reasons, SB4 frustrates the purposes of § 1357(g) and “skews” improperly and irrevocably the “delicate balance of statutory objectives” it sets forth to ensure that those who enforce the immigration

laws are highly trained, certified, and carefully supervised by federal authorities.³¹ Moreover, as in *Buckman*, SB4 exists “solely by virtue” of the federal immigration laws. As a result, the requirements and punishments it imposes on law enforcement officers, agencies and public officials are preempted.³²

There can be no doubt that SB4’s operative provisions are at least impliedly preempted. Indeed, the *Government itself* states in its Guidance that, “through these and other cooperative arrangements [under § 1357(g)], state and local governments have been able to assist DHS in a manner that conforms to *DHS’s balanced administration of a complex immigration scheme and that is consistent with DHS’s specific priorities and approach.*”³³

More important, SB4 imposes precisely the kind of mandatory local regime that the Government itself has deemed to be in conflict with both the federal immigration laws, its carefully-crafted enforcement scheme, and its immigration enforcement goals. As the Government itself explains in its Guidance, currently available on its website:

In requiring ‘cooperation,’ the INA thus requires that a state or local law enforcement officer who assists DHS officers in their enforcement of the immigration laws must at all times have the freedom to adapt to federal priorities and direction and conform to federal discretion, *rather than being subject to systematic mandatory state or local directives that may work at odds with DHS.* Although a similar lack of receptiveness to federal priorities might pervade even a system that gives officers discretion, *any such state*

³¹ See *Buckman*, 561 U.S. at 348 (“The balance sought by the Administration can be skewed by allowing [such] claims ...”).

³² *Id.* at 352-53; see also *Perdue*, 209 F. Supp. 3d at 851 (E.D.N.C. 2016) (holding that a state law claim is preempted under *Buckman* if “the existence of these federal enactments is a critical element in [plaintiff’s] case,’ and [if] a plaintiff’s claims ‘exist solely by virtue of the FDCA ... requirements.’” *Id.* (quoting *Buckman*, 531 U.S. at 352)).

³³ See DHS, *supra* note 25, at 7 (emphasis supplied).

*or local government-directed mandate would necessarily function as a parallel or contradictory direction, in competition with the Secretary's direction, as to how to enforce immigration law, thereby eroding the federal government's exclusive authority over immigration enforcement. Where inconsistent with federal priorities, a mandatory directive would force the Federal Government to divert resources away from the enforcement priorities it has set. Even if a state or local mandatory directive matches the federal priorities in place at the time of adoption, federal priorities and the manner in which they are applied can, and do, change. In fact, over the past two years, the federal immigration enforcement priorities and the manner in which they are applied have been significantly revised. While any mandatory scheme raises these concerns, they are particularly pressing where state or local mandates are codified because such codified laws are by their nature more difficult to adjust to respond to changing priorities of the Federal Government.*³⁴

Because SB4 conflicts with or skews § 1357(g)'s delicate balance of statutory objectives to utilize only certified-trained, knowledgeable, closely-supervised (by federal officials) immigration officers to enforce federal immigration law, federal law preempts Art. 2.251 [Code of Criminal Procedure], § 39.07 [Texas Penal Code], § 87.031 [Local Gov't Code], and §§ 752.053(a), (b)(1), (b)(2)(B), 752.055, 752.056, 752.0565 [Gov't Code] of SB4. These provisions are, therefore, of no effect.³⁵

There is no set of circumstance under which SB4 could operate constitutionally. Since Houston is not the federal government, it does not currently provide training to its elected or appointed officials, or employees, including its police officers, regarding federal immigration enforcement.³⁶ Even if Houston did provide some immigration enforcement training, however, it could never mandate the U.S. Attorney General's

³⁴ DHS, *supra* note 25, at 9-10.

³⁵ See *Buckman*, 531 U.S. at 348.

³⁶ Houston, however, does provide training and policies regarding probable cause, warrants, and lawful searches and seizures unrelated to federal immigration law. See Exh. A, ¶¶ 16-17.

training, direct supervision of its officers, or require that he or she certify them as trained.³⁷ Moreover, SB4 could never provide the choice to local governments that §1357(g)(5) provides as to whether local enforcement will be mandatory or voluntary. Finally, SB4 deprives cities and the federal government of the ability to prevent a finding of liability against them for torts and similar claims or to have the federal government take legal responsibility when local police act as immigration officers. *Id.* The listed provisions of SB4 are, therefore, preempted.

C. Texas’ and the Government’s Preemption Responses are Misdirected, Baseless, or Both

Both Texas and the Government offer similar responses to Plaintiffs’ various preemption arguments.³⁸ None has merit.

1. No Deference is Due the Government’s Views on SB4’s Preemptive Effect or Its Statement of Interest

It is well-settled that where, as here, the federal government has so dramatically changed its position [at least in its Statement of Interest] with regard to the constitutionality of state laws, its views on the preemptive effect of federal statutes are entitled to no deference whatsoever. In *Wyeth v. Levine*, 555 U.S. at 581, the Supreme Court held that “the United States’ amicus brief is similarly *undeserving of deference*.” *Id.* (emphasis supplied). It explained: “Unlike the Government’s brief in *Geier v. American*

³⁷ See *PLIVA, Inc. v. Mensing*, 564 U.S. 604, 623-24 (2011) (“[w]hen a party cannot satisfy its state duties without the Federal Government’s special permission and assistance, which is dependent on the exercise of judgment by a federal agency, that party cannot independently satisfy those state duties for pre-emption purposes”).

³⁸ Texas will also have the opportunity to respond to the arguments Houston makes here under the court’s June 30 briefing order.

Honda Motor Co., 529 U.S. 861 (2000), which explained the effects of state law on the DOT’s regulation in a manner consistent with the agency’s prior accounts ... the Government’s explanation of federal drug regulation *departs markedly* from the FDA’s understanding at all times relevant to this case.”³⁹

Here, the Government’s Guidance, *see supra* note 25, demonstrate its long-standing interpretation of the federal immigration laws. Its Statement of Interest, however, departs markedly from those views. This court should, therefore, disregard it here, along with the Government’s views on the preemptive effect of SB4 on the federal immigration laws it contains. If, however, this court gives the Government’s statement any deference Houston would respond as follows:

2. SB4’s Penalties and Mandates Are Not Merely a “Matter of Internal State Management”

Both Texas and the Government argue that the penalties and mandates SB4 imposes do not create a preemption issue but create only a “matter of state management;” therefore, “a state may direct the operations of its officials and discipline them for failing to comply with the *state* direction without implicating federal preemption principles or requiring federal approval.”⁴⁰ Nothing in *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597 (1991), which the Government cites for this notion, supports it, including the language it quotes and takes badly out of context. Instead, all of the cases the Government cites address whether, without an explicit reference to

³⁹ *Wyeth*, 555 U.S. at 581 (emphasis supplied).

⁴⁰ Statement of Interest of the United States [Doc. 90] (“Statement of Interest”) at 22 (emphasis supplied).

political subdivisions in the statute, cities can assert federal statutory rights delegated to states.⁴¹ Thus, in *Mortier*, a case seeking to hold state and local pesticide regulations preempted by federal law, the Court *upheld* local governments' power to regulate pesticides, a power granted specifically to states, because the application of ordinary preemption principles did not reveal an unconstitutional conflict. The case does not discuss in any manner a state's disciplining a city like an errant schoolchild.

Second, the Fifth Circuit has held, in the very cases the Government cites, that similar encroachment upon local authority was *not* the minimal management of state affairs the Government would dismiss here. To the contrary, in *Koog*, 79 F.3d at 461 (emphasis supplied), the Fifth Circuit explained:

our understanding of the principles of federalism does not permit us to characterize the Brady [gun control] Act as a 'minimal interference with state functions.' *We do not consider it a minimal interference when a local sheriff or chief of police is offered no choice but to devote purely local manpower and monetary resources to check the backgrounds of countless applicants for handgun purchases.*

Worse, in a footnote to its Statement of Interest, the Government cites an 84-year old Supreme Court case apparently to preserve the argument that cities somehow

⁴¹ Indeed, the very sentence before the one quoted by the Government states: "Properly read, the statutory language tilts in favor of local regulation." *Id.* at 607. *See also Columbus v. Ours Garage & Wrecker Service, Inc.*, 536 U.S. 424, 433 (2002) ("[r]eading § 14501(c)'s set of exceptions [some including political subdivisions and some not] in combination ... we conclude that the statute does not provide the requisite "clear and manifest indication that Congress sought to supplant local authority"); *Koog v. United States*, 79 F.3d 452, 460 (5th Cir. 1996) (in a case involving challenge by local law enforcement officers to the mandates of federal gun control law, the court held such mandates unconstitutional in part, stating merely that states have a say in the matter). Neither case, however, stands for the proposition that cities have no rights to complain of draconian state penalties for failure to comply with federal direction or of the unconstitutionality or preemption of state law that directly affects them.

lack standing to sue the states that “created” them.⁴² The Government’s argument, however, misstates binding federal law in the Fifth Circuit.

In *Rogers v. Brockett*, 588 F.2d 1057 (5th Cir. 1979), *cert. denied* 444 U.S. 827 (1979), the court held that a school district could bring an action, alleging federal preemption, against the State of Texas and others to challenge the constitutionality of state statutes that required certain districts to participate in federal-subsidized breakfast programs. Addressing cases like *Williams v. Mayor*, the court explained:

The Supreme Court itself said, in a somewhat different context from that facing us here, that ‘a correct reading of the seemingly unconfined dicta of *Hunter* and kindred cases is not that the State has plenary power to manipulate in every conceivable way, for every conceivable purpose, the affairs of its municipal corporations, but rather that the State’s authority is unrestrained by the particular prohibitions of the Constitution considered in those cases.’ *Gomillion v. Lightfoot*, 364 U.S. 339, 344, 81 S. Ct. 125, 128, 5 L. Ed. 2d 110 (1960). We agree. *We think these cases are substantive interpretations of the constitutional provisions involved; we do not think they hold that a municipality never has standing to sue the state of which it is a creature. In fact, correctly interpreted, these cases do not deal with “standing,” in the sense in which we use the term, at all.*

Id. at 1068 (emphasis supplied). More recently, the Fifth Circuit has reaffirmed that, “although some circuits have followed a per se rule that political subdivisions may not sue their parent states under any constitutional provision, *that is not the rule in this circuit.*”⁴³

Equally important, cities’ ability to assert challenges under the Supremacy Clause is particularly important where, as here, the remedy sought is only prospective

⁴² *Id.* at 22, n.13, citing *Williams v. Mayor*, 289 U.S. 36, 40 (1933).

⁴³ *Donelon v. La. Div. of Admin. Law ex rel. Wise*, 522 F.3d 564, 568 (5th Cir. 2008).

injunctive relief, not money damages. As the Court explained in *Green v. Mansour*, 474 U.S. 64, 68 (1985) “the availability of prospective relief of the sort awarded in *Ex parte Young* gives life to the Supremacy Clause. Remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law.”⁴⁴

Finally, Houston has standing to assert federal preemption against Texas because of the Supremacy Clause’s unique nature. “The Supremacy Clause is ‘not a source of any federal rights’ but rather operat[es] to ‘secure federal rights by according them priority whenever they come in conflict with state law.’ That is, a plaintiff alleging a Supremacy Clause claim is actually alleging a right under some other federal law, which trumps a contrary state law by operation of the Supremacy Clause.”⁴⁵

⁴⁴ *Id.* at 68 (citing *Ex parte Young*, 209 U.S. 123, 155-56, 159 (1908)).

⁴⁵ *City of Hugo v. Nichols (Two Cases)*, 656 F.3d 1251, 1256 (10th Cir. 2011) (quoting *Chapman v. Hous. Welfare Rights Org.*, 441 U.S. 600, 613 (1979)). There is also a good argument, made in learned treatises and academic articles, that cities also possess independent constitutional status under the Tenth Amendment to the U.S. Constitution, which reserves powers not delegated to the United States “to the States, respectively, or to the people.” (Emphasis supplied). Under long-standing principles of statutory construction, “the people” in this context must mean something other than the states. The phrase also cannot be treated as mere constitutional surplusage. At the time the Constitution was drafted, Thomas Jefferson, Alexis de Toqueville, and others considered cities and town to be “little republics,” “repositories of popular sovereignty through which citizens decided the most fundamental political questions.” Jake Sullivan, *Comment, The Tenth Amendment and Local Government*, 112 Yale L.J. 1935, 1940 & n.31 (May 2003). Several influential writers have, therefore, posited that the Tenth Amendment’s reference “to the people” was to cities and towns because it “presupposed the existence of cities and towns as important political communities through which people expressed their will and exercised various powers.” *Id.* at 1941 & n.34 (emphasis in original), (citing Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 Colum. L. Rev. 1, 89 (1990)); see also Annie Decker, *Preemption Conflation: Dividing the Local from the State in Congressional Decision Making*, 30 Yale L. & Policy Rev. 321, 350 (Spring 2012) (citing Sullivan and others, she argues that “the Tenth Amendment can be read to preserve the right of local self-determination, seeing local governments as the best vehicle for expression of the people’s will. Similarly, looking beyond the Constitution’s textual silence, others have argued that local governments have a form of sovereignty apart from the states”); Amasa M. Eaton, *The Right to Local Self-Government*, 13 Harv. L. Rev. 441 (Feb. 1900) (arguing that cities and towns reserved their right to self-government long before the Constitution was drafted).

3. The Government’s “Cooperation” Arguments Ignore the Operative Provisions of § 1357(g) and its Own Guidance

The Government’s preemption arguments, at pages 20-21 of its Statement of Interest, like Texas’s arguments in its memorandum, and the arguments of both at the court’s hearing, suggest that there is no conflict between SB4 and federal immigration law because all SB4 requires is the mere cooperation and communication already provided for in § 1357(g)(10). To embrace this argument, this court must believe that the rest of § 1357(g)’s requirements have somehow been nullified by § 1357(g)(10) and that SB4’s punitive provisions are actually toothless. Moreover, this court must also believe that SB4 requires something that the Government would consider to be “cooperation” under the federal immigration laws. None of these assumptions is grounded in reality or federal law.

First, as set forth in Section I(B)(1) above, the Government’s expansive interpretation of § 1357(g)(10) runs counter to the plain language of § 1357(g), its structure and purposes, bedrock principles of statutory interpretation, the Government’s own Guidance, and the Ninth Circuit. Subsection 1357(g)(10) simply cannot be read properly to negate all the other subsections of § 1357(g). Yet that is precisely how the Government and Texas would interpret the provision here.

Second, also as set forth above, SB4 expressly empowers local officers to perform the functions of immigration officers, not merely to cooperate and communicate with them. The Texas Legislature made this distinction clear when it separated those functions in Tex. Gov’t Code § 753.053(b)(1), which empowers

officers to inquire “into the immigration status of a person under lawful arrest or detention” and, § 753.053(b)(3), which addresses “assisting and cooperating with federal immigration officers.” Moreover, § 1357(a)(1) sets forth the functions of immigration officers and SB4 requires that local officers perform them on a regular and systematic basis. That is not cooperation: it is conscription.

Third, the Government’s own published Guidance, earlier versions of which were cited in *Arizona*, 567 U.S. at 410, eviscerate its arguments here. First, its definition of “cooperate” in § 1357(g)(10)(B) *excludes the very activities SB4 requires*. For example, its Guidance defines the term “cooperate” as

the rendering of assistance by state and local officers to federal officials, *in the latter officials’ enforcement* of the INA, in a manner that maintains the ability to conform to the policies and priorities of DHS and that ensures that individual state and local officers are at all times in a position to be—and, when requested, are in fact—*responsive to the direction and guidance of federal officials charged with implementing and enforcing the immigration laws*.⁴⁶

More important, the Government *does not* consider it “cooperation” when a state or local government thwarts its goals, schemes, or processes as SB4 inevitably does.

[t]o constitute genuine cooperation as contemplated by 8 U.S.C. § 1357(g)(10), state or local governments *must not systematically act in a way that conflicts with the policies or priorities set by the Federal Government or limits the ability of the Federal Government to exercise discretion under federal law whenever it deems appropriate*. States may not act with the aim or effect of altering the Federal Government’s prioritization or balancing of different goals—*such as by effectively compelling the Federal Government to address certain ends or by furthering those ends while disregarding others*, or by attempting to frustrate the Federal Government’s accomplishment of one end to advance other ends. *In other words, when states attempt to act in the immigration arena, their actions cannot disrupt or interfere with the Federal Government’s pursuit of its multiple, inter-related goals.*

⁴⁶ DHS, *supra* note 25, at 8 (emphasis supplied).

Id. at 10 (emphasis supplied). Most important, in discussing the need for federal primacy in immigration enforcement, the Government’s Guidance states:

The INA’s ‘cooperation’ requirement means that a state or local government may not adopt its own mandatory set of directives to implement the state’s own enforcement policies, because such a mandate would serve as an obstacle to the ability of individual state and local officers to cooperate with federal officers administering federal policies and discretion as the circumstances require. *State or local laws or actions that are not responsive to federal control or direction, or categorically demand enforcement in such a way as to deprive the Federal Government—and state and local officers—of the flexibility and discretion that animates the Federal Government’s ability to globally supervise immigration enforcement, do not constitute the requisite ‘cooperation’ within the meaning of 8 U.S.C. § 1357(g)(10)(B), even if the state or local government’s own purpose is to enforce federal immigration law.*

Id. at 8 (emphasis supplied). The Government reinforces this notion in the website’s language introducing this document. It states: “*for a state or local government to act systematically on a matter that affects immigration enforcement, however, that action has to be consistent with the comprehensive regulatory regime of the INA, which requires such state enforcement efforts be responsive to the policies and priorities set by DHS.*”⁴⁷ There is, therefore, nothing about what SB4 actually does— turn Texas’ local law enforcement officers into a rump federal enforcement force, far outside the purview of DHS and not trained or supervised by them—that would constitute “cooperation” under even the Government’s own definition of the term.

In this regard, in its Statement, the Government rewrites § 1357(g)(10) to assume that the cooperation required is cooperation between individual officers *and*

⁴⁷ DHS, *supra* note 25 (website introduction) (emphasis supplied).

ICE and its individual agents. The statute, however, refers to cooperation and communication *with the Attorney General*. They are not the same thing. The Government's Guidance make clear that § 1357(g)(10) merely reinforces federal *policy-making* primacy. "The text of the statute [§ 1357(g)] makes clear that state and local governments may not adopt and implement their own enforcement programs based on their own assessment of what is appropriate for administering the INA, separate and apart from what the Secretary has established and oversees. Thus 8 U.S.C. § 1357(g)(10)(B) refers to states cooperating '*with the [Secretary]*' (emphasis in original), the federal officer charged by Congress with the administration of the INA."⁴⁸

Fourth, although the Government glosses over the mandatory character of the alleged "cooperation" coerced here, § 1357(g)(5), which requires U.S. Attorney General and cities to decide jointly what enforcement activities will be mandatory or voluntary, and the Supremacy Clause do not. Indeed, courts have found conflict preemption where only the *technique* of enforcement varied.

In *Arizona*, for example, the court found § 5(C) of the state's immigration law preempted on its face, even though it attempted to achieve the same goals as federal law, because it involved a conflict in the *method* of enforcement.⁴⁹ The Court recognized that a "[c]onflict in technique can be fully as disruptive to the system Congress erected as conflict in overt policy."⁵⁰ That is particularly true where, as here,

⁴⁸ *Id.* at 8-9.

⁴⁹ *Arizona*, 567 U.S. at 406.

⁵⁰ *Id.* (citing *Motor Coach Employees v. Lockridge*, 403 U.S. 274, 287 (1971)).

Texas purports to do in SB4 what the federal government is absolutely, constitutionally prohibited from doing: mandating that local authorities enforce federal law.⁵¹ By nullifying § 1357(g)(5)'s choice of mandatory or voluntary enforcement activities, § 1357(g)'s voluntary contracts, and substituting draconian penalties to ensure compliance, SB4 substantially changes the techniques Texas and the Government may use to enforce locally federal immigration laws. Thus, even if Texas is right about cooperation—and it is not—SB4's operative provisions are *still* preempted.

Texas' cannot escape the mandatory nature of SB4—and preemption—by claiming that prohibiting a prohibition on immigration inquiries, combined with extraordinarily stiff penalties for any infraction, including barring speech critical of SB4 or the policies it mandates, somehow renders a police officer's inquiry into a person's immigration status voluntary, cooperative, or anything but the product of the rankest, most naked kind of coercion. Instead, by changing so dramatically the method by which local governments must deal with federal immigration enforcement, the Texas Legislature has doomed SB4 to inevitable preemption.

4. The Government's Argument that Federal Law is Not in Conflict with SB4 Because It Does Not Prohibit Inquiring About Immigration Status is Misdirected

In its final preemption response, the Government claims that *Arizona* permits a law that imposes a mandatory obligation to inquire about immigration status. *It doesn't*.

⁵¹ See *Koog*, 79 F.3d at 461 (“we believe that permitting Congress to circumvent the coercion principle by issuing commands directly to state and local officials critically diminishes the separate and sovereign dignity of the States recognized by New York”); see also *Commissions Imp. Exp. S.A. v. Republic of the Congo*, 757 F.3d 321, 326 (D.C. Cir. 2014) (citing *Arizona*).

First, *Arizona*'s § 2(B) differs from SB4's § 752.053 in that § 2(B) left considerable discretion in the hands of local officers to make "reasonable attempts" to determine immigration status based upon a "reasonable suspicion" that the person was unlawfully in the United States. 567 U.S. at 411. SB4 includes no such provisions and, in fact, would impose harsh penalties on any lawmaker or supervisor who would allow such discretion. Instead, status checks under SB4 are effectively mandatory in virtually all circumstances. *Arizona* never countenanced SB4's unyielding requirements.

Second, in the Supreme Court, the Government's objection to SB4 was not that it conflicted with the enforcement scheme set forth in § 1357(g). Although it had raised that argument in the Ninth Circuit, by the time the case reached the Supreme Court, the Government focused on § 2(B)'s interference with its deferred action programs and other enforcement *priorities*. *Id.* at 412. As a result, the Court focused more on the communication requirement of § 2(B) than on the mandatory inquiry provision and concluded that "the federal scheme thus leaves room for a policy requiring state officials *to contact* ICE as a routine matter." *Id.* at 413 (emphasis added).

The Government's own Guidance, however, makes clear that such routine *contact* is not equivalent to routine *interrogation* about immigration status.

there is an important distinction between communication of alien-status information between a state or local government and DHS, and the original acquisition of information by the state or local officer from an individual. The terms '[t]o communicate' and 'report' in 8 U.S.C. 1357(g)(10)(A) encompass only the specific act of exchanging information with DHS; that provision does not, in itself, provide a state or local officer with additional authority to investigate an individual's immigration status so as to acquire

*information that might be communicated to DHS. Nor does 8 U.S.C. § 1373, by itself, provide the state or local officers with that additional authority.*⁵²

Thus, nothing in *Arizona* authorizes the mandatory, routine interrogation about immigration status that SB4 requires.

II. SB4 VIOLATES THE HOME-RULE PROVISIONS OF TEXAS CONSTITUTION ART. XI, § 5⁵³

The Court may take judicial notice that Houston is a home-rule city.⁵⁴ Its charter describes the procedure under which local officials, including a Mayor and City Council, are elected and removed from office.⁵⁵ It also reserves to Houston and its governing body all constitutional home-rule authority, including the discretion to allocate resources and determine its own priorities in promoting the welfare, health, prosperity, comfort, public safety, and convenience of all Houstonians.⁵⁶

Under the Texas Constitution, art. XI, § 5, home-rule cities such as Houston possess the full power of self-government and “look to the Legislature not for grants of power, but only for limitations on their power.”⁵⁷ Unlike the federal Supremacy clause, however, the State of Texas, under art. XI, § 5, may not simply legislate and expect

⁵² See DHS, *supra* note 25, at 12.

⁵³ The motion/application of the City of Austin raises a home-rule argument that would encompass Houston’s argument here. See Dkt. 57, at 18-19.

⁵⁴ See, e.g., Houston, Tex., *City Charter*, Art. II, § 2(b).

⁵⁵ *Id.* at Art. V, *et seq.*

⁵⁶ *Id.* at Art. II, § 2(a).

⁵⁷ See *Dallas Merch. ’s & Concessionaire’s Ass’n v. City of Dallas*, 852 S.W.2d 489, 490-91 (Tex. 1993).

cities to defer.⁵⁸ Instead, a city must defer only to the extent that its law conflicts with the state statute.

The State of Texas has imposed no regulations of its own that conflict with those imposed by municipalities. Instead, the State of Texas now purports to tell municipalities *how to exercise power* that was conferred on them by the federal government and the State Constitution *that the cities still retain*. The Texas Constitution's home-rule provision does not permit such micro-management.

SB4 and, in particular, § 752.0565 [Gov't Code] of SB4, entitled "Removal from Office," also violates the Home Rule provision of the Texas Constitution, art. XI, § 5, by improperly denying Houston the power of self-government, including the right to elect and remove local officials, by misusing and misapplying *quo warranto* proceedings in a situation for which they were never intended or suited.

SB4 also violates art. XI, § 5, by improperly infringing Houston's right to determine for itself how to exercise its own police power. Under the Houston City Charter, art. XVI, § 1: "The City of Houston shall have power by ordinance duly passed to establish and maintain the City Police Department, prescribe the duties of policemen and regulate their conduct." In addition, art. VI, § 7a gives Houston's mayor the power to appoint and remove heads of departments.

Pursuant to such provisions, § 34-22 of Houston's Code of Ordinances states: "There is hereby created the office of the chief of police in the police department of the

⁵⁸ *City of Richardson v. Responsible Dog Owners*, 794 S.W.2d 17, 19 (Tex. 1990).

city. The chief of police shall be appointed by the mayor and confirmed by the city council. Subject only to the orders and actions of the city council and mayor, the chief of police shall be the executive officer and director of the police department. He shall have management of the department, shall exercise all of the functions assigned to the department, and shall carry out the provisions of law and of ordinances with respect to such functions.”

Neither the United States nor Texas Constitutions grant the Texas Legislature any authority to regulate the immigration status of foreign nationals. To the extent that SB4 seeks to regulate the manner in which Houston provides for the public health and safety of all of its residents and visitors, including foreign nationals, SB4 is an unconstitutional violation of Houston’s home-rule authority.

Finally, by arbitrarily imposing unduly burdensome and oppressive harms on Houston, its officials, its employees, and its residents, and by substantially restricting protected conduct including freedoms of expression, association, and travel, SB4 is not rationally related to any legitimate governmental interest.

III. SB4 VIOLATES THE FIRST AMENDMENT AND TEXAS CONSTITUTION ART. I, § 8

Houston adopts the First Amendment and Texas constitutional equivalents’ arguments and evidence submitted by the cities of El Cenizo, El Paso, Austin, and San Antonio in connection with their motions/applications for preliminary injunction. SB4 violates the constitutional provisions because it penalizes the protected speech of local officials who “endorse” a “policy,” even an “informal, unwritten policy,” that

would contradict SB4's mandates, and is unconstitutionally overbroad by including vague terms, such as "materially limit," "custody," "endorse," "informal or unwritten policy," Houston asks the court to enjoin SB4, and, in particular, §§ 752.053(a)(1), 752.055-56, 752.0565 [Gov't Code] of SB4, as violative of the First Amendment, as applied to the States through the Fourteenth Amendment, and art. I, § 8 of the Texas Constitution.

IV. SB4 VIOLATES THE FOURTH AMENDMENT AND THE TEXAS CONSTITUTION, ART. I, § 9

Houston adopts the Fourth Amendment arguments and evidence submitted by the cities of El Cenizo and El Paso in connection with their application for preliminary injunction. In particular, Houston is aware the El Cenizo plaintiffs are addressing the question of cities' standing to raise Fourth Amendment issues, Houston agree with and adopts their view that plaintiffs standing to raise these issues because police officials cannot be made to choose between complying with SB4 and violating the Fourth Amendment, on the one hand, or disobeying SB4 and subjecting themselves to jail and removal from office, on the other.

V. SB4 VIOLATES THE FOURTEENTH AMENDMENT EQUAL PROTECTION AND DUE PROCESS CLAUSES AND TEXAS CONSTITUTION ARTS. I, §§ 3 & 9

Houston adopts the Fourteenth Amendment Equal Protection and Due Process, and Texas equivalents' arguments and evidence submitted by the cities of El Cenizo and El Paso in connection with their application for preliminary injunction.

SB4 and, in particular, § 752.053(b) [Gov't Code] of SB4, impermissibly invites police officers to engage in unconstitutional investigative practices, including profiling based upon race, ethnicity, national origin, and perceived status. SB4 prevents all legislative, executive, or judicial action at the local level that is designed to protect or even guide individual police officers in enforcing laws affecting immigrants as such. Because SB4 fails to present any cognizable Guidance for enforcement of suspected civil immigration violations, SB4's purported "savings clause," *id.* at § 752.059, is illusory. SB4 cannot be constitutionally applied and should be enjoined in its entirety.

As set forth in in El Paso's application, SB4's citizen reporting provision, § 752.055, treats citizens and lawful immigrants differently, according privileges to citizens alone. There is no constitutional basis for this discriminatory treatment. Moreover, state-compelled enforcement of federal immigration laws is not a compelling interest that justifies such race-based discrimination. SB4 is not narrowly-tailored, and is not the least restrictive means of achieving the requisite governmental interest, if any.

There is likewise no rational basis for removing immigration enforcement from any control or guidance by police, chiefs, sheriffs, other local leaders, ICE itself, or the U.S. Attorney General as provided by contract by federal law. *See* 8 U.S.C. § 1357(g). This is a narrowly-tailored alternative that avoids the constitutional infirmities of SB4.

PRAYER FOR RELIEF

The City of Houston respectfully request that the court enter a preliminary injunction barring Texas from enforcing SB4 in whole or in part.

Respectfully submitted,

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*Pending Pro Hac Vice Permission ***

CERTIFICATE OF SERVICE

I hereby certify that on July 10th, 2017, I served the following attorneys with a true and correct copy of the foregoing document in accordance with *Rule 5(b) of the Federal Rules of Civil Procedure*.

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