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

City of El Cenizo, Texas *et al.*,	§	
	§	
Plaintiffs,	§	
	§	
	§	
v.	§	Civil Case No. 5:17-cv-00404-OLG
	§	
State of Texas, *et al.*,	§	
	§	
Defendants.	§	

BRIEF OF *AMICUS CURIAE* NATIONAL COMISSION ON HUMAN RIGHTS OF MEXICO IN SUPPORT OF PLAINTIFFS

I. INTRODUCTION

The National Human Rights Commission of Mexico extends an *amicus curiae* letter to assist the plaintiffs in the litigation underway against the entry into force of Law SB4 passed by the Texas State Legislature of the United States of America.

The National Human Rights Commission is a Mexican autonomous constitutional body responsible, among other things, for the protection, enforcement, advocacy, study and promotion of the human rights of Mexican peoples. In view of its duties, the National Commission presents this *amicus curiae* with the aim of making a useful contribution to the respect of the rights of migrant persons in the state of Texas.

This *amicus curiae* will discuss four issues that contend the unconstitutionality of Law SB4. The first section will analyze the vagueness of Law SB4; the second will address the issue of arbitrary detentions; the third will elaborate on the discriminatory content of Law SB4 and lastly, the fourth section will point at the effects Law SB4 would have on the right to freedom of expression and religious freedom.

II. VAGUENESS OF LAW SB4

The National Commission believes that Law SB4 does not adequately regulate the legal concept of lawful detention and uses broad terms that allow its enforcement to be arbitrary and discriminatory. This makes the law unconstitutionally vague and, consequently, in violation of the Fourteenth Amendment of the US Constitution.

In the case of *Women's Med. Ctr. Of Nw. Houston vs. Bell*, the United States Court of Appeals for the Fifth Circuit in Texas held that due process is guaranteed by the Fourteenth Amendment of the US Constitution, which "proscribes laws so vague that 'persons of common intelligence must necessarily guess at [their] meaning and differ as to [their] application.'"[1]

Likewise, the US Court of Appeals for the Fifth Circuit stated that the consolidated norm used to assess whether a law is unconstitutionally vague consists of whether the law:[2]

> *(1) fails to provide those targeted by the statute a reasonable opportunity to know what conduct is prohibited, or*
>
> *(2) is so indefinite that it allows arbitrary and discriminatory enforcement.*

Law SB4 only uses the term "lawful detention" on three occasions. The first time, it is used to cursorily define what should be understood by lawful detention.[3] The term appears two more times in the section stating that a local entity or campus police department "may not prohibit or materially limit" certain authorities from inquiring into the immigration status or place of birth of a person under "lawful detention" or under arrest.[4]

---

[1] *Women's Med. Ctr. Of Nw. Houston vs. Bell,* 248 F.3d 411, 421 (5th Cir. 2001).
[2] *Id.*
[3] *"**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.*
[4] *"...a local entity or campus police department **may not prohibit or materially limit** a person who is a commissioned peace officer described by Article 2.12, Code of Criminal Procedure, a corrections officer, a booking clerk, a magistrate, or a district attorney, criminal district attorney, or other prosecuting attorney and who is employed by or otherwise under the direction or control of the entity or department from doing any of the following:*
(1) inquiring into the immigration status of a person under a lawful detention or under arrest;

With a regulation based on simply three mentions, it is clear that the incidence of the term lawful detention in Law SB4 is practically nonexistent as the law only succinctly defines the legal concept and establishes the duty of authorities regarding persons who are already found under lawful detention. As a result, the lack of regulation on "lawful detention" makes it possible for authorities to act arbitrarily since the law does not clearly specify and define the conditions under which detentions should be made for them to be deemed lawful.

It is noteworthy that the legislation does not specify that in order to carry out a lawful detention, authorities must comply with the criterion of "reasonable suspicion", as set forth in the Fourth Amendment of the US Constitution and in Article 1, Section 9 of the Texas Constitution, according to the recent criteria of the US Court of Appeals for the Fifth Circuit.[5]

The vagueness with which the legal concept of "lawful detention" was worded in Law SB4 is unconstitutional because it does not clearly and explicitly regulate the powers and norms authorities must follow when carrying out a detention. This is essential for giving legal certainty to the actions of the enforcing authorities and to the exercise of human rights. The mentioned inadequacy of the statute will obligate authorities to fill the gap in the law with their own interpretation. This, in turn, will lead to ambiguities, conjectures, different applications and, in many cases, discrimination by the authorities empowered to enforce said law.

For instance, the way in which the legal concept of lawful detention is regulated in Law SB4 allows authorities to detain any person walking on the street in an arbitrary and discriminatory way, without any formality and under the excuse of investigating a crime. Moreover, it allows these authorities to ask about the person's immigration status and/or place of birth.

Because of the above reasons, the National Commission thinks that the second criterion to determine that a law is unconstitutionally vague has been updated by the US Circuit Court of Appeals for the Fifth Circuit. We believe that the vagueness with which the

---

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

[5] *U.S. v. Monsivais*, No. 15-10357, slip op. at 3-4 (5th Cir. Feb. 2, 2017)

legal concept of lawful detention in Law SB4 was regulated will lead to obligating each of the authorities to fill in the lack of clarity and the gap with his or her own interpretation of the provision, which will result in arbitrary and discriminatory enforcement.

Meanwhile, Law SB4, Section 752.053, Subsection (b) establishes that the authorities "**may not prohibit or materially limit**" other authorities from inquiring about the immigration status and place of birth of a person who has been "lawfully detained" or is under arrest.

The use of words "**may not prohibit or materially limit**" is ambiguous since it is left to the authorities to decide whether this phrase gives them tacit authorization to ask any person who is under "lawful detention" or in custody about his or her immigration status and/or place of birth.

Along the same lines, the scope of the terms used allows for the discriminatory enforcement of the law since it will be the authorities who decide which cases or which persons under "lawful detention" or in custody, are to be asked about their immigration status and/or place of birth and who are not.

In view of the above, the National Commission believes that the phrase "**may not prohibit or materially limit**" as used in SB4 contains broad terms that allow for the arbitrary and discriminatory enforcement of Law SB4 because, as mentioned before, the criterion to determine that a law is unconstitutionally vague was again updated by the US Circuit Court of Appeals for the Fifth Circuit.

Lastly, it is important to point out that severe sanctions, like the high fines or removal established in Law SB4, for those authorities who are in violation of the prohibition of preventing certain authorities from inquiring about the immigration status and place of birth of a person who is under "lawful detention" or under arrest, will lead to authorities detaining any person at the slightest hint of suspicion and asking every one of them about their immigration status and/or place of birth, given the vagueness of the wording in the law. This would be done to avoid falling into what could be considered a violation of Law SB4 and be subjected to the sanctions established in the law because, logically, no authority would want to be fined or removed from his or her position.

In accordance with the above, the National Commission believes that the vagueness of Law SB4 will have serious consequences that would affect the migrant population living in the State of Texas since the wording of the law empowers authorities to make arbitrary and discriminatory decisions to inquire about the immigration status and/or place of birth of said migrants.

For these reasons, it is requested that this Court declare Law SB4 unconstitutionally vague, contravening the Fourteenth Amendment of the US Constitution.

III. ARBITRARY DETENTIONS

Law SB4 violates every person's right not to be arbitrarily detained (unreasonable seizure), as set forth in the Fourth Amendment of the US Constitution and in Article 1, Section 9, of the Texas Constitution, by allowing officials to detain a person by using the excuse of a criminal investigation when the authority actually seeks to restrict the freedom of movement of such person to then inform the federal immigration authorities and for the latter to assume custody of the detained person.

The National Commission believes that once local or campus police officers find themselves with the power to inquire about persons' immigration status and place of birth, they can incur in a **pretextual detention**. This type of detention occurs when a law enforcement officer asks an individual to stop or lawfully detains a person for a minor infraction when the officer actually wants to investigate the person for a different offense for which there is no lawful grounds to make a detention or an arrest.[6]

Likewise, on finding themselves with the power to inquire about the immigration status and place of birth of persons, local or campus police officers can incur in **prolonged detention**. This type of detention occurs when a law enforcement officer stops a person and on inquiring about the person's immigration status, the latter declares he or she is not in the country legally. When faced with this situation, the detaining officer may decide to call the federal immigration authorities to proceed with the foreigner's deportation out of the United States. Meanwhile, the officer restricts the person's freedom of movement, unduly prolonging the detention.

---

[6] *Garcia v. State*, 827 S.W.2d 937, 939-940 (Tex.Crim.App.1992).

A pretextual detention that is unduly prolonged and whose real purpose is for the federal immigration authorities to take custody of the person detained violates the rights of migrants not to be subjected to arbitrary detentions, as set forth in both the Fourth Amendment of the US Constitution and in Article 1, Section 9 of the Texas Constitution.[7]

The case law on these provisions establishes that the detaining officer must have a reasonable suspicion, based on objective facts, that the individual is involved in criminal activity.[8] Moreover, the general rule is that an investigative stop should last no longer than necessary to effect its purpose,[9] even if there are no rigid time limitations for this type of detention.[10] However, once the original purpose of detention is exhausted, that the reasonable suspicion forming the basis for said detention has been confirmed or dispelled,[11] it may not be extended as if it were a "fishing expedition"[12] in hopes of finding out whether other crimes have been committed. Therefore, for instance, once a police officer has fully resolved a traffic violation, said officer may not lawfully detain the driver unless there is an objective reason to suspect the person has committed another offense and this is not provided for in Law SB4.[13]

Therefore, by allowing local and campus police to carry out pretextual detentions that are unduly extended while waiting for federal immigration authorities to take custody of the detained person, Law SB4 violates an individual's right not to be arbitrarily detained, as set forth in both the Fourth Amendment of the US Constitution and Article 1, Section 9, of the Texas Constitution.

IV. DISCRIMINATION CONTAINED IN LAW SB4

The National Commission believes that Law SB4 goes against the Fourth Amendment since it is a discriminatory law because its enforcement centers on persons that

---

[7] *Johnson v. State*, 912 S.W.2d 227, 232 (1995);
[8] *Brown v. Texas*, 443 U.S. 47, 51 (1979); *Terry v. Ohio*, 392 U.S. 1 (1968); *Rhodes v. State*, 945 S.W.2d 115, 117 (1997).
[9] *Davis v. State*, 947 S.W.2d 240, 245 (Tex.Crim.App.1997).
[10] *Kothe v. State*, 152 S.W.3d 54, 64 (Tex.Crim.App.2004).
[11] ROBERT R. BARTON, TEXAS SEARCH AND SEIZURE § 1.02.10.4[B] (6th ed. 2015).
[12] *Kelly v. State*, 331 S.W.3d 541, 549 (Tex.App. – Houston [14 Dist.] 2011).
[13] Idem.

local police officers might regard as foreigners. In this case, a person's interrogation, detention and custody will depend on his or her physical traits and racial profile.

The Fourth Amendment states the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

As a result, it would be easy to give way to the differentiated application of Law SB4, which could have repercussions in the form of discriminatory acts since it could be argued that Law SB4 is impartial and does not establish a clear objective. It will be enforced by using discriminatory criteria that are not valid, such as a person's language, personal appearance or accent. Therefore, the inhabitants of Texas could be subjected to unreasonable searches in their persons without any probable cause, but prompted by their racial profile.

To this effect, the National Commission points out that US nationals would also experience detentions based on racial profiling, despite being US citizens. Since both migrants and US citizens could be subjected to detentions that are not founded on probable cause, it can easily assumed that the detentions will depend on persons' physical characteristics and not objective factors that are needed to make a lawful detention.

Moreover, the Equal Protection Clause contained in the Fourteenth Amendment guarantees any person the equal protection of the laws. The Equal Protection Clause makes it possible to scrutinize measures or laws that could be discriminatory and affect a specific sector of the population. Such scrutiny of the contents of the law must examine every detail that could affect a specific segment of the population.

It is very likely that Law SB4 will function as described above, generating a disproportionate impact on a sector of the population because of their racial heritage or for belonging to a particular vulnerable group.

The fact that migrants with certain physical characteristics and who speak certain languages might find themselves at serious risk of being subjected to the effects of a law simply because of their looks is a form of discrimination that violates the principle of

equality under the law according to which all citizens must receive equal protection and equal treatment.

In view of this, the National Commission would like to stress that Law SB4 goes against the Fourth Amendment since it would result in detentions that would not be based on probable cause, but simply motivated by racial profiling.

V. EFFECTS OF LAW SB4 ON FREEDOM OF EXPRESSION AND FREEDOM OF RELIGION

The National Commission believes that SB4 violates the freedom of expression and the autonomy of private or independent institutions of higher education with religious affiliations in the State of Texas by forcing them to carry out the conducts established in said law that go against the fundamental values of these institutions, in addition to contravening the First Amendment of the US Constitution and Article 1, Section 8 of the Texas Constitution.

The State of Texas has a total of 455 venues of higher education, 112 of which are public and 343 are private. At least 55 of the private institutions have religious affiliations that are mainly variants of Christianity (Baptist, Methodist and Presbyterian).[14]

A large number of these universities have fundamental values enshrined in their institutional missions and internal regulations, which pursue institutional policies that are in line with their professed religious affiliation. Some of these fundamental values are equality and non-discrimination, the inclusion of all communities, social justice, and peace, among others.[15]

Within this context, the National Commission holds that private or independent institutions of higher education in the State of Texas have religious affiliations and respect fundamental values that are at variance with the obligations imposed by Section 752.053, of Law SB 4.

---

[14] National Center for Education Statistics, College Navigator. Available at https://nces.ed.gov/collegenavigator/?s=TX&ct=3

[15] See: University of the incarnate, http://www.uiw.edu/mission/, (Aug. 12, 2017), St. Mary's University of San Antonio, https://www.stmarytx.edu/about/# (Aug. 12, 2017); and Our Lady of the Lake University, http://www.ollusa.edu/s/1190/hybrid/default-hybrid-ollu.aspx?sid=1190&gid=1&pgid=7889, (Aug. 12, 2017).

Freedom of expression as established in the First Amendment of the US Constitution, as well as in Article 1, Section 8 of the Texas Constitution recognizes the protection of freedom of expression without government interference. Meanwhile, the Texas Education Code states that every university should establish "goals consistent with the role and mission of the institution," (Section 51.352) which is revealed in its ability to promulgate its own rules and regulations for the safety and welfare of students, employees, and property, as well as any other regulations it may deem necessary (Section 51.202)

In this particular instance, this freedom and autonomy to promulgate its internal rules and regulations are embodied in the right of universities and private institutions to establish their mission and fundamental values like equality and non-discrimination, as well as the inclusion of all communities.

Consequently, in the case of private universities, the enforcement of Law SB4 will directly affect students and employees, as SB4 will compel the campus police to detain, inquire about immigration status, share information and permit delays in the detention so that immigration authorities can take custody of selected individuals. This contravenes the internal university rules and regulations that generally aim at prohibiting discrimination and including all communities.

Therefore, SB4 violates the right to freedom of expression and institutional autonomy set forth in the First Amendment, as well as in the Texas Constitution and Education Code, by obligating campus police to carry out certain discriminatory actions that go against the fundamental values of these institutions.

Lastly, Law SB4 violates the First Amendment by infringing upon the freedom of religion of the universities that want to implement policies that protect the rights of migrants.

The National Commission is aware that the First Amendment protects the right to freedom of religion without government interference. Furthermore, the Free Exercise Clause prohibits the government from interfering with religious practices. In this vein, Law SB4 violates the right of religious freedom of those universities that are moved to protect vulnerable individuals like migrants because these institutions will be prohibited from taking measures to protect and not attack the migrant student population.

The Religious Freedom Restoration Act prohibits the federal government from forcing persons to act against their beliefs. The State of Texas has its own religious freedom act, which also protects citizens' right to not be forced by state laws to carry out actions that go against their religious beliefs.

In the case of *Burwell vs. Hobby Lobby Inc.*, 573 U.S. ____ (2014), the US Supreme Court declared it unconstitutional to obligate a company with an inherent belief system to engage in actions or to carry out practices that go against their religious beliefs.

Taking this precedent into account, the National Commission believes that Law SB4 will force universities to go against the religious values enshrined in their vision that seeks the promotion of equality and the protection of the weak. This constitutes a violation of the First Amendment and the Texas Religious Freedom Restoration Act.

VI. CONCLUSION AND MEASURES REQUESTED

The National Commission believes that the vagueness in the definition of "lawful detention", as well as Section 752.053, subsection (b) that establishes its operational use, in Law SB4, violate the Fourteenth Amendment of the US Constitution.

The National Commission also concludes that Law SB4 goes against the Fourth Amendment by allowing for arbitrary detentions that are not founded on reasonable suspicion.

Likewise, Law SB4 will violate the Fourth Amendment by allowing detentions that would not be based on probable cause, but on racial profiling.

The National Commission would like to highlight the fact that Law SB4 infringes the First Amendment of the US Constitution, as well as the Texas Constitution and Education Code, by violating the right to freedom of expression and institutional autonomy in view that it will force universities to act in such a way that goes against the fundamental values of the institutions.

Furthermore, Law SB4 violates the First Amendment of the US Constitution and the Texas Religious Freedom Restoration Act by obligating universities to act against their values and religious beliefs.

Based on the above, the National Human Rights Commission of Mexico calls for this Court to:

- Declare Law SB4 unconstitutional and stop its entry into force.

- Suspend the effects of Law SB4 in such a way that it may not be used to enact discriminatory measures or force local authorities to adopt such measures.

August 7th, 2017.

Respectfully submitted,

Luis Raúl González Pérez
President
National Commission on Human Rights
Periférico Sur 3469, San Jerónimo Lídice,
10200, Mexico City, MEXICO
Phone: (+ 52 55) 56 81 81 25 x 1099
Email: lrgonzalez@cndh.org.mx;
ecorzo@cndh.org.mx