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

CITY OF EL CENIZO, *et al.*, *Plaintiffs,* v. STATE OF TEXAS, *et al.*, *Defendants*.	Case No. 5:17-cv-404-OLG

BRIEF OF *AMICUS CURIAE* CITY OF SAN MARCOS, TEXAS IN SUPPORT OF PLAINTIFFS' MOTIONS FOR PRELIMINARY INJUNCTION

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

Amicus City of San Marcos, Texas is a home rule city in Hays County, Texas with a population of 61,980 according to the 2016 Census. U.S. Census Data indicates that in 2010, 37.5 percent of the city's residents were Hispanic or Latino. San Marcos is the home of Texas State University's main campus with a Fall 2016 enrollment of 38,808 students. More than 50 percent of Texas State's students are from racial or ethnic minority groups with 35 percent listed as Hispanic, 11 percent African-American, and 5 percent of other racial or ethnic minorities. Minority students comprise 80 percent of the 7,858 students enrolled in the San Marcos Consolidated Independent School District's schools. The majority of those students are Hispanic.

Despite the San Marcos Police Department's ("SMPD") ongoing efforts to calm the fears of the community, there are many who believe that they, their family members, or friends will be stopped, questioned, detained, or deported if SB4 becomes law. The San Marcos City Council has heard a chorus of voices, growing daily by number and intensity, opposed to SB4. The council voted on August 22, 2017 to authorize the submission of a brief as *Amicus Curiae.*

INTRODUCTION

The City of San, Marcos, Texas files this brief as *Amicus Curiae* in support of Plaintiffs' Motions for Preliminary Injunction to prevent SB4 from becoming effective on September 1, 2017. The fear that SB4 has instilled in the immigrant and non-immigrant population in San Marcos is real. As the effective date of SB4 draws nearer, those fears threaten to undermine the San Marcos Police Departments' efforts to increase community outreach and partnership including areas of the city that are predominantly Hispanic.

Under current SMPD practice, its officers will not make an inquiry about a person's immigration status unless the individual has been involved in the commission of a violent crime

and the department determines that the safety of the community would be served, by immigration enforcement, to remove the individual from San Marcos. Continuation of that policy after September 1 would subject the city's police chief to thousands of dollars in civil penalties and the possibility of removal from office. Trust and cooperation between the police and city residents are the cornerstones of effective community policing. If allowed to become law, SB4 will destroy that trust. SB4 threatens punishment of public officials who attempt to reassure the community through policies, practices, or constitutionally protected statements of opinion that are deemed, by others, to "materially limit enforcement of the immigration laws."

The San Marcos Police Department is aware of U.S. Immigration and Customs Enforcement's ("ICE") 287(g) program that allows local law enforcement officers to engage in enforcement of immigration laws. SMPD understands that participation in the program is voluntary under 8 U.S.C. §§1357(g) (9) and (10). The department established its law enforcement priorities and made an assessment of its available resources. It chose not to deputize its employees as immigration enforcement officers and has not signed a memorandum of agreement with ICE. SB4 creates an unfunded mandate that will draw police resources away from responding to other calls for service. *Amicus* believes that enforcement of immigration laws is, and should remain, the responsibility of the federal government. Congress intended local police participation in the enforcement of immigration laws to be voluntary. SB4 thwarts that intent and a preliminary injunction should be issued to prevent it from being enforced anywhere in Texas.

While SB4 has been touted as a public safety measure, *Amicus* believes that fears of immigration enforcement will deter residents of San Marcos from calling the police, reporting crimes as victims, or coming forward as witnesses. As a result, San Marcos' residents will be less safe.

ARGUMENT

I. SB4 is preempted by Federal Law

SB4 prohibits a local entity from adopting, enforcing, or endorsing a policy that "prohibits or materially limits the enforcement of immigration law." TEX. GOV'T CODE §752.053(a)(1).[1] Prohibited policies include those that would materially limit a commissioned peace officer from, "assisting or cooperating with a federal immigration officer as reasonable or necessary, including providing enforcement assistance." §752.053(b)(3). In a scenario involving an ICE raid in San Marcos, SMPD's available personnel and equipment could be commandeered to assist federal immigration officials and leave the city with insufficient resources to respond to calls for service from its residents. From a plain reading of these provisions, it appears to *Amicus* that SB4 would make SMPD's participation in enforcement of immigration laws mandatory whenever a federal immigration officer requests assistance. A policy that allowed SMPD personnel to refuse an ICE request for assistance, when sufficient resources are not available, could subject the police chief to civil penalties under §752.056 or removal from office under §752.0565.

SB4 makes SMPD's assistance with the enforcement of immigration laws mandatory, but that is not what Congress intended.

> "Federal law specifies the limited circumstances in which state officers may perform the functions of an immigration officer. A principal example is when the Attorney General has granted that authority to specific officers in a formal agreement with a state or local government."

Arizona v. United States, 132 S. Ct. 2492, 2506 (2012).

SMPD has not entered into a voluntary agreement with ICE. Its officers are not trained in the complex provisions of federal immigration law. SB4 is in conflict with 8 U.S.C. §1357(g)(2) and (9). Federal law requires a police chief's consent to use police personnel for immigration

[1] The sections of the Texas Government Code amended by SB4 will be effective September 1, 2017.

enforcement even in situations where the U.S. Attorney General determines that an immediate federal response is needed to deal with "an actual or imminent mass influx" of immigrants near a border. 8 U.S.C. §1103(a)(10). SB4's mandatory cooperation requirements are in conflict with federal law.

Amicus concurs with the arguments of the City of Dallas and the El Cenizo Plaintiffs regarding federal preemption of SB4. (*See* ECF 152 at 8-13 and ECF 154 at 15-23).

II. SB4's Provisions are Unconstitutionally Vague

The void for vagueness doctrine requires that the law must give "a person of ordinary intelligence fair notice of what is prohibited" and must not be "so standardless that it authorizes or encourages seriously discriminatory enforcement." *FCC v. Fox Television Stations, Inc*., 567 U.S. 239, 253 (2012) (quoting *United States v. Williams*, 553 U.S. 285, 304 (2008)).

SB4 defines the term "local entity" to include the members of a governing body of a municipality, an officer or employee of a municipality including those in a police department, a municipal attorney, county attorney, or district attorney. §752.051(5). It defines the term "policy" to include, "a formal, written rule, order, ordinance, or policy, or an informal, unwritten policy." §752.051(6).

But, public officials are left guessing about what conduct on their part could lead to the imposition of crushing civil penalties of up to $25,000 per day or their ouster from office through *quo warranto* proceedings instituted by the Office of the Attorney General. That is because no definitions are offered to explain when a policy "materially limits the enforcement of immigration laws." Section 752.053(a)(1) provides no guidance and §752.0565 (removal from office) provides no comfort. All it takes to start the *quo warranto* process under TEX CIV. PRAC. and REM. CODE §66.002 to remove a local public official from office is "*evidence including evidence of a*

statement by the public officer" establishing "probable grounds" that a public officer "engaged in conduct" that violates §752.053(a)(1). So, the phrase, "*materially limits the enforcement of immigration laws*," really means whatever the Texas Attorney General's Office says it means. Any statement, comment, or remark made during a city council meeting, at a neighborhood forum, at a grocery store, at a coffee shop, or during a political debate could trigger the removal process. Furthermore, unlike TEX. CIV. PRAC. & REM. CODE §66.002, SB4's removal provision *requires* the attorney general to initiate removal proceedings when presented with such "evidence." TEX. GOV'T CODE §752.0565(b).

The potential for abuse of SB4, as a vehicle for state-sponsored retribution against local public officials for the exercise of their right to free speech in public or private discourse on the politically charged issue of immigration, is obvious. It results from the vagueness of the statute itself without regard to the motives of the current holders of state office. Section 752.053(a)(1) is invalid on its face because it leaves local public officials guessing at its meaning and it authorizes seriously discriminatory enforcement.

III. SB4 Violates the First Amendment Right to Free Speech

The right to speak out on matters of public concern is a hallmark of our constitutional democracy. This country is currently engaged in a heated debate regarding immigration enforcement and immigration reform. "The public interest in having free and unhindered debate on matters of public importance" is "the core value of the Free Speech Clause of the First Amendment." *See Pickering v. Board of Education*, 391 U.S. 563, 573 (1968). Local government officials, whether elected or appointed, do not forfeit their right to speak out on matters of public concern when they take office or accept public employment. A state "cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in free

expression." *Connick v. Myers*, 461 U.S. 138, 142 (1983). Local public officials in Texas have a First Amendment right to express their opinions on the matter of immigration. Some may believe that federal immigration law should be amended to provide a path to citizenship. Others hold the view that enforcement of immigration laws is the responsibility of the federal government and that city police officers should not be compelled to serve as immigration enforcement officers. Many have already spoken out against SB4 and some have questioned the motives of those responsible for sponsoring the bill and supporting its adoption.

SB4 equates "*evidence of a statement*" by a public officer with the adoption or endorsement of a policy. SB4 prohibits local elected and appointed officials from adopting or endorsing a policy that "*materially limits the enforcement of immigration laws*." After September 1, 2017, elected local officials and public employees in Texas who speak critically about the enforcement of immigration laws, or SB4 itself will be at risk for state-sponsored punishment including civil penalties and removal from office. The threat of dismissal from public employment is a powerful means of inhibiting free speech. *See Pickering*, at 574. State–sponsored punishment of those with opposing viewpoints is the hallmark of a totalitarian regime.

This Court should enjoin enforcement of TEX. GOV'T CODE §752.053(a)(1) because it is an unconstitutional limitation on free speech.

IV. Compliance with SB4 Would Result in Unlawful Seizures In Violation of the Fourth Amendment and Liability For Texas Cities Under 42 U.S.C. §1983

Under SB4, any individual stopped by the police – perhaps for a moving violation or a broken tail light – is subject to questioning by a police officer about his or her immigration status. TEX. GOV'T CODE §752.053(b)(1). The officer is authorized by SB4 to send information about the individual's place of birth to United States Immigration and Customs Enforcement. TEX. GOV'T CODE §752.053(b)(2)(A). If the federal government makes a detainer request, SB4

imposes an absolute and non-discretionary duty to "*comply with, honor, and fulfill*" the request, thus resulting in detention for up to 48 hours, unless the person can produce a Texas Driver's License or another form of government-issued identification to prove citizenship in the United States. TEX. CODE CRIM. PROC. art. 2.251.

Detention in compliance with an immigration detainer is a seizure under the Fourth Amendment and must be supported with probable cause or a warrant. *See Arizona v. United States*, 132 S.Ct. 2492, 2509 (2012); *Morales v. Chadbourne*, 793 F.3d 208, 217 (1st Cir. 2015). But, SB4 mandates compliance whether or not the federal immigration detainer is supported by probable cause or a warrant and thus compels local law enforcement agencies and their officers to engage in seizures in violation of the Fourth Amendment.

This Court has previously determined that a county policy of honoring ICE detainer requests under the assumption that probable cause existed to believe the detainee had committed a federal crime, solely because an ICE detainer had been issued, meets the standard of deliberate indifference to the Fourth Amendment rights of a detainee. *Santoyo v. United States*, No. 16-855 (W.D. Tex. June 5, 2017). Compliance with SB4 will put local law enforcement agencies in the no-win situation of honoring immigration detainer requests in violation of the Fourth Amendment, thus resulting in liability under 42 U.S.C. §1983, or facing civil penalties or removal from office because they have adopted a policy that requires an independent assessment of probable cause before honoring such requests.

V. SB4 Will Make Communities in Texas Less Safe

SB4 will have its greatest impact on Hispanic individuals and others whose physical appearance and attributes lead law enforcement officers to question them about their immigration status after they have been detained. The current practice in SMPD is to question immigration

status only when an individual has been arrested for involvement in the commission of a violent crime. That policy will not be enforceable if SB4 is allowed to become law on September 1, 2017. San Marcos residents are justifiably afraid that they, their families, or friends will be stopped, questioned, detained, and deported because SB4 compels SMPD's officers to act as immigration enforcement officers. They will fear the police and be reluctant to come forward as crime victims or witnesses. As a result, the entire community will be less safe.

San Marcos joins the arguments of the Plaintiffs and those presented in the Brief *Amici Curiae* of Major Cities Chiefs Association, Police Executive Research Forum, and United States Conference of Mayors In Support of Plaintiffs' Motions For Preliminary Injunction. (*See* ECF No. 165 at 6-13).

CONCLUSION

For these reasons, and for the reasons stated in the Plaintiffs' briefs, *Amicus* supports the entry of a preliminary injunction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on August 24, 2017, I electronically filed the foregoing document with the clerk of court for the United States District Court for the Western District of Texas using the electronic case failing system of the court. The electronic case filing system sent a "Notice of Electronic Filing" to all counsel of record who have consented in writing to accept this Notice as service of this document by electronic means.

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