No. 17-50762

In the United States Court of Appeals for the Fifth Circuit

CITY OF EL CENIZO, TEXAS; RAUL L. REYES, MAYOR, CITY OF EL CENIZO; TOM SCHMERBER, COUNTY SHERIFF; MARIO A. HERNANDEZ, MAVERICK COUNTY CONSTABLE PCT. 3-1; LEAGUE OF UNITED LATIN AMERICAN CITIZENS; MAVERICK COUNTY; CITY OF EL PASO, Plaintiffs-Appellees,

CITY OF AUSTIN, Intervenor Plaintiff-Appellee,

TRAVIS COUNTY; TRAVIS COUNTY JUDGE SARAH ECKHARDT; AND TRAVIS COUNTY SHERIFF SALLY HERNANDEZ, Intervenor Plaintiffs-Appellees,

CITY OF DALLAS, Intervenor Plaintiff-Appellee,

TEXAS ASSOCIATION OF HISPANIC COUNTY JUDGES AND COUNTY COMMISSIONERS, Intervenor Plaintiff-Appellee,

CITY OF HOUSTON, Intervenor Plaintiff-Appellee,

v.

STATE OF TEXAS; GREG ABBOTT, GOVERNOR OF THE STATE OF TEXAS, IN HIS OFFICIAL CAPACITY; AND KEN PAXTON, TEXAS ATTORNEY GENERAL, Defendants-Appellants.

EL PASO COUNTY; RICHARD WILES, SHERIFF OF EL PASO COUNTY, IN HIS OFFICIAL CAPACITY; AND THE TEXAS ORGANIZING PROJECT EDUCATION FUND, Plaintiffs-Appellees,

v.

STATE OF TEXAS; GREG ABBOTT, GOVERNOR; KEN PAXTON, ATTORNEY GENERAL; AND STEVE MCCRAW, DIRECTOR OF THE TEXAS DEPARTMENT OF PUBLIC SAFETY, Defendants-Appellants.

CITY OF SAN ANTONIO; REY A. SALDANA, IN HIS OFFICIAL CAPACITY AS SAN ANTONIO CITY COUNCILMEMBER; TEXAS ASSOCIATION OF CHICANOS IN HIGHER EDUCATION; LA UNION DEL PUEBLO ENTERO, INC.; AND WORKERS DEFENSE PROJECT, Plaintiffs-Appellees,

v.

STATE OF TEXAS; KEN PAXTON, SUED IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF TEXAS; AND GREG ABBOTT, SUED IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF TEXAS, Defendants-Appellants.

On Appeal from the United States District Court for the Western District of Texas, San Antonio Division, Nos. 5:17-cv-404, 5:17-cv-459, 5:17-cv-489

EMERGENCY MOTION TO STAY PRELIMINARY INJUNCTION PENDING APPEAL

Certificate of Interested Parties

Pursuant to the fourth sentence of Fifth Circuit Rule 28.2.1, appellants need not furnish a certificate of interested parties because they are governmental parties.

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Nature of the Emergency

The issue of "sanctuary cities" entered the national spotlight in 2015, when a convicted criminal was released by the San Francisco sheriff's department—despite a request by federal authorities to detain him for immigration enforcement—and killed Kate Steinle.[1] Responding to this public-safety concern, the Texas Legislature passed Senate Bill 4 (SB4) earlier this year to improve the cooperation of the State and its localities with the federal government in its enforcement of immigration law.

Before SB4, some law-enforcement agencies in Texas were already cooperating with federal officials' enforcement of immigration law. And some were already complying with federal-government requests (known as "ICE detainers") to continue detaining individuals already in state or local custody for up to an additional 48 hours—based on the federal government's representation, through an immigration warrant, of probable cause to believe that the person is a removable alien.

But other law-enforcement agencies in Texas had policies that prohibited such federal–local cooperation. Through SB4, Texas prohibits its local law-enforcement agencies from having such sanctuary-city policies. Exh. 2 (SB4) §752.053.

The district court preliminarily enjoined SB4 in substantial part on August 30, 2017, just two days before SB4's effective date of September 1, 2017. Exh. 38 (Order). The district court's sweeping rationale goes much further than allowing localities to have sanctuary-city policies. The district court's reasoning deems unlawful even state or local *voluntary* compliance with ICE-detainer requests or enforcement cooperation—all done at the express direction of the federal government.

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[1] Steve Almasy et al., *Suspect in Killing of San Francisco Woman Had Been Deported Five Times*, CNN.com, July 4, 2015, https://perma.cc/4FPJ-PTWA.

The district court's fundamentally flawed holding that States violate the Fourth Amendment by honoring federal ICE-detainer requests threatens to shut down this valid federal–local cooperation, which has existed throughout the Nation since at least the 1940s. Order 67 n.71; Exh. 14 at 6-7. And the district court's separate and erroneous preemption holding—that state and local officials are preempted from engaging in "enforcement cooperation" at the direction of federal immigration officials—is so aggressive that it calls into question the legality of preexisting, longstanding cooperation by state and local officials throughout the Nation with federal officials' enforcement of immigration law.

The district court's Order should be immediately stayed pending appeal, as this injunction has far-reaching public-safety consequences. Exh. 41 (McCraw Decl.) ¶¶3-4; Exh. 42 (Waybourn Decl.) ¶¶3-6. SB4 is wholly valid, and the State has every right to prohibit its own localities from having sanctuary-city policies. Moreover, the Order even threatens existing and legitimate local voluntary cooperation with the federal government's enforcement of immigration law.

A decision on the stay motion is therefore necessary as soon as possible, which the State submits is the evening of September 7, 2017, under circuit practice. *E.g.*, *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 734 F.3d 406, 419 (5th Cir. 2013) (granting emergency stay motion filed two days before). This expedited consideration is needed to minimize the irreparable harm being suffered because the State is unable to enforce its duly enacted public-safety law. *See Maryland v. King*, 567 U.S. 1301, 1301 (2012) (Roberts, C.J., in chambers) (preventing a State

from implementing a statute addressing "law enforcement and public safety interests . . . constitutes irreparable harm"). The timing to minimize this irreparable harm is unfortunately tight because, despite a preliminary-injunction hearing on June 26, the district court waited over two months to enjoin SB4 on August 30—two days before its effective date. The State then filed this stay motion expeditiously just two business days after the district court denied the State's stay motion on August 31.[2]

ARGUMENT

The four relevant factors all favor a stay pending appeal: (1) defendants' likely success on the merits; (2) defendants' irreparable harm; (3) no substantial harm to other parties; and (4) the public interest. *See Planned Parenthood*, 734 F.3d at 410.

I. DEFENDANTS ARE LIKELY TO SUCCEED ON APPEAL.

Given the applicable word limit, this motion will not attempt to exhaustively catalogue the district court's errors and, instead, will highlight errors that easily show a likelihood of reversal on all four violations found by the district court.

A. Overview of SB4

SB4 does two main things. *See generally* Exh. 15 at 3-9 (detailed statutory overview). First, SB4 directs law-enforcement agencies in Texas to honor ICE detainers—requests by U.S. Immigration & Customs Enforcement to notify the government of the release date of an alien already in local officials' custody, and to maintain custody of that alien (for up to 48 hours past the release date) so federal agents can

[2] The State certifies that the facts supporting emergency consideration of this motion are true and complete. 5th Cir. R. 27.3. No prior request for this relief has been submitted to this Court. 5th Cir. R. 8.4.

arrest the alien for immigration-law violations. *See* §§752.053(a)(3), 772.0073(a)(2);[3] Tex. Code Crim. Proc. art. 2.251(a). Federal policy requires all ICE detainers to be accompanied by a warrant issued by a federal immigration official, certifying the federal government's probable cause to believe that the person in question is unlawfully present. *See* Order 68-69 & n.73, 72 n.76.

Second, SB4 directs law-enforcement agencies not to prohibit or materially limit officers from "assisting or cooperating" with the federal government's enforcement of immigration law. §752.053(a)(1), (a)(2), (b)(3). This policy does not *require* officers to take affirmative enforcement actions. Rather, it displaces agency policies that *forbid* officers from ever asking about immigration status or providing enforcement assistance to federal immigration agents. *E.g.*, §752.053(b)(1)-(4) (prohibited-policy examples).

B. SB4's ICE-Detainer Provision Does Not Violate the Fourth Amendment.

1. First off, "neither this court nor the Supreme Court has held that the Fourth Amendment extends to a native and citizen of another nation who entered and remained in the United States illegally." *United States v. Portillo-Munoz*, 643 F.3d 437, 440 (5th Cir. 2011); *see Castro v. Cabrera*, 742 F.3d 595, 600 (5th Cir. 2014). So it is doubtful that the Fourth Amendment even applies to many aliens subject to ICE detainers under SB4.

[3] SB4's enactment and amendment of Texas statutes took effect September 1, 2017, although enforcement of some resulting provisions is enjoined. Section citations are to the Texas Government Code unless otherwise specified.

2. Even if the Fourth Amendment would apply, the district court's analysis has many fatal defects.

Most importantly, the district court erred in treating the Fourth Amendment's reasonableness inquiry as somehow different for federal versus state or local officials. The district court conceded the "broad and long-recognized" authority of *federal* officials to take custody of aliens based on probable cause of civil immigration violations. Order 69 (citing, *e.g.*, *United States v. Varkonyi*, 645 F.2d 453, 458 (5th Cir. Unit A 1981)). Because that detention is reasonable under the Fourth Amendment, it makes no difference whether state officials carry out the first 48 hours of that detention at the express request of the federal government. That is especially so since a federal ICE-detainer request to state officials is backed by a federal immigration warrant, expressly stating that the federal government has probable cause to believe that the individual is a removable alien.

The district court wrongly held that State and local officials must satisfy a "probable cause predicate" that "differs" from the predicate that federal officials must satisfy. Order 72. That doctrinal move is unprecedented. The "touchstone of the Fourth Amendment is 'reasonableness.'" *Riley v. California*, 134 S. Ct. 2473, 2482 (2014). The Fourth Amendment's reasonableness inquiry analyzes "the content of information possessed by police and its degree of reliability," *Alabama v. White*, 496 U.S. 325, 330 (1990)—not the precise identity of the official effecting the seizure or "the law of the particular State in which the search occurs," *Virginia v. Moore*, 553

U.S. 164, 172 (2008). If federal officials had sufficient probable cause to make a detention reasonable, that same seizure is also reasonable for state or local officials to perform at federal officials' request.

3. To be sure, the identity of the official effecting a seizure might implicate separate (1) state-law local-official-power issues or (2) federal preemption.[4] But those issues must be analyzed under applicable state-law or preemption doctrines, rather than the Fourth Amendment's reasonableness inquiry. *See, e.g.*, *United States v. Laville*, 480 F.3d 187, 192 (3d Cir. 2007) ("[V]alidity of an arrest under state law must never be confused or conflated with the Fourth Amendment concept of reasonableness.").

The district court's order, though, conflates these three distinct issues. For example, the district court incorrectly stated: "Defendants have not identified any provision of law—within the INA, Texas statute, or some other legal authority—that authorizes the local officials subject to SB 4 to arrest and detain for civil immigration violations, or to assess probable cause of removability." Order 76. That is not a Fourth Amendment issue regarding the individual right to be free from unreasonable seizures; it is an issue about whether the official effecting the seizure has been dele-

[4] Tenth Amendment commandeering issues are not presented; that amendment does not constrain a *State's* ability to direct its localities or local law-enforcement officials, whose local power is set at "the absolute discretion of the State." *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178 (1907); *see also* Tex. Const. art. XI, §1 (counties are "legal subdivisions of the State"), art. V, §23 (sheriffs' "duties . . . shall be prescribed by the Legislature"); *Kelley v. Johnson*, 425 U.S. 238, 247 (1976).

gated power to do so. In any event, SB4 itself authorizes Texas law-enforcement officials to detain persons "subject to an immigration detainer request issued by [ICE]." Tex. Code Crim. Proc. art. 2.251(a).

The district court then further conflated these issues by incorrectly suggesting (Order 76 & n.81) that SB4's ICE-detainer-compliance authorization is preempted under *Arizona v. United States*, 567 U.S. 387 (2012). *Arizona* held preempted a state law that allowed detention based on "the *unilateral* decision of state officers to arrest an alien for being removable *absent any request, approval, or other instruction from the Federal Government*." *Id.* at 410 (emphases added). In contrast to such "unilateral state action," federal ICE-detainer requests exemplify valid "cooperation under federal law" that is affirmatively *contemplated* by 8 U.S.C. §1357(g)(10)(B). *Id.*; *see also id.* ("allow[ing] federal immigration officials to gain access to detainees held in state facilities" is permitted).

Even if States gave up certain aspects of their common-law police powers upon joining the Union by submitting to federal preemption under the Supremacy Clause, *cf.* Order 70-71, the INA's 8 U.S.C. §1357(g)(10)(B) restored any otherwise preempted state power to comply with ICE-detainer requests. SB4 directs local officials to execute ICE-detainer detentions under the "request, approval," and "instruction" of federal immigration officials—in compliance with *Arizona*'s endorsement of such federally-guided cooperation. 567 U.S. at 410; *see United States v. Quintana*, 623 F.3d 1237, 1241-42 (8th Cir. 2010) (state trooper "was authorized to assist" in detention under §1357(g)(10)(B) based on border-patrol agent's probable cause of removability).

4. By wrongly concluding that SB4's authorization of ICE-detainer compliance would be preempted, the district court incorrectly held that state or local officials could detain individuals only for *crimes*—rather than civil offenses. Order 71, 73, 80. But state and local officials, like federal officials, have authority to detain for certain civil offenses. *See Santos v. Frederick Cty. Bd. of Comm'rs*, 725 F.3d 451, 466 (4th Cir. 2013) (state detentions for civil immigration violations are lawful when at "direction or authorization by federal officials," including ICE); 3 Wayne LaFave et al., Search and Seizure §5.1(b) (5th ed. 2012) (listing examples, including arrests for incapacitation due to intoxication); *see also, e.g.*, *Demore v. Kim*, 538 U.S. 510, 523 (2003); *Zadvydas v. Davis*, 533 U.S. 678, 697 (2001) (noting that civil removal proceedings contemplate detention).

5. The district court erred in concluding that local officials cannot act on ICE agents' immigration warrants if the local officials are not themselves "trained to [make] . . . a particularized assessment of probable cause of removability." Order 76-77. Local officers may rely and act on ICE's particularized determination of probable cause of removability, which is stated in the immigration warrant that ICE issues to local officers. *See, e.g.*, *Brooks v. United States*, 416 F.2d 1044, 1049 (5th Cir. 1969) ("[L]aw enforcement officers participating in a common investigation are reliable informants."). Where federal officials have probable cause and local officials act pursuant to those federal officials' requests, the local officials also have probable cause under the "collective knowledge" doctrine—even if the local officials lack "personal knowledge of the evidence." *United States v. Ibarra-Sanchez*, 199 F.3d 753, 759-60 (5th Cir. 1999).

To the extent a detainee in any particular case argues otherwise—such as to claim that a local official had conclusive, affirmative knowledge that the federal agents' determination was wrong—that claim would be only an as-applied challenge to a specific detention, not a basis for facially enjoining SB4's ICE-detainer mandate as the district court did. *See United States v. Salerno*, 481 U.S. 739, 745 (1987). Unlike in *City of Los Angeles v. Patel*, 135 S. Ct. 2443, 2451 (2015), SB4 will not "prohibit the particularized assessment of probable cause in every case in which it applies," as ICE detainers themselves reflect ICE's particularized finding of probable cause of removability. *Cf.* Order 78.

6. Lastly, the district court's order jeopardizes other federal–local cooperation. For example, local law-enforcement agencies can contract with federal immigration officials to undertake specific immigration-enforcement functions, 8 U.S.C. §1357(g), such as issuing "immigration detainers," serving "warrants of arrest for immigration violations," and "process[ing] . . . immigration violations." Exh. 42, App. D to Exh. A at 17-18. It is unclear how those arrangements survive the district court's sweeping Fourth Amendment holding that local officials can detain and execute warrants only if "probable cause of a crime exists." Order 80. Moreover, to the extent that the injunction extends to compliance with immigration detainers seeking only notification of an alien's release date, as opposed to detention of the alien, *see* Order 68, 94, a plainly permissible information-sharing practice is now suspended.

C. SB4's Enforcement-Assistance Provision Is Not Preempted.

The district court manifestly erred in holding that SB4's enforcement-assistance provision (§752.053(b)(3)) is field and conflict preempted. Order 19-33. The court

ignored SB4's text and purpose by pretending that SB4 requires localities to engage in *unilateral* immigration enforcement divorced from any assistance or cooperation by the federal government. Nothing in SB4 requires (or allows) unilateral enforcement: The provision at issue merely prohibits policies barring local officials from "*assisting* or *cooperating* with a federal immigration officer as reasonable or necessary, including providing enforcement *assistance*." §752.053(b)(3) (emphases added).

1. The district court fundamentally misapprehended what §752.053(b)(3) does and does not do. Section 752.053(b)(3) prohibits local policies that *block* local officials from "assisting or cooperating" with federal immigration authorities. It is a statewide prohibition on sanctuary-city policies that ban federal–local cooperation. Before any such cooperation can occur, though, the federal government must first ask for assistance. So "when the Attorney General has not requested [cooperation] and will not supervise local enforcement," Order 30, SB4 does not come into play.

SB4 does not direct local officers to "apprehend and remove aliens without supervision and direction from the Federal Government," Order 31, or "establish[] a systematic local enforcement procedure," Order 33. The State never claimed to have the "'inherent authority' to carry out immigration enforcement" unilaterally. Order 29.

2. By misconstruing §752.053(b)(3), the district court erroneously held that it was not protected from preemption by 8 U.S.C. §1357(g)(10)(B). Order 31-32. This "federal statute permit[s] state officers to 'cooperate with the Attorney General in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States.'" *Arizona*, 567 U.S. at 410 (quoting 8 U.S.C.

§1357(g)(10)(B)). That is precisely what SB4's §752.052(b)(3) does: it ensures that state and local officers are permitted to cooperate with the federal government in enforcing immigration law. Thus, SB4 is neither field nor conflict preempted, as 8 U.S.C. §1357(g)(10)(B) expressly says such cooperation is permitted.[5]

SB4 "simply seeks to enforce" the federal–local cooperation that federal law itself promotes, thus "trac[ing] the federal law." *Chamber of Commerce v. Whiting*, 563 U.S. 582, 602, 607 (2011). The State is not unilaterally "determin[ing] whether a person is removable." *Arizona*, 567 U.S. at 409. Federal immigration officials are the ones who ultimately determine what steps to take (or not to take) to detain or remove any unlawfully present alien. There is no risk, then, of putting "local officials in the impermissible position of arresting and detaining persons based on their immigration status without federal direction and supervision." *Villas at Parkside Partners v. City of Farmers Branch*, 726 F.3d 524, 532 (5th Cir. 2013) (en banc).

The district court incorrectly said *Arizona* distinguished "communication from enforcement cooperation." Order 32. *Arizona* certainly held that "unilateral" state immigration enforcement was preempted. 567 U.S. at 410. But *Arizona* listed multiple examples of enforcement "cooperation" *permitted* under 8 U.S.C. §1357(g)(10)(B): "situations where States participate[d] in a joint task force with federal officers, provide operational support in executing a warrant, or allow federal immigration officials to gain access to detainees held in state facilities." *Id.*

[5] Congress also has broadly encouraged federal–local immigration-enforcement cooperation elsewhere. *E.g.*, 8 U.S.C. §§1103(a)(11), 1373(a), (b), 1644.

3. The district court correctly recognized that "[s]ubsection (g)(10)(B) allows states to cooperate with the Attorney General absent a formal agreement." Order 29. But, in direct conflict with that observation, the court erroneously held that SB4's §752.053(b)(3) was preempted because it is purportedly "circumventing" the statutory requirements for a written, formal federal–local cooperation agreement under 8 U.S.C. §1357(g)(1)-(5). Order 27.

As the district court recognized, 8 U.S.C. §1357(g)(10) itself says that a formal agreement is not required for federal–local cooperation:

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

8 U.S.C. §1357(g)(10) (emphases added). Subparagraph (B) belies the district court's conclusion that, by permitting formal agreements to allow local officials to *directly enforce* immigration law, Congress meant to preempt lesser forms of local *cooperation* with federal agents' enforcement activities. Order 24-26, 31-32. By holding that formal 8 U.S.C. §1357(g) agreements are the exclusive means for local officials to *cooperate* with federal officials in immigration enforcement, the district court effectively read 8 U.S.C. §1357(g)(10)(B) out of the INA. Order 28-30 & n.30.

If a State or locality wanted the federal government to deputize its officials to "perform the functions of an immigration officer," *Arizona*, 567 U.S. at 408—for

example, to issue "immigration detainers," serve "warrants of arrest for immigration violations," and "process . . . immigration violations." Exh. 42, App. D to Exh. A at 17-18—then the State or locality would need to enter into a formal agreement under 8 U.S.C. §1357(g)(1). Under such an agreement, the state or local officials would be de facto deputized federal immigration officers "subject to the direction and supervision of the Attorney General." 8 U.S.C. §1357(g)(3).

SB4's §752.053(b)(3), though, does not address whether the State or localities should enter into formal agreements for their officials to be deputized as de facto federal immigration officers. Instead, it deals with local officials "assisting and cooperating" with federal immigration officers' actions, which is exactly when a formal agreement is not needed under 8 U.S.C. §1357(g)(10)(B). SB4 simply does not conflict with the "exacting requirements" for formal agreements under 8 U.S.C. §1357(g)(1)-(5). Order 25; *see, e.g.*, *United States v. Vasquez-Alvarez*, 176 F.3d 1294, 1300 (10th Cir. 1999) (observing that 8 U.S.C. §1357(g)(10)(B) "evinces a clear invitation from Congress for state and local agencies to participate in the process of enforcing federal immigration laws" even outside of a "formal [§1357(g)] agreement").

Indeed, plaintiffs themselves have long cooperated with federal officials in the enforcement of federal immigration law by (selectively) enforcing ICE-detainer requests without formal agreements. *See, e.g.*, Exh. 11 (Travis County Sheriff Sally Hernandez Decl.) ¶26. As the United States noted below, "[n]othing in [8 U.S.C. §1357(g)(10)] suggests it permits *ad hoc* efforts at cooperation by individual officers

but not state enactments to provide that same type of cooperation by all state officers." Exh. 14 (Statement of Interest of the United States) at 21.

4. Finally, the district court's remedy sweeps far too broadly: The court enjoined §753.053(b)(3) in its entirety based only on one term in that provision: "enforcement assistance." Order 19, 32-33. The court never addressed SB4's severability clause expressing "the intent of the legislature that every . . . clause, phrase or word in this Act . . . are severable from each other." SB4 §7.01. Courts must apply state-law severability provisions to the greatest extent possible. *See, e.g.*, *Leavitt v. Jane L.*, 518 U.S. 137, 139-40 (1996). Thus, any preemption regarding "enforcement assistance" warrants, at most, enjoining that phrase alone.

D. SB4's Endorsement Prohibition Does Not Violate Free Speech.

SB4's §752.053(a)(1) provides that local entities may not "adopt, enforce, or endorse" policies limiting immigration-law enforcement. The district court erred in enjoining this entire provision under the First Amendment.

1. The court erroneously defined "endorse" as "sweeping in scope," Order 44, based on what it "could mean," Order 41. In a facial challenge—and particularly in the overbreadth context, *see, e.g.*, *United States v. Wallington*, 889 F.2d 573, 576 (5th Cir. 1989)—statutory provisions must be interpreted to avoid constitutional concerns, *see, e.g.*, *Virginia v. Am. Booksellers Ass'n Inc.*, 484 U.S. 383, 397 (1988). The Supreme Court has often admonished that "[t]he elementary rule is that *every reasonable construction* must be resorted to, in order to save a statute from unconstitutionality." *Skilling v. United States*, 561 U.S. 358, 406 (2010).

As the State repeatedly proposed—but the district court did not even discuss—the term "endorse" in SB4 is readily susceptible to a valid narrowing construction: the dictionary definition "to sanction." Webster's New International Dictionary 845 (2d ed. 1945); *accord* Webster's New World College Dictionary 480 (5th ed. 2016); Oxford English Dictionary 162 (Oxford Univ. Press 1971). To "sanction," in turn, means "to ratify or confirm," or "to authorize or permit; countenance." Webster's New World College Dictionary 1286.

So defined, "endorse" obviates all free-speech concerns. And this comports with SB4's design of prohibiting, not free speech, but local sanctuary-city policies obstructing cooperation with federal immigration officials. Section 752.053(a)(1)'s direction that local agencies and officials may not adopt, enforce, or endorse such policies—with "endorse" meaning to ratify, confirm, authorize, or permit such policies in their agency—has nothing to do with the political process, political campaigns, or constitutionally protected speech generally. It deals with those local entities' use of their governmental power.

2. Even if the statutory term "endorse" were invalid, the district court significantly erred as to the remedy. Order 93. In §752.053(a)(1), "endorse" is a single word in a disjunctive list of verbs; the single word "endorse" could be severed and enjoined while leaving the rest of the provision operative. That was the appropriate remedy for any violation—particularly in light of SB4's severability clause. *See, e.g.*, *Leavitt*, 518 U.S. at 139-40; *Phelps-Roper v. Koster*, 713 F.3d 942, 953 (8th Cir. 2013) (holding that an unconstitutional word appearing just once in a serial list should be stricken, and everything else upheld). One set of plaintiffs even conceded that, given

SB4's severability clause, the appropriate remedy for any First Amendment problem would be to enjoin only the term "endorse." *See* Exh. 25 (Transcript of Preliminary Injunction Hearing) at 53 (statement of El Cenizo counsel).

Instead, the district court enjoined the entire statutory provision containing that word—without even mentioning SB4's severability clause. Order 33-48, 93. The court claimed that it "cannot rewrite a law to conform it to constitutional requirements." Order 39 (citing *United States v. Stevens*, 559 U.S. 460, 481 (2010)). But there is nothing to *rewrite*; the prohibition on remedial rewriting of statutes deals with *affirmatively writing new words into* a statute. *Randall v. Sorrell*, 548 U.S. 230, 262 (2006); *accord Stevens*, 559 U.S. at 480-81.

Nor would striking "endorse" alone present any other problems. Removing it would not "leave gaping loopholes." *Randall*, 548 U.S. at 262. It is not integral to the "functional coherence" of the statutory provision. *Farmers Branch*, 726 F.3d at 537. That one word in a serial list is not "so interwoven" in §752.053(a)(1) that it "cannot be separated." *Hill v. Wallace*, 259 U.S. 44, 70 (1922). And the remaining statute would be "fully operative as a law." *Champlin Refining Co. v. Corp. Comm'n of Okla.*, 286 U.S. 210, 234 (1932).

E. SB4's "Materially Limit" Prohibitions Are Not Facially Vague.

SB4 directs local officials not to prohibit or "materially limit" local officials' cooperation with federal immigration enforcement. §752.053(a)-(b). The district court wrongly held this term unconstitutionally vague on plaintiffs' facial, pre-enforcement challenge. The term has a clear, core meaning—which is why plaintiffs can so assuredly argue that their preferred local policies are prohibited. *Cf.* Order 52.

1. A vagueness analysis tests whether a law is definite enough "to provide a person of ordinary intelligence fair notice of what is prohibited" or is "so standardless that it authorizes or encourages seriously discriminatory enforcement." *Holder v. Humanitarian Law Proj.*, 561 U.S. 1, 18 (2010); *see Roark & Hardee LP v. City of Austin*, 522 F.3d 533, 552-53 (5th Cir. 2008). The challenger must show that "no standard of conduct is specified at all." *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495 n.7 (1982). When "laws that do not threaten to infringe constitutionally protected conduct" are "challenged facially as unduly vague, in violation of due process," the challenger "'must demonstrate that the law is impermissibly vague in all of its applications.'" *Roark*, 522 F.3d at 546 (quoting *Hoffman Estates*,455 U.S. at 497).

The Supreme Court did not jettison these principles in *Johnson v. United States*, 135 S. Ct. 2551 (2015). *Cf.* Order 54. *Johnson* was not a pre-enforcement challenge; it invalidated a criminal sentence after "[n]ine years' experience" trying to grapple with "the indeterminacy of the wide-ranging inquiry required by the [Armed Career Criminal Act's] residual clause." 135 S. Ct. at 2558, 2560. The provision had created numerous circuit splits and "proved 'nearly impossible to apply consistently.'" *Id.* at 2560. Ultimately, the clause was vague "although it would be permissible as applied to some conduct because the statute required applying an uncertain term to 'an idealized ordinary case of the crime,' and 'not to real-world facts or statutory elements.'" *Crooks v. Mabus*, 845 F.3d 412, 417 (D.C. Cir. 2016) (quoting *Johnson*, 135 S. Ct. at 2557, 2561).

SB4 shares none of those characteristics. Moreover, unlike in *Johnson*, several plaintiffs here *concede* that their conduct would be covered by SB4, *see* Exh. 15 at 35-36, and "[a] plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others." *Hoffman Estates*, 455 U.S. at 495.

SB4 is not vague merely because it could yield close legal questions in some circumstances. Order 56. Rather, a law is unconstitutionally vague only if it "simply has no core." *Smith v. Goguen*, 415 U.S. 566, 578 (1974). The provision here has an obvious valid core that precludes facial vagueness: SB4 prohibits sanctuary-city policies limiting when local officials can collect and share immigration-status information—the type of federal–state cooperation that the district court ruled was constitutional, *see* Order 11-17—or limiting federal–local cooperation to only certain types of immigration violators, *e.g.*, Order 58 n.57 (citing Travis County Sheriff Office's policy).

2. In all events, "materially limit" is not vague under any test. *See* Order 55-56. A "material" limit is one that is "substantial," as opposed to insignificant, Webster's New International Dictionary 1392 (3d ed. 2002), and "material" also suggests a "logical connection" between the action and the "consequential facts" creating the action's significance—here, the effect on immigration-law enforcement, Black's Law Dictionary 1124 (10th ed. 2014). Thus, as applied to immigration-law enforcement, a "material limit" is a policy or action (1) addressing that topic of immigration-law enforcement, as opposed to routine police matters, (2) that either prohibits immigration law-enforcement activity or significantly limits that activity from

its otherwise-allowed scope. These constraints are not "contrary to the text of the statute," Order 55, but rather consistent with routine statutory-interpretation principles. *See United States v. Golding*, 332 F.3d 838, 844 (5th Cir. 2003) (per curiam) (*noscitur a sociis* canon); §752.053(b)(1)-(4) (examples of what is covered).

A materiality standard is also routine in the law. *E.g.*, Fed. R. Evid. 807(a)(2). For example, "materially limit[]" is used in federal law. *E.g.*, 15 U.S.C. §77d-1(b)(1)(H)(i); *Comm'r v. Estate of Hubert*, 520 U.S. 93, 105-07 (1997) (plurality op.) (discussing a "material limitation" standard). Likewise, the ABA model rules on professional conduct refer to a "materially limit[]" standard. Model Rules of Prof'l Conduct 1.7(a)(2), 1.10(a)(1) (Am. Bar Ass'n 2016). Where narrowing context or settled legal concepts indicate a particular meaning, "*every reasonable construction* must be resorted to, in order to save a statute from unconstitutionality." *Skilling*, 561 U.S. at 406.

Purported concerns about as-applied discriminatory enforcement cannot sustain a pre-enforcement facial challenge. Order 57; *see, e.g.*, *Hoffman Estates*, 455 U.S. at 503-04. Since "gradations of fact or charge would make a difference" as to liability, "adjudication of the reach and constitutionality of [the statute] must await a concrete fact situation." *Holder*, 561 U.S. at 25.

II. The Remaining Factors Favor a Stay.

"The presumption of constitutionality which attaches to" SB4 "is not merely a factor to be considered in evaluating success on the merits, but an equity to be considered in favor of applicants in balancing hardships." *Walters v. Nat'l Ass'n of Radiation Survivors*, 468 U.S. 1323, 1324 (1984) (Rehnquist, J., in chambers). States

necessarily suffer irreparable harm when their public-safety statutes are enjoined. *Maryland v. King*, 567 U.S. at 1301 (Roberts, C.J., in chambers); *accord Planned Parenthood*, 734 F.3d at 419.

On the other hand, a stay pending appeal creates no meaningful possibility of injury to plaintiffs. State and local law-enforcement officials have been cooperating with federal immigration authorities for years without irreparable harm to those officials. *E.g.*, Exh. 16 ¶¶12, 22; Exh. 17 ¶¶6-10; Exh. 18 ¶¶6-10. This is true even of plaintiffs, who have sometimes enforced ICE-detainer requests, based on their own policy preferences (such as the seriousness of the allegations against the detainee). *See, e.g.*, Exh. 11 ¶26. Lifting barriers to immigration-law enforcement when the federal government requests help is a public good that does not injure plaintiffs. *See Heckler v. Cmty. Health Servs. of Crawford Cty, Inc.*, 467 U.S. 51, 60 (1984) (noting "the interest of the citizenry as a whole in obedience to the rule of law").

Finally, a stay of the preliminary injunction would allow Defendants to carry out the statutory policy of the Legislature, which "is in itself a declaration of public interest." *Virginian Ry. Co. v. Sys. Fed'n No. 40*, 300 U.S. 515, 552 (1937).

Conclusion

The Court should stay the district court's injunction pending appeal of the preliminary injunction or any later appeal of a final judgment enjoining SB4.

Respectfully submitted.

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Certificate of Conference

Appellees have been contacted by e-mail on September 4 and September 5, 2017. Because appellees have not responded with consent to the relief requested herein, appellants consider this motion opposed. The filing of this motion was also preceded by telephone calls to the clerk's office and to the offices of opposing counsel on September 5, 2017 advising of the intent to file the emergency motion.

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Certificate of Service

I certify that this document has been served by ECF or e-mail on September 5, 2017, upon the following:

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Certificate of Compliance

I certify that, on September 5, 2017, this document was transmitted to the Clerk of the United States Court of Appeals for the Fifth Circuit via the Court's CM/ECF document filing system.

I certify that (1) required privacy redactions have been made, 5th Cir. R. 25.2.13; (2) the electronic submission is an exact copy of the paper document, 5th Cir. R. 25.2.1; and (3) the electronic submission has been scanned with the most recent version of commercial virus-scanning software and was reported free of viruses.

I certify that this motion complies with the type-volume limitation of Rule 27(d)(2) because it contains no more than 5,200 words, and complies with the typeface and style requirements of Rule 32(a)(5) and (a)(6) because it was prepared in Microsoft Word using 14-point Equity typeface.

/s/ Scott A. Keller
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EXHIBITS

District Court Documents

	ECF No.	Document (in No. 5:17-cv-404 unless otherwise noted)	Date
1.	1	Complaint by El Paso County et al. (No. 5:17-cv-459)	May 22, 2017
2.	1-1	Senate Bill No. 4	May 8, 2017
3.	24	Motion for Preliminary Injunction by City of El Cenizo et al.	June 5, 2017
4.	31	Second Amended Complaint by City of El Cenizo et al.	June 8, 2017
5.	37	Intervenor Complaint by City of Austin	June 12, 2017
6.	51	Amended Complaint by TOPEF	June 19, 2017
7.	55	Motion for Preliminary Injunction by City of San Antonio et al.	June 19, 2017
8.	56	Motion for Preliminary Injunction by El Paso County et al.	June 19, 2017
9.	57	Motion for Preliminary Injunction by City of Austin	June 19, 2017
10.	58	Motion for Preliminary Injunction by Judge Sarah Eckhardt et al.	June 19, 2017
11.	58-1	Declaration of Sally Hernandez	June 19, 2017
12.	77	Memorandum in Support of Motion for Preliminary Injunction by City of San Antonio et al.	June 19, 2017
13.	78	Intervenor Complaint by Judge Sarah Eckhardt et al.	June 20, 2017
14.	90	Statement of Interest of the United States	June 23, 2017
15.	91	Opposition to Motions for Preliminary Injunction	June 23, 2017
16.	91-1	Declaration of Steven C. McCraw	June 23, 2017
17.	91-2	Declaration of Bill E. Waybourn	June 23, 2017
18.	91-3	Declaration of Rand Henderson	June 23, 2017
19.	91-4	Declaration of Laura Stowe	June 23, 2017
20.	96	Intervenor Complaint by City of Dallas	June 23, 2017
21.	125	Brief in Support of Motion for Preliminary Injunction	June 27, 2017
22.	137	Brief by Immigration Reform Law Institute	June 27, 2017
23.	139	Intervenor Complaint by City of Houston	June 30, 2017
24.	142	Intervenor Complaint by Texas Association of Hispanic County Judges and County Commissioners	June 30, 2017
25.	143	Transcript of Preliminary Injunction Hearing	July 3, 2017
26.	144	Brief by Texas Association of Hispanic County Judges and County Commissioners	July 8, 2017
27.	146	Post-hearing Brief by City of Austin	July 10, 2017
28.	148	Post-hearing Brief by Judge Sarah Eckhardt et al.	July 10, 2017

29.	149	Post-hearing Brief by El Paso County et al.	July 10, 2017
30.	150	Post-hearing Brief by City of Houston	July 10, 2017
31.	151	Post-hearing Brief by City of San Antonio et al.	July 10, 2017
32.	152	Post-hearing Brief by City of Dallas	July 10, 2017
33.	154	Post-hearing Brief by City of El Cenizo et al.	July 10, 2017
34.	170	Supplemental Statement of Interest by the United States	July 20, 2017
35.	172	Post-hearing Brief by Defendants	July 20, 2017
36.	174	First Amended Complaint by City of San Antonio et al.	July 20, 2017
37.	178	Amended Answer to Complaints	Aug. 3, 2017
38.	189	Order Granting Preliminary Injunction	Aug. 30, 2017
39.	n/a	Text Order Denying Opposed Motion to Stay Pending Appeal	Aug. 31, 2017
40.	192	Amended Notice of Appeal	Sept. 1, 2017

Declarations

41.	n/a	Declaration of Steven C. McCraw	Sept. 5, 2017
42.	n/a	Declaration of Bill E. Waybourn	Sept. 4, 2017