No. 17-50762

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, JUDGE SARAH ECKHARDT, in her Official Capacity as Travis County Judge; SHERIFF SALLY HERNANDEZ, in her Official Capacity as Travis County Sheriff; TRAVIS COUNTY; CITY OF DALLAS, TEXAS; TEXAS ASSOCIATION OF HISPANIC COUNTY JUDGES AND COUNTY COMMISSIONERS; THE CITY OF HOUSTON,

Intervenors - Plaintiffs - Appellees

v.

STATE OF TEXAS; GREG ABBOTT, Governor of the State of Texas, in his Official Capacity, KEN PAXTON, Texas Attorney General,

Defendants - Appellants

EL PASO COUNTY; RICHARD WILES, Sheriff of El Paso County, in his Official Capacity; TEXAS ORGANIZING PROJECT EDUCATION FUND; MOVE San Antonio,

Plaintiffs – Appellees

v.

STATE OF TEXAS; GREG ABBOTT, Governor; KEN PAXTON, Attorney General; STEVE MCCRAW, Director of the Texas Department of Public Safety,

Defendants - Appellants

CITY OF SAN ANTONIO; BEXAR COUNTY, TEXAS; REY A. SALDANA, in his Official Capacity as San Antonio City Councilmember; TEXAS ASSOCIATION

OF CHICANOS IN HIGHER EDUCATION; LA UNION DEL PUEBLO ENTERO, INCORPORATED; WORKERS DEFENSE PROJECT,

Plaintiffs – Appellees

CITY OF AUSTIN,

Intervenor Plaintiff - Appellee

v.

STATE OF TEXAS; KEN PAXTON, sued in his Official Capacity as Attorney General of Texas; 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

BRIEF OF AMICUS CURIAE THE UNITED STATES OF AMERICA IN SUPPORT OF TEXAS'S MOTION FOR A STAY PENDING APPEAL

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INTRODUCTION AND STATEMENT OF INTEREST OF THE UNITED STATES

This Court should stay the district court's preliminary injunction of the detainer provision of Texas Senate Bill 4 (SB 4). The decision below severely undermines the United States' interests in cooperation with state and local governments on immigration enforcement. *See* 28 U.S.C. § 517. The detainer provision requires Texas state and local law enforcement officers to honor federal officials' requests to notify them about removable aliens in local custody and to detain such aliens (for no more than 48 hours) until federal officials can take custody of them in an orderly manner. These federal requests are accompanied by a federal administrative arrest warrant supported by probable cause to believe that the alien is removable from this country. The district court did not dispute that, consistent with the Fourth Amendment, federal officers can arrest and detain an alien pursuant to such a warrant. The district court nonetheless ruled that, in directing Texas officers to act, the detainer provision likely violates the Fourth Amendment because federal detainer requests rest on probable cause that an alien is removable—not probable cause that the alien committed a crime—and the requests do not let local law enforcement find probable cause of a crime for themselves.

The district court's decision is manifestly erroneous. SB 4 affirmatively authorizes (and indeed mandates) state and local law enforcement officers in Texas to temporarily detain aliens in cooperation with a federal detainer request. The Immigration and Naturalization Act (INA), 8 U.S.C. § 1101 *et seq.*, does not preempt

such cooperation. The INA permits such state or local "cooperat[ion] with the Attorney General in the identification, apprehension, detention, or removal of aliens." *Id.* § 1357(g)(10). And just as the Fourth Amendment permits the federal government to detain an alien pursuant to an administrative warrant backed by probable cause to believe the alien is removable, it permits state and local officials to detain the same alien based on the same determination of probable cause at the express behest of the federal government. The district court erred in ruling otherwise.

The district court's erroneous Fourth Amendment ruling also does not even apply on its own terms to the detainer provision's requirement to notify federal officials about removable aliens in local custody. That requirement presents no legal problem. Yet the court inexplicably and erroneously enjoined that requirement too.

All other factors favor a stay. The United States' reliance on detainers and administrative warrants advances important border-safety, public-safety, and national-security interests. By scuttling the United States' chosen approach for administering federal immigration laws in Texas, the injunction harms the public by preventing prompt and effective removal of dangerous criminals. The injunction also hinders local governments who wish to cooperate with federal officials, and gives safe harbor to the non-cooperative jurisdictions that the Texas legislature reasonably required to cooperate. The provision should be permitted to take effect while this Court resolves this appeal.

BACKGROUND

A. Federal law authorizes States and localities to aid federal immigration enforcement, including by complying with federal detainer requests

The federal government has "broad, undoubted power over the subject of immigration and the status of aliens." *Arizona v. United States*, 567 U.S. 387, 394 (2012). Under the INA, this includes authority to interview, arrest, and detain removable aliens. *See* 8 U.S.C. § 1226(a) (Secretary of Homeland Security may issue administrative arrest warrants and arrest and detain aliens pending removal decision); *id.* § 1226(c)(1) (Secretary "shall take into custody" aliens who have committed certain criminal offenses when "released"); *id.* § 1231(a)(1)(A), (2) (Secretary may detain and remove aliens ordered removed); *id.* § 1357(a)(1), (2) (authorizing certain warrantless interrogations and arrests).[1]

Although the federal government possesses broad power over immigration, enforcing the laws concerning removable aliens is a formidable challenge. To meet that challenge, the federal government works with state and local governments. These cooperative efforts are critical to enabling the federal government to identify and remove the hundreds of thousands of aliens who violate immigration laws each year.

Federal law contemplates and authorizes these cooperative efforts. For example, Congress has authorized the Department of Homeland Security (DHS) to enter into

[1] Following the Homeland Security Act of 2002, many references in the INA to the "Attorney General" are now read to mean the Secretary. *Clark v. Suarez Martinez*, 543 U.S. 371, 374 n.1 (2005).

cooperative agreements with States and localities. *See* 8 U.S.C. § 1357(g). Under these agreements, trained and qualified state and local officers may, "subject to the direction and supervision of the [Secretary]," *id.* § 1357(g)(3), perform specified immigration enforcement functions relating to investigating, apprehending, and detaining aliens. *Id.* § 1357(g)(1)-(9). Even without a formal agreement, state and local officers may "communicate with the [Secretary] regarding the immigration status of any individual" or "otherwise [] cooperate with the [Secretary] in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States," *id.* § 1357(g)(10), when that cooperation is pursuant to a "request, approval, or other instruction from the Federal Government," *Arizona*, 567 U.S. at 410. Examples include: (1) participation in joint task forces with federal officers; (2) providing operational support to execute a warrant; (3) giving federal officials access to detainees held in state or local facilities; (4) holding an alien in custody to enable the federal government to make an arrest; (5) responding to requests for information about when an alien will be released from custody; and (6) requesting immigration-status information from aliens and sharing that information with federal officials. *See* DHS, Guidance on State and Local Governments' Assistance in Immigration Enforcement and Related Matters (Sept. 21, 2011), http://www.dhs.gov/xlibrary/assets/guidance-state-local-assistance-immigration-enforcement.pdf. The INA permits such cooperation whether it is directed by state statute or is implemented *ad hoc* by a local sheriff. *See Arizona*, 567 U.S. at 413.

States and localities frequently cooperate with federal immigration enforcement by responding to federal requests for assistance. These requests are often contained in federal immigration detainers issued by Immigration and Customs Enforcement (ICE), a component of DHS responsible for immigration enforcement in the interior of the country.[2] In an immigration detainer, ICE: (1) provides a State or locality with notice of its intent to take custody of a removable alien who is detained in their custody; and (2) requests cooperation in those efforts. A detainer asks a State or locality to cooperate by notifying DHS of the alien's release date and, if ICE has probable cause of removability, holding the alien for up to 48 hours until DHS can take custody. *See* 8 C.F.R. § 287.7.[3]

DHS's immigration-detainer form, Form I-247A, sets forth the basis for DHS's determination that it has probable cause to believe that the subject is a removable alien. *See* ICE Policy No. 10074.2 (April 2, 2017), https://www.ice.gov/detainer-policy. The form explains the basis of DHS's probable-cause finding based upon: (1) a final order of removal against the alien; (2) the pendency of ongoing removal proceedings against the alien; (3) biometric confirmation of the alien's identity and a records match in federal databases that indicate, by themselves or with other reliable information, that the alien either lacks lawful immigration status or, despite such status, is removable; or (4) the

[2] U.S. Customs and Border Protection (CBP), another DHS component, also issues detainers, but it is responsible for border, not interior, enforcement. This brief addresses only ICE detainers.

[3] Several statutes authorize such action, including 8 U.S.C. §§ 1103, 1226, 1357, and 1231. *See Comm. for Immigrant Rights of Sonoma Cnty. v. Cnty. of Sonoma*, 644 F. Supp. 2d 1177, 1199 (N.D. Cal. 2009).

alien's voluntary statements to an immigration officer, or other reliable evidence that the alien either lacks lawful immigration status or, despite such status, is removable. As of April 2, 2017, ICE detainers may be issued only for aliens already in the criminal custody of a State or locality and must be accompanied by a signed administrative warrant of arrest issued under 8 U.S.C. §§ 1226 or 1231(a). That arrest warrant is issued by an executive officer based on a probable-cause determination. *See* 8 C.F.R. §§ 236.1, 241.2, 287.5.[4]

B. To aid federal immigration enforcement, Texas enacted Senate Bill 4's detainer provision, which directs Texas localities to cooperate with federal detainer requests

This case involves Texas Senate Bill 4, which allows and requires local officials to cooperate with federal immigration enforcement and prevents local actions impeding such efforts through policies forbidding such cooperation. Here the United States focuses on SB 4's detainer provision, codified at Texas Code of Criminal Procedure Article 2.251, which authorizes and directs state and local law enforcement to comply with federal immigration detainer requests.

Entitled "duties related to immigration detainer requests," Article 2.251 provides a directive for local Texas law enforcement entities that receive, for a person in their custody, a "federal government request to a local entity to maintain temporary custody of an alien, including a [DHS] Form I-247 document or a similar or successor form."

[4] These are either a Form I-200, Warrant for Arrest of Alien, or a Form I-205, Warrant of Removal/Deportation.

The provision directs that such entities:

> (1) comply with, honor, and fulfill any request made in the detainer request provided by the federal government; and
> (2) inform the person that the person is being held pursuant to an immigration detainer request issued by United States Immigration and Customs Enforcement.

Art. 2.251(a). As discussed above, federal immigration detainers contain both notification and detention requests. So this provision requires that local officers notify ICE when an alien subject to a detainer is scheduled to be released and to hold the alien up to 48 hours longer to permit ICE to take custody in a safe custodial setting.

C. The district court preliminarily enjoins SB 4's detainer provision

The district court held that most provisions of SB 4 were likely preempted by federal law or unconstitutional, and enjoined their operation preliminarily.

As relevant to this brief, the district court concluded that SB 4's detainer provision likely violates the Fourth Amendment and preliminarily enjoined that provision. Slip op. 65-81, 93-94. Before reaching that issue, the court discussed state authority and federal preemption. On state authority, the district court noted that "states retain no inherent authority to effect arrests or detentions in immigration matters," *id.* at 71; *see also id.* at 70-73 (discussing state-law restrictions on arrests), but the court did not appear to dispute that the detainer provision empowered local law enforcement to make civil immigration arrests at ICE's request. The court also appeared to say that, "[t]o the extent that" the detainer provision "authoriz[es]" local officials "to arrest and detain for civil immigration violations, or to assess probable cause of

removability," it is preempted. *Id.* at 76 & n.81.

The district court ultimately rested its holding on the Fourth Amendment. The court did not dispute that federal ICE officers may, consistent with the Fourth Amendment, detain aliens "upon finding probable cause to believe that the subject is an alien who is removable from the United States." Slip op. 73. But the court saw matters differently for state and local officials called upon to detain aliens at ICE's request under a detainer and administrative warrant. Because an ICE detainer and administrative warrant do not necessarily establish probable cause of a *crime* but only probable cause of a civil offense (removability), *id.* at 75, an ICE request to detain supported by such documents does not, the court concluded, furnish the probable cause needed for a local law enforcement officer to detain a removable alien at the federal government's request consistent with the Fourth Amendment, *see id.* at 76. Nor, the court added, does SB 4 permit a local official to independently assess whether there is probable cause that the subject of an ICE detainer has committed a crime. *See id.* at 75-76. Since SB 4's detainer provision requires local officials "to detain the subject of the federal detainer request" despite the absence of a probable-cause finding of a crime, the court concluded, "the detainer provision "likely violate[s] the Fourth Amendment" on its face. *Id.* at 76; *see id.* at 81. The court did not analyze whether the detainer provision lawfully requires local law enforcement to notify federal officials of the release dates of removable aliens in local custody.

The court preliminarily enjoined operation of Article 2.251(a)(1)'s requirement

that law enforcement agencies "comply with, honor, and fulfill" any immigration detainer request. Slip op. 93-94. That injunction bars enforcement of both the notification and detainer portions of SB 4's detainer provision.

THE COURT SHOULD STAY PENDING APPEAL THE DISTRICT COURT'S INJUNCTION OF SB 4'S DETAINER PROVISION

The district court manifestly erred in enjoining Texas's decision in SB 4 to direct its localities to cooperate with federal requests for assistance by notifying ICE of removable aliens and briefly detaining them. The Fourth Amendment allows Texas to issue that directive. Leaving in place the district court's injunction would harm the United States' ability to enforce immigration law in Texas and endanger the public. The Court should stay the injunction of SB 4's detainer provision pending appeal.

I. The District Court Erred in Holding that SB 4's Detainer Provision Likely Violates the Fourth Amendment.

SB 4's detainer provision directs local law enforcement officers to cooperate with federal detainers by notifying federal authorities about removable aliens and detaining such aliens based on probable cause of removability. Tex. Code Crim. Proc. Art. 2.251(a)(1). There is no serious dispute that federal immigration law contemplates and embraces such cooperation, or that federal officials can themselves constitutionally effect the detentions at issue. Nevertheless, the district court enjoined local law enforcement from detaining aliens under this provision (slip op. 75-76, 93-94) and from even notifying federal officials when such aliens will be released (*id.* at 93-94). The district court erred on both fronts.

A. To the extent the district court suggested that no authorization exists for cooperation with detainers, or that such cooperation is preempted, it erred

As a threshold matter, the district court made two erroneous suggestions. First, it suggested that Texas law enforcement officers lack authorization to comply with federal detainer requests—perhaps, for example, because States lack "inherent authority to effect arrests or detentions in immigration matters." Slip op. 71; *see id.* at 70-73. But there is no need for implied authority here. As the district court could not seriously dispute, SB 4 affirmatively authorizes such cooperative detention here, because it unambiguously requires local law enforcement to "comply with, honor, and fulfill" federal detainers that ask local officials to (among other things) detain aliens based on probable cause of removability. Tex. Code Crim. Proc. Art. 2.251(a)(1).

Second, the district court suggested that federal law may preempt SB 4's conferral of authority on local law enforcement to cooperate with detainers. *See* slip op. 76 & n.81. That cryptic suggestion—contained in a one-sentence footnote citing no authority—is plainly wrong under federal statutes and caselaw. *See* 8 U.S.C. § 1357(d), (g)(10); *Arizona*, 567 U.S. at 410. Detainers are "request[s] . . . from the Federal Government" to a State or locality to assist its efforts to detain a particular alien, so complying with those requests is necessarily permissible cooperation at the "request, approval, or other instruction from the Federal Government." *Arizona*, 567 U.S. at 410 (finding such cooperation consistent with federal law, including "arrest[ing] an alien for being removable" following a "request, approval, or other instruction from the Federal

Government," and "responding to requests for information about when an alien will be released from their custody").[5]

B. The district court erred in ruling that the Fourth Amendment likely bars local law enforcement from detaining an alien based on a federal detainer request

The district court held that the detainer provision "likely violate[s] the Fourth Amendment" because it requires local officials "to detain the subject of the federal detainer request" despite the absence of a probable cause finding of a crime (slip op. 76) and does not permit local officials to make such a finding for themselves (*id.* at 75). *See id.* at 74-76. Three points show that the district court' erred: (1) federal officials can (as the court did not dispute) constitutionally arrest aliens under a federal administrative warrant; (2) the lawfulness of that practice does not change when state or local officials make such an arrest; and (3) there is no constitutional problem when local officials rely on federal officials' probable-cause determinations.

First, there is no dispute that the Fourth Amendment permits *federal* officers to make civil arrests of aliens based only on probable cause of removability contained in a detainer or administrative warrant. To start, the "Fourth Amendment does not require

[5] Courts have recognized that federal law permits States and localities to cooperate with detainers' notification and detention requests. *See, e.g.*, *Santos v. Frederick Cnty. Bd. of Comm'rs*, 725 F.3d 451, 465-67 (4th Cir. 2013) (detention by state officer lawful when "at ICE's express direction"); *United States v. Ovando-Garzo*, 752 F.3d 1161, 1164-65 (8th Cir. 2014) (cooperation without "written agreement" is lawful if "not unilateral"). While some decisions have found certain state and local immigration arrests to be unlawful, those decisions either involved the absence of state-law authority to cooperate with detainers, *see Lunn v. Commonwealth*, 477 Mass. 517, 528-33 (2017), or unilateral state action in the absence of a federal request or direction, *see Melendres v. Arpaio*, 695 F.3d 990, 1001 (9th Cir. 2012); *Buquer v. City of Indianapolis*, 2013 WL 1332158, at *10-11 (S.D. Ind. Mar. 28, 2013).

warrants to be based on probable cause of a crime, as opposed to a civil offense." *United States v. Phillips*, 834 F.3d 1176, 1181 (11th Cir. 2016). Arrests may be premised on probable cause of any legal violation, civil or criminal. *See, e.g.*, *Arkansas v. Sullivan*, 532 U.S. 769 (2001) (per curiam); *Soldal v. Cook Cnty.*, 506 U.S. 56, 69 (1992). That understanding is especially settled in the immigration context. There is "overwhelming historical legislative recognition of the propriety of administrative arrest[s] for deportable aliens." *Abel v. United States*, 362 U.S. 217, 233 (1960) (noting "impressive historical evidence" of validity of "administrative deportation arrest from almost the beginning of the Nation"); *see, e.g.*, *Lopez v. INS*, 758 F.2d 1390, 1393 (10th Cir. 1985) (aliens "may be arrested by administrative warrant issued without order of a magistrate").

The district court did not contest that federal immigration officers can detain an alien based on a civil administrative warrant attesting to probable cause of removability. The court did suggest that Fourth Amendment problems arise when an arrest is based on probable cause of a civil—as opposed to a criminal—violation. Slip op. 70-73. The authorities discussed above rebut that suggestion.[6] The district court also suggested warrants accompanying detainers are problematic because they are issued by an ICE

[6] That suggestion also conflicts with cases affirming the propriety of non-immigration civil detentions. *See, e.g.*, *Bruce v. Guernsey*, 777 F.3d 872, 875-75 (7th Cir. 2015) (mental-illness-based detention); *United States v. Gilmore*, 776 F.3d 765, 770-71 (10th Cir. 2015) (intoxication); *United States v. Timms*, 664 F.3d 436, 452-53 (4th Cir. 2012) (sexual dangerousness); *United States v. Burtton*, 599 F.3d 823, 830 (8th Cir. 2010) (open-container violation).

official rather than a judicial officer. *Id.* at 70-72. But given the civil context of federal immigration detainers, an executive official (like a federal immigration officer) can constitutionally make the necessary probable-cause determination. "[L]egislation giving authority to the Attorney General or his delegate to arrest aliens pending deportation proceedings under an administrative warrant, not a judicial warrant within the scope of the Fourth Amendment," has existed "from almost the beginning of the Nation" and challenges to their validity "call[] for no further consideration." *Abel*, 362 U.S. 232-34. So "it is not unconstitutional under the Fourth Amendment for the Legislature to delegate a probable cause determination to an executive officer, such as an ICE agent, rather than to an immigration, magistrate, or federal district court judge."[7] *Roy v. ICE*, No. 13-4416, 2017 WL 2559616, *10 (C.D. Cal. June 12, 2017); *see Sherman v. United States Parole Comm'n*, 502 F.3d 869, 876-80 (9th Cir. 2007) (listing immigration among examples where warrants may be issued "outside the scope of the Fourth Amendment's Warrant Clause"); *United States v. Lucas*, 499 F.3d 769, 777 (8th Cir. 2007) (same); *Spinella v. Esperdy*, 188 F. Supp. 535, 540-41 (S.D.N.Y. 1960) (same); *State v. Rodriguez*, 317 Or. 27, 42-43 (1993) (similar).

Second, because the Fourth Amendment allows federal immigration officers to arrest and detain based on an administrative warrant attesting to probable cause of

[7] Immigration is one of several civil circumstances involving administrative warrants where the Fourth Amendment imposes lesser restrictions. *See, e.g.*, *United States v. Garcia-Avalino*, 444 F.3d 444, 446-47 (5th Cir. 2006) ("supervised releasees"); *Sherman*, 502 F.3d at 876-80 (parole violators); *Lucas*, 499 F.3d at 776-79 (prison escapees).

removability, state and local officials can do the same when they act at the request or direction of the federal government. The Fourth Amendment does not apply differently when a local official rather than a federal official is making an arrest or detaining an individual. "The Fourth Amendment's meaning [does] not change with local law enforcement practices . . . . Fourth Amendment protections are not 'so variable' and cannot 'be made to turn upon such trivialities." *Virginia v. Moore*, 553 U.S. 164, 172 (2008). To hold otherwise would cause Fourth Amendment "protections [to] vary if federal officers were not subject to the same statutory constraints as state officers." *Id.* at 176.

Thus, if a seizure is legal under the Fourth Amendment when a federal officer effectuates it, then so too when a state or local officer does so, even where state law does not authorize the arrest. *See Martinez-Medina v. Holder*, 673 F.3d 1029, 1037 (9th Cir. 2011) ("deputy sheriff's violation of Oregon law [in arresting alien based on a violation of federal immigration law] does not constitute a violation of the Fourth Amendment"). This is especially true where, as here, a state officer is not just arresting for a federal offense, but doing so at and after the express request of the federal government supported by a federal warrant, and consistent with state law authorizing the arrests and requiring compliance with federal detainers requesting such arrests. Thus, the district court was wrong to conclude that the Fourth Amendment bars state and local officials—but not federal officials—from detaining aliens "based upon suspicion" of "removab[ility]" rather than on "suspicion of a crime." Slip op. 75.

Third, arrests or detentions based on probable cause may lawfully be made where the probable-cause determination is made by one official (here, a federal ICE officer) and relied on by another official who serves under a different sovereign (here, a state or local official). Put differently, state and local officers may rely on ICE's findings of probable cause, as articulated in a detainer and administrative warrant, to detain the subject of a detainer when the federal government so requests. Where one officer obtains an arrest warrant based on probable cause, other officers can make the arrest even if they are "unaware of the specific facts that established probable cause." *United States v. Hensley*, 469 U.S. 221, 231 (1985). "[W]here law enforcement authorities are cooperating . . . the knowledge of one is presumed shared by all." *Illinois v. Andreas*, 463 U.S. 765, 772 n.5 (1983); *accord United States v. McDonald*, 606 F.2d 552, 553 (5th Cir. 1979) (per curiam) (collective knowledge satisfied where "officer reasonably believed that appellant was the subject of a federal arrest warrant").

This rule of collective law-enforcement knowledge applies when "the communication [is] between federal and state or local authorities," 3 Wayne R. LaFave, SEARCH AND SEIZURE, § 3.5(b) (2016) (collecting cases), including when a state or local officer arrests someone based upon probable cause from information received from an immigration officer. *See, e.g.*, *Liu v. Phillips*, 234 F.3d 55, 57-58 (1st Cir. 2000); *Smith v. State*, 719 So. 2d 1018, 1022 (Fla. Dist. Ct. App. 1998). Indeed, the Supreme Court has suggested that state arrests based on civil immigration violations are not constitutionally problematic if made in response to a "request, approval, or other instruction from the

Federal Government"; that proposition assumes state and local reliance on federal officers' probable cause to make the arrest. *Arizona*, 567 U.S. at 410. Therefore, the district court was wrong to think that the Fourth Amendment requires local law enforcement to make probable-cause assessments for themselves, independent of the determination made by federal immigration officers. *See* slip op. 75.[8]

For these reasons, the Fourth Amendment allows local officials to detain aliens in response to federal detainer requests. The district court erred in holding otherwise.

C. The district court erred in barring local law enforcement from notifying federal officials when a criminal alien will be released

The district court did not analyze the legality of SB 4's requirement that local law enforcement respond to a detainer by notifying ICE of a criminal alien's release date. The district court nonetheless enjoined operation of the detainer provision in full, *see* slip op. 93-94, which includes the provision's directive that local officials provide this notification, *see* Tex. Code Crim. Proc. Art. 2.251(a)(1).

The district court provided no basis for that part of the injunction. Even if it had, the invalidation of the notification requirement would not withstand scrutiny. "State officials can . . . assist the Federal Government by responding to requests for

[8] The district court relied exclusively on cases predating ICE's current policy, and therefore involving detainers that were not accompanied by administrative warrants. *See* slip op. 71-72. It also ignored the fact that courts routinely apply collective-knowledge principles in civil cases where one sovereign effects arrest based on another sovereign's probable cause. *See, e.g.*, *United States v. Cardona*, 903 F.2d 60, 62-63 (1st Cir. 1990) (parole violator warrant issued by New York, effectuated by local police in Rhode Island); *Furrow v. U.S. Bd. of Parole*, 418 F. Supp. 1309, 1312 (D. Me. 1976) (same, federal warrant, effectuated by Maine); *Andrews v. State*, 962 So. 2d 971, 973 (Fla. Dist. Ct. App. 2007) (military deserter warrant effectuated by local police).

information about when an alien will be released from their custody." *Arizona*, 567 U.S. at 410. An immigration detainer is such a request. It asks "that officials give the [federal government] notice of the person's death, impending release, or transfer to another institution," to "ensure that upon the completion of [an alien's] state criminal matter, [the alien] would be transferred to federal custody to face any immigration consequences." *United States v. Juarez-Velasquez*, 763 F.3d 430, 435-36 (5th Cir. 5014). And where (as with federal detainers) an alien remains subject to state or local custody or charges, that state-law basis is "[t]he impetus for the entire duration" of the alien's detention, "not the immigration detainer." *Id.* at 436 n.2. The notification requirement raises no Fourth Amendment problem. The district court's injunction as to the notification provision is baseless.

II. The Remaining Stay Factors Strongly Favor Staying the District Court's Injunction of SB 4's Detainer Provision

The remaining stay factors strongly support a stay. Independent of the parties, the injunction of SB 4's detainer provision harms the United States' ability to enforce immigration law. By interfering with State cooperation in immigration enforcement, the injunction harms the federal government's efforts to remove criminal aliens in many ways: it impinges on core Executive functions, offends the separation of powers, undermines federalism, and causes "considerable administrative burden on [DHS]." *See INS v. Legalization Assistance Project*, 510 U.S. 1301, 1306 (1993) (O'Connor, J., in chambers). And by declaring likely unlawful the Executive's cooperation with Texas

local officers relying on federal immigration detainers for immigration enforcement, the district court has stifled "statutes enacted by representatives of its people." *Maryland v. King*, 567 U.S. 1301, 1301 (2010) (Roberts, C.J., in chambers).

The injunction also causes "ongoing and concrete harm to [the United States'] law enforcement and public safety interests" in Texas. *Id.*. Cooperation with detainers increases overall safety and enforcement efficiency with respect to criminal aliens. *See* Ex. 1, Decl. of Corey Price, ¶¶ 5-8. If detainers become inoperative in Texas, ICE will experience significant detrimental impacts to enforcement efforts, including: (1) increased public-safety and officer-safety risks, with criminal aliens being released into the communities, potentially re-offending, and requiring at-large apprehensions in uncontrolled and potentially dangerous public spaces; (2) operational inefficiency, as it takes ICE four times as long to conduct at-large arrests than to arrest aliens at jails and prisons, thereby sapping time and resources from other mission-sensitive tasks; and (3) diminished enforcement, given the need to expend resources on apprehending aliens released at large, which limits the number of criminal aliens that can be apprehended. *Id.*

Those harms are immediate. With few exceptions, Texas law enforcement agencies cooperate with detainers. In fiscal year 2016 in Texas, ICE issued 19,607 detainers, and as of August 27, 2017, that number was 25,520 for fiscal year 2017. *Id.* ¶¶ 9-11. And some counties in the Western District alone are so remote that, without cooperation with detainer requests, ICE would likely be unable to arrive in time to take

custody. The district court did not account for these harms. The court did assert that "[l]ocal cooperation, under the rubric of federal law, will not change" under its ruling. Slip op. 91. That is wrong. The injunction hobbles SB 4's efforts to require recalcitrant localities—local jurisdictions that bar local law enforcement from aiding federal immigration enforcement—to cooperate with federal authorities. And because the court declared local cooperation with federal immigration warrants and detainer requests to be likely unconstitutional absent probable cause of criminality, jurisdictions throughout Texas will likely modify their cooperation policies to avoid the threat of Fourth Amendment liability caused by the court's decision.

By contrast, the plaintiffs will suffer relatively slight harm from having to comply with ICE detainers, particularly given that each has cooperated with detainers in full or in part until now. It is no harm to comply with a lawful exercise of a State's authority over its subsidiaries compelling cooperation with federal requests that comply with the Fourth Amendment. ICE detainers request assistance to help facilitate the removal of removable criminal aliens for whom there is no entitlement to be sheltered from ICE's custody. Any intrusion on local decision-making is strongly outweighed by the harm to the federal government's ability to remove dangerous aliens in Texas.

The other interests of the public and of third parties also favor a stay. By preventing DHS from implementing its chosen approach for best administering the immigration laws in Texas, the injunction harms the public, by preventing prompt removal of dangerous criminals and the constitutional actions of elected officials from

working as Congress intended. *See Nken v. Holder*, 556 U.S. 418, 436 (2009); *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 497 (2001). These considerations again outweigh those on the other side, especially given that removable aliens subject to detainers have no entitlement to avoid immigration custody pending adjudication of their removability. *See Demore v. Kim*, 538 U.S. 510, 533 (2003).

CONCLUSION

The district court's injunction of SB 4's detainer provision should be stayed pending resolution of this appeal. At the least, the injunction should be stayed to the extent that it enjoins compliance with notification requests in federal detainers.

Dated: September 8, 2017

Respectfully submitted,

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Civil Division

WILLIAM C. PEACHEY
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Office of Immigration Litigation

/s/ Erez Reuveni
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CERTIFICATE OF SERVICE

I certify that on September 8, 2017, I electronically filed the foregoing document with the Clerk of Court by using the CM/ECF system, which will provide electronic notice and an electronic link to this document to the attorneys of record for all parties.

/s/ Erez Reuveni
EREZ REUVENI
Senior Litigation Counsel
U.S. Department of Justice

CERTIFICATE OF COMPLIANCE

1. 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.

2. I certify that this response complies with the type-volume requirement of Federal Rule of Appellate Procedure 27(d)(1) and (2) because is not more than 5,200 words or 20 pages, and complies with the typeface requirements of Rule 32(a)(5) and (6) because it was prepared using 14-point Garamond typeface.

/s/ Erez Reuveni
EREZ REUVENI
Senior Litigation Counsel
U.S. Department of Justice

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

City of El Cenizo, Texas, *et al.*, Plaintiffs, v. Texas, *et al.*, Defendants	Civil Action No. 5:17-cv-404-OLG

DECLARATION OF COREY PRICE

I, Corey A. Price, hereby state and declare that the following statements are true and correct to the best of my knowledge, information and belief:

1. I am the Assistant Director for Enforcement, with Enforcement and Removal Operations (ERO), United States Immigration and Customs Enforcement (ICE), Department of Homeland Security (DHS), in Washington, D.C. My current responsibilities include management of the national programs of the Criminal Alien Division, the Fugitive Operations and Training Division, and the Targeting Operations Division. I have worked for the former Immigration and Naturalization Service, and then ICE, since June, 1998. Prior to my current job, from December, 2015 to August, 2017, I served as ERO's Field Office Director of the El Paso, Texas Area of Responsibility (AOR). In that job, I oversaw ERO operations – including the apprehension and detention of criminal aliens -- in West Texas and New Mexico, with a team of more than 350 employees. Additionally, I served as a member of the Joint Task Force West Unified Command for the El Paso corridor and collaborated with federal, state and local law

enforcement on numerous efforts, including the Papal visit to the borderland, the response to the southwest border surge of 2016, and the Alliance to Combat Transnational Threats.

2. ICE is the principal investigative arm of DHS. ICE's primary mission is to promote homeland security and public safety through the criminal and civil enforcement of federal laws governing border control, customs, trade, and immigration. A critical ICE mandate is the enhancement of public safety and the security of the American public through the enforcement of our immigration laws. ICE is authorized to identify and remove aliens who have been convicted of crimes such as murder, predatory sexual offenses, narcotics trafficking, alien smuggling, and a host of other offenses that harm persons in the United States and have extraordinary public safety consequences. Such aliens can be dangerous and recidivist.

3. ERO and Homeland Security Investigations are the two principal operational components within ICE. ERO oversees programs and conducts operations to identify and apprehend removable aliens, to detain these individuals when necessary, and to remove illegal and removable aliens from the United States. ERO prioritizes the apprehension, arrest, and removal of aliens who: a) have been convicted of or charged with a criminal offense; b) have been charged with any criminal offense that has not been resolved; c) have committed acts which would constitute a chargeable criminal offense; d) have engaged in fraud or willful misrepresentation in connection with any official matter before a government agency; e) have abused a program related to receipt of public benefits; f) are subject to a final order of removal but have not complied with a final order of removal to depart the United States; or g) otherwise pose a risk to public safety or national security in the judgment of the immigration officer. ERO manages all logistical aspects of the removal process, including domestic transportation, detention, alternatives to detention programs, bond management, and supervised release. In addition, ERO repatriates aliens ordered removed from the United States to more than 170 countries around the world.

ERO consists of more than 7,500 employees located at ICE headquarters, 24 field offices in the U.S. and overseas.

4. The Criminal Alien Division (CAD), which I oversee, supports ICE's mandate by performing strategic planning and establishing policy designed to guide ICE's ability to identify, arrest and remove criminal aliens from the United Sates following removal proceedings and issuance of an Order of Final Removal.

5. Where a state or local jurisdiction withholds cooperation with ICE's operational ability to enforce federal immigration law against criminal aliens, there are detrimental impacts on ICE's ability to fulfill its mission, and thereby, to protect the public. These detrimental impacts include:

a. a public safety risk, as criminal aliens are being released into the community with the potential to re-offend, rather than into ICE custody for removal proceedings;

b. an officer safety risk, as certain aliens who otherwise would have been transferred in a controlled, safe, and secure manner directly from state or local custody into ICE custody for removal proceedings are instead released at large, where they must be sought for arrest by ERO officers in riskier and potentially hazardous environments;

c. operational inefficiency, because after the alien has been released from state or local custody, attempting to take the alien into federal custody typically requires ERO officers to operate in multi-person, outfitted Fugitive Operation teams that entail a greater expenditure of time, effort, funds, and manpower relative to what is necessary to take custody of the alien directly from state or local detention; and

d. diminished enforcement, because the need to expend greater resources on apprehending aliens who have already been released at large limits the number of criminal aliens

ERO is able to apprehend with its limited resources, leaving more criminal aliens at large and in violation of our immigration laws, and placing the public at greater risk.

6. The cooperation ICE receives from state and local law enforcement agencies is critical to its ability to identify and arrest criminal aliens who meet DHS immigration enforcement and removal priorities.

7. The absence of cooperation enabling ICE to take custody of criminal aliens directly from state or local detention creates the potential for more dangerous arrest situations where an alien has already been released and is at large. To apprehend such an alien, ICE will have to attempt to locate that person either at home or somewhere else in the community. This can create a more dangerous situation for ICE officers, who may have to go into a dangerous environment to find an individual, and potentially for community members, who may be caught in the middle of a less than peaceful surrender. This situation involves a greater possibility of the use of force or violence by the target, who, once out in the community, may resist being taken back into custody and may have greater access to weapons.

8. Having advance notice, where feasible, of a criminal alien's release from detention and/or having cooperation from state or local law enforcement agencies that hold aliens up to 48 hours past the time when they would otherwise have been released pursuant to an immigration detainer is extremely important to ICE. Among other benefits, advance notice allows ICE to determine how to best allocate its limited personnel resources. Apprehending criminal aliens after they have been released into the community requires the expenditure of significantly greater resources. ICE estimates that it takes ERO four times as long to conduct at-large arrests than to arrest aliens at jails and prisons through the Criminal Alien Program. At current staffing levels, ICE field offices are not able to take custody of all criminal aliens and serve them with arrest warrants immediately after they are released from state or local custody. ERO is also not able to identify and apprehend all at-large criminal aliens after they are released

and before they reoffend, and in fact, ERO officers are only able to arrest a fraction of those released from state and local custody due to the significantly greater operational burden of conducting at-large arrests.

9. In Fiscal Year 2016, ICE issued 19,607 detainers in the State of Texas. As of August 26, 2017, ICE has issued 25,520 detainers in the State of Texas in Fiscal Year 2017.

10. ERO currently has 1,171 officers in the State of Texas. These officers are responsible for all ERO operations in the state, including identifying and apprehending criminal aliens at all state prisons and county jails. Many of these state prisons and county jails are not located near an ERO field office or sub-office. Therefore, if state and local law enforcement agencies do not honor immigration detainers, ERO will not be able to effectively conduct its immigration enforcement mission in Texas. Thousands of criminal aliens will be released into Texas communities instead of being safely transferred to ICE custody.

11. With very few exceptions, state and local law enforcement agencies in Texas cooperate with immigration detainers. This cooperation is vital to ERO's ability to carry out its mission. For example, McCullough, Lampasas, and San Saba counties range in distance from 90 to approximately 150 miles from the nearest ERO office in Austin. If local law enforcement officers in those counties cannot honor detainers, it would be unlikely that ERO officers could arrive at the county jails in time for an inmate's release to take custody. Officers would be required to drive up to two and a half hours to conduct surveillance and at- large operations. Terrell County Jail in Sanderson, Texas is located 120 miles from the ERO Pecos office, which has only five officers currently assigned to the Criminal Alien Program. Hudspeth County Jail in Sierra Blanca, Texas is located 90 miles from the ERO El Paso office. Again, if local law enforcement officers in these counties cannot honor detainers, it would be unlikely that ERO officers could arrive at the county jails in time for an inmate's release to take the alien into

federal custody. Officers would be required to conduct surveillance and at-large operations, which would have a negative effect on ERO's ability to safely apprehend, detain, and remove criminal aliens.

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

Executed in Washington, D.C. this 5th day of September, 2017.

Corey A. Price
Assistant Director for Enforcement
Enforcement and Removal Operations
U.S. Immigration and Customs Enforcement

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

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September 12, 2017

Mr. Erez Reuveni
U.S. Department of Justice, Office of Immigration Litigation
Civil Division
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Washington, DC 20001

No. 17-50762 City of El Cenizo, Texas, et al v. State of Texas, et al
USDC No. 5:17-CV-404
USDC No. 5:17-CV-459
USDC No. 5:17-CV-489

Dear Mr. Reuveni,

The following pertains to your Amicus brief electronically filed on September 12, 2017.

We filed your brief. However, **you must make the following correction by tomorrow, September 13, 2017.**

You need to correct or add:

Caption on the brief does not agree with the caption of the case in compliance with FED R. APP. P. 32(a)(2)(C). Caption must exactly match the Court's Official Caption (See Official Caption below) The full caption is required on the front of your brief and it may extend onto the second page if necessary.

Note: Once you have prepared your sufficient brief, you must electronically file your 'Proposed Sufficient Brief' by selecting from the Briefs category the event, Proposed Sufficient Brief, via the electronic filing system. Please do not send paper copies of the brief until requested to do so by the clerk's office. The brief is not sufficient until final review by the clerk's office. If the brief is in compliance, paper copies will be requested and you will receive a notice of docket activity advising you that the sufficient brief filing has been accepted and no further corrections are necessary. The certificate of service/proof of service on your proposed sufficient brief **MUST** be dated on the actual date that service is being made. Also, if your brief is sealed, this event automatically seals/restricts any attached

documents, therefore you may still use this event to submit a sufficient brief.

Sincerely,

LYLE W. CAYCE, Clerk

By: _____
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cc:
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Ms. Jo Anne Bernal
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Mr. Edgar Saldivar
Mr. John Paul Salmon
Mr. Andre Segura
Mr. Michael Siegel
Ms. Sherine Elizabeth Thomas
Mr. Eric A. White
Mr. Richard Paul Yetter

Case No. 17-50762

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, JUDGE SARAH ECKHARDT, in her Official Capacity as Travis County Judge; SHERIFF SALLY HERNANDEZ, in her Official Capacity as Travis County Sheriff; TRAVIS COUNTY; CITY OF DALLAS, TEXAS; TEXAS ASSOCIATION OF HISPANIC COUNTY JUDGES AND COUNTY COMMISSIONERS; THE CITY OF HOUSTON,

Intervenors - Plaintiffs - Appellees

v.

STATE OF TEXAS; GREG ABBOTT, Governor of the State of Texas, in his Official Capacity, KEN PAXTON, Texas Attorney General,

Defendants - Appellants

EL PASO COUNTY; RICHARD WILES, Sheriff of El Paso County, in his Official Capacity; TEXAS ORGANIZING PROJECT EDUCATION FUND; MOVE San Antonio,

Plaintiffs - Appellees

v.

STATE OF TEXAS; GREG ABBOTT, Governor; KEN PAXTON, Attorney General; STEVE MCCRAW, Director of the Texas Department of Public Safety,

Defendants - Appellants

CITY OF SAN ANTONIO; BEXAR COUNTY, TEXAS; REY A. SALDANA, in his Official Capacity as San Antonio City Councilmember; TEXAS ASSOCIATION OF CHICANOS IN HIGHER EDUCATION; LA UNION DEL PUEBLO ENTERO, INCORPORATED; WORKERS DEFENSE PROJECT,

Plaintiffs - Appellees

CITY OF AUSTIN,

Intervenor Plaintiff - Appellee

v.

STATE OF TEXAS; KEN PAXTON, sued in his Official Capacity as Attorney General of Texas; GREG ABBOTT, sued in his Official Capacity as Governor of the State of Texas,

Defendants - Appellants