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, 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 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; AND THE 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

REPLY IN SUPPORT OF EMERGENCY MOTION TO STAY PRELIMINARY INJUNCTION PENDING APPEAL

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ARGUMENT

I. DEFENDANTS ARE LIKELY TO SUCCEED ON APPEAL.

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

1. Plaintiffs do not dispute the power of *federal* officials to detain aliens based on probable cause of removability.[1] *See* Mot.5; United States Amicus Br. (U.S.Br.) 13. And plaintiffs completely ignore authorities cited by the State (Mot.5-6) and the United States (U.S.Br.14)—most importantly, *Virginia v. Moore*, 553 U.S. 164, 172 (2008)—which hold that the Fourth Amendment analysis *must be* "divorced from questions relating to the detaining officer's authority." San Antonio Opp. (S.A.Opp.) 14.

Arizona v. United States, 567 U.S. 387 (2012), came nowhere close to even suggesting that a State cannot honor an ICE-detainer request. *Contra* S.A.Opp.14-15. *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*." 567 U.S. at 410 (emphases added). In contrast, when a State relies on an ICE-detainer request, the "predicate for an arrest" is the federal government's express "request" and "instruc-

[1] This Court has not held that the Fourth Amendment applies to all aliens subject to ICE detainers. *Cf.* S.A.Opp.13 & n.13. Under the "entry fiction," aliens who entered unlawfully are deemed "as if stopped at the border," so where "the entry fiction applies . . . there is no violation of the Fourth Amendment." *Castro v. Cabrera*, 742 F.3d 595, 599-600 (5th Cir. 2014).

The State also disputes plaintiffs' standing to raise Fourth Amendment claims. *Cf.* El Cenizo Opp. (E.C.Opp.) 13 n.7. Plaintiffs cannot vicariously assert hypothetical detainees' Fourth Amendment rights, which are "personal rights" that "may not be vicariously asserted." *Rakas v. Illinois*, 439 U.S. 128, 133-34 (1978); *see* Exh. 35 at 17-19.

tion." *Id.* at 407, 410. A State honoring an ICE-detainer request is *not* "[d]etaining individuals solely to verify their immigration status," *id.* at 413, so constitutional concerns from such a practice are not present here. *Contra* S.A.Opp.14. Rather, the State is relying on the federal government's representation that there is *already* probable cause of removability.

2. Plaintiffs entirely ignore authorities cited by the State (Mot.7-8) and the United States (U.S.Br.11-12 & n.6) confirming that the state and federal government can both reasonably make warrantless arrests for civil offenses like immigration-law violations, not just crimes. *Cf.* S.A.Opp.16; *see also* 3 Wayne LaFave et al., *Search and Seizure* § 5.1(b) (5th ed. 2012) (listing examples, including arrests for intoxication, for mental-health evaluations, and to return runaway juveniles).[2]

The Eighth Circuit held this argument—that state and local officials cannot detain aliens at the express direction of federal immigration officials—"meritless." *United States v. Ovando-Garzo*, 752 F.3d 1161, 1164 (8th Cir. 2014). Likewise, as the Fourth Circuit has explained, "a state police officer" does not violate the Fourth Amendment when detaining unlawfully-present aliens "at ICE's express direction." *Santos v. Frederick Cty. Bd. of Comm'rs*, 725 F.3d 451, 466-67 (4th Cir. 2013). *Santos* held the arrest there unlawful because "ICE's request that Santos be detained on ICE's behalf came fully forty-five minutes after Santos had already been arrested," so "the deputies' initial seizure of Santos was not directed or au-

[2] Insofar as *Mercado v. Dallas County*, 229 F. Supp. 3d 501 (N.D. Tex. 2017), and *Santoyo v. United States*, 2017 WL 2896021 (W.D. Tex. June 5, 2017), could be read to foreclose honoring ICE detainers without *criminal* probable cause, those decisions are wrongly based on the same analytical errors regarding the requisite probable cause. *Cf.* S.A.Opp.16.

thorized by ICE." *Id.* at 466; *cf.* S.A.Opp.15, 17 n.4. By contrast, SB4 requires detention only *after* local officers receive an ICE-detainer request.

Immigration-enforcement arrests based on federal officials' removability determinations do not have to be supported by *judicial* warrants. U.S.Br.12; *see, e.g.*, *Roy v. Cty. of L.A.*, No. 2:12-CV-09012, 2017 WL 2559616, at *6-10 (C.D. Cal. June 12, 2017) ("No court has held to the contrary."). Plaintiffs do not dispute this point. *See* S.A.Opp.14-15.

3. Plaintiffs misunderstand the "collective knowledge" doctrine. *See* S.A.Opp. 16-18; E.C.Opp.15-16. That doctrine applies to all Fourth Amendment claims, *contra* S.A.Opp.16, and courts have applied it in the immigration context. *See, e.g.*, *United States v. Hernandez*, 477 F.3d 210, 215 n.13 (5th Cir. 2007); *People v. Xirum*, 993 N.Y.S.2d 627, 631 (N.Y. Sup. Ct. 2014) ("Similar to the fellow officer rule . . . the [state] had the right to rely upon [a detainer issued by] the very Federal law enforcement agency charged under the law with 'the identification, apprehension, and removal of illegal aliens from the United States.'" (quoting *Arizona*, 567 U.S. at 397)).

Plaintiffs do not dispute that federal, state, and local officers are "reliable informants" in relaying probable cause. Mot.8. And they do not address precedent routinely applying the collective-knowledge doctrine to separate sovereigns' officials in civil cases. U.S.Br.16 n.8.

Plaintiffs also disregard the fact that an ICE-detainer request itself is "some degree of communication between the arresting officer and an officer who has

knowledge of all the necessary facts." S.A.Opp.16 (quoting *United States v. Ibarra*, 493 F.3d 526, 530 (5th Cir. 2007)).

And whereas plaintiffs complain that "an ICE detainer request does not relay *facts* about removability," S.A.Opp.17, the collective-knowledge doctrine has never required the arresting officer to know the facts possessed by the other officer requesting the detention. Cooperating officers can validly arrest even when the arresting officers are "'unaware of the specific facts that established probable cause.'" U.S.Br.15 (quoting *United States v. Hensley*, 469 U.S. 221, 231 (1985)). The Court has recognized this point repeatedly. *E.g.*, *United States v. Willis*, 304 F. App'x 256, 258 (5th Cir. 2008) (per curiam) (citing *Ibarra*, 493 F.3d at 530) (valid arrest conducted on police dispatcher's order based on request from investigating officers whose "factual knowledge" was "imputed to the arresting officers"). Although not required under the collective-knowledge doctrine, ICE detainers and immigration warrants even have check-boxes providing the factual basis supporting removability. *See* U.S. ICE, *Detainer Policy* (last visited Sept. 19, 2017), https://www.ice.gov/detainer-policy (providing sample ICE detainer and warrants).

Plaintiffs have no answer for the fact that federal officials make particularized determinations "assess[ing] probable cause" of removability each time they issue an ICE detainer. E.C.Opp.16. Instead, plaintiffs insist that local officials should be able to assess removability for themselves. S.A.Opp.16-17; E.C.Opp.13-16. This, of course, was expressly held preempted in *Arizona*, 567 U.S. at 409, and *Villas at Parkside Partners v. City of Farmers Branch*, 726 F.3d 524, 532 (5th Cir. 2013) (en

banc).[3] In any event, this argument ignores that state and local officials have probable cause of removability based on federal ICE-detainer requests under the collective-knowledge doctrine. Isolated scenarios that could hypothetically contradict federal agents' probable-cause determinations cannot facially invalidate SB4. *See* E.C.Opp.14, 15 n.8.[4]

4. As-applied challenges—which would only arise in the hypothetical situation where a federal ICE detainer is issued while the local officer has definitive knowledge that an alien is not removable—are not unworkable. *Cf.* E.C.Opp.17. SB4's detainer exception already eliminates much of even that hypothetical uncertainty, as it allows a local official not to detain if the subject produces a driver's license or other proof of citizenship or lawful status. Tex. Code Crim. Proc. art. 2.251(b).

5. Under plaintiffs' view, even local officers' *voluntary* compliance with federal ICE-detainer requests violates the Fourth Amendment. S.A.Opp.15 (asserting that local detention "based solely on probable cause of removability . . . violate[s] the Fourth Amendment"); E.C.Opp.12 ("SB 4's detainer mandate violates the Fourth Amendment because it requires officers to honor detainers without probable cause of a *crime*"). The district court erred in accepting this sweeping reasoning—which

[3] If it is problematic for SB4 to allow local officers not to detain when an individual produces a drivers' license or other proof of citizenship or lawful status, Tex. Code Crim. Proc. art 2.251(b), then only this exception—not the entire ICE-detainer mandate—should be enjoined. *See* S.A.Opp.17-18.

[4] The same is true of hypothetical "verbal" ICE-detainer requests. E.C.Opp.14-15. ICE policy merely provides that nothing precludes local officers "from temporarily detaining an alien while an ICE immigration officer responds to the scene" of a separate state-law detention. ICE Policy No. 10074.2, ¶ 2.5.

would end this legitimate form of federal–local cooperation that has existed since the 1940s. *See* Order 80.

Plaintiffs also understate the consequences of the district court's Fourth Amendment holding for §1357(g) agreements. *See* S.A.Opp.18. Those agreements reach far beyond "information-sharing practices." S.A.Opp.18. For example, the agreements authorize 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—all of which would be prohibited under the district court's reasoning.

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

1. Plaintiffs attack a straw man in defending the district court's preemption holding: They repeatedly pretend that SB4's enforcement-assistance provision (§752.053(b)(3)) turns local law-enforcement officers into immigration agents free from federal control. *See* E.C.Opp.8-12; S.A.Opp.8-12. But §752.053(b)(3)'s text confirms that it only applies when "cooperation is pursuant to a 'request, approval, or other instruction from the Federal Government.'" U.S.Br.4 (quoting *Arizona*, 567 U.S. at 410).

Section 752.053(b)(3) applies only to policies barring local officials from "assisting or cooperating *with a federal immigration officer* as reasonable or necessary, including providing enforcement assistance" (emphasis added). Thus, §752.053(b)(3) applies only when there has been a predicate request for cooperation from a federal immigration official. At all times, then, it is the federal government—not state or local officers—that retains "enforcement direction and discretion." S.A.Opp.11.

This limit is not "simply" a "promise" made by the State during litigation. E.C.Opp.9. SB4's statutory text compels it.

In tension with their other arguments, plaintiffs contend that the district court did not "presume[] that SB4 requires localities to engage in *unilateral* immigration enforcement." E.C.Opp.9 (emphasis added). In the very next line, though, they say that the court did "express[] concern about the State coercing *unfettered* immigration enforcement." E.C.Opp.9 (emphasis added). "Unfettered" is just another word for "unilateral." Regardless, any action that results from SB4's enforcement-assistance prohibition is necessarily fettered by the fact that it only deals with assisting or cooperating *with a federal immigration official*.

2. Ensuring local officers' ability to assist and cooperate with federal immigration officials is not field (S.A.Opp.8-12) or conflict (E.C.Opp.8-12) preempted. Plaintiffs spend only a few lines (S.A.Opp.11; E.C.Opp.11) addressing 8 U.S.C. §1357(g)(10)(B), which is fatal to their preemption argument.

Like the district court's holding, plaintiffs' view would render §1357(g)(10)(B) a nullity. This section expressly authorizes States and localities—even without a formal §1357(g) "agreement"—"to cooperate with the [federal government] in the identification, apprehension, detention, or removal of aliens." Mot.12 (quoting 8 U.S.C. §1357(g)(10)(B)). There is no need to "distinguish[] between" (S.A.Opp.10) conflict and field preemption here because §1357(g)(10)(B) expressly allows the cooperation contemplated in §752.053(b)(3). Where Congress expressly allows state or local action, there can be no conflict. And, simultaneously, express allowance shows that Congress intended the opposite of occupying the field.

It is preposterous for plaintiffs to suggest that "the federal government has so dramatically changed its position" here. E.C.Opp.12. As the Supreme Court in *Arizona* noted, the prior Presidential Administration acknowledged that 8 U.S.C. §1357(g)(10)(B) permitted States and localities—even without a formal §1357(g) agreement—to "participate 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." 567 U.S. at 410. The United States continues to adhere to this view. U.S.Br.4 (listing six examples of cooperation permitted under §1357(g)(10)(B) without a formal agreement). In each of these endeavors, "the Federal Government retain[s] enforcement direction and discretion," S.A.Opp.11, and in no way does this somehow "deprive the Federal Government . . . of . . . flexibility and discretion," E.C.Opp.11. As explained above, §752.053(b)(3) only applies when there is a predicate federal request for cooperation.

Section 1357(g)(10)(B), of course, "does not trump the rest of the INA." S.A.Opp.11. The rest of §1357(g), however, does not address mere assistance and cooperation; it addresses when state or local officials can be deputized to directly "perform the functions of an immigration officer." *Arizona*, 567 U.S. at 408. The INA's "detailed framework" (S.A.Opp.11) governing formal §1357(g) agreements is about authorizing local officials directly to enforce immigration law as deputized de facto federal immigration agents—not merely assisting and cooperating with a federal immigration officer. Mot.13.

Plaintiffs' own practices highlight the disingenuousness of their newfound belief that local officers need a formal §1357(g) agreement to assist or cooperate with federal immigration officials in immigration enforcement. Plaintiff Travis County, for instance, contends that "the detention of aliens" is included in §1357(g)(1) and argues that it thus must be read to be the exclusive function of federal immigration officers. E.C.Opp.8 n.3. But, like nearly all jurisdictions, Travis County has long cooperated with federal immigration officials to detain aliens under ICE detainers—at least when, in its "discretion and judgment," it determined that it was "appropriate to hold an individual," Exh. 11 (Hernandez Decl.) ¶26—all without a formal §1357(g) agreement.

Nor does §752.053(b)(3) impermissibly put local officials in a position where they "'cannot satisfy [their] state duties without the Federal Government's special permission and assistance.'" E.C.Opp.9-10 (quoting *PLIVA, Inc. v. Mensing*, 564 U.S. 604, 623-24 (2011)). Section 752.053(b)(3) creates no express or implied duty for a local officer to act in the absence of a federal official's request for assistance. *PLIVA* concerned state labeling requirements for generic-drug manufacturers. 564 U.S. at 617. To comply with the state laws, generic manufacturers would have had to first convince the FDA to change its branded labeling requirements to require stronger labels, as federal regulations require generics and branded drugs to have the same warning labels. *Id.* That is, "state law imposed a duty on the Manufacturers to take a certain action, and federal law barred them from taking that action." *Id.* at 624. There is no such conflict here. Federal immigration officials are the ones

who would ultimately determine what steps to take (or not to take) to enforce federal immigration law.

Similarly, there can be no conflict in the enforcement "*method*" (E.C.Opp.10), because any assistance or cooperation rendered will necessarily be at the "request, approval, or other instruction from the Federal Government." *Arizona*, 567 U.S. at 410. Plaintiffs' arguments to the contrary are premised on their unsupported belief that Congress somehow mandated that any cooperation with federal immigration officials had to be determined on an *ad hoc* basis by every locality in the Nation, right on down to El Cenizo. *See* E.C.Opp.10. Neither the INA nor any other statute evinces this counterintuitive intent. Congress encouraged local cooperation with federal immigration officials. 8 U.S.C. §§ 1357(g)(10), 1373, 1644. As the United States explains (U.S.Br.4): "The INA permits such cooperation whether it is directed by state statute or is implemented *ad hoc* by a local sheriff." In fact, plaintiffs' position would lead to significantly more *dis*uniformity in the federal government's ability to enforce immigration law.

At bottom, this is an issue about the division of power between a State and its own municipalities. The U.S. Constitution does not constrain a State's ability to direct its own localities or local law-enforcement officials, whose power is set at "the absolute discretion of the State." *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178 (1907); *accord*, *e.g.*, *Koog v. United States*, 79 F.3d 452, 460 (5th Cir. 1996). The State's ability to shape policies adopted by its political subdivisions, *see* Tex. Const. art. XI, § 1 (counties are "legal subdivisions of the State"), and to regulate its own officials, *see, e.g.*, *id.* art. V, § 23 (sheriffs' "duties . . . shall be prescribed by

the Legislature"), is unquestionably an exercise of the State's traditional police powers. *E.g.*, *Kelley v. Johnson*, 425 U.S. 238, 247 (1976). The State has every right to prohibit its own local subdivisions from impeding the immigration-enforcement cooperation that the federal government actively encourages. *See, e.g.*, *Arizona*, 567 U.S. at 412.

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

1. Plaintiffs incorrectly assert that "accepting the State's position would require rewriting, not construing, the statute." S.A.Opp.20. The State has offered a construction of "endorse" matching its dictionary definition, by which "endorse" is understood to mean "to sanction," Mot.15; Exh. 15 at 42-43. For the reasons explained by the State, *id.*, this construction would make the best sense in context of the subsection and SB4 as a whole, would not render "endorse" "surplusage" (S.A.Opp.20), and most importantly would obviate all constitutional concerns.

2. As to remedy, nearly every plaintiff now concedes that the proper remedy for any First Amendment problem with "endorse" would be to strike that word alone. *See* S.A.Opp.22-23; Exh. 25 at 53 (statement of El Cenizo counsel). The district court said it was rejecting the State's "suggest[ion] that perhaps the Court could just strike the word 'endorse.'" Order 39. In the event this court concludes that "endorse" necessitates an injunction on constitutional grounds, it should clarify that only that word is enjoined.

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

1. The contours of SB4 are clear. *Cf.* E.C.Opp.1-2, 4-7. SB4 directs officials not to "adopt, enforce, or endorse a policy under which the entity or department prohibits or materially limits the enforcement of immigration laws." §752.053(a)(1). Nor may officials, "as demonstrated by pattern or practice, prohibit or materially limit the enforcement of immigration laws." §752.053(a)(2).

Plaintiffs concede that SB4 clearly prohibits policies that plaintiffs have in place today.[5] The best example is that El Cenizo's Mayor alleges it has a "sanctuary city" policy that "limits the situations in which [city] . . . officials can engage in immigration enforcement or collect and disseminate such information." ROA.463 (ECF No. 24-8) (Reyes Decl.) ¶19. El Cenizo admits that "SB4 would prohibit the enforcement of [its] ordinance." *Id.*

Thus, SB4 has an obviously valid "core," which forecloses a claim of facial vagueness. *Smith v. Goguen*, 415 U.S. 566, 578 (1974). Indeed, §752.053(b)(1)-(4) provide enumerated examples of what is prohibited under §752.053(a)(1)-(2).

Policies materially limiting lawful immigration-status inquiries are clearly covered. §752.053(b)(1). Thus, the Maverick County Sheriff's policy that he "currently instruct[s] [his] deputies not to inquire as to an individual's immigration status during a law enforcement contact" is covered. ROA.446 (ECF No. 24-5) (Schmerber Decl.) ¶19.

[5] It is thus irrelevant for this facial vagueness claim that plaintiffs raise some as-applied challenges implicating plaintiff officials' own conduct. E.C.Opp.5.

Policies materially limiting information-sharing with the federal government are clearly covered. §752.053(b)(2). The district court upheld this provision. *See* Order 11-18.

Policies materially limiting lawful, "reasonable or necessary," enforcement cooperation "with a federal immigration officer" are clearly covered. §752.053(b)(3). *Arizona* noted that local law enforcement could "participate 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." 567 U.S. at 410. Thus, the policy that the "Maverick County Sheriff's Office will not participate or cooperate in the arrests of individuals for civil immigration violations," ROA.443 (ECF No. 24-5) ¶9, is covered.

Policies materially limiting federal access to jails would also be covered. §752.053(b)(4). So categorically declining federal ICE requests to assist with a raid or grant access to jails would be clearly prohibited. E.C.Opp.4.

2. Beyond the fact that SB4 has a clear valid core, plaintiffs repeatedly ignore the two key parameters of SB4's coverage.

First, SB4 applies only to policies or practices addressing immigration enforcement—as opposed to general policies on matters like overtime and patrolling locations. *See* E.C.Opp.4. That is because "material[]" limits, §752.053(a)(1)-(2), are "substantial," as opposed to insignificant, and require a "logical connection" between action and "consequential facts"—here, immigration enforcement. Mot.18.

So SB4 does not prohibit immigration-neutral local policies regarding bona fide resource allocation generally applicable to all law-enforcement activities. Sheriff

Hernandez is thus incorrect that her practices of "declin[ing] requests from federal immigration authorities to assist them in the apprehension of individuals" because of "limited resources" will be prohibited under SB4.[6] Exh. 11 (Hernandez Decl.) ¶46; *see also* ROA.1290 (ECF No. 57-4) (Manley Decl.) ¶23 (Austin Police Chief).

Second, SB4 applies only to policies implicating powers that a locality already has the lawful ability to perform. A local policy cannot possibly "*limit* the enforcement of immigration laws" if it prohibits actions that the locality already lacks the lawful power to perform. E.C.Opp.4 (emphasis added). In general, this means that SB4 applies only to policies involving situations where the federal government has first requested assistance or cooperation. Otherwise, local officials would be engaged in "unilateral" immigration-enforcement action, which is generally preempted under *Arizona*, 567 U.S. at 410.[7] Hence, a policy banning unilateral immigration enforcement would not "materially limit" any "immigration enforcement" powers of the locality. §752.053(a)(1)-(2). That conclusion is further bolstered by §752.053(b)(3), which only covers assistance or cooperation "with a federal immigration officer" as "reasonable or necessary."

Consequently, a police chief instructing officers not to hold detained motorists to ask about immigration status without reasonable suspicion, E.C.Opp.4, would not be implicated by SB4 because the Constitution already denies that authority.

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[6] Of course, if there were not actual bona fide resource constraints—and that was just a pretextual excuse masking a "pattern or practice," §752.053(a)(2), of materially limiting cooperation with federal requests for assistance—then SB4 would apply.

[7] State and local officials are permitted to unilaterally ask about immigration status, at least when (1) they have made an arrest, stop, or detention "on some other legitimate basis" and (2) there is "reasonable suspicion" of removability. *Arizona*, 567 U.S. at 411; *see* §752.053(b)(1) (inquiry permissible if person is "under a lawful detention or under arrest").

See Order 84 ("questioning not supported by any quantum of suspicion" satisfies the Fourth Amendment only if "it does not prolong an otherwise lawful detention" (citing *Muehler v. Mena*, 544 U.S. 93, 101 (2005)). Nor would the scenario involving patrolling priorities, E.C.Opp.4, because cities have no "unilateral" immigration-enforcement authority in that field to "materially limit."

3. Plaintiffs misread *Johnson v. United States*, 135 S. Ct. 2551 (2015). *See* E.C.Opp.7. *Johnson* did not invert established facial-challenge doctrine and hold that when a law is vague as-applied to some possible situation then it must be invalidated facially. Rather, *Johnson* merely establishes that the possibility of validity "as applied to some conduct" in the abstract does not insulate a statute from vagueness. *Crooks v. Mabus*, 845 F.3d 412, 417 (D.C. Cir. 2016) (quoting *Johnson*, 135 S. Ct. at 2557, 2561).

Crucially, unlike in *Johnson*, several plaintiffs here *concede* that their conduct would be covered by SB4. *See supra* pp.12-13; Exh. 15 at 35-36. That alone means SB4 is not facially vague.

Moreover, the State has not yet enforced the challenged provisions of SB4 against anyone. *Cf. Johnson*, 135 S. Ct. at 2561. As explained above, various hypotheticals asserted by plaintiffs would not be covered under SB4's text, confirming that the proper challenge to any application of SB4 on the margins is in post-enforcement proceedings. Mot.19; *see Gonzales v. Carhart*, 550 U.S. 124, 168 (2007) (as-applied claims are "the basic building blocks of constitutional adjudication." (citation omitted)).

4. This case is fundamentally different than one challenging regulation of private conduct. In those cases, plaintiffs may argue that compliance is too burdensome because it chills protected activity. *E.g.*, E.C.Opp.7-8 (citing *Women's Med. Ctr. of N.W. Hous. v. Bell*, 248 F.3d 411, 422 (5th Cir. 2001)). But SB4 does not implicate constitutionally protected conduct; it sets the standards of conduct for the State's own law-enforcement officers.

II. The Other Factors Favor a Stay.

A. The El Cenizo plaintiffs wrongly claim (E.C.Opp.18) that the State faces "no irreparable harm" from the injunction of its public-safety law. That is contrary to binding circuit precedent: "When a statute is enjoined, the State necessarily suffers the irreparable harm of denying the public interest in the enforcement of its laws." *Planned Parenthood of Greater Texas Surgical Health Servs. v. Abbott*, 734 F.3d 406, 419 (5th Cir. 2013).

Whereas the San Antonio plaintiffs do not dispute this point (S.A.Opp.3), the El Cenizo plaintiffs rest their view on a single decision that is both nonprecedential (which plaintiffs do not note) and readily distinguishable. It merely reasoned that six years' delay by a *plaintiff* in seeking injunctive relief for an alleged commercial wrong suggested that damages were an adequate remedy. *Dillard v. Sec. Pac. Corp.*, 85 F.3d 621, at *4 (5th Cir. 1996) (per curiam) (unpublished). In contrast, this case involves the timely *defense* of a state law responding to evolving public-safety concerns, and plaintiffs here certainly have not agreed to pay damages for their noncompliance with the State's public-safety directives in SB4.

Under binding circuit precedent, the public-interest factor also favors the government when challenging a court's injunction: "As the State is the appealing party, its interest and harm merge with that of the public." *Planned Parenthood*, 734 F.3d at 419 (citing *Nken v. Holder*, 566 U.S. 418, 435 (2009), which holds that "these factors merge" when the government suffers irreparable harm).

Even beyond the fact that the State's public-safety statute has been enjoined, the State and its citizens suffer harm from having to release individuals that the federal government itself is trying to detain with probable cause of legal violations. SB4 directs law-enforcement agencies not to prohibit their officers from participating in federal enforcement of immigration law, which the El Cenizo plaintiffs contend (E.C.Opp.18) "will harm public safety." Plaintiffs are free to argue to legislators that the enforcement of immigration law harms public safety. But courts should be loath to find a public interest in nonenforcement of the law.

Plaintiffs also miss the point in arguing that the injunction will not seriously affect local cooperation in federal immigration-law enforcement. Plaintiffs note that Texas localities generally voluntarily complied with ICE detainers before SB4. E.C.Opp.18; S.A.Opp.4. Plaintiffs thus argue that harm to the State is minimal because the district court's injunction of "the mandatory, coercive scheme created by SB4" leaves the State's law-enforcement agencies free to "cooperate with the federal government" voluntarily. E.C.Opp.20; *accord* S.A.Opp.4-5.

But on the district court's and plaintiffs' reasoning, even *voluntary* local compliance with ICE detainers is unlawful. *See supra* pp.5-8; Mot.1-2. The Fourth Amendment and preemption reasoning below has nothing to do with whether local

participation in immigration enforcement is voluntary versus compelled. *See* Order 19-33, 65-81. Instead, the reasoning below holds that *any* local compliance with ICE detainers violates the Fourth Amendment and *any* local assistance in immigration enforcement without a formal §1357(g) agreement is preempted. *Id.*

Hence, the order puts localities throughout Texas on notice that they will face litigation if those localities even *voluntarily* comply with ICE detainers or engage in enforcement assistance. That point is why the irreparable harm from the injunction is so far-reaching, why the United States favors a stay, and why the McCraw and Waybourn declarations properly explain the injunction's factual consequences.[8]

B. Plaintiffs have no substantial harm that outweighs the irreparable harm to the State. Much of plaintiffs' equity argument draws on their merits arguments attacking SB4—which fail, as explained above.

The rest of plaintiffs' equity argument assails the consequences if SB4's enforcement mechanisms take effect, such as potential penalties assessed under SB4. But that is not irreparable harm to plaintiffs—particularly given that the State is likely to prevail on the merits. If the State initiated an enforcement proceeding against any official for violation of SB4, that official could raise constitutional challenges to SB4 as a defense in such a proceeding. The penalties would not be imposed unless they are lawful. Indeed, such an enforcement proceeding would be a

[8] The El Cenizo plaintiffs object to the declarations as expressing legal conclusions. E.C.Opp.20 n.12. This is unfounded. The declarations explain the consequences of the district court's injunction—as any evidence on a stay motion will. Exhs. 41, 42. Regardless of whether the injunction itself prohibits pre-SB4-type voluntary cooperation, McCraw and Waybourn are explaining the *factual* consequences on state and local law enforcement of the district court's reasoning in the injunction—whose scope is undisputed. *See* Fed. R. App. P. 8(a)(2)(B)(ii) (stay motions may include sworn statements of facts subject to dispute).

better vehicle to address plaintiffs' vagueness challenges, as pre-enforcement challenges like this one are particularly disfavored. *See supra* p.15.

To the extent the plaintiff cities and officials argue that such enforcement proceedings will not occur because they will be incentivized to honor all ICE-detainer requests and cooperate with federal immigration enforcement, that is not a cognizable Article III injury to those plaintiffs. They would be using official power delegated by the State to achieve such cooperation, and "a part of the state may not sue the state under the federal constitution." *Tex. Catastrophe Prop. Ins. Ass'n v. Morales*, 975 F.2d 1178, 1182 (5th Cir. 1992). The Supreme Court and this Court have long refused to recognize injury simply because a subordinate state entity is compelled to use its state power in a particular way. Rather, this subject "is one in which the legislature of the state may act according to its own judgment, unrestrained by any limitation of its power imposed by the constitution of the United States." *Tr. of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518, 630 (1819) (Marshall, C.J.), *quoted in Morales*, 975 F.2d at 1182; *accord Coleman v. Miller*, 307 U.S. 433, 441 (1939) ("Being but creatures of the State, municipal corporations have no standing to invoke the contract clause or the provisions of the Fourteenth Amendment of the Constitution in opposition to the will of their creator."); *Appling Cty v. Mun. Elec. Auth.*, 621 F.2d 1301, 1308 (5th Cir. 1980) ("a city or county cannot challenge a state statute on federal Constitutional grounds"); *City of Safety Harbor v. Birchfield*, 529 F.2d 1251, 1254 (5th Cir. 1976) (holding that a mayor had no standing and did "not possess constitutional rights . . . in the same sense as private corporations or individuals").

Conclusion

The Court should grant a stay pending appeal.

Respectfully submitted.

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Certificate of Compliance

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I certify that this motion complies with the type-volume limitation of Rule 27(d)(2) and this Court's order of September 14, 2017 granting leave to file a reply brief in excess of the word-count limitation because it contains no more than 5,000 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.

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