IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Docket No. 17-50762

CITY OF EL CENIZO, TEXAS; RAUL L. REYES, Mayor, City of El Cenizo; TOM SCHMERBER, Maverick County Sheriff; MARIO A. HERNANDEZ, Maverick County Constable Pct. 3-1; LEAGUE OF UNITED LATIN AMERICAN CITIZENS; MAVERICK COUNTY,

Plaintiffs – Appellees Cross-Appellants

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 Cross-Appellants

v.

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

Defendants – Appellants Cross-Appellees

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

Plaintiffs – Appellees Cross-Appellants

v.

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

Defendants – Appellants Cross-Appellees

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

Plaintiffs - Appellees Cross-Appellants

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 Cross-Appellees

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

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INTRODUCTION

This cross-reply brief addresses only preemption and standing.

Texas contends that SB4 is not preempted because it does not authorize *unilateral* action, meaning local action taken without an ICE request. But, as explained in the amicus brief filed by former high-ranking immigration officials, who collectively served in Democratic and Republican administrations, Congress made a deliberate decision to place immigration functions in the hands of only trained federal officers and state officers deputized under a 287(g) agreement, and not in local hands just because they received a request from an ICE officer:

> [T]he INA makes enforcement of federal immigration law a *federal* matter, providing that where state and local officers are empowered to engage in such enforcement, they must do so pursuant to an agreement . . . .
>
> * * *
>
> [S]ubparagraph (g)(10)(B) does not broadly authorize officers and employers to engage in all the functions of a federal immigration officer, in the absence of a Section 287(g) agreement. Nor does it authorize them to engage in such functions, in the absence of a Section 287(g) agreement, *whenever a federal immigration officer may ask.*

Fmr. Imm. Officials. Br. 4, 5 (emphasis added to second paragraph).

Texas nonetheless claims there is a simple solution if SB4 authorizes preempted conduct: The Court should construe SB4, contrary to its text, to be co-extensive with whatever the savings proviso in subsection (g)(10)(B) allows. But

even if the Court could ignore SB4's text, the crux of the problem would remain. Local officials, and in particular local law enforcement officers, must make countless on-the-ground decisions in real time, and must know what actions could personally bankrupt them, cost them their jobs, or even land them in jail. The Supreme Court itself labeled subsection (g)(10)(B) ambiguous. The text of SB4 provides no further clarity, and, in its briefs, Texas itself has been unable to provide any real guidance, and certainly nothing that would allow local police to navigate the real-world decisions they are faced with every day.

Recognizing SB4's lack of guidance, Texas repeatedly seeks to place the costs of confusion on local officials, arguing that they can simply raise their arguments when forced to defend individual enforcement actions brought against them by the State. The suggestion that local enforcement officials should gamble their careers and livelihoods on a guess as to the meaning of a complex federal statute is an astonishing position for Texas to take. Texas knows full well that no official is going to run that risk and will have no practical choice but to obey every ICE request, even where compliance means engaging in a preempted immigration function. Thus, under the unique circumstances here, where a narrowing construction is not possible or practical, facial relief is the only meaningful remedy for local officials navigating the practical realities they face.

Texas also fails to seriously grapple with Plaintiffs' argument that Congress made clear that local participation in immigration enforcement must be voluntary, and that localities must be free to decide for themselves how they will participate. Texas simply relies on the proposition that states generally have control over their political subdivisions. But Plaintiffs do not question that general proposition. The specific question here is whether Congress made the decision, in the sensitive area of federal immigration enforcement, to give both states and localities independent discretion to choose how to engage, in light of local concerns and resource constraints. Congress clearly did, and Texas's suggestion that Congress lacks constitutional power to specify conditions for local participation in this uniquely federal area is patently wrong.

ARGUMENT

I. SB4 IS PREEMPTED UNDER CONGRESS'S CAREFULLY CALIBRATED SCHEME TO ENFORCE FEDERAL IMMIGRATION LAW.

SB4's enforcement provisions are preempted for two principal reasons. First, SB4 authorizes localities to engage in immigration activities that Congress barred non-federal actors from performing without a 287(g) agreement. Thus, in the absence of a 287(g) agreement, even the State itself cannot perform such activities (and thus plainly cannot authorize local officers to do so). Section I.A. Second, even as to those activities that may be performed without a 287(g)

agreement pursuant to the savings proviso in 8 U.S.C. § 1357(g)(10)(B), Congress made clear that localities must be able to decide for *themselves* whether and how to engage in such activities, a congressional decision the states cannot override. Section I.B. SB4's information-sharing provision is preempted for the distinct reason that it attaches different penalties than those chosen by Congress to regulate the same activity. Section I.C.

A. SB4's Enforcement Provisions Authorize Action That Is Preempted Absent a 287(g) Agreement.

1. SB4's enforcement provisions are preempted because they authorize local officers to perform "immigration officer functions," 8 U.S.C. § 1357(g), which fall outside the cooperation permitted by § 1357(g)(10)(B). E.C.Br.23-25. As Plaintiffs have previously explained, a request from a federal officer cannot, by itself, transform a preempted immigration-officer function into non-preempted cooperation, because that would gut the INA's clear requirement that local officers receive training and certification before they perform immigration functions. E.C.Br.26-30, 44-48. *See also* Fmr. Imm. Officials. Br. 4-5. This defect renders invalid the general enforcement provisions in Gov't Code § 752.053(a)(1)-(2), E.C.Br.21-32, as well as the more specific provisions covering enforcement

assistance (E.C.Br.29-31) and detainers (E.C.Br.44-48), which are encompassed under subsections (a)(1)-(2).[1]

In response, Texas adheres to the view that a federal "request" or "approval" automatically transforms the requested activity into non-preempted "cooperation." Tex.Reply.24, 19. But that would nullify Congress's careful scheme to ensure that local immigration enforcement adheres to federal standards. Congress was clear that before a local officer could "interrogate," "arrest," "search," serve warrants, issue NTAs, or issue detainers, 8 U.S.C. § 1357(a); 8 C.F.R. § 287.5(a)-(e)—in other words, "perform a function of an immigration officer," 8 U.S.C. § 1357(g)(1)—the local officer needed to receive training, certification, and be subject to a formal agreement. E.C.Br.26-27. If Texas were right that only completely unilateral action is preempted, there would never be a need for a 287(g) agreement. Federal officials could simply ask local officers to perform

[1] Texas argues that Plaintiffs' opening brief did not address (a)(1) and (a)(2), Tex.Reply.42-43, ignoring the eleven pages Plaintiffs devoted to this issue, the multiple discussions of (a)(1) and (a)(2) throughout, and the headings for Parts II and II.A of the brief. E.C.Br.20-32. In one subpart of that analysis, Plaintiffs explained that even if one specific application of the enforcement provisions (in § 752.053(b)(3)) was interpreted as co-extensive with § 1357(g)(10)(B), the general provisions (in § 752.053(a)(1)-(2)) necessarily go further. E.C.Br.31-32. Texas also suggests that Plaintiffs waived their challenges to (a)(1) and (a)(2) by not raising them below. Tex.Reply.43. But Plaintiffs' briefs below clearly argued that (a)(1) and (a)(2) were preempted by § 1357. *See* ROA 345, 350-56, 3621-23 & n.10 (El Cenizo); 1216 (Austin); 1814 (Travis Co.); 2035-37, 3512-21 (San Antonio); 3421-33, 4342-46 (Houston); 3554-56 (Dallas).

immigration functions, and suddenly those functions would become mere cooperation. That cannot be right. *See* Fmr. Imm. Officials. Br. 5.

Texas's argument that federal direction renders an action "cooperation" is also foreclosed by 8 U.S.C. § 1357(g)(3), which requires federal "direction and supervision" *even for deputized 287(g) officers operating under a formal agreement*. Other provisions that narrowly authorize local officers to perform immigration functions impose similar requirements (*contra* Tex.Reply.25-26). *See* 8 U.S.C. § 1252c(a) (authorizing certain arrests only after approval from ICE); 28 C.F.R. § 65.84(a)(3)(iv), (vi), (xi) (requiring training and "operational direction" by federal officials for local enforcement under 8 U.S.C. § 1103(a)(10)).

Texas argues, however, that Plaintiffs' reading would "render § 1357(g)(10)(B) a nullity." Tex.Reply.23, 19. But Plaintiffs' reading of the statute makes perfect sense. Local officers that are deputized under 287(g) agreements may engage in immigration functions, including arrests, as if they were federal agents. Subsection (g)(10)(B), in contrast, provides that an agreement is not needed for local officers to engage in immigration activities that are not actual immigration functions. Thus, subsection (g)(10)(B) allows a local officer to provide support for federal agents as *they* perform immigration functions—for instance, local officers can secure a perimeter while *ICE* agents make an arrest, allow *ICE* agents to access their jails for its interrogations, or respond to

information requests for *ICE* investigations. *See Arizona v. United States*, 567 U.S. 387, 410 (2012) (noting the types of limited support activities in which local officers can participate without an agreement).[2]

2. Texas makes no attempt to grapple with the impossible position in which SB4 would place local officials. To avoid devastating penalties, sheriffs and police chiefs would have to correctly divine, every day, where the line is between preempted "immigration officer functions" and non-preempted cooperation. 8 U.S.C. §§ 1357(g), 1357(g)(10)(B). But even Texas has no idea where that line is—it has now spent dozens of pages erroneously arguing that a federal request *ipso facto* cures any possible preemption. Elsewhere in its briefing, however, Texas appears to admit that even a request does not allow local officers to, for instance, execute "warrants of arrest." Tex.Reply.7. And despite its constant refrain that "cooperation" and "requests" are synonymous, Texas now advances the perplexing notion that § 1357(g)(10)(B) sometimes *does* give permission "to act

[2] Contrary to Texas's suggestion, Tex.Reply.30, some "information-sharing" *does* constitute cooperation under § 1357(g)(10)(B). The previous subsection, § 1357(g)(10)(A), only mentions the sharing of information "regarding the immigration status of an[] individual." Sharing other types of information—such as "information about when an alien will be released"—"constitutes cooperation" for purposes of § 1357(g)(10)(B). *Arizona*, 567 U.S. at 410.

unilaterally in the field of immigration enforcement." Tex.Reply.21 (arguing that some forms of "cooperation" involve unilateral action).[3]

Texas argues that SB4 could be construed to avoid these problems. Tex.Reply.45-46. But that is not possible, absent a detailed list of precisely which actions are and are not preempted. Even the Supreme Court found § 1357(g)(10)(B) too "ambigu[ous]" to spell out its content. *Arizona*, 567 U.S. at 410. The Court need not "proceed application by conceivable application when confronted with a facially unconstitutional statutory provision." *Whole Women's Health v. Hellerstadt*, 136 S. Ct. 2292, 2319 (2016). Nor would any such narrowing list be consistent with the text of SB4, which in open-ended terms blocks restrictions on "the enforcement of immigration laws" across the board. Gov't Code § 752.053(a)(1)-(2).[4] Local officers will thus be forced to engage in preempted activities to avoid financial and professional ruin.[5]

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[3] Texas does not claim that local officials will not receive requests to perform immigration functions, nor could it. *See* E.C.Br.27 n.9. In fact, Texas itself cites a case (Tex.Reply.25) in which an ICE agent asked a local officer to carry out an immigration arrest, by himself, using his own judgment, if the local officer "came in contact with [a person] and found that he was, in fact, in the country illegally." *United States v. Vasquez-Alvarez*, 176 F.3d 1294, 1295 (10th Cir. 1999), *abrogated*, *Arizona*, 567 U.S. at 407-10.

[4] This is a crucial aspect of SB4 that differentiates it from the status-check provision the Supreme Court upheld in *Arizona*. The narrowing construction of the *Arizona* provision was easy to apply on the ground: local officers could not prolong stops or detentions to verify status. No such clear construction exists here. Equally as important, the Arizona statute did not impose penalties on *individuals*.

3. Under this analysis, several specific applications of the enforcement provisions in (a)(1) and (a)(2) are also preempted. Arresting for civil immigration violations—even pursuant to a warrant or detainer—is an immigration-officer function, yet is authorized by SB4.[6] So are interrogations about immigration status, yet they also are authorized by SB4 in § 752.053(b)(1). Both therefore require formal agreements under 8 U.S.C. § 1357(g).

Detainers

Texas does not disagree that prolonging detention pursuant to a detainer constitutes an arrest, nor does Texas dispute that local officers are barred from making arrests without a 287(g) agreement, given that an "arrest" is an immigration-officer function. 8 U.S.C. § 1357(a)(2); E.C.Br.44-48. Rather,

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[5] Texas's reliance on a provision of Arizona law that barred local entities from placing certain limitations on immigration enforcement is misplaced. Tex.Reply.44-45 & n.9. The district court in *United States v. Arizona*, 703 F. Supp. 2d 980, 989, 1008 (D. Ariz. 2010), provided no reasoning for its decision not to preliminarily enjoin that provision; the ruling as to that provision was never appealed and never even mentioned by the Supreme Court in *Arizona*, as Texas admits.

[6] Texas claims that Plaintiffs cannot address "SB4's ICE-detainer provisions" in this cross-appeal reply. Tex.Reply.1. But detainer policies are a key part of SB4's enforcement provisions, § 752.053(a)(1)-(2), which Texas agrees are properly a part of the cross-appeal. *See* Tex.Reply.i (including them in its "[c]ross-appeal response"). Indeed, Texas itself has taken the position that SB4's enforcement provisions apply to detainer-limiting policies. *See* Tex.Stay.Motion.18 (citing "Travis County Sheriff Office's policy" on detainers as a "core" application of § 752.053(a)(1)).

Texas's main response, once again, is that a federal request cures everything, so only "a unilateral field arrest" is preempted. Tex.Reply.19. That argument is wrong under the preemption analysis that applies to all immigration functions, *see supra*, as well as for two reasons specific to detainers and arrests.

Congress has tightly regulated local immigration arrests, specifying the precise circumstances when they are permitted. *See* E.C.Br.23-24, 45 (listing immigration arrest statutes). Among other things, Congress has required arresting officers to receive training and certification, even when the Attorney General "direct[s] and supervis[es]" them. 8 U.S.C. § 1357(g)(3). Yet, according to Texas, in subsection (g)(10)(B), a savings clause that does not mention detainers at all, Congress implicitly conferred an unlimited authority for local officers to make immigration arrests any time a federal agent asks.[7] But Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions." *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001). It is implausible that, having explicitly cabined local arrest authority across multiple provisions, Congress silently approved a glaring loophole through such "circuitous means." *Yates v. Collier*, 868 F.3d 354, 369 (5th Cir. 2017). Rather, one "would expect to see some affirmative indication of intent if Congress actually meant" for

[7] Texas rightly does not argue that § 1357(d)—the only part of the INA that uses the word "detainer"—authorizes local arrests. E.C.Br.48; *see* Profs. Amicus 6-15 (discussing history of immigration detainers, and refuting Texas's claim that detainers historically involved detention, as opposed to notification only).

§ 1357(g)(10)(B) to provide "a backdoor means to achieve" a pervasive local arrest regime. *Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973, 984 (2017).

Texas has pointed to no such indication. Nothing in the legislative history suggests that Congress ever imagined that § 1357(g)(10)(B)'s narrow savings clause would authorize widespread local arrests. To the contrary, the enactment of § 1357(g) was premised on Congress's understanding that local officers lacked immigration arrest authority *entirely*. As Members explained, there is "nothing" local officers can do when they encounter a potentially removable non-citizen "other than calling the local INS officer to report the case." 142 Cong. Rec. H2476-77 (Mar. 20, 1996) (Rep. Latham); *see id*. H2477 (Rep. Doolittle) ("Federal law does not allow" a removable individual apprehended by police "to be held": "All the local law enforcement can do is call up the INS and notify them."); 142 Cong. Rec. H2191-92 (Mar. 13, 1996) (history of § 1252c) (similar). The solution Congress provided was § 1357(g), which allowed only "specially trained State officers to arrest and detain aliens." S. Rep. No. 104-249, at 20 (1996). If Congress had understood itself to be creating or preserving local authority to arrest *outside* that scheme, surely someone would have mentioned it.[8]

[8] Texas argues that an earlier regulation contemplated detention, Tex.Reply.12, but there is "no hint that Congress knew of th[is] particular regulation[]" when it enacted § 1357(g)(10). *Leary v. United States*, 395 U.S. 6, 24 (1969); *see Brown v. Gardner*, 513 U.S. 115, 121 (1994) (same); *United States v. Calamaro*, 354 U.S. 351, 359 (1957) (disregarding regulation when "there is nothing to indicate that it

There are two additional reasons why Texas cannot be right about detainers in particular. First, if Texas were right, 8 U.S.C. § 1252c would be superfluous. It authorizes non-deputized local officers to make immigration arrests when three conditions are met: (1) the person reentered the country after a previous felony conviction in the United States, (2) ICE confirms the person's status, and (3) ICE plans "to take the individual into Federal custody." *Id.* § 1252c(a). Yet on Texas's theory, where the second and third requirements are satisfied, an officer may arrest under subsection (g)(10)(B)—whether or not the first requirement is met.

Texas argues, however, that § 1252c covers different ground, because it authorizes *unilateral* arrests. Tex.Reply.20 n.6. Not so. Texas ignores the statute's express requirement that, upon contacting ICE, the local officer may hold the person only to facilitate ICE taking custody. If ICE does not convey its desire to take custody, § 1252c provides no arrest authority. Thus, if § 1357(g)(10)(B) conferred unlimited authority to arrest with federal approval, § 1252c's limitation to those with previous felony convictions would be meaningless.

Second, as Texas itself appears to recognize (Tex.Reply.7), non-deputized local officers cannot make immigration arrests even pursuant to a federal administrative warrant—*i.e.*, at ICE's direction. Texas has not explained why detainers are any different. The differentiating factor cannot be that a detainer is a

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was ever called to the attention of Congress"). Indeed, the available evidence is to the contrary.

federal request, since an administrative warrant is likewise a federal request. *See* E.C.Br.22-23.

Moreover, Texas agrees that detainers, like warrants, can "require[] local officers to exercise some judgment." Tex.Reply.20 (quotation marks omitted). That is why, under Congress's scheme, officers need to be trained. Texas responds that officers can contact ICE "with questions" regarding detainers. Tex.Reply.19-20. But, as Plaintiffs have explained, so could any local officer who engaged in a preempted immigration-officer function. E.C.Br.47 n.16. If the option to call were enough, *nothing* would be preempted. Texas does not respond to this argument.

At any rate, it is incorrect that local officers can simply sort out any detainer problems over the phone. At the Law Enforcement Support Center (LESC), calls are answered by technicians with no authority to cancel detainers, and an official with that authority is not always available. An average caller waits "approximately 70 minutes," and tracking down alien files "may take two days or more." Decl. of David Palmatier, LESC Unit Chief, at 8, 11, *United States v. Arizona*, No. 10-1413, Dkt. No. 27-3 (D. Ariz. *filed* July 7, 2010), *available at* https://www.justice.gov/sites/default/files/opa/legacy/2010/07/06/declaration-of-david-palmatier.pdf.

Finally, Texas tries to minimize DHS's guidance on cooperation (cited by the Supreme Court in *Arizona*), which does not once mention detainers.

E.C.Br.47-48. Texas says the memo comes "from the previous presidential administration," Tex.Reply.26, but the guidance is still in effect today, and the United States cited it as good authority in this case. *See* U.S.Stay.Br.4. Texas also claims that the examples of permissible (g)(10)(B) "cooperation" cited in the guidance include only "permissible *unilateral* state action." Tex.Reply.21. Putting aside the oddity of "unilateral" "cooperation," Texas's description is puzzling. How could "a *joint* task force," "operational *support*," "allowing *federal*" access to locals jails, and "responding to *requests* for information" be unilateral? *Arizona*, 567 U.S. at 410 (emphases added). Texas cannot avoid the fact that neither DHS nor the Supreme Court thought § 1357(g)(10)(B) authorized the expansive local arrest regime Texas claims to support detainer authority.[9]

Interrogations

Plaintiffs previously explained (E.C.Br.39-41) that the interrogation provision in § 752.053(b)(1) goes beyond the provision *Arizona* upheld because it authorizes unilateral "interrogat[ions]" of non-citizens about their "right to be or to

[9] Texas protests that if detainer arrests are preempted, the same conclusion would apply to "a selective local decision to comply." Tex.Reply.17. But Plaintiffs have sought only to enjoin SB4's blanket provisions. Moreover, as the district court noted, detainers supported by probable cause of a crime are not addressed by Plaintiffs' arguments, nor are detainers honored pursuant to 287(g) agreements, which localities remain free to sign. Finally, as noted below, SB4 also suffers from another flaw—it strips localities of the ability to decide their own participation, in violation of Congress's scheme—which would avoid questions about detainers' compliance with § 1357(g). *See infra* Section I.B.

remain in the United States," an immigration-officer function. 8 U.S.C. § 1357(a)(1). The *Arizona* provision covered only "communicat[ion]" with ICE, which the INA expressly allows. 8 U.S.C. §§ 1357(g)(10)(A), 1373, 1644; *see Arizona*, 567 U.S. at 412 ("communicate with ICE"), 394 ("verify . . . with the Federal Government"), 411 ("contact ICE"), 412 ("contact ICE"), 414 ("status check").

Texas's only response is that, contrary to the Court's description, the *Arizona* statute *must have* "contemplated interaction" between the officer and the individual "regarding immigration status," because the statute "presumed" lawful status if the person produced a driver's license. Tex.Reply.48 (quoting Ariz. Rev. Stat. §11-1051(B)). But asking for a driver's license does not involve a status interrogation. And where a person lacked a license, the "way to perform" Arizona's required status check was "*to contact ICE*." *Arizona*, 567 U.S. at 411 (emphasis added).

Moreover, the *Arizona* provision required communication with ICE only if reasonable suspicion existed, whereas SB4 authorizes interrogations without any suspicion at all, exacerbating Congress's concerns regarding abuses. E.C.Br.41-42; *Arizona*, 567 U.S. at 395, 408 (noting that one of Congress's main concerns in limiting local immigration involvement is avoiding the "[p]erceived mistreatment" or "unnecessary harassment of some aliens"). Texas responds with the non-

sequitur that an interrogation during a lawful stop does not violate the Fourth Amendment. Reply.Br.47 (quoting Fourth Amendment cases). But Congress's concern for harassment goes well beyond the requirements of the Fourth Amendment.

B. SB4 Is Preempted Because Congress Mandated a Voluntary System.

Even where Congress permits a locality to engage in immigration activities without a 287(g) agreement, that engagement must be voluntary, and the choice must be made by the locality. Congress made a clear decision not to treat states as one monolithic unit for purposes of immigration enforcement. E.C.Br.32-39.

The INA thus speaks directly to local decisionmakers and local laws. *See, e.g.*, 8 U.S.C. § 1357(g)(1), (4), (5). For instance, § 1357(g)(10) refers to communication and cooperation by "any officer or employee of a State *or* political subdivision" (emphasis added). Other provisions located in § 1357, and elsewhere throughout the INA, are likewise specifically directed to both "local" government entities and officials and "local" laws. E.C.Br.33, 36. The INA also repeatedly emphasizes the voluntary nature of local engagement in immigration enforcement, *see, e.g.*, 8 U.S.C. § 1357(g)(9); and dispenses with the discretion enjoyed by localities in only one narrow circumstance regarding information sharing, *see* 8 U.S.C. § 1373; E.C.Br.34-35. SB4 upends this congressional choice to preserve local discretion.

1. Texas brushes off Congress's deliberate decision to address itself separately to states and to localities as just another indication that more assistance is better, asserting that "federal immigration officials routinely work with state and local law-enforcement officials and, no doubt, would happily welcome . . . cooperation from both." Tex.Reply.28-29. But the point is not whether Congress (much less ICE officials) would welcome support, but whether Congress preserved discretion for both states and localities to decide for *themselves* whether to voluntarily cooperate. Congress thus carefully differentiated between the two, allowing each to make their own decisions. For example, under § 1357(g)(1), a "State" can choose to enter into an agreement to deputize its own "officer or employee" to perform immigration functions; or a "political subdivision" can independently enter an agreement for its own "officer or employee." And for local officers, the agreement must comply with "local"—not just state—law. *Id.*; *see also id.* § 1252c(a). Both requirements underscore the importance in Congress's scheme of buy-in at the local level, where day-to-day decisions and communications will occur. Congress likewise went out of its way to emphasize the local ability to opt out, warning against construing the statute "to require any . . . political subdivision of a State to enter into an agreement" to engage in immigration enforcement. *Id.* § 1357(g)(9).

This was no mistake. Texas does not deny that immigration enforcement imposes significant costs on localities, or that Congress has acknowledged that problem. E.C.Br.37. The decision whether to participate in enforcement is weighty, with real-world implications for a locality's other work and obligations. The kind of non-voluntary system Texas envisions could spawn all sorts of problems that Congress sought to avoid in permitting localities to decline to participate, or to tailor their participation to local needs and resources. *Id.* Congress envisioned a voluntary relationship, not conscription even in the face of local incapacity or resentment.

Moreover, Congress clearly knew how to go further, but did so only in one very limited circumstance: Localities cannot opt out of sharing immigration and citizenship status information under 8 U.S.C. § 1373; E.C.Br.34. Texas responds that Congress made the decision to eliminate a locality's discretion in only this one area because it believed the Tenth Amendment would prohibit it from going any further, and not because Congress wanted to preserve the maximum amount of choice for localities. Tex.Reply.29 (stating, without any evidence, that the decision was based on Tenth Amendment concerns: "Congress went right up to the line of what it could do without running afoul of the Tenth Amendment anti-commandeering doctrine"). But § 1373 does not strip local discretion even as to all information sharing, only the narrow category of citizenship and immigration

status information. Texas does not even try to explain how incremental expansions of § 1373 to apply to other types of information would raise meaningfully different constitutional concerns than § 1373 already does. And without that explanation, it has no real argument that the narrow scope of § 1373 is anything but a congressional decision to respect localities' other voluntary choices.

Nor can Texas simply disregard that Congress has repeatedly rejected proposals to expand § 1373—including to strip discretion over other kinds of information sharing. E.C.Br.34-35 & n.11. The State wrongly claims it is entirely "irrelevant," Tex.Reply.30, that such bills have been "introduced repeatedly in Congress but none has ever been enacted," *Flood v. Kuhn*, 407 U.S. 258, 283 (1972) (relying on rejected proposals). But Texas's cases establish no such principle, particularly where legislation has been repeatedly and recently proposed and rejected.

Texas relies on *P.R. Dep't of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495 (1988) (Tex.Reply.30), but there the relevant statutory authority had expired—making it a "decidedly untypical" preemption case. *Id*. at 500. Notably, however, the Court acknowledged that preemption *can* be demonstrated by "inaction joined with action." *Id*. at 503. That is the case here: Congress carefully limited the scope of § 1373, and its decision not to do more to strip local discretion is confirmed by the many defeated bills. *Cf. Perez v. United States*, 167 F.3d 913,

916 (5th Cir. 1999) (Tex.Reply.30) (only general inaction, no specific defeated proposals).[10]

2. Texas further contends that it is "unconstitutional" for Congress to permit localities to opt out of federal immigration enforcement over a state's objection, because doing so intrudes on a state's sovereignty over its political subdivisions. Tex.Reply.31-32, 28. Whatever force that principle conceivably carries in other areas, it has no force in this uniquely federal area. The "preeminent role of the Federal Government" in immigration sets it apart from other areas of federal regulation. *Toll v. Moreno*, 458 U.S. 1, 10 (1982); *see also Arizona*, 567 U.S. at 409-10.

As a result, Congress does not have to permit *any* state participation in immigration enforcement. The fact that "Congress adopted a less intrusive scheme" and permitted some local participation "on the condition" of voluntary agreement does not render its judgment "invalid." *FERC v. Mississippi*, 456 U.S. 742, 765 (1982). Rather, Congress may "condition continued state involvement in

[10] Texas suggests (Tex.Reply.30) that Plaintiffs have cited statements from those who lost the legislative battle because the bill was defeated. But the statements are from those who were advocating *against* the bills, who are reliable sources on the motivation for rejecting them. As one of Texas's own cases explains, "[s]tatements by the opponents of a bill and failure to enact suggested amendments" do, in fact, carry "some weight." *Bryant v. Yellen*, 447 U.S. 352, 376 (1980). Texas's other cases show only that sometimes the legislative history will be too mixed to be useful. *See, e.g.*, *N.L.R.B. v. SW Gen., Inc.*, 137 S. Ct. 929, 942-43 (2017) (statements were "contradictory").

a pre-emptible area," like federal immigration enforcement, without raising state sovereignty concerns. *Id*.; *see also Printz v. United States*, 521 U.S. 898, 925-26 (1997) (discussing the conditional non-preemption holdings of *FERC* and *Hodel v. Va. Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264 (1981)); E.C.Br. 37 n.12; *cf. Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 549 (1985).

Texas acknowledges that in *Lawrence County v. Lead-Deadwood School District No. 40-1*, 469 U.S. 256 (1985), the Court gave preemptive effect to a congressional scheme in which the federal government granted discretion to a locality over the State's objection. *Id*. at 263-64 (Congress sought to ensure "local governments the freedom and flexibility to spend the federal money as they saw fit," but State law ran "directly counter to this objective"); E.C.Br.38 (discussing case). Texas dismisses the decision because it involved a "conditional-funding" scheme. Tex.Reply.31. But funding is also subject to federalism principles, *see Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 576-77, 580 (2012), yet the Court in *Lead-Deadwood* found the law preempted. In fact, the dissent raised essentially the same state sovereignty arguments Texas advances here. 469 U.S. at 270-71 (Rehnquist, J. dissenting) (asserting that the Court's holding was "[f]lying in the face" of states' control over localities). Given federal primacy over immigration, Congress has broad authority to preserve the discretion of localities

to decide for themselves how they will participate in the enforcement of *federal* immigration law.

3. Texas alternatively argues that even if Congress has the constitutional power to determine how best to use non-federal actors to enforce immigration law, Congress ought to have spoken more clearly, because choosing to deal directly with localities is an "awesome" step that "'strikes near the heart of State sovereignty.'" Tex.Reply.28 (quoting *City of Abilene v. FCC*, 164 F.3d 49, 51-52 (D.C. Cir. 1999)). But as discussed above, and in Plaintiffs' earlier brief, Congress has been unmistakably clear in differentiating between states and localities, including in subsection (g)(10)(B).

In any event, Texas's contention that Congress was required to provide some strong clear statement is wrong. Texas relies exclusively on *City of Abilene*, where the D.C. Circuit held that a clear statement of congressional intent was required before it would find that the Telecommunications Act of 1996 preempted a state statute barring cities from providing telecommunications services. 164 F.3d at 52. But that Act established federal control in an area where "the states held virtually exclusive sway prior to the enactment of the Act." *P.R. Tel. Co. v. Telecomm. Reg. Bd.*, 189 F.3d 1, 14 (1st Cir. 1999). SB4, in stark contrast, involves an area of unique historic federal control. *City of Abilene* itself explained that the analysis is different where a case involves not "federal preemption of traditional state

powers," but instead an attempt to "exercise traditional *federal* powers." 164 F.3d at 52 (emphasis added); *cf. Arizona v. Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247, 2256 (2013) (emphasizing that a clear statement is required only where a preemption claim implicates "areas traditionally regulated by the States") (internal quotation marks omitted).[11]

C. The Communication Provision Is Preempted.

SB4's communication provision (§752.053(b)(2)) is preempted because it regulates the same conduct as the federal status-communication provision in § 1373, but imposes different penalties from those Congress chose. E.C.Br.42-43 (citing cases). Texas does not dispute that SB4 does so, nor the legal principle laid out in Plaintiffs' brief. *See Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 379 (2000) (a "common end hardly neutralizes conflicting means").

Instead, Texas argues that § 1373 contains no "enforcement mechanisms" at all, Reply.Br.51, 54, and that Congress must therefore have intended to leave enforcement of § 1373 "up to the States." Tex.Reply.52. Texas thus concludes: "It is not the case, then, that 'two separate remedies are brought to bear on the same activity.'" *Id.* at 52 (quoting *Crosby*, 530 U.S. at 380).

[11] The question in *Abilene* was whether municipalities fell within the term "entity"—which Congress had "left undefined." 164 F.3d at 52. Here, in contrast, Congress has expressly differentiated between states and "local" governments and "political subdivisions."

That is wrong. The federal government simply chose to enforce § 1373 the same way it enforces countless other federal laws: through an injunctive action, and not through harsh penalties on local entities and employees. Texas offers no evidence that Congress chose to leave enforcement of this federal immigration provision to the states. To the contrary, Congress's decision to adopt a scheme of injunctive enforcement was deliberate. It has considered adding harsher penalties to § 1373 on numerous occasions, *see, e.g.*, H.R. 3009, 114th Cong., §§ 2, 3 (passed House July 23, 2015); LEAVE Act of 2009, H.R. 994, 111th Cong., § 921 (2009), but has chosen not to. E.C.Br.43; *see Bonito Boats v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 167-68 (1989); *Three Affiliated Tribes of Fort Berthold Reservation v. World Eng'g*, 476 U.S. 877, 887 (1986) (state preempted from adding penalties that "Congress specifically considered . . . but did not provide").

Texas relatedly suggests (Reply.Br.53) that Congress may not have imposed penalties because it believed it could not do so under the Tenth Amendment. But, again, Texas has offered no evidence that Congress wanted to impose penalties on local officials. Nor has Texas explained why it would "test the boundaries of the Tenth Amendment" to add penalties. Tex.Reply.53. Congress does that all the time. *See, e.g.*, *Reno v. Condon*, 528 U.S. 141, 146-48 (2000) (rejecting Tenth Amendment challenge to federal law that imposed "civil penalty" and "criminal fine" on local officials).

Texas incorrectly states that *Arizona* upheld a provision "requiring communications with ICE"—section 2(B)—that "*itself* attached harsher penalties than § 1373." Tex.Reply.51 (emphasis added). There were no penalties attached to section 2(B). The penalties Texas cites were attached to a *different* provision, section 2(A), which did not duplicate § 1373, was not before the Supreme Court, and which the Court did not even mention.

Texas also incorrectly states that, in *Chamber of Commerce v. Whiting*, 563 U.S. 582, 606-07 (2011), the Court upheld a state's addition of licensing sanctions because of an "absence of congressional prohibition on those sanctions." Tex.Reply.52. The federal law in *Whiting* did not merely fail to prohibit sanctions; it *expressly* permitted state sanctions "through licensing and similar laws." *Whiting*, 563 U.S. at 594-95 (quoting 8 U.S.C. § 1324a(h)(2)). If anything, *Whiting* illustrates that Congress knows how to authorize concurrent state sanctions when it wants to. Notably, the Court in *Whiting* held that a different state-law provision was not preempted specifically because "the consequences" of violating it were "*the same* as the consequences" imposed by the equivalent "federal law." 563 U.S. at 608 (emphasis added).

II. PLAINTIFFS HAVE STANDING.

Texas wrongly argues that municipalities do not have standing to sue the State.[12] This Court has established that municipalities have standing to sue the State where, as here, they seek to protect structural rights under the Supremacy Clause. *Rogers v. Brockette*, 588 F.2d 1057, 1069-71 (5th Cir. 1979); *see also Donelon v. Wise*, 522 F.3d 564, 567 n.6 (5th Cir. 2008) (clarifying that this Circuit does not have "a per se rule that political subdivisions may not sue their parent states under any constitutional provision"). Texas's cases do not provide otherwise.[13] Further, and critically, Plaintiffs include individuals and non-profit organizations who independently have standing to challenge SB4's provisions.[14]

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[12] Texas obliquely addressed standing in the harms section of its brief. Tex.Reply.39-41. In light of the Court's request that the parties divide arguments to the extent possible, Plaintiffs here address only the standing arguments, and leave Texas's other contentions about harm for other Plaintiffs. Article III is satisfied where at least one plaintiff has standing. *See McAllen Grace Brethren Church v. Salazar*, 764 F.3d 465, 471 (5th Cir. 2014).

[13] Some cases, like *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819), cited by Texas, Tex.Reply.39, "are not decisions about a municipality's standing to sue its state," but rather about state authority over the organization of its subdivisions. *Rogers*, 588 F.2d at 1069. Other cases involve claims not at issue in this litigation. *Tex. Catastrophe Prop. Ins. Ass'n v. Morales*, 975 F.2d 1178 (5th Cir. 1992) (right to counsel in civil cases); *Coleman v. Miller*, 307 U.S. 433 (1939) (Contract Clause claim); *Appling Cty. v. Mun. Elec. Auth.*, 621 F.2d 1301 (5th Cir. 1980) (same).

[14] Texas LULAC, for example, does not rely on speculative harms, as Texas suggests, Tex.Reply.42, but has demonstrated, among other things, that its members are likely to be detained in the future due to SB4 and that it will be

Texas is also wrong to suggest that standing for local officials is limited to challenges to "flagrantly unconstitutional" state laws. Tex.Reply.40-41 (citing *Michigan v. DeFillippo*, 443 U.S. 31, 38 (1979)). *DeFillippo*, a case about the scope of the exclusionary rule, is far afield. By contrast, it is well established that public officials have standing to assert their own constitutional rights where, as here, they are placed in the untenable position of either violating their oath or being subjected to harsh penalties for not doing so. E.C.Br.64 n.24. This Court has never held otherwise.[15]

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harmed as an organization by having to divert scarce resources. *See* ROA.3644-48; *Ass'n of Am. Physicians & Surgeons, Inc. v. Tex. Med. Bd.*, 627 F.3d 547, 550 (5th Cir. 2010) (associational standing); *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982) (organizational standing).

[15] As Plaintiffs explained, the officers assert their own rights so need not establish third-party standing. E.C.Br.64 n.24. But in any event they clearly satisfy the requirements for third-party standing to assert the interests of arrestees. *Id.*; *see also Singleton v. Wulff*, 428 U.S. 106, 114-16 (1991); *Carey v. Population Servs. Int'l*, 431 U.S. 678, 683-84 (1977); *Barrows v. Jackson*, 346 U.S. 249, 254-58 (1983). Unlawful detainers violate the rights of arrestees and Plaintiffs' own oath; and arrestees face obstacles in bringing suit—claims are quickly moot, because detention lasts less than 48 hours, and arrestees may not wish to draw attention to themselves through lawsuits.

CONCLUSION

The Court should uphold the district court's injunction, and reverse as to the cross-appeal.

Dated: October 27, 2017

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CERTIFICATE OF SERVICE

I hereby certify that on October 27, 2017, I electronically filed the foregoing with the Clerk for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. A true and correct copy of this brief has been served via the Court's CM/ECF system on all counsel of record.

/s/ Lee Gelernt
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Dated: October 27, 2017

CERTIFICATE OF COMPLIANCE

I certify that the required privacy redactions have been made per Fifth Circuit Rule 25.2.13 and that the electronic submission has been scanned with the most recent version of commercial virus-scanning software and was reported free of viruses. This brief complies with the type-volume limitation of Fed. R. App. P. 28.1(e)(2)(A)(i) because this brief contains 6,423 words, excluding parts of the brief exempted by Fed. R. App. P. 32(f).

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/s/ Lee Gelernt
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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. Gelernt,

We have reviewed your electronically filed reply brief and it is sufficient.

You must submit the 7 paper copies of your brief required by 5TH CIR. R. 31.1 for overnight delivery as this case is expedited.

Sincerely,

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