IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Docket No. 17-50762

CITY OF EL CENIZO, TEXAS, et al.,
Plaintiffs-Appellees,

v.

STATE OF TEXAS, et al.,
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

PLAINTIFFS' RESPONSE TO EMERGENCY MOTION TO STAY PRELIMINARY INJUNCTION PENDING APPEAL

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No. 17-50762

CITY OF EL CENIZO, TEXAS, et al.,
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v.

STATE OF TEXAS, et al.,
Defendants-Appellants.

The undersigned counsel of record certifies that pursuant to the fourth sentence of Rule 28.2.1, the following listed persons or entities have an interest in the outcome of this case. These representations are made so that the judges of this Court may evaluate possible disqualification or recusal.

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INTRODUCTION

SB 4 is a uniquely punitive law. No State has ever threatened its own law enforcement personnel with imprisonment, termination, and crippling fines for failing to adequately lend themselves to a federal police force. The statute fails to give sufficient notice of which actions will lead to these devastating penalties; its systematic enforcement regime conflicts with Congress's voluntary one; and it forces police to detain without regard for probable cause.

No emergency justifies Texas's request for the extraordinary remedy of a stay pending appeal, particularly given that argument on the merits is now scheduled for early November. The local policies SB 4 targets have been in place for at least eight months, and some as long as two decades. *See, e.g.*, Houston PD Policy 500-05 (1992); Hernandez Decl., Dkt. No. 79-1, ¶ 8-9 (Travis County policy announced January 2017); Reyes Decl., Dkt. No. 24-8, ¶ 19 (El Cenizo ordinance adopted 1999).[1] The Legislature, moreover, has considered and rejected similar bills over multiple years.

By contrast, if a stay were granted, sheriffs and police chiefs would suddenly see their careers, savings, and physical liberty jeopardized, even for a single violation of SB 4's vague dictates. As the district court found, local officials on the ground cannot understand what SB 4 requires. As telling, the State itself does

[1] For convenience, plaintiffs have attached the exhibits cited in this brief.

not appear to know the precise contours of the law and has advanced divergent positions as this litigation has proceeded. SB 4 would force local officials to choose between detaining their residents even when they doubt probable cause or risk criminal prosecution and removal from office. Especially now, it is critical that residents needing help (including mixed immigration-status families) be assured that they can approach local police. *See* Acevedo Supp. Decl., Exh. 1, Sept. 12, 2017 (Houston Police Chief) (explaining that many people did not seek assistance because of SB 4).

The district court's careful opinion upheld significant portions of SB 4. As for the others, the injunction simply preserved the status quo that has existed for years. SB 4 presents weighty constitutional issues. An emergency stay motion is no place to resolve them. The status quo should be preserved pending appeal. *See Barber v. Bryant*, 833 F.3d 510, 511 (5th Cir. 2016) (denying stay in order to "maint[ain] the status quo" and noting that "[a] stay is an intrusion into the ordinary processes of . . . judicial review").

ARGUMENT

I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS.

SB 4 bars a wide range of actions and policies that "prohibit[] or materially limit[]" immigration enforcement. Tex. Gov't Code § 752.053(a), (b). Local officials are subject to fines of up to $25,500 per day, and to removal from office

for a single violation. *Id.* §§ 752.056(a), (b) (fines); 752.0565(a) (removal with no scienter requirement). SB 4 also mandates that local officers blindly honor every detainer request, unless the person can prove citizenship or immigration status. Tex. Code Crim. P. art. 2.251(a), (b) (2017). A single violation is punishable by a year's imprisonment and automatic removal from office. Tex. Pen. Code §§ 39.07, 12.21; Tex. Loc. Gov't Code § 87.031(c). The district court correctly found that certain provisions of SB 4 are unconstitutionally vague and preempted by federal law, and that the detainer mandate violates the Fourth Amendment.[2]

A. The District Court Correctly Concluded that the "Materially Limit" Provisions Are Unconstitutionally Vague.

A law is unconstitutionally vague when it "fails to draw reasonably clear lines between lawful and unlawful conduct." *Kramer v. Price*, 712 F.2d 174, 176 (5th Cir. 1983). A vague law either "(1) fails to provide those targeted by the statute a reasonable opportunity to know what conduct is prohibited, or (2) is so indefinite that it allows arbitrary and discriminatory enforcement." *Women's Med. Ctr. v. Bell*, 248 F.3d 411, 421 (5th Cir. 2001); Op. 45-47. Both are true of SB 4's "materially limit" prohibition.

SB 4 provides that local officials may not take any action that "materially limits" immigration inquiries, information sharing, undefined "enforcement

[2] Plaintiffs support the arguments advanced by the other set of plaintiffs in their brief. To avoid repetition, those arguments are not repeated here.

assistance," jail access, and, more broadly, anything else that constitutes "the enforcement of immigration laws." Gov't Code § 752.053(a), (b). Yet a nearly unlimited set of actions could be said to "materially limit" immigration "enforcement" or "assistance."

Any time a sheriff or police chief prioritizes a routine police matter over immigration enforcement, she has "limit[ed] the enforcement of immigration laws." Whether any given limitation amounts to a "material" limitation is unclear, and an incorrect guess subjects officials to enormous penalties. For instance, a police chief may want to instruct officers not to interrogate motorists about their immigration status unless there is reasonable suspicion of a status violation, or when other matters are more pressing. *See id.* § 752.053(b)(1). Would that be merely a limit, or a material limit? Deputies might want to spend time patrolling border regions or monitoring day laborers, but the sheriff instructs them to focus instead on higher-priority areas. That policy would certainly limit immigration enforcement, but materially? *See id.* § 752.053(a)(1). The same question would arise any time ICE asks a local agency to lend officers to help with a raid, *id.* § 752.053(b)(3), or escort ICE agents around a jail, *id.* § 752.053(b)(4), or investigate an immigration-related tip. In fact, the uncertainty attaches to *any* choice about how to allocate law enforcement resources, many of which will inevitably limit the enforcement of immigration laws. SB 4 provides no guidance

about which of these choices will subject chiefs and sheriffs to crippling fines and removal from office.

These are all questions that plaintiffs would face every single day under SB 4. *See, e.g.*, Hernandez Decl. ¶¶ 35-36, 44-46; Schmerber Decl., Dkt. No. 24-5, ¶ 13; M. Hernandez Decl., Dkt. No. 24-6, ¶¶ 10-13; Reyes Decl. ¶¶ 23-24. Texas is thus wrong that plaintiffs are somehow only challenging SB 4's vagueness "as applied to the conduct of others." Mot. 18 (quotation marks omitted). *See* Op. 52-53 (rejecting similar argument).

Moreover, SB 4's long list of prohibitions compounds the vagueness of "materially limit." *Int'l Soc'y for Krishna Consciousness v. Eaves*, 601 F.2d 809, 832 (5th Cir. 1979) (holding that "hamper or impede" was vague in the context of multiple additive terms). SB 4 forbids material limits (which must be something short of "prohibit[ions]") imposed by explicit policies, "informal" policies, *id.* § 752.051(6), "patterns," "practices," *id.* § 752.053(a)(2), and individual "action[s]," Mot. 18; *see* Gov't Code § 752.053(b). Even if each restriction were "tolerable in isolation," together "their sum makes a task for us which at best could be only guesswork." *Johnson v. United States*, 135 S. Ct. 2551, 2560 (2015).

Texas responds that a material limit means only "a policy or action [] addressing th[e] topic of immigration-law enforcement, as opposed to routine police matters." Mot. 18. But the plaintiffs' decisions covered by SB 4 explicitly

address *both*. Op. 53, 55-56. And as even Texas says, the "materially limit" provisions outlaw policies and actions that merely have a negative "*effect*" on immigration-law enforcement. Mot. 18; Tr. 130 (Counsel for the State) (whether a decision "materially limit[s]" enforcement is a matter of "causation"). Nor can the Court "narrow[] a vague state regulation. We take the state and local regulations as we have been given them." *Svc. Employees Int'l Union Local 5 v. Houston*, 595 F.3d 588, 597 (5th Cir. 2010).

Texas also defends these provisions by asserting that "material" and "limit" are used in other legal contexts. Mot. 19. But that is usually true of vague provisions. *See, e.g.*, *Johnson*, 135 S. Ct. at 2561 (rejecting vagueness defense based on fact that a challenged phrase was used in "dozens of federal and state criminal laws"). Context is crucial, and in the context of SB 4, "people in appell[ees'] position cannot know wh[at] to expect." *Krishna*, 601 F.2d at 832.

Even Texas seems unsure of SB 4's scope. *See* Tr. 129 (agreeing that "[t]here are a million gray area hypotheticals"). Its briefs have taken contradictory positions, many of them at odds with SB 4's text. For instance, Texas has claimed that SB 4 "merely prohibits local *policies*" that "*categorically* block[] cooperation with federal authorities." Mot. for Stay, Dkt. No. 191, at 2 (emphases altered); Mot. 4, 10 (SB 4 only prohibits "policies" that fully "ban" assistance); Opp. to Mot. for Prelim. Inj., Dkt. No. 91, at 1, 4, 9 (same). But according to SB 4's text

and other statements made by Texas, the statute extends beyond non-enforcement "policies" to individual "actions." Mot. 18; Dkt. No. 91, at 5, 33, 38; *see* Gov't Code § 752.053(b). And it plainly applies not just to "categorical" prohibitions, but also to "material limits," "patterns," and "practices." Moreover, Texas's examples of SB 4's "core" applications simply restate the statute's text. *See* Mot. 18 (defining "material limits" as "policies limiting" enforcement or "limiting federal-local cooperation"); *cf. Women's Med. Ctr.*, 248 F.3d at 422 (finding vagueness where law's drafter could not explain its content).

Finally, Texas argues that SB 4 can only be enjoined if it "is impermissibly vague in all of its applications." Mot. 17 (quotation marks omitted). But the Supreme Court in *Johnson* disavowed the "supposed requirement of vagueness in all applications," which it explained was "not a requirement at all, but a tautology." 135 S. Ct. at 2561 (facially invalidating law despite acknowledging that some conduct "clearly falls within the provision's grasp"); *see SEIU Local 5 v. City of Houston*, 595 F.3d 588, 605 (5th Cir. 2010) (striking down vague ordinance despite clear applications). Texas tries to distinguish *Johnson*, noting that this case involves a pre-enforcement challenge. Mot. 17-18. That is a distinction with no relevance here. Texas law enforcement officers are properly asking for protection now from a law they cannot understand and will be punished for violating, precisely what the vagueness doctrine is meant to protect against. *See, e.g.*,

Women's Med. Ctr., 248 F.3d at 422 (affirming pre-enforcement injunction on vagueness grounds).

B. SB 4's Enforcement Assistance Provision Is Preempted.

Under § 752.053(b)(3), officials may not prohibit or materially limit police officers from "assisting or cooperating with a federal immigration officer as reasonable or necessary, including providing enforcement assistance." Plaintiffs argued below that SB 4 goes far beyond mandating cooperation and, among other things, requires police routinely to perform the functions of federal immigration officers[3] without the federal supervision, certification, and training required by 8 U.S.C. § 1357(g).[4] To that extent, Plaintiffs argued that SB 4 conflicts with § 1357's immigration-enforcement scheme and is preempted.

The district court agreed and held that "[b]ypassing the training, certification, and supervision and establishing a systematic local enforcement

[3] Texas is incorrect to suggest that, under SB 4, local police will not perform "immigration officer functions." 8 U.S.C. § 1357(g); Mot. 12-13. Those functions include the "detention of aliens in the United States," 8 U.S.C. § 1357(g)(1), which SB 4 affirmatively requires. *See* Code Crim. P. art. 2.251. They also include the "power without a warrant to interrogate any alien or person believed to be an alien as to his right to be or remain in the United States," 8 U.S.C. § 1357(a)(1), which corresponds directly to SB 4's § 752.053(b)(1).

[4] Federal law imposes a number of requirements before local police may routinely assist in federal immigration enforcement. Federal officials must "direct[] and supervis[e]," and determine that each local officer is "qualified to perform a function of an immigration officer." 8 U.S.C. § 1357(g)(1), (3). The local officers must "have knowledge of . . . Federal law relating to the function," and receive "adequate training regarding the enforcement of relevant Federal immigration laws." *Id.* § 1357(g)(2). And a written agreement must set forth, for each local officer, "the specific powers and duties" to be performed, "the duration of the authority of the individual, and the position of the agency of the Attorney General who is required to supervise and direct the individual." *Id.* § 1357(g)(5).

procedure would likely go against the program put in place by Congress [in § 1357(g)]." Op. 33. It thus enjoined the "enforcement provision in Tex. Gov't Code § 752.053(b)(3)." Op. 93. The court made clear, however, that it was *not* enjoining cooperation and communication with federal immigration authorities. Op. 93 n.102.

Rather than directly address the district court's detailed preemption analysis, Texas attempts to distract from it by advancing arguments and purported evidence grounded in false premises. Texas argues, for instance, that the district court "misapprehended" § 752.053(b)(3) because the court improperly presumed that SB 4 requires localities to engage in unilateral immigration enforcement. Mot. 10. It did not. Instead, the court expressed concern about the State coercing unfettered immigration enforcement without satisfying § 1357(g)'s requirements of training, certification, and supervision. Op. 24-26. The court properly recognized that, for preemption purposes, it is not sufficient for Texas simply to promise that it will rely on the federal government to voluntarily provide the same supervision and training mandated in § 1357(g) or that, absent a federal request for enforcement assistance, somehow "SB4 does not come into play." Mot. 10. Instead, when, as here, "a party cannot satisfy its state duties without the Federal Government's special permission and assistance, which is dependent on the exercise of judgment

by a federal agency, that party cannot independently satisfy those state duties for pre-emption purposes." *PLIVA, Inc. v. Mensing*, 564 U.S. 604, 623-24 (2011).

Texas also argues that § 752.053(b)(3) "merely prohibits *policies* barring local officials from 'assisting or cooperating with a federal immigration officer.'" Mot. 10 (emphasis altered). It does far more than that. Under this provision, if an ICE officer asks a sheriff's deputy to join an immigration raid, neither the county nor the sheriff can prevent the deputy from joining the raid. *Id.* ("[A] local entity . . . may not prohibit or materially limit *a person* who is a commissioned peace officer [from] . . . providing enforcement assistance."); *see* Opp. to Mot. for Prelim. Inj., Dkt. No. 91, at 39. The request becomes a mandate to the county and sheriff. The local entity loses its ability to control its own employees regardless of their lack of training or understanding of federal immigration law.

SB 4, and § 752.053(b)(3) in particular, thus fundamentally changes the nature of relations between local and federal governments regarding immigration enforcement. What was once voluntary and cooperative is now coerced by the state. In *Arizona v. United States*, the Court found § 5(C) of the state's immigration law facially preempted, even though it attempted to achieve the same goals as federal law, because it involved a conflict in the *method* of enforcement. 132 S. Ct. 2492, 2505 (2012). The Court recognized that a "[c]onflict in technique can be fully as disruptive to the system Congress erected as conflict in overt

policy." *Id.* (quoting *Motor Coach Employees v. Lockridge*, 403 U.S. 274, 287 (1971)). Similarly, in *Buckman v. Plaintiffs' Legal Committee*, the Court recognized that state-law fraud-on-the-FDA claims were preempted because they skewed "a somewhat delicate balance of statutory objectives" that Congress had already struck. 531 U.S. 341, 348-53 (2001). Section 752.053(b)(3) would therefore *still* be preempted even if it were only a conflict in technique.

Texas also seeks refuge in an over-expansive reading of § 1357(g)(10) that negates subsections (1)-(8). Ordinary statutory construction principles, the plain language of § 1357 and SB 4, and their structure and purposes do not permit Texas's reading. And the federal government's own guidance defines "cooperate" in § 1357(g)(10)(B) to *exclude the very activities SB4 requires*.

> State or local laws or actions that . . . *categorically* demand enforcement in such a way as to deprive the Federal Government—and state and local officers—of the flexibility and discretion that animates the Federal Government's ability to globally supervise immigration enforcement, *do not constitute the requisite "cooperation"* within the meaning of 8 U.S.C. § 1357(g)(10)(B).

DHS, Guidance on State and Local Governments' Assistance in Immigration Enforcement and Related Matters 8 (July 16, 2015) (emphasis added).[5]

In a last-ditch effort, Texas cites to the federal government's statement of interest to argue that, because plaintiffs have voluntarily cooperated in honoring

[5] *Available at* https://www.dhs.gov/publication/guidance-state-and-local-governments-assistance-immigration-enforcement-and-related. *See* Dkt. No. 150, Exh. D.

ICE detainers in the past, SB 4's mandates do not present a preemptive conflict. Mot. 13-14. First, that argument ignores *Arizona* and *Buckman's* "frustration of purpose" jurisprudence. Second, the government's statement of interest and amicus brief, prepared solely for litigation, depart markedly from its long-standing interpretation of § 1357(g)(10), as expressed in its current Guidance. Where, as here, the federal government has so dramatically changed its position with regard to the permissibility of state laws, the Supreme Court has held that its views on the preemptive effect of federal statutes are entitled to no deference.[6] In the end, it is the statute enacted by Congress that controls.

C. SB 4's Detainer Mandate Violates the Fourth Amendment.

The district court correctly held that SB 4's detainer mandate violates the Fourth Amendment because it requires officers to honor detainers without probable cause of a *crime*. Op. 65-81; *accord Mercado v. Dallas Cty.*, 229 F. Supp. 3d 501, 510-13 (N.D. Tex. 2016) (Fitzwater, J.). The State's primary response is that the Fourth Amendment requires local officers to have probable cause only of removability. Mot. 4-8. The other set of plaintiffs address that contention in their

[6] *See Wyeth v. Levine*, 555 U.S. 555, 581 (2008). Even if the United States had consistently adhered to its interpretation, however, this Court has also held that "near indifference" is the level of deference due "an interpretation advanced for the first time in a litigation brief," as the federal government's interpretation is here. *United States v. Mead Corp.*, 533 U.S. 218, 228 (2001) (cited in *Luminant Generation Co., LLC v. EPA*, 675 F.3d 917, 927 (5th Cir. 2012)).

brief. To avoid repetition, this brief explains why the detainer mandate violates the Fourth Amendment even if localities only need probable cause of removability.[7]

The State concedes that extending a person's detention based on an immigration detainer constitutes "a new seizure for Fourth Amendment purposes." *Morales v. Chadbourne*, 793 F.3d 208, 217 & n.3 (1st Cir. 2015) (collecting cases). Thus, there is no dispute that there must at least be probable cause of removability. Texas notes, however, that ICE detainer forms have check boxes indicating that there is probable cause of removability, and argues that the Fourth Amendment is therefore satisfied. Mot. 5. But the fact that *ICE* claims probable cause exists does not save SB 4's detainer mandate. Local officers must also be able to assess for themselves whether probable cause of removability exists.

It is black-letter law that arresting officers—here, the local officers—must undertake a "particularized" probable cause inquiry "with respect to [each] person" they arrest. *Ybarra v. Illinois*, 444 U.S. 85, 91 (1979); *see* Hernandez Decl. ¶ 27. But SB 4 does not permit local officers to make that probable cause inquiry. Instead, using the threat of criminal penalties and removal from office, it compels them to honor every detention request where the person cannot affirmatively prove status with documentation. Thus, even where local officers harbor doubts about

[7] In its stay motion, Texas does not dispute the district court's conclusion that plaintiffs have standing to raise a Fourth Amendment claim, and plaintiffs therefore do not address it here. Op. 63-64.

probable cause of removability, they must detain anyway. That means in every case, the local official is violating the Fourth Amendment because SB 4 prohibits them from undertaking the constitutionally-required "particularized" probable cause inquiry "with respect to [each] person" they arrest. *Ybarra*, 444 U.S. at 91.

Texas offers three basic responses. First, it notes that officials may decline a request where the person can affirmatively prove U.S. citizenship or lawful status with documentation. Code Crim. P. art. 2.251(b). But that cannot save the statute. Under the Fourth Amendment, the burden rests with the arresting officer to establish probable cause; the burden cannot be switched to the detainee to come forward with documentation on the spot to prove the absence of probable cause. Many situations will present reasons to doubt probable cause—for instance, when the arresting officer personally knows the detainee and their status, or the detainee or ICE reveal information undermining probable cause, or when ICE fails to check the correct boxes on the detainer form. *See Groh v. Ramirez*, 540 U.S. 551, 563 (2004) (officers violated Fourth Amendment by executing facially invalid warrant); Bacon Decl., Dkt. No. 24-2, ¶¶ 9-11, 30, 61 (explaining that over two dozen different immigration statuses permit an individual to remain in the country, but that not all come with documentation); Watson Decl., Dkt. No. 57-6, ¶ 26 (estimating that over one million Latinos in Texas lack photo ID). Similarly, in some cases ICE agents may request a detention verbally, without the I-247 detainer

form's representation of probable cause—a practice that ICE policy expressly permits and SB 4's mandate encompasses. *See* U.S. Imm. & Customs Enf. Policy No. 10074.2, ¶ 2.5 (effective Apr. 2, 2017); Tex. Gov't Code § 772.0073(a)(2) (defining mandated detainers as *any* detention request, "including" the I-247 or related forms); Op. 80. Texas acknowledges that prolonging detention despite knowledge negating probable cause violates the Fourth Amendment. Mot. 9. And yet SB 4 mandates that officers detain anyway in such situations.[8]

Second, Texas argues that although SB 4 precludes local officers from assessing probable cause of removability, SB 4 is nonetheless consistent with the Fourth Amendment under the "collective knowledge" doctrine, which allows an arresting officer to rely on the knowledge of a fellow officer. But as the State's own cases reveal, officers may not rely on requests from others when there is reason to doubt that probable cause actually exists. Yet that is exactly what SB 4 requires. *See Whiteley v. Warden, Wyo. State Penitentiary*, 401 U.S. 560, 568 (1971) ("[A]n otherwise illegal arrest cannot be insulated from challenge by the

[8] Over the years, a troubling number of detainers have been issued without probable cause. *See, e.g.*, *Morales v. Chadbourne*, 235 F. Supp. 3d 388, 398 (D.R.I. 2017); *Davila v. United States*, 2017 WL 1162912, at *13-*14 (W.D. Pa. Mar. 28, 2017); *Miranda-Olivares v. Clackamas Cty.*, 2014 WL 1414305, at *11 (D. Or. Apr. 11, 2014); *Makowski v. United States*, 27 F. Supp. 3d 901, 918 (N.D. Ill. 2014); *see also Galarza v. Szalczyk*, 745 F.3d 634, 638 (3d Cir. 2014); *Mendia v. Garcia*, 768 F.3d 1009, 1012 (9th Cir. 2014). And ICE acknowledges that it has mistakenly placed *hundreds* of detainers on U.S. citizens in recent years. *See, e.g.*, Eyder Peralta, *You Say You're an American, but What if You Had to Prove It or Be Deported?*, NPR, Dec. 22, 2016 (documenting "693 U.S. citizens [who] were held in local jails on federal detainers"), http://www.npr.org/sections/thetwo-way/2016/12/22/504031635/you-say-you-re-an-american-but-what-if-you-had-to-prove-it-or-be-deported.

decision of the instigating officer to rely on fellow officers to make the arrest."); *Evett v. DETNTFF*, 330 F.3d 681, 688 (5th Cir. 2003) (fellow officer rule does not allow arresting officer to "disregard facts tending to dissipate probable cause"); *United States v. Webster*, 750 F.2d 307, 323-24 (5th Cir. 1984) (unreasonable to rely on request to carry out arrest because insufficient information was communicated). As the Supreme Court has explained, an arrest statute that "afford[ed] the police *no* discretion" would "fl[y] in the face of common sense that *all* police officers must use some discretion in deciding when" to effectuate an arrest. *City of Chicago v. Morales*, 527 U.S. 41, 62 n.32 (1991) (second emphasis added); *see Town of Castle Rock v. Gonzales*, 545 U.S. 748, 761 (2005). In short, arresting officers are constitutionally required to assure themselves that probable cause exists even when someone else asks for the arrest.

Third, Texas argues that the district court erred in enjoining the detainer mandate on a facial pre-enforcement challenge. But, as noted above, SB 4 results in a violation of the Fourth Amendment in *every* case, because for *every* arrest it prohibits local officers from fulfilling their own constitutionally-required duty to assess probable cause. *Ybarra*, 444 U.S. at 91 (police must undertake a "particularized" probable cause inquiry "with respect to [each] person"); *cf. Sibron v. New York*, 392 U.S. 40, 59 (1968) (the "procedural safeguards written into a statute" must be "adequate" to justify any searches under the statute). That

probable cause may exist in many (or even most) cases does not excuse SB 4's elimination of a procedural safeguard that the Fourth Amendment requires for every seizure. *See City of Los Angeles v. Patel*, 135 S. Ct. 2443, 2452-53, 2456 (2015) (noting that "the vast majority" of searches under the challenged statute would be lawful, and that pre-compliance review would "rare[ly]" be invoked, but nonetheless facially invalidating the statute in a pre-enforcement challenge because it authorized warrantless searches without an opportunity for pre-compliance review—a procedural safeguard the Fourth Amendment required to be available in every case).

Moreover, Texas's proposed "as applied" alternative is wholly unworkable. According to the State, local officials—commanded by SB 4 to undertake unconstitutional arrests on pain of losing their jobs, their property, and their liberty—should simply bring an "as-applied challenge to a specific detention." Mot. 9. Yet it is hard to believe the State really envisions sheriffs and jail supervisors rushing into court to file emergency TRO motions each time they doubt probable cause. Nor is there any good-faith exception for officials who knowingly decline a detainer based on the mistaken belief that the person has proved lawful status. Penal Code § 39.07(b); Bacon Decl. ¶¶ 9-11, 30, 61. A sheriff who made that mistake, even once, would face a year in jail and immediate

forfeiture of her office. *See id.*; Gov't Code § 87.031(c); *id.* § 752.0565(b). Facial relief is thus not only legally proper but necessary as a practical matter.

II. TEXAS WILL NOT BE IRREPARABLY HARMED ABSENT A STAY.

Texas faces no irreparable harm during the pendency of this highly expedited appeal. Local policies on immigration enforcement have been on the books in Texas for decades; the Legislature has considered this question slowly over several years; and SB 4's own effective date was set for four months after enactment. *See Dillard v. Security Pacific Corp.*, 85 F.3d 621 (5th Cir. 1996) ("[L]ong delay implie[s] lack of irreparable harm."). The State faces no emergency during the several weeks between now and argument on the merits.

Texas has come forward with no evidence that the injunction will harm public safety. *See* Op. 92 (finding "overwhelming evidence" that SB 4 will "make many communities and neighborhoods less safe"); *U.S. v. Dial*, 542 F.3d 1059 (5th Cir. 2008) (fact-finding reviewed for clear error). As the United States points out, Texas localities *already* participate in federal enforcement efforts "[w]ith few exceptions." U.S. Br. 18, 19; *see* Op. 91 ("As the State concedes, local jurisdictions have been cooperating with federal immigration authorities for decades."). And contrary to claims about removing "dangerous criminals," U.S.

Br. 19, according to ICE's own data, the vast majority of detainers are placed on people with no criminal records or very minor ones.[9]

Texas is left asserting the bare institutional harm that its law was enjoined. Mot. 2-3, 19-20.[10] But that cannot outweigh the harms plaintiffs face. Op. 88-90 (detailing harms); *see id.* at 33 n.40, 57-58 (describing actions Texas has already taken to withhold funds from Travis County used for veterans, children, and victims of domestic violence). "Injunctions often cause delays, and the government can resume work if it prevails on the merits." *Texas v. United States*, 787 F.3d 733, 767-68 (5th Cir. 2015). Indeed, the Supreme Court has vacated stays in numerous cases involving injunctions of state laws, demonstrating that a state's institutional harm does not automatically outweigh harms to plaintiffs. *E.g.*, *June Medical Services, LLC v. Gee*, 136 S. Ct. 1354 (Mem.) (2016); *see Indep. Living Ctr. of S. Cal., Inc. v. Maxwell-Jolly*, 572 F.3d 644, 658 (9th Cir. 2009).[11]

Finally, Texas and its declarants are simply wrong that the preliminary injunction of SB 4 somehow abrogates existing § 1357(g) contracts or enjoins

[9] Transactional Records Access Clearinghouse, Syr. Univ., *Few ICE Detainers Target Serious Criminals*, Sept. 17, 2013, http://trac.syr.edu/immigration/reports/330/.

[10] Calling SB 4 a "public-safety law" is not enough either, Mot. 2, because "simply showing some *possibility* of irreparable injury fails to satisfy" the stay standard. *Nken v. Holder*, 556 U.S. 418, 434-35 (2009) (emphasis added, quotation marks omitted).

[11] Texas cites *Maryland v. King*, 567 U.S. 1301 (Roberts, as Circuit Justice, in chambers); *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345 (1977) (Rehnquist, as Circuit Justice, in chambers). But neither case remotely suggests that a stay should automatically issue whenever a law is enjoined, as this Court has made clear. *See Texas*, 787 F.3d at 767-68.

"routine cooperation with federal immigration officials." Tex. Exh. 41 ¶¶ 2, 5, Exh. 42 ¶¶ 5-6; Mot. 9.[12] The district court's opinion addressed the mandatory, coercive scheme created by SB 4, and simply enjoined the State from enforcing certain provisions. Op. 22-33, 98 n.102. The opinion does not enjoin localities from continuing to cooperate with the federal government, nor does it address the arrest authority of officers deputized under § 1357(g). No harm to the State justifies an emergency stay.

CONCLUSION

The motion for a stay pending appeal should be denied.

[12] Plaintiffs object to the McCraw and Waybourn Declarations and attached exhibits. Tex. Exhs. 41, 42. Neither Declaration was part of the trial record, both could have been submitted below, and neither declarant may properly opine on the legal effect of the district court's ruling. Fed. R. Evid. 602, 701, 702.

Dated: September 12, 2017

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CERTIFICATE OF SERVICE

I hereby certify that on September 12, 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 motion has been served via the Court's CM/ECF system on all counsel of record.

/s/ Lee Gelernt
Lee Gelernt, Esq.
Dated: September 12, 2017

CERTIFICATE OF COMPLIANCE

I certify that the required privacy redactions have been made per 5th 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. 27(d)(2) because this brief contains 4,942 words, excluding parts of the brief exempted by Fed. R. App. P. 27(a)(2)(B).

I certify that this motion complied with typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because the motion has been prepared in a proportionally-spaced typeface using Microsoft Office 2013 in 14 point Times New Roman.

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