No. _____

In the

Supreme Court of the United States

LAS AMERICAS IMMIGRANT ADVOCACY CENTER; AMERICAN GATEWAYS; AND EL PASO COUNTY, TEXAS,

Applicants,

v.

STEVEN MCCRAW, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF TEXAS DEPARTMENT OF PUBLIC SAFETY; AND BILL HICKS, IN HIS OFFICIAL CAPACITY AS DISTRICT ATTORNEY FOR THE 34TH DISTRICT,

Respondents.

APPLICATION TO VACATE STAY OF PRELIMINARY INJUNCTION ENTERED BY THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PARTIES TO THE PROCEEDING

Applicants, Plaintiffs-Appellees below, are Las Americas Immigrant Advocacy Center, American Gateways, and the County of El Paso, Texas.

Respondents, Defendants-Appellants below, are Steven C. McCraw in his official capacity as Director of the Texas Department of Public Safety and Bill D. Hicks in his official capacity as District Attorney for the 34th Judicial District of Texas.

The Plaintiff-Appellee in the consolidated case below is the United States of America.

The Defendants-Appellants in the consolidated case below are the State of Texas; Greg Abbott in his official capacity as Governor of Texas; the Texas Department of Public Safety; and Steven C. McCraw in his official capacity as Director of the Texas Department of Public Safety.

RELATED PROCEEDINGS

United States District Court (W.D. Tex.):

United States v. Texas, No. 24-cv-00008 (Feb. 29, 2024)

Las Americas Immigrant Advocacy Ctr. v. McCraw, No. 23-cv-1537 (Feb. 29, 2024)

United States Court of Appeals (5th Cir.):

United States v. Texas, No. 24-50149 (Mar. 2, 2024)

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TO THE HONORABLE SAMUEL A. ALITO, JR., ASSOCIATE JUSTICE OF THE SUPREME COURT AND CIRCUIT JUSTICE FOR THE FIFTH CIRCUIT:

Pursuant to this Court's Rule 23 and the All Writs Act, 28 U.S.C. § 1651, plaintiffs Las Americas Immigrant Advocacy Center, American Gateways, and the County of El Paso, Texas, respectfully apply for vacatur of the stay issued by the Fifth Circuit Court of Appeals on March 2, 2024.

The regulation of entry and removal is an exclusively federal domain. This Court has made that clear, over and over, for 150 years. Yet Texas enacted a law, Senate Bill 4, 88th Legis., 4th Spec. Sess. (Tex. 2023) ("S.B. 4"), which criminalizes entry into this country, and allows state officials to issue state deportation orders. Challenges to the authority of the federal government and to this Court's precedents do not come much more direct than that.

The district court enjoined S.B. 4, but, without a word of explanation, the court of appeals reinstated the law by issuing an administrative stay and postponing its resolution of Texas's stay motion. Absent intervention by this Court, Texas can start ordering people removed to Mexico under S.B. 4 starting Sunday, March 10. That is because S.B. 4 allows state judges to issue orders to leave the country—backed by 20-year penalties for noncompliance—at the very start of a prosecution. Intervention from this Court is urgently needed.

As the district court rightly held, S.B. 4 is straightforwardly preempted. The field of entry into and removal from the United States is a quintessential example of a dominant federal interest. Congress has exhaustively regulated entry and removal in general, and noncitizens entering between ports in particular. Moreover, S.B. 4 conflicts with the federal discretion and control at the heart of our immigration laws; with the federal government's foreign policy authority; and with Congress's careful balance of myriad national interests—including access to asylum and

other protections. S.B. 4 requires people to leave the country despite their explicit federal permission to remain here.

On the equities, Texas is upending the long-established rule that immigration—specifically the entry and expulsion of noncitizens—is for the federal government to control. Whatever policy disagreements Texas may have with the current occupant of the White House (or the statutes enacted by Congress), the status quo here is remarkably longstanding and stable, and the district court's injunction maintains that status quo. By contrast, putting Texas's blatantly unlawful new system into operation will have devastating consequences: widespread arrests and prosecutions for state crimes that are preempted by federal law; organizations and local governments scrambling to adjust to a brand new state immigration system that contradicts federal law; a range of new impediments to federal law enforcement efforts and those of local governments like plaintiff El Paso County; and confusion and chaos at ports of entry as state officers issue state deportation orders.

Those harms are set to begin immediately if S.B. 4 goes into effect. The entire new system is set up to coerce noncitizens into "accepting" state deportation orders at the outset of a prosecution as an alternative to near-certain conviction, imprisonment, *and* the same removal order issued as part of sentencing. So if the law is permitted to go into effect, state courts can immediately begin pumping out state deportations without waiting for criminal proceedings to run their course. Those state removals operate entirely outside of the federal immigration system, and they effectively nullify noncitizens' federal rights to seek asylum and other protections. If S.B. 4 is later struck down—as it must be under settled law—the result will be a mess of illegal state deportations to Mexico, outstanding deportation orders backed by the threat of 20-year prison terms, and unlawful arrests, prosecutions, and prison terms.

Even though, as the district court rightly found, there would be no immediate harm to Texas in maintaining the status quo through the preliminary injunction, plaintiffs have been forced to seek emergency relief from this Court because the court of appeals issued an unreasoned "administrative stay" of indefinite duration. App. 116.[1] It did so even though every stay factor is strongly in the favor of plaintiffs and the United States. The result is that, absent this Court's intervention, Texas will be allowed to start implementing S.B. 4 this Sunday, March 10, when the court of appeals' seven-day stay of its own stay order expires.

This Court should vacate the court of appeals' administrative stay. If the Court has not done so by Saturday, March 9, plaintiffs respectfully request that it enter an administrative stay of the court of appeals' administrative stay, keeping the district court's preliminary injunction and status quo intact while this application is considered.

STATEMENT

A. The Federal Government Has Exclusive Authority to Regulate Entry and Removal.

"The Government of the United States has broad, undoubted power over the subject of immigration and the status of" noncitizens. *Arizona v. United States*, 567 U.S. 387, 394 (2012). In the Immigration and Nationality Act ("INA"), Congress created a complex system to regulate entry into and removal from the United States. *See generally*, 8 U.S.C. §§ 1151–1382. That scheme balances policy goals, including discouraging irregular entry between ports and providing for humanitarian and other protections regardless of where one enters. To do so, it provides federal

[1] While the Fifth Circuit's administrative stay is styled as "temporary," *id.*, the court of appeals declined at this juncture to actually rule on the question of a stay pending appeal, instead deferring that issue to the future merits panel.

officers a range of tools to regulate immigration, including civil immigration procedures and criminal charges.

On the civil side, Congress has specified categories of noncitizens who may be denied admission to the United States, *see* 8 U.S.C. § 1182, including those who enter between ports of entry, *see id.* § 1182(a)(6). To decide whether a person who entered without inspection at a port will be removed, Congress has established several alternative removal procedures, including full removal proceedings with trial-like processes subject to administrative and judicial appeals, 8 U.S.C. §§ 1229a, 1252, and expedited removal proceedings, a shortened form of proceedings applicable to recent border crossers, 8 U.S.C. § 1225(b)(1). On the criminal side, unlawful entry and reentry after removal are federal offenses, along with various other criminal regulations related to irregular entries. 8 U.S.C. §§ 1325, 1326; *see also*, *e.g.*, §§ 1321, 1323, 1324 (criminalizing the "unauthorized landing of aliens," and "unlawful bringing of aliens" into the country).

Even as it rendered noncitizens entering between ports "inadmissible" and subject to criminal penalties, Congress enacted a range of protections that are available despite unlawful entry. Asylum, a form of humanitarian protection that can lead to permanent residence and eventually citizenship, is specifically available "whether or not" a noncitizen enters "at a designated port of arrival," and "irrespective of such [noncitizen's] status." 8 U.S.C. § 1158(a)(1). Congress also barred officials from removing people to likely persecution or torture, in compliance with the United States' obligations under international treaties. *See id.* § 1231(b)(3); Pub. L. No. 105-277, Div. G, Title XXII, § 2242, 112 Stat. 2681, 2681-822 (1998) (codified as Note to 8 U.S.C. § 1231). In addition, individuals who are placed in full removal proceedings may apply for other forms of relief Congress has extended, including cancellation of removal. 8 U.S.C. § 1229b(b). Noncitizens who have entered without inspection may also apply affirmatively for numerous other

forms of relief outside of removal proceedings, including visas for victims of crimes and trafficking, *id.* § 1101(a)(15)(U), (T), temporary protected status, *id.* § 1254a, and Special Immigrant Juvenile Status for noncitizens under 21 years of age, *id.* § 1101(a)(27)(J).

Given the complexities of the immigration system, federal discretion and control is vital. "A principal feature of the removal system" that Congress designed "is the broad discretion exercised by immigration officials." *Arizona*, 567 U.S. at 396. Federal officials "decide whether it makes sense to pursue removal at all." *Id*. Federal officials choose among the several removal processes Congress established. *See Biden v. Texas*, 597 U.S. 785, 801-03 (2022); *United States v. Texas*, 599 U.S. 670, 679 (2023). Federal officials decide whether to deploy the associated criminal immigration charges. *See Ga. Latino All. for Hum. Rts. v. Governor of Ga.*, 691 F.3d 1250, 1265 (11th Cir. 2012). And once removal procedures have been initiated, federal officials decide whether to extend relief to otherwise removable noncitizens. *See*, *e.g.*, *INS v. Yueh-Shaio Yang*, 519 U.S. 26, 30 (1996).

B. Texas Enacts S.B. 4 to Regulate Entry into and Removal from the Country.

S.B. 4 establishes three new state crimes that criminalize entry into the United States and direct state officers to effectuate deportations without any federal direction or protection from removal.

The challenged law makes it a crime under Texas law for a noncitizen to enter or attempt to enter Texas directly from a foreign nation—which, as a practical matter, means entry across the United States-Mexico border—at any location other than a port of entry. S.B. 4, § 2 (codified at Tex. Penal Code § 51.02(a)). Affirmative defenses are available for this charge when the conduct did not violate the federal illegal entry statute, 8 U.S.C. § 1325(a), or when a noncitizen has already been granted "lawful presence," asylum, or benefits under the Deferred Action for Childhood

Arrivals program. Tex. Penal Code § 51.02(c). S.B. 4 does not provide an affirmative defense for noncitizens seeking federal status, including those with pending asylum claims, or for those who have petitioned or wish to petition the federal government for relief. *Id*.

S.B. 4 also creates a new state "reentry" charge, applicable if a noncitizen enters, attempts to enter, or is at any time found in Texas after the person has been denied admission, excluded, deported, or removed from the United States, or departed from the United States while an order of exclusion, deportation, or removal was outstanding. Tex. Penal Code § 51.03(a). There are no affirmative defenses for this crime. *Id*. In particular, the fact that an individual could not be convicted of the federal reentry charge, 8 U.S.C. § 1326—because for example they reentered with the express consent of the Attorney General, § 1326(a)(2)—is not a defense to § 51.03.

Finally, S.B. 4 creates a mechanism for the State of Texas to unilaterally order the deportation of individuals from the United States. If a person is convicted under S.B. 4's entry or reentry provisions, the state judge must enter an Order to Return, which requires the defendant to return to the foreign nation from which they entered. S.B. 4, § 1 (codified at Tex. Code of Crim. Proc. Art. 5B.002(d)). Refusal to comply with an Order to Return is a state crime punishable by up to 20 years in prison; there are no affirmative defenses. S.B. 4, § 2 (codified at Tex. Penal Code § 51.04).

S.B. 4 also provides that a state magistrate or judge may alternatively enter an Order to Return in lieu of continuing the prosecution if the noncitizen accepts that order. S.B. 4 Art. 5B.002(a)-(c). This front-end removal order may be issued as soon as a first appearance before a magistrate. *Id.* Art. 5B.002(b).

As to all of these offenses, S.B. 4 specifically prohibits "abat[ing] the prosecution . . . on the basis that a federal determination regarding the immigration status of the defendant is pending or will be initiated." *Id.* Art. 5B.003.

Of particular relevance to the immediate effect of the stay entered below, S.B. 4 yields removal orders far more quickly than an ordinary criminal process yields a sentence. These provisions work together to exert enormous pressure to accept a state deportation order at the outset of a case. An individual arrested under S.B. 4 for entry without inspection will often lack a defense to the state criminal charge (even if they do have a defense against federal civil removal, like asylum eligibility); they will therefore face a criminal sentence and the mandatory issuance of a state order of removal. S.B. 4 offers them an alternative: accept a state deportation order at the outset instead, in lieu of prosecution and an inevitable prison term. Since the noncitizen will be issued a removal order after conviction anyway, the incentive is strong to simply accept the removal order.

And once the removal order is in place—whether by acceptance or as part of a sentence—the pressure to forego any chance at federal protection is likewise intense, because failure to comply with the state removal order exposes the noncitizen to an additional state charge under S.B. 4, carrying with it a potential 20 years of incarceration. And the statute contains no defenses to that charge—regardless of what federal relief from federal removal may be available. By contrast, in the federal system, even if a person is prosecuted and convicted for an entry crime they cannot be removed from the United States without a *separate* proceeding to obtain a removal order, in which they can raise all available federal defenses to removal.

Indeed, placing pressure on noncitizens to accept state removal in lieu of criminal prosecution, and to depart the United States regardless of available federal relief, was the intent of

the Texas legislature, which chose the structure of S.B. 4 over competing bills that lacked the removal provisions.[2] As S.B. 4's sponsor explained, the legislature's goal was "not to incarcerate more people . . . . [T]he primary focus would be to return those folks to the country from which they came."[3]

C. The District Court Preliminarily Enjoins Enforcement of S.B. 4.

Applicants are the plaintiffs in one of two consolidated cases, *Las Americas v. McCraw*, 1:23-cv-01537 (W.D. Tex.). They are two Texas organizations dedicated to advancing and protecting the rights of noncitizens and the County of El Paso. The district court consolidated the *Las Americas* plaintiffs with the challenge to S.B. 4 brought by the United States, *United States v. Texas, et al.*, 1:24-cv-00008 (W.D. Tex.).

Plaintiffs in both cases filed motions for a preliminary injunction on January 12, 2024, and Texas filed oppositions to both on February 7. The district court held a hearing on February 15. On February 29, the district court preliminarily enjoined enforcement of S.B. 4.

The district court held that S.B. 4's criminalization of illegal entry and illegal reentry, and its authorization of removal, were subject to field and conflict preemption. App. 29-62.[4] The federal government, the court explained, has a "dominant interest in immigration and a complex

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[2] *See*, *e.g.*, Tex. H.B. 1600, 88th Leg., R.S. (2023); Tex. H.B. 5270, 88th Leg., R.S. (2023); Tex. H.B. 5281, 88th Leg, R.S. (2023); S.B. 2424, Tex. 88th Leg., R.S. (2023); S.B. 2, Tex. 88th Leg., 1st C.S. (2023); Tex. H.B. 23, 88th Leg. 3d C.S. (2023); Tex. H.B. 79, 88th Leg., 4th C.S. (2023); Tex. H.B. 104, 88th Leg., 3d C.S. (2023); Tex. S.B. 11, 88th Leg., 3d C.S. (2023) (rejected bills from 88th Legislative Session).

[3] Phil Prazan, *Feud between House and Senate leaders may scuttle far reaching border security bill*, NBC DFW (Nov. 5, 2023) https://perma.cc/9V3D-4B59; *see also, e.g., id*. (House Speaker condemning version that lacked removal provisions, because it would impose "the exorbitant costs of [noncitizens'] long-term detention, including healthcare, housing, and meals").

[4] The court held the provisions also violated the foreign commerce clause. Only the United States has advanced that claim. App. 62 n.25. The court also held that both the United States and the *Las Americas* plaintiffs had standing and a cause of action to challenge S.B. 4. App. 10-22, 24-27.

legal framework to regulate noncitizen entry and removal," rendering S.B. 4 field preempted. App. 53. It likewise held that S.B. 4 conflicts with federal law in multiple respects, including by eliminating federal supervision and discretion; directing prosecutions to continue despite available federal relief from removal; and interfering with the federal government's ability to conduct foreign policy. App. 53-62.

The district court also rejected Texas's claim that migration across the southern border constituted an "actual invasion" under Art. I, § 10, cl. 3, or that S.B. 4 would be a proper exercise of any war power the State might be able to claim. App. 69-90. It further explained that, even if this could be a war measure under some circumstances, "to allow Texas to permanently supersede federal directives on the basis of an invasion would amount to nullification of federal law and authority—a notion that is antithetical to the Constitution and has been unequivocally rejected by federal courts since the Civil War." App. 3; *see id*. at 90-98. The district court enjoined enforcement of S.B. 4 in its entirety. App. 108-10.

Applying the factors laid out in *Nken v. Holder*, 556 U.S. 418, 434 (2009), the district court also found a stay pending appeal inappropriate. App. 110-14. First, Texas was unlikely to prevail on the merits on appeal. S.B. 4 "intrudes onto especially dominant federal interests, such as the removal of noncitizens, and conflicts with federal law by disallowing consideration of pending asylum or withholding determinations." App. 111. The district court recognized that "an injunction generally automatically results in a form of irreparable injury to the state" but reasoned that "several factors mitigate that injury": Unauthorized immigration "is not new" and is addressed by the federal regime; federal law allows for state officers to participate in immigration enforcement in a specified manner; and the State may deal with crimes committed by cartels and drug trafficking in Texas under generally applicable criminal statutes. App. 112. On the third and

fourth *Nken* factors, the district court found that S.B. 4 has already caused and will likely continue to cause diplomatic harms, undermine federal agencies' ability to detect and address security risks, and upend plaintiffs' operations. App. 113. It explained that S.B. 4 would harm plaintiff El Paso County's law enforcement operations, and would have the "perverse" effect of removing crime victims while hampering efforts to prosecute the perpetrators. App. 105-06. If the preliminary injunction did not remain in effect, the district court reasoned, the law would result in thousands of individuals being "arrested, incarcerated, or removed prior to resolution of S.B. 4's constitutionality." *Id*.

D. The Fifth Circuit Stays the Preliminary Injunction.

At 11:59 p.m. Central Time on March 1, Texas sought an emergency stay pending appeal and an administrative stay from the Fifth Circuit. The United States and the *Las Americas* plaintiffs both opposed the entry of an administrative stay within hours and indicated that complete oppositions to the request for a stay pending appeal would follow. The United States promised to file its full opposition that same day. In their administrative stay opposition, the *Las Americas* plaintiffs explained that the 150-year-long status quo was that states are excluded from regulating entry and removal. No. 24-50149, ECF No. 38, at 1-2. They also explained that given S.B. 4's intense pressure to accept a state deportation order as soon as arraignment, the system Texas had constructed could be expected to immediately begin yielding state deportation orders—as soon as the first day it went into effect. *Id.* Finally, plaintiffs explained that, given the scope of S.B. 4, it was safe to project numerous arrests and state removal orders; indeed, Defendant Director of the Texas Department of Public Safety Steven McCraw had projected some 80,000 additional arrests annually under S.B. 4. *Id.*

The law was not set to go into effect until March 5, leaving the court of appeals several days to consider the parties' briefs before Texas's requested stay would have any practical effect. However, at 6:13 p.m. Central Time on March 2—some 18 hours after Texas's brief was filed and before the United States and the *Las Americas* plaintiffs had filed briefing on the request for a stay pending appeal—the Court of Appeals (Judges Clement, Engelhardt, and Ramirez) entered an unreasoned order granting a "temporary administrative stay." App. 116. The court "deferred" the request for a stay pending appeal "to the oral argument merits panel," and expedited the appeal. *Id.* As of this filing no panel assignment or briefing schedule has issued, so there is presently no way to know how long the "temporary" stay will remain pending without further consideration. *Id.*[5] Judge Ramirez dissented from the grant of a temporary administrative stay. *Id.*

In their opposition to the administrative stay, the *Las Americas* plaintiffs had requested that any stay order itself be stayed for seven days to allow applications for relief to this Court. No. 24-50149, ECF No. 38, at 10. The court of appeals granted that request. The "temporary administrative stay" of the preliminary injunction is now set to go into effect on March 10—and S.B. 4 along with it. App. 116.

ARGUMENT

The propriety of the stay issued by the court of appeals is governed by the standard set out in *Nken v. Holder*, 556 U.S. 418 (2009). The Court "considers four factors: (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the

[5] Such stays sometimes last for months. For example, in *United States v. Abbott*, the court of appeals granted an "administrative stay" and deferred the motion for stay pending appeal to the oral argument panel. No. 23-50632 (5th Cir.), ECF Nos. 29, 36. The argument panel then dissolved the administrative stay in its opinion affirming the preliminary injunction—issued nearly three months after the "administrative stay." *United States v. Abbott*, 87 F.4th 616, 620 (5th Cir. 2023), *reh'g en banc granted, opinion vacated*, 90 F.4th 870 (5th Cir. 2024) (en banc).

applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Id.* at 426 (internal quotation marks omitted). Where the court of appeals issues a stay "without opinion," this Court has vacated the stay where there is "a significant possibility that a majority of the Court eventually will agree with the District Court's decision," and where there will be "irreparable harm if the stay is not vacated." *Certain Named & Unnamed Non-Citizen Children & Their Parents v. Texas*, 448 U.S. 1327, 1328, 1330-32 (1980) (citations omitted); *compare Western Airlines, Inc. v. Teamsters*, 480 U.S. 1301, 1305 (1987) (O'Connor, J., in chambers) (considering whether "the court of appeals is demonstrably wrong" in a reasoned stay opinion) (internal quotation marks omitted).

The standard to vacate the stay is amply met here. Texas came nowhere near satisfying its burden to justify a stay, because as explained below, S.B. 4 defies this Court's clear precedent, upends a 150-year status quo, and would do enormous and immediate harm to the plaintiffs and thousands of others.

I. TEXAS IS UNLIKELY TO SUCCEED ON THE MERITS, BECAUSE S.B. 4 IS PREEMPTED BY THE IMMIGRATION LAWS ENACTED BY CONGRESS.

As the district court rightly held, S.B. 4 is straightforwardly preempted under settled field and conflict preemption principles. Nothing Texas has offered—including its invocation of a metaphorical "war" on migration—can save this extraordinary usurpation of federal authority.

A. S.B. 4 Intrudes on the Exclusively Federal Field of Entry and Removal.

In S.B. 4, Texas has established a new state immigration system that entirely bypasses Congress's comprehensive scheme. Texas has regulated and criminalized entry into the United States; chosen for itself who will be permitted to remain in the country, what statuses will qualify as defenses to removal, and what procedures will apply; and claimed the power to deport

noncitizens by ordering them to leave the United States on pain of severe additional punishment. But Congress has long occupied the field of entry and removal in what this Court has repeatedly explained is an area of dominant national concern.

Field preemption may be inferred from either a "federal interest . . . so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject," or "a framework of regulation 'so pervasive . . . that Congress left no room for the States to supplement it.'" *Arizona*, 567 U.S. at 399 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1990)). Here, as the district court rightly held, S.B. 4 is field preempted under both approaches.

1. The federal interest in immigration is "dominant and supreme." App. 33; *see id.* at 30-33. For 150 years, this Court has been crystal clear that the regulation of entry into and expulsion from the United States are exclusively federal matters from which the States are excluded. *See, e.g.*, *Chy Lung v. Freeman*, 92 U.S. 275, 280 (1875) ("The passage of laws which concern the admission of citizens and subjects of foreign nations to our shores belongs to Congress, and not to the States."); *Truax v. Raich*, 239 U.S. 33, 42 (1915) ("The authority to control immigration—to admit or exclude aliens—is vested solely in the Federal government."); *Hines v. Davidowitz*, 312 U.S. 52, 62 & n.10 (1941) (noting the "continuous recognition by this Court" of "the supremacy of the national power . . . over immigration . . . and deportation"); *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410, 419 (1948) ("The Federal Government has broad constitutional powers in determining what aliens shall be admitted to the United States, [and] the period they may remain," and "the states are granted no such powers"); *De Canas v. Bica*, 424 U.S. 351, 354 (1976) ("Power to regulate immigration is unquestionably exclusively a federal

power."); *Arizona*, 567 U.S. at 409 ("[T]he removal process is entrusted to the discretion of the Federal Government.").[6]

Core immigration laws governing entry and removal are "inherent in [the] sovereignty" of the United States as a nation. *Nishimura Ekiu v. United States*, 142 U.S. 651, 659 (1892). That sovereign authority includes the power "to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe," *id.*, as well as to "expel" noncitizens from within the country, *Fong Yue Ting v. United States*, 149 U.S. 698, 711 (1893); *see Arizona*, 567 U.S. at 394-95. States, by contrast, are not endowed with "powers of external sovereignty" such as "the power to expel" noncitizens. *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 316-18 (1936) (citing *Fong Yue Ting*).[7]

Relatedly, immigration decisions are so "deeply intertwined with the United States' foreign relations," App. 31, that they "must be made with one voice," *Arizona*, 567 U.S. at 409; *see also Jama v. ICE*, 543 U.S. 335, 348 (2005) (similar). "It is fundamental that foreign countries concerned about the status, safety, and security of their nationals in the United States must be able to confer and communicate on this subject with one national sovereign, not the 50 separate States."

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[6] The Fifth Circuit has previously recognized this principle, and the other lower courts are in accord. *See, e.g.*, *Texas v. United States*, 50 F.4th 498, 516 (5th Cir. 2022) (opinion joined by Judge Engelhardt) (because "[p]olicies pertaining to the entry of aliens and their right to remain here are entrusted exclusively to Congress[,] [a]n attempt by Texas to establish an alternative classification system . . . would be preempted") (cleaned up); *United States v. Alabama*, 691 F.3d 1269, 1293 (11th Cir. 2012) ("The power to expel aliens has long been recognized as an exclusively federal power."); *Lozano v. City of Hazleton*, 724 F.3d 297, 315 (3d Cir. 2013) (similar).

[7] States do have certain "elements of sovereignty." *Arizona*, 567 U.S. at 398. For example, the federal government may not "compel[] state officers to enforce federal law." *Murphy v. Nat'l Collegiate Athletic Ass'n*, 584 U.S. 453, 463 (2018); *see United States v. California*, 921 F.3d 865, 888 (9th Cir. 2019), *cert. denied*, 141 S. Ct. 124 (2020). And the federal government's external powers are, of course, "[s]ubject . . . to the Constitution's guarantees of individual rights." *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 417 n.9 (2003).

Arizona, 567 U.S. at 395. This Court has reiterated this point again and again. *See Chy Lung*, 92 U.S. at 279–280 (warning that state immigration regulation would allow "a single State . . . , at her pleasure, [to] embroil us in disastrous quarrels with other nations"); *Hines*, 312 U.S. at 624 (emphasizing "the supremacy of the national power in the general field of foreign affairs, including power over immigration"); *Toll v. Moreno*, 458 U.S. 1, 10 (1982) (tying the national government's immigration control to its authority "'to establish a uniform Rule of Naturalization,' its power 'to regulate Commerce with foreign Nations,' and its broad authority over foreign affairs") (cleaned up, citations omitted).

Immigration has long been *the* "paradigmatic example" of a dominant federal interest for purposes of field preemption. App. 30-31. When this Court first explained how a dominant federal interest could give rise to field preemption, it pointed to *Hines*—where the Court had announced field preemption over noncitizen registration in large part because of the exclusive federal interest in immigration and foreign affairs. *Rice*, 331 U.S. at 230. And the Court has since pointed to *Hines* as the "seminal" example of a "dominant federal interest" for purposes of field preemption. *Hillsborough Cnty., Fla. v. Automated Med. Lab'ys, Inc.*, 471 U.S. 707, 719 (1985); *id*. (explaining that *Hines* "inferred an intent to pre-empt from the dominance of the federal interest in foreign affairs because 'the supremacy of the national power in the general field of foreign affairs . . . is made clear by the Constitution,' and the regulation of that field is 'intimately blended and intertwined with responsibilities of the national government'") (quoting *Hines*, 312 U.S. at 62, 66) (citations omitted); *see also Com. of Pa. v. Nelson*, 350 U.S. 497, 505 (1956) (holding that seditious conduct was a matter of dominant federal interest in part because it was tied to national sovereignty). If core immigration matters are not an area of dominant federal interest, then nothing is.

That principle resolves this case. S.B. 4 regulates both entry and removal. Indeed, Texas has never contested that S.B. 4 regulates entry into the United States—understandably, as entry is the common element applicable to the entire S.B. 4 system. But the regulation of entry is a central aspect of the federal government's sovereign authority over immigration and thus an area of dominant federal interest. *Nishimura Ekiu*, 142 U.S. at 659. So states are excluded from any regulation in this field. *See Arizona*, 567 U.S. at 402-03.

For example, in *Chy Lung*, California established a regulation of who could enter the country, prohibiting various categories of noncitizens from entering without state permission. 92 U.S. at 278. This Court explained that leaving such decisions in state hands was untenable, as it would expose the entire nation to the foreign policy fallout created by a single state. *Id*. at 279-80. It therefore held that states have no power to enact "laws which concern the admission" of noncitizens "to our shores." *Id*. at 280. Similarly, in an opinion approvingly cited by *Hines*, 312 U.S. at 61 n.8, the California Supreme Court struck down a state statute criminalizing "unlawfully coming in, being, and remaining within the limits of the state of California," deeming it "so plainly in excess of the power of the state, and in conflict with the constitution of the United States, that any extended discussion of its provisions is wholly unnecessary," *Ex parte Ah Cue*, 101 Cal. 197, 197 (1894). And Texas's own courts have struck down probation conditions regulating "the matter of entry into the United States," as "wholly preempted by federal law," *Hernandez v. State*, 613 S.W.2d 287, 290 (Tex. Crim. App. 1980).

The same is true of S.B. 4's state deportation orders. Expulsion is a core aspect of the Nation's sovereignty. *Fong Yue Ting*, 149 U.S. at 711; *Curtiss-Wright Exp. Corp.*, 299 U.S. at 318. States plainly cannot deport people. For example, when Michigan enacted a statute a century ago that, *inter alia*, authorized state deportations, a three-judge court struck it down, explaining

that such a law "seeks to usurp the power of government, exclusively vested by the Constitution in Congress, over the control of aliens and immigration." *Arrowsmith v. Voorhies*, 55 F.2d 310, 312 (E.D. Mich. 1931). This Court approvingly cited that decision in *Hines*, 312 U.S. at 61 n.8; *see also Davidowitz v. Hines*, 30 F. Supp. 470, 475 (M.D. Pa. 1939) (discussing *Arrowsmith*).

In district court, Texas quibbled about whether S.B. 4 regulates removal. App. 42-44. But the district court rightly pointed out that deportation to Mexico is the very design of S.B. 4: "Given that Texas may incarcerate someone for 20 years if they do not cross into Mexico, it is rather absurd to argue" the state orders are anything but deportations. *Id*. at 43. Indeed, S.B. 4 itself defines a "removal" to include a state return order. Tex. Penal Code § 51.03(c). And Texas has elsewhere been perfectly clear that the whole point of S.B. 4 is to "expel[]" people from the country.[8]

Texas's declarants stated that "DPS intends to monitor compliance with orders to return" by "hav[ing] an officer escort the alien to a port of entry." No. 1:24-cv-00008-DAE, ECF No. 25-3 at ¶ 9. "If Mexican authorities do not accept the entrance of an alien …" the "escorting DPS officer will deliver him to the American side of the port of entry and observe the alien go to the Mexican side. Upon witnessing the aliens cross to the Mexican side of the international bridge, the officer will consider the aliens to have complied with the return order and will cease monitoring the alien." *Id.* at ¶ 15.[9] "[W]hether the removal occurs in handcuffs or under threat

[8] *Written Testimony Before the Subcomm. on the Constitution and Limited Gov't of the H. Comm. on the Judiciary*, 118th Cong. (2024) (written statement of Brent Webster, First Assistant Att'y Gen. of Texas), https://perma.cc/497P-6EHY.

[9] While Texas claimed it will "coordinate" with the federal officials "to inform them when aliens will be brought to ports of entry" and when "DPS become[s] aware that a detained alien has a pending application for asylum or other relief with the federal government," No. 1:24-cv-00008-DAE, ECF No. 25-3 ¶11, 13, Texas nowhere promises to lift the threat of a long prison term for noncompliance.

of handcuffs (and 20 years of prison) . . . is not a distinction of constitutional significance" for the preemption analysis. App. 43-44. For example, Texas's Court of Criminal Appeals struck down a probation condition requiring a noncitizen defendant to "leave the country." *Gutierrez v. State*, 380 S.W.3d 167, 170, 173, 176 (Tex. Crim. App. 2012). As a probation condition, that order was backed by the threat of prison time for noncompliance, just like S.B. 4. *See id*. at 170-71. The court understood that this amounted to an "order [of] deportation"—and, indeed, the State "concede[d]" that the probation condition was preempted by federal law. *Id*. at 173; *see also id*. at 179 n.1 (Cochran, J, concurring) (collecting numerous cases holding state deportation conditions preempted).

In fact, States have no authority to come anywhere *close* to expelling noncitizens from our shores. Thus, in *Truax*, the Court rejected a state statute as "tantamount to the assertion of the right to deny [noncitizens] entrance and abode" in the state—a power which "is vested solely in the Federal government." 239 U.S. at 42; *see also Arizona*, 567 U.S. at 408 (broad arrest authority would "allow the State to achieve its own immigration policy" even though state officers could not order removal); *Alabama*, 691 F.3d at 1294 (holding that laws "seeking to make the lives of unlawfully present aliens so difficult as to force them to retreat from the state" represented a preempted "policy of expulsion"). Here, S.B. 4 directly orders noncitizens to leave the country.

In short, the federal interest here is unquestionably dominant.

2. Not only is this an area of dominant federal interest, Congress has "enacted a 'framework of regulation so pervasive that Congress left no room for the States to supplement it.'" App. 33 (quoting *Arizona*, 567 U.S. at 399). This pervasive regulation is a second and related reason why S.B. 4 is field preempted.

Through the INA, Congress has established an exceptionally detailed, complex, and finely reticulated regulatory framework governing the inspection, admission, and removal of noncitizens seeking to enter the United States. *See, e.g.*, 8 U.S.C. §§ 1182, 1225, 1227, 1229c, 1229b, 1231; *see also Arizona*, 567 U.S. at 395-97 (addressing the "pervasiveness" of the "extensive and complex" immigration regulation system); App. 35 ("The country's immigration laws are massive, sprawling, detailed, complex, and pervasive."). Congress has specifically provided that the INA's provisions shall be "the sole and exclusive procedure" for determining whether an alien may be admitted into or removed from the United States. 8 U.S.C. § 1229a(a)(3).

In particular, Congress has extensively regulated individuals who enter between ports of entry—those whom Texas is attempting to regulate through S.B. 4. Congress's regulatory framework strikes a careful balance between multiple federal interests, which S.B. 4 sweeps away.

On one hand, the federal scheme contains a variety of enforcement mechanisms, both civil and criminal. Congress has created multiple removal pathways, with detailed procedures and multiple layers of review by federal officials; criminalized entry and re-entry between ports of entry, along with efforts to assist or facilitate entry between ports; and provided a detailed set of standards and procedures for when people who enter between ports may be arrested and detained by federal officials. *See supra.*

On the other hand, Congress has established numerous forms of relief from removal for people who enter between ports: Asylum is available "whether or not" a noncitizen arrives "at a designated port of arrival," *id.* § 1158(a)(1), and can be accessed through multiple procedural channels, *see id.* §§ 1225(b)(1)(B), 1158(d); 8 C.F.R. § 208.4. Withholding of removal bars a person's removal to any country where they face persecution or torture. *See* 8 U.S.C. § 1231(b)(3) and Note. Individuals who are placed in full removal proceedings may apply for other forms of

relief Congress has extended, including cancellation of removal. *Id.* § 1229b(b). And noncitizens who have entered without inspection may also apply affirmatively for numerous other forms of relief outside of removal proceedings, including visas for victims of crimes and trafficking, *id.* §§ 1101(a)(15)(U); 1101(a)(15)(T); temporary protected status, *id.* § 1254a; and Special Immigrant Juvenile Status for noncitizens under 21 years of age, *id.* § 1101(a)(27)(J).

Critically, Congress entrusted *federal* officials with discretion to balance these interests, as this Court has recognized: "A principal feature of the removal system is the broad discretion exercised by immigration officials" over whether it makes sense to detain, remove, or prosecute in the first place. *Arizona*, 567 U.S. at 396; *see* 8 U.S.C. § 1103(a)(1), (a)(5). Specifically, Congress has provided federal Executive Branch officials with a range of tools to address noncitizens entering between ports. Federal prosecutors may choose to bring criminal charges under 8 U.S.C. §§ 1325 or 1326; immigration officials may initiate ordinary removal proceedings, *id*. § 1229a, or expedited proceedings if applicable, *id*. § 1225(b)(1); and federal officials may exercise discretion to forgo removal proceedings, defer removal, or take other discretionary action to ameliorate the potential harshness of the immigration laws. *See Arizona*, 567 U.S. at 396, 402, 409.

In making these enforcement decisions, federal officials must weigh a variety of federal interests, including federal immigration priorities, "immediate human concerns," international law, the need to encourage cooperation with criminal investigations, and the foreign policy consequences of decisions about which noncitizens to arrest, detain, and expel. *Id.* at 396, 400. That is why "the removal process is entrusted to the discretion of the Federal Government," not states. *Id.* at 409. Indeed, this Court recently emphasized that the federal government's broad discretion over arrests, removal proceedings, and removals "implicates not only 'normal domestic

law enforcement priorities' but also 'foreign-policy objectives.'" *Texas*, 599 U.S. at 679 (quoting *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 490-91 (1999)).

Through these many intricate and interrelated provisions, Congress "struck a careful balance" and established "a full set of standards governing" those who enter between ports, "including the punishment for noncompliance." *Arizona*, 567 U.S. at 400-01. Noncitizens remain in the country "only by federal permission, subject to federal inspection, in the hands of federally certified personnel and under an intricate system of federal commands." *City of Burbank v. Lockheed Air Terminal Inc.*, 411 U.S. 624, 633-34 (1973) (internal quotation marks omitted). The federal entry and removal system is thus "designed as a 'harmonious whole.'" *Arizona*, 567 U.S. at 401 (quoting *Hines*, 312 U.S. at 72).

3. In sum, the field of entry and removal is preempted both by the dominant federal interest and the pervasive federal regulatory regime. The federal system "makes a single sovereign responsible" for operating this "comprehensive and unified" immigration process. *Id*. As a result, "States may not enter" the field "in any respect," and "even complementary state regulation is impermissible." *Id*. at 401-02.

Below, Texas tried to distinguish *Arizona*'s field preemption holding, suggesting that noncitizen registration is more amenable to field preemption because it is "uniquely *domestic*" and "operates *internally* throughout the country," No. 1:24-cv-00008-DAE, ECF No. 25, at 16; App. 164 (emphasis added). But, as explained, this Court's cases teach the exact opposite: The regulation of entry and removal is uniquely federal largely *because* it implicates the United States' "powers of external sovereignty." *Curtiss-Wright*, 299 U.S. at 318; *see Arizona*, 567 U.S. at 394-95; *Nishimura Ekiu*, 142 U.S. at 659; *Fong Yue Ting*, 149 U.S. at 711. This Court has held that noncitizen registration laws, though they operate within the United States, warrant field

preemption in large part because of their connection to foreign relations. *See Hines*, 312 U.S. at 66 (connecting registration to "the exterior relation of this whole nation with other nations and governments") (internal quotation marks omitted). If that is true of registration requirements, it cannot be less true for the regulation of entry and removal, which is the very core of Congress's immigration powers. And Texas has never grappled with the 150 years of *other* cases this Court has handed down which also make clear that S.B. 4 cannot stand.

B. S.B. 4 Conflicts with Congress's Entry-and-Removal Scheme.

While S.B. 4 is straightforwardly field preempted, it is also conflict preempted. *See Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372 n.6 (2000) (analyses are "are not rigidly distinct") (internal quotation marks omitted).

First, S.B. 4 *requires* state officials to contradict federal law, by mandating state removal despite a person's federal permission to remain in the United States while their claims for asylum or other relief are pending, and by requiring noncitizens to comply with state removal orders even if they are later granted legal status in the United States.

This conflict is stark. If a noncitizen is convicted under S.B. 4, they must be issued a state deportation order, which requires them to leave the country under threat of an additional 20-year sentence. Tex. Code of Crim. Proc. Art. 5B.002(d); Tex. Penal Code §§ 12.33(a), 51.04. But in the federal system, that very same person may be granted asylum, or various other forms of status, which would give them indefinite permission to remain in this country, without a removal order, and with a path to lawful permanent residence and eventually citizenship. 8 C.F.R. §§ 208.14(e), 209.2.

Apparently recognizing this glaring conflict, Texas has suggested that a grant of asylum would provide the noncitizen with "a preemption defense" against state charges. App. 186. The

concession is well taken: Of course the State cannot order someone deported if the federal government permits that person to stay. But that concession also dooms the statute. For federal law does not only provide protection against removal for people *granted* asylum. It also allows people to remain in this country *pending a decision* about their asylum claim. 8 U.S.C. § 1225(b)(1)(A)(ii) (preventing removal while a person's asylum claim is heard); *see id.* § 1158(d)(2); 8 C.F.R. § 208.7 (providing for work authorization while an asylum decision is pending). In fact, federal law *requires* people to remain in this country while they are pursuing asylum or other relief. *See, e.g.*, 8 U.S.C. § 1229a(5)(A) (requiring noncitizens to attend their federal hearings). And more broadly, federal law allows people to remain in the country while their removal proceedings play out, until federal officials determine that the person is not a U.S. citizen and does not have any immigration status that could prevent their removal. *See* 8 U.S.C. § 1231(a)(1)(A) (removal only *after* "an alien is ordered removed" in federal removal proceedings).

S.B. 4 explicitly rejects any defense for people who are applying for asylum or other federal relief. It provides that a "court may not abate the prosecution of an offense under" its new criminal provisions "on the basis that a federal determination regarding the immigration status of the defendant is pending or will be initiated." Tex. Code Crim. Proc. Art. 5B.003. That is, S.B. 4 itself recognizes that state officers not only might but *must* reach conflicting judgments with federal authorities about whether a noncitizen may remain in the United States. This not only "is not the system Congress created," *Arizona*, 567 U.S. at 408; it demolishes that system in favor of an immigration process Texas would prefer.

Second, S.B. 4 conflicts with one of the main pillars of the federal scheme: the "broad discretion" which Congress enshrined as a "principal feature" of the federal immigration system.

Id. at 396. As explained above, Congress endowed federal officials with a range of tools—prosecutions, various kinds of removal proceedings, numerous forms of relief and prosecutorial discretion—so that federal officials could make enforcement decisions in a way that serves federal immigration priorities, domestic law enforcement, humanitarian concerns, and relations with other countries. Texas's new scheme wipes all of that away. Under S.B. 4, federal officials get no say in whether noncitizens are prosecuted, and state deportation orders, backed by decades-long prison terms, operate independently of any federal discretion. The statute thus blatantly "violates the principle that the removal process is entrusted to the discretion of the Federal Government." *Id.* at 409; *see also Crosby*, 530 U.S. at 374 (state law preempted because it was an obstacle to Congress's goal of providing "flexible and effective authority" to the President).

In *Arizona*, for example, the Court invalidated a provision (Section 6) which authorized state immigration arrests in excess of the limited circumstances that such arrests are permitted under federal law. 567 U.S. at 407-10. That statute did not purport to establish state entry crimes or authorize state removals; rather, it addressed what role state police can play in assisting *federal* immigration enforcement. And even in that far more limited context, the Court was clear that "the unilateral decision of state officers to arrest an alien for being removable absent any request, approval, or other instruction from the Federal Government" "violates the principle that the removal process is entrusted to the discretion of the Federal Government." *Id*. at 409-10.[10] S.B. 4 goes far beyond unilateral arrest, placing in state hands the sole decision whether to prosecute, convict, imprison, and deport noncitizens for immigration violations.[11]

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[10] The Court invalidated Section 6 an "obstacle" to federal law, but also cited *Hines* and explained how Section 6 detracted from the integrated federal scheme. *Arizona*, 567 U.S. at 408-10.

[11] A similar analysis applied to Section 2(B) of the Arizona act, which permitted state officers "to communicate with ICE" about their suspicions. *Id*. at 412. As with Section 6, the

That discretion is particularly critical in this context because immigration is, as explained above, so closely connected to foreign affairs. *See Texas*, 599 U.S. at 679. Here, Texas plans to issue tens of thousands of orders to non-Mexicans to return *to Mexico* or face decades in prison. Mexico strongly opposes this. App. 44. As this Court recently explained, efforts to negotiate similar returns to Mexico have, in the past, "played a particularly outsized role in diplomatic engagements with Mexico, diverting attention from more productive efforts to fight transnational criminal and smuggling networks and address the root causes of migration." *Biden*, 597 U.S. at 806 (internal quotation marks omitted). This time, Texas is not merely advancing a statutory interpretation which would "tie the hands of the Executive" by allowing a court to supervise negotiations with Mexico. *Id*. Here Texas is acting *unilaterally* to force noncitizens onto Mexico's sovereign territory, with potentially extreme consequences for our *national* government's relationship and agreements with Mexico. This interference with the federal government's foreign policy powers is extraordinary. *See id*.; *Crosby*, 530 U.S. at 380-86.[12]

Third, all this would be quite enough to render S.B. 4 conflict preempted even if its provisions precisely tracked their federal counterparts. But they do not. For example, the state re-entry crime is far broader than the corresponding federal statute. App. 60. Under the federal statute, a noncitizen cannot be convicted if she has obtained federal "consent" to again seek admission to the United States. 8 U.S.C. § 1326(a)(2)(A). A noncitizen might obtain such federal

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Court warned that "it would disrupt the federal framework to put state officers in the position of holding aliens in custody for possible unlawful presence without federal direction and supervision." *Id*. at 413. S.B. 4, of course, does that and much more to usurp federal immigration power. The Court ultimately did not facially invalidate Section 2(B) because it "could be read to avoid these concerns." *Id*. But here there is no "basic uncertainty about what the law means," *id*. at 415—and Texas has never even suggested one.

[12] Moreover, by setting *Mexico* as the country to which noncitizens are deported, S.B. 4 conflicts with the federal scheme governing the appropriate country of removal. App. 58-59; *Jama*, 543 U.S. at 338-41.

consent, despite a prior removal, if she has access to an immigrant visa to become a lawful permanent resident, *see United States v. Sanchez-Milam*, 305 F.3d 310, 312 (5th Cir. 2002) (per curiam); 8 C.F.R. § 212.2(d), or if she is granted parole to return to the United States, 8 U.S.C. § 1182(d)(5)(A). Those individuals are not subject to federal prosecution under 8 U.S.C. § 1326(a)(2)(A). But they are subject to prosecution under S.B. 4, which contains no such limit. *See* Tex. Penal Code § 51.03 (criminalizing noncitizen "found in this state after" she "has been . . . removed"); *cf.* Tex. Penal Code § 51.02(c)(2) (providing affirmative defense, inapplicable to re-entry crime, where "the defendant's conduct does not constitute a violation of 8 U.S.C. Section 1325(a)"). The result is that people who the federal government has expressly permitted to return to the United States, and who have been granted long-term legal status, are nevertheless criminalized by Texas. *Cf. Arizona*, 567 U.S. at 402-03 (emphasizing "inconsistency" between state and federal crimes).

S.B. 4 simply cannot be reconciled with the federal regime—whether viewed through a field or conflict preemption lens. *See id.* at 403 ("These specific conflicts between state and federal law simply underscore the reason for field preemption."). Congress set out a comprehensive scheme that discourages and penalizes entry between ports while also safeguarding multiple forms of relief from removal for those who enter between ports. That congressional scheme imposes detailed procedures that must be followed to determine people's ultimate immigration status, and places numerous kinds of discretion in the hands of federal officials. In S.B. 4, Texas seeks to remake immigration law by eliminating humanitarian relief, federal discretion, and federal control. That is manifestly not what Congress has enacted.

C. Texas's responses lack merit.

In proceedings below, Texas offered little to rebut this clear case of field and conflict preemption.

Texas invoked the presumption against preemption. But such a presumption "is not triggered when the State regulates in an area where there has been a history of significant federal presence." *United States v. Locke*, 529 U.S. 89, 108 (2000). As explained above, that is obviously true of entry and removal. *See Alabama*, 691 F.3d at 1296 (no presumption); *United States v. South Carolina*, 720 F.3d 518, 529 (4th Cir. 2013) (same); *Lozano*, 724 F.3d at 314 n.23 (same). And even if such a presumption applied, it would be amply overcome here. *See Crosby*, 530 U.S. at 374 n.8; *United States v. Pink*, 315 U.S. 203, 232 (1942) ("state laws and polices" must "yield before the exercise of the external powers of the United States").

Texas also suggested below that Congress has invited state regulation of entry and removal. No. 24-50149, ECF No. 36 at 11-12 (citing, for example, 8 U.S.C. §1324(c), which permits state officers to arrest for certain crimes). But the limited role Congress has carved out for state and local assistance in enforcing the federal scheme only underscores that a state is *not* permitted to "achieve its own immigration policy." *Arizona*, 567 U.S. at 408; *cf. Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 212 & n.25 (1983) (holding that "the federal government has occupied the entire field of nuclear safety concerns, *except the limited powers expressly ceded to the states*") (emphasis added). And, as noted, Congress has specifically provided that the INA's provisions shall be "the sole and exclusive procedure" for determining such questions. 8 U.S.C. § 1229a(a)(3); App. 36, 42.

Of course not every state law "touching on" noncitizens "is a regulation of immigration," which "is unquestionably exclusively a federal power." *De Canas*, 424 U.S. at 354-55, 358. And

Congress *can* invite more state regulation with regard to noncitizens. *See id*. at 363 (prohibition on employers hiring unauthorized noncitizens was permissible where "Congress sanctioned concurrent state legislation on the subject," even if it had some "purely speculative and indirect impact on immigration"); *but see Arizona*, 567 U.S. at 404-06 (explaining that since *DeCanas* Congress has excluded conflicting state regulation of employment). But nothing in federal law remotely permits S.B. 4.

Nor is this a case in which a generally applicable state criminal law may "overlap" with immigration law in some specific instance. No. 24-50149, ECF No. 36 at 13. For example, in *Kansas v. Garcia*, on which Texas relied below, the Court rejected an argument that prosecutions under a general identity-theft statute based on income tax withholding forms were preempted merely because the same information was also included in employment verification forms, finding no congressional intent to foreclose tax-withholding prosecutions. 140 S. Ct. 791, 800, 806 (2020). The state law in *Kansas* did not come anywhere near regulating the core immigration matters of entry and removal. Here, by contrast, S.B.'s numerous conflicts with federal law implicate central aspects of the federal government's sovereign authority, so S.B. 4 is both field and conflict preempted.

D. Texas's "Invasion" Defense Cannot Justify S.B. 4.

In district court, Texas articulated a breathtaking assertion of state supremacy: that the clear preemption of S.B. 4 is irrelevant, because Texas is constitutionally entitled to declare "war" on migration and enact its own immigration system in response. *See* U.S. Const. art. 1, § 10, cl. 3. On that view, Texas can declare "war" on migrants coming into the United States because the word "invasion" "could refer" to immigration; the declaration allows the State to completely disregard federal law; courts must accept the State's actions under its war declaration; the President has no

say in the matter; and even Congress "cannot countermand such state action." No. 1:24-cv-00008-DAE, ECF No. 25, at 24 & n.43, 25, 27-28, 30. The district court rejected this argument after serious deliberation, including a thorough review of that clause's framing history and other constitutional provisions. App. 65-98.

In its request for a stay from the court of appeals, Texas seemingly backed away from its claim that asylum seekers crossing the border to seek safety and a better life are an "invasion." Instead, it framed the issue as one of facial relief—arguing that "at least *some* applications of S.B. 4 are constitutional" because the law could be legally applied "against cartel members." No. 24-50149, ECF No. 36, at 15-16. Of course, Texas is free to address crimes committed by cartels in Texas through its ordinary criminal laws. But it cannot regulate entry and removal, and federal immigration laws already specifically address the kind of criminal conduct Texas mentions—reinforcing that Congress has exhaustively regulated this field. *See, e.g.*, 8 U.S.C. §§ 1182(a)(2)(C) (grounds of inadmissibility and removability for drug trafficking); 1182(a)(2)(H) (human trafficking); 1182(a)(3) (security and terrorism).

Texas's reasoning is a house of cards. It suggests that some small number of individuals will enter the country to commit crimes; that Texas could permissibly declare war on those specific individuals; that S.B. 4 is a permissible tool of war against them (along with, presumably, more traditional means of warfare); and that, therefore, S.B. 4 should go into effect for *everyone*, even though it reaches far beyond those individuals and is obviously preempted. This flawed logic cannot be enough to unlock sweeping state authority free from any federal control. Otherwise, the Constitution's commitment of immigration and foreign policy to the *federal* government would be a farce. App. 90-96. And States could pass all sorts of blatantly preempted laws by merely

"conjur[ing] up just one hypothetical factual scenario" to defeat an injunction. *Lozano*, 724 F.3d at 313 n.22.

Ultimately, "SB 4 is a 'war' inasmuch as the 'War on Drugs' is a war—a metaphorical invocation of the term 'war' to denote a serious effort." App. 87. But the framers did not "intend[] to grant states the unilateral power" to disregard federal law "whenever they disagreed with federal immigration policy." App. 74; *see Sterling v. Constantin*, 287 U.S. 378, 397-98, 402 (1932) (claim to "supreme and unchallengeable" state power was "obviously untenable" under our system of government); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) (warning against interpreting "isolated clauses . . . torn from context" to defeat "a workable government"); *id.* at 642, 644 (opposing the "sinister and alarming" idea that war powers would make President "Commander-in-Chief of the country"). While Texas may have "frustrations with the problems caused by illegal immigration," it "may not pursue policies that undermine federal law." *Arizona*, 567 U.S. at 416.

II. THE BALANCE OF EQUITIES WEIGH DECISIVELY AGAINST TEXAS.

The equities strongly support vacating the court of appeals' stay. S.B. 4 will cause enormous harm from the first day it goes into effect, because it would sow chaos in the federal immigration system; upend the plaintiffs' operations; and allow Texas to nullify the federal rights of thousands of noncitizens who may ultimately be entitled to remain in the United States under the laws Congress has enacted. By contrast, Texas faces no irreparable harm from following the status quo that has prevailed for 150 years.

A. The Court of Appeals' Stay Will Harm the Plaintiffs and Thousands of Others.

The court of appeals' stay will inflict immediate and severe harm on the plaintiffs, the federal immigration system, and thousands of individuals and families in Texas. Even if the stay is only "temporary," it will upend operations and impose severe harms on noncitizens.

The plaintiffs' operations would be thrown into turmoil, as the district court laid out in detail. App. 13-17, 20-22, 104-07 (explaining how S.B. 4 "will stifle th[eir] programs," "moot many asylum applications," harm "victims of abuse [and] human trafficking," and undermine a variety of law enforcement operations). Texas has stated that it plans to prosecute and deport tens of thousands of people, starting immediately—all completely outside the federal system, and without regard for people's right to protection under federal law. *See id.* at 18 & n.6; No. 23-cv-01537, ECF No. 30-3 ¶ 10 (plans to arrest 80,000 people in the first year).

S.B. 4 will hurt public safety. As the district court found, S.B. 4 will harm the ability of El Paso County and other local governments "to focus on high risk or violent criminals." App. 106-07. And it will compromise federal immigration programs that are meant to secure the cooperation of victims and witnesses in criminal investigations. App. 15, 105.

Families and individuals throughout Texas will suffer grievous harm starting as soon as S.B. 4 takes effect, as they will be separated from loved ones and denied the humanitarian protections provided by federal law. These harms would start immediately, because S.B. 4 allows state judges to order people removed at the very beginning of a prosecution. *See* Tex. Code of Crim. Proc. Art. 5B.002(a)-(c). As explained above, S.B. 4 is set up to make noncitizens accept removal right away, instead of waiting for mandatory removal after a prison term. And noncitizens must comply with these removal orders or face another 20 years in prison.

Texas has not contested any of this or denied that it will start seeking state removal orders as soon as it can. The State has been perfectly clear that the whole point of S.B. 4 is to "expel[]" people from the country. *See* note 8, *supra*. By doing so, S.B. 4 would nullify people's federal rights to seek asylum and numerous other forms of humanitarian relief from removal. *See, e.g.*, 8 U.S.C. § 1158(a)(1) (providing asylum for noncitizens who are "physically present in the United

States"); 8 U.S.C. § 1231(b)(3)(A) (withholding of removal requires physical presence); 8 U.S.C. § 1229a(b)(5)(A) (in absentia removal if a person does not attend their hearings). S.B. 4 explicitly provides that state officials should order removal even if the person is seeking asylum or other protection under federal law. Tex. Code of Crim. Proc. Art. 5B.003. "[T]here is a public interest in preventing [people] from being wrongfully removed, particularly to countries where they are likely to face substantial harm." *Nken*, 556 U.S. at 436. As the district court found, "the record makes clear that removing noncitizens into Mexico risks subjecting them to death, torture, and rape." App. 108. "Thousands of individuals should not be arrested, incarcerated, or removed prior to resolution of SB 4's constitutionality." App. 113.

For anyone who stays in Texas despite a removal order under S.B. 4, they will be thrust into an unacceptable conflict between the federal and state immigration regimes. On the one hand, federal law provides that people who are seeking humanitarian protection or challenging removal can live and often work in the United States while they pursue their claims—in fact they *must* remain here to effectively pursue them. *See supra*. And people who are granted relief from removal can stay here indefinitely. But under S.B. 4, the same people will be subject to a state order to leave the country, on pain of decades in jail. And once a state removal order has been issued, even a *grant* of legal status by the federal government would not save a person from their obligation to leave the country under Texas law. Tex. Penal Code § 51.04 (no defenses).[13]

[13] While S.B. 4 provides a defense to conviction if a person is granted asylum *before* the state removal order is entered, that can never be the case for almost anyone who is ordered removed under S.B. 4, whether at the start of their prosecution or at conviction, because the person's federal removal case will not be resolved yet.

B. Texas Faces No Comparable Harm.

By contrast, Texas can offer no reason the status quo must be upended *right now*. For well over a hundred years, this Court has made clear that states are barred from enforcing a law like S.B. 4 that directly regulates entry into the United States and allows state officials to remove people from the country. It is hard to imagine a more firmly established status quo. A stay is meant to "*preserv[e]* the status quo," not upend it. *San Diegans for Mt. Soledad Nat'l War Memorial v. Paulson*, 548 U.S. 1301, 1304 (2006) (Kennedy, J., in chambers) (emphasis added); *see Nken*, 556 U.S. at 429. And the status quo is doubly important for what is nominally a "temporary administrative stay"—that is, a stay issued *without* any explanation, acknowledgement, or seemingly even consideration, of the actual factors this Court has identified to justify a stay pending appeal. App. 116.

Nor has Texas pointed to any event that requires enforcing S.B. 4 immediately, before its legality can even be adjudicated. To the contrary, Texas's long-standing dissatisfaction with the federal government's enforcement of the immigration laws belies the notion that it faces some unique harm now that cannot await resolution of the merits of this appeal after full briefing and argument. And Texas lacks any interest in enforcing a preempted law. *See Trans World Airlines, Inc. v. Mattox*, 897 F.2d 773, 784 (5th Cir. 1990); *Alabama*, 691 F.3d at 1301.

CONCLUSION

The Court should vacate the stay entered by the court of appeals. If the Court has not done so by Saturday, March 9, it should enter an administrative stay of the court of appeals' stay to maintain the status quo pending resolution of this application.

Respectfully submitted,

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