No. 17-50762

In the United States Court of Appeals for the Fifth Circuit

CITY OF EL CENIZO, TEXAS; RAUL L. REYES, MAYOR, CITY OF EL CENIZO; TOM SCHMERBER, COUNTY SHERIFF; MARIO A. HERNANDEZ, MAVERICK COUNTY CONSTABLE PCT. 3-1; LEAGUE OF UNITED LATIN AMERICAN CITIZENS; MAVERICK COUNTY; CITY OF EL PASO; JO ANNE BERNAL, COUNTY ATTORNEY OF EL PASO COUNTY, IN HER OFFICIAL CAPACITY,

Plaintiffs-Appellees Cross-Appellants,

CITY OF AUSTIN, JUDGE SARAH ECKHARDT, IN HER OFFICIAL CAPACITY AS TRAVIS COUNTY JUDGE; SHERIFF SALLY HERNANDEZ, IN HER OFFICIAL CAPACITY AS TRAVIS COUNTY SHERIFF; TRAVIS COUNTY; CITY OF DALLAS, TEXAS; TEXAS ASSOCIATION OF HISPANIC COUNTY JUDGES AND COUNTY COMMISSIONERS; THE CITY OF HOUSTON,

Intervenors-Plaintiffs-Appellees Cross-Appellants,

v.

STATE OF TEXAS; GREG ABBOTT, GOVERNOR OF THE STATE OF TEXAS, IN HIS OFFICIAL CAPACITY, KEN PAXTON, TEXAS ATTORNEY GENERAL,

Defendants-Appellants Cross-Appellees.

EL PASO COUNTY; RICHARD WILES, SHERIFF OF EL PASO COUNTY, IN HIS OFFICIAL CAPACITY; TEXAS ORGANIZING PROJECT EDUCATION FUND; MOVE SAN ANTONIO,

Plaintiffs-Appellees Cross-Appellants,

v.

STATE OF TEXAS; GREG ABBOTT, GOVERNOR; KEN PAXTON, ATTORNEY GENERAL; STEVE MCCRAW, DIRECTOR OF THE TEXAS DEPARTMENT OF PUBLIC SAFETY,

Defendants-Appellants Cross-Appellees.

CITY OF SAN ANTONIO; BEXAR COUNTY, TEXAS; REY A. SALDANA, IN HIS OFFICIAL CAPACITY AS SAN ANTONIO CITY COUNCILMEMBER; TEXAS ASSOCIATION OF CHICANOS IN HIGHER EDUCATION; LA UNION DEL PUEBLO ENTERO, INCORPORATED; WORKERS DEFENSE PROJECT,

Plaintiffs-Appellees Cross-Appellants,

CITY OF AUSTIN,

Intervenor-Plaintiff-Appellees Cross-Appellants,

v.

STATE OF TEXAS; KEN PAXTON, SUED IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF TEXAS; GREG ABBOTT, SUED IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF TEXAS,

Defendants-Appellants Cross-Appellees.

On Appeal from the United States District Court for the Western District of Texas, San Antonio Division, Nos. 5:17-cv-404, 5:17-cv-459, 5:17-cv-489

BRIEF OF APPELLEES-CROSS APPELLANTS CITY OF SAN ANTONIO, TEXAS, CITY OF EL PASO, TEXAS, BEXAR COUNTY, REY A. SALDAÑA, TEXAS ASSOCIATION OF CHICANOS IN HIGHER EDUCATION, LA UNION DEL PUEBLO ENTERO, WORKERS DEFENSE PROJECT, TEXAS ASSOCIATION OF HISPANIC COUNTY JUDGES AND COUNTY COMMISSIONERS, EL PASO COUNTY, RICHARD WILES, JO ANNE BERNAL, AND THE TEXAS ORGANIZING PROJECT EDUCATION FUND

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CERTIFICATE OF INTERESTED PERSONS

(1) Case No. 17-50762, *City of El Cenizo, Texas et al. v. State of Texas, et al.*

(2) The undersigned counsel of record certifies that the following listed persons or entities as described in the fourth sentence of Rule 28.2.1 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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STATEMENT REGARDING ORAL ARGUMENT

Oral argument is warranted because this case raises complex issues under the First Amendment, Fourth Amendment, Fourteenth Amendment and Supremacy Clause. Oral argument will assist the Court in analyzing these and related issues.

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STATEMENT OF THE ISSUES ON APPEAL

1. Whether the District Court abused its discretion in finding that Plaintiffs are likely to succeed on the merits of their claims that:

   a) The "endorse" provision of SB 4 Section 752.053(a)(1) violates the First Amendment;

   b) The "enforcement assistance" provision of SB 4 Section 752.053(b)(3) is preempted; and

   c) SB 4's detainer mandate, contained in Article 2.251 and Section 752.053(a)(3), violates the Fourth Amendment.

2. Whether the District Court abused its discretion in finding that the balance of equities weighs in favor of enjoining the enforcement of the relevant portions of SB 4.

STATEMENT OF THE ISSUES ON CROSS-APPEAL

1. Whether the District Court abused its discretion in declining to find that Plaintiffs are likely to succeed on the merits of their claim that the following provisions of SB 4 are preempted:

   a) Sections 752.053(a)(1), (a)(2), (b)(1), (b)(2), relating to policies and practices that prohibit or materially limit the enforcement of immigration law;

   b) The related penalty provisions in Section 752.056 and 752.0565; and

   c) The detainer provision in Article 2.251 and related penalty provision in Section 39.07.

Plaintiffs also join in the appeal and cross-appeal issues raised by all other appellees and cross-appellees in this matter and join fully in the arguments in their briefs consistent with the arguments presented herein.[1]

[1] The term "Plaintiffs" as used in this brief refers to the appellees/cross-appellants listed on the caption page, which include municipalities, community unions, professional and other organizations, and individual elected officials, among others. We use the term "Texas" hereafter to refer collectively to the appellants/cross-appellees, which include both the state and two of its officials.

STATEMENT OF THE CASE

Law enforcement chiefs in cities and counties are on the front lines of fighting crime. Their officers are in the trenches, investigating crimes and enforcing the law on a daily basis and building public trust that makes communities and neighborhoods safe. ROA.4211–12. Texas passed Senate Bill 4 in what it claimed was an effort to promote public safety over the vehement objections of the very police chiefs with the most intimate knowledge about how to ensure the safety of their communities. ROA.4212. As these officials have explained, and as the District Court found, SB 4 impedes the ability of law enforcement to work with local communities and to protect the public; it likewise unnecessarily inhibits local officials from setting policies that best serve their residents' safety, health, and economic well-being. ROA.4211.[2]

SB 4 coerces local jurisdictions into enforcing immigration law in a manner that Congress never intended. It does so by compelling local

[2] *See also, e.g.*, ROA.4480-81 (San Antonio Councilman Rey Saldaña testified that immigration status inquiries hurt public safety because police officers already face backlogs of calls for service to address higher-priority offenses, e.g. domestic abuse and burglary); ROA.2306-13 (McManus Dec.); ROA.4461 (Wolff Testimony); ROA.576-78 (Travis County Sheriff's Office Policy on Cooperation with ICE); ROA.1820-35 (Sheriff Hernandez Dec.); ROA.844-50 (Bernal Dec.); ROA.459-66 (Reyes Dec.); ROA.442-7 (Schmerber Dec.).

authorities to engage in immigration enforcement activities, and by imposing draconian penalties—including steep fines and removal from office—on individual officials and officers who do not comply. It muzzles speech critical of immigration enforcement with the same harsh threats. And it makes compliance with detainer requests mandatory, leaving no room for considerations of cost, space, training or appropriate independent assessments of probable cause. The harshest penalty of all is reserved for those who do not comply with this detainer mandate: They face criminal prosecution and jail time themselves.

Texas has consistently argued that it has the sovereign power to control the activities of what it views as its subdivisions by means of immigration laws of this sort. But Texas may not do so at the expense of the Supremacy Clause or constitutional protections. The District Court correctly found that SB 4 likely violates constitutional mandates in four distinct ways. It violates local officials' and employees' First Amendment rights through the "endorse" provision; it impermissibly preempts federal law through its "enforcement assistance" provision; its mandatory detainer provision violates the Fourth Amendment; and its "materially limit" provisions are fatally vague.

The foreseeable results of these impermissible enactments are fear and chaos among already-vulnerable members of society, and sanctuary for criminals whose victims may not report crime now that doing so is more likely to result in deportation and separation from their families. Undocumented immigrants will also be hesitant to seek recourse in the legal system and to access health care. ROA.4209. All Texans are less safe under SB 4's regime. ROA.4211.

Meanwhile, because SB 4 takes away local decision-making authority, it leaves community members subject to the personal views of individual police officers untrained in the complexities of immigration law, inevitably leading to inconsistent law enforcement practices and racial profiling. ROA.4208.[3] Under this regime, community trust in law enforcement erodes and crime rates increase. ROA.4208-09.[4]

SB 4's legislative history provides further evidence of these pernicious effects—and the intent behind them. The bill's author, Senator Charles Perry, claimed it was intended to address "criminal

[3] *See also* ROA.446 (Schmerber Dec.); ROA.849-50 (Bernal Dec.); ROA.1285-86 (Manley Dec.); ROA.2300 (McManus Dec.); ROA.4262-63 (Bernal Testimony); ROA.4208.ROA.465 (Reyes Dec.); ROA.446 (Schmerber Dec); ROA.440-441 (Gupta Dec.).

[4] *See also* ROA.2970-71 (Acevedo Dec.).

aliens that have committed heinous crimes." Over a thousand Texans registered opposition to SB 4 before Texas legislative committees, dwarfing the fewer than one dozen individuals who favored the bill. ROA.4211.[5] Witness after witness at the legislative hearings on SB 4 warned that the bill would negatively impact the everyday lives of everyday Texans and discourage victims and witnesses of crimes from cooperating with police officers. No police chief testified in favor of SB 4. Instead, law enforcement executives overwhelmingly testified that public safety would be threatened—not improved—by removing local discretion over immigration questioning and arrests. ROA.4211[6] Despite this testimony, the Legislature rejected limiting amendments responsive to local policing and public safety concerns.[7] The legislative debate was marked by racial strife rather than by thoughtful analysis of effective policing policies.[8]

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[5] ROA.4409 (Rep. Hernandez Testimony).

[6]ROA.929 (Dallas Police); ROA.1036 (Harris County Sheriff); ROA.1188 (San Antonio and Houston Police; Dallas County Sheriff); ROA.1058 (Arlington Police).

[7] ROA.851-860 (Eddie Rodriguez Dec.); ROA.6486-88 (Diego Bernal Dec.); ROA.4409-15 (Rep. Hernandez Testimony).

[8] *See,* ROA.6491-93 (Diego Bernal Dec.); ROA.2399 (Moody Dec.); ROA.2377-81 (Blanco Dec.); ROA.2391-95 (Romero Dec.).

Although the District Court was keenly aware of the turbulence surrounding SB 4's passage and the policy debate that raged around it, the court also appropriately focused its inquiry on the technical legal issues more narrowly raised by Plaintiffs' constitutional claims. The court was well aware of the fact that, whatever the wisdom of the policies embodied in SB 4, "the Court cannot and does not second guess the Legislature." ROA.4212. Because various provisions of the statute violate constitutional rights and principles, however, the District Court appropriately enjoined enforcement of those provisions.

The District Court correctly determined that Plaintiffs had shown that they are likely to succeed on the merits, and that the balance of harms tips sharply in Plaintiffs' favor. Because the District Court's factual findings are judged under an abuse of discretion standard, they deserve appropriate deference. This Court should affirm the District Court's ruling as to the enjoined provisions of SB 4.

SUMMARY OF THE ARGUMENT

The District Court correctly found that Plaintiffs are likely to prevail on the merits of their First Amendment, Supremacy Clause and Fourth Amendment claims.

First Amendment. SB 4's "endorse" provision, Section 752.053(a)(1), outlaws speech in favor of policies that prohibit or materially limit the enforcement of immigration laws. This kind of viewpoint-based prohibition strikes at the core of First Amendment protections and renders the statute facially unconstitutional. Texas attempts to reason away the violation with crabbed and insupportable revisions of the statute's plain language. The Court is not free to adopt those revisions. The endorse provision cannot be saved.

Supremacy Clause. Congress has indicated its intent to occupy the field in the area of local and federal cooperation in the enforcement of immigration laws. SB 4's "enforcement assistance" provision impermissibly intrudes into that field. That provision is also conflict preempted. Federal law prohibits unilateral enforcement assistance in the absence of federal direction and supervision. The federal framework also establishes critical requirements for routine

cooperation—requirements that SB 4 subverts. On the flip side, SB 4 imposes harsh sanctions against local jurisdictions and officials for failure to provide enforcement assistance—sanctions that are nowhere found in and that plainly conflict with the federal scheme.

Fourth Amendment. SB 4's detainer provision, Article 2.251, compels compliance with all immigration detainer requests, notwithstanding the fact that those requests are based on suspected civil—not criminal—infractions. This is contrary to well-established Fourth Amendment law prohibiting seizures based on civil violations.

Texas argues that such seizures are permissible because it is undisputed that ICE officers may detain persons suspected of civil immigration violations, and whatever ICE agents may do, local officials may do too. But differences in the authority of federal and local officials to enforce immigration law are critical in this context, and the question of authority cannot be divorced from the Fourth Amendment reasonableness analysis. This is borne out by at least two circuit-level decisions holding that local officers violate the Fourth Amendment when they seize persons on the basis of suspected immigration infractions. The "collective knowledge" doctrine on which Texas relies

does not cure the Fourth Amendment problem either. That doctrine does not extend to the mandatory compliance regime created by SB 4, which impermissibly displaces local officials' obligation to conduct an appropriate probable cause inquiry.

The District Court also properly balanced the relevant harms, and its findings in this area, which are fully supported by the record, are entitled to deference. Indeed, the District Court's findings of concrete, significant harm to Plaintiffs are not even contested. The State's generalized harm does not overcome this actual harm to Plaintiffs, and the public interest is served by enjoining unconstitutional state action.

The District Court did err, however, in declining to find that Plaintiffs are likely to succeed with their Supremacy Clause challenge to those provisions of SB 4 relating to policies or practices that prohibit or materially limit local immigration enforcement, local inquiries into immigration status, and record sharing. Those provisions are both conflict and field preempted, as are the accompanying penalty provisions. The District Court also erred in declining to find that SB 4's mandatory detainer provision is conflict preempted by federal law, which establishes a voluntary framework for responding to detainers

and other requests for enforcement assistance. SB 4's detainer request provision requires untrained, local officials to make immigration status determinations in conflict with the Congressional scheme.

ARGUMENT

I. The District Court Correctly Decided that the Appellees Are Likely to Prevail on the Merits.

A. The District Court Did Not Abuse Its Discretion in Enjoining SB 4's Endorsement Prohibition Because It Violates the First Amendment.

SB 4 prohibits "*any officer or employee* of a municipality, county, or special district or authority, including a sheriff, municipal police department, municipal attorney, or county attorney," from "endors[ing]" a policy that "prohibits or materially limits the enforcement of immigration laws." *See* SB 4 §§ 752.051(5), 752.053(a)(1) (emphasis added). Violations of this provision carry steep penalties: a minimum fine of $1,000 for the first offense; $25,000 for any subsequent offense; and removal from office for public officials. *Id.* at §§ 752.0565, 752.056(a). The District Court correctly held that Plaintiffs are likely to succeed in their claim that this ban on "endorsement" constitutes an unconstitutional viewpoint-based restriction on speech.

1. The District Court Applied the Plain Meaning of "Endorse."

The District Court's holding is based on the scope of the term "endorse." Relying on, among other sources, the *Oxford English Dictionary* and the statute itself, the District Court gave "endorse" its

most natural and intended construction and concluded that the term, as used in SB 4, encompasses "a recommendation, suggestion, comment, or other expression in support of or in favor of an idea or viewpoint that is generally conveyed openly or publicly." ROA.4160. As the District Court noted, this definition is consistent with the stated intent of SB 4's drafter, who explained that "endorse" means, among other things, to "support" and to "identify with." ROA.4157. It is also consistent with a related provision of SB 4, which makes "a statement by [a] public officer" evidence of a violation of § 752.053. SB 4 § 752.056(b); ROA.4160. Indeed, Texas's own allegations in parallel litigation related to the constitutionality of SB 4 reveal that Texas itself understands the term "endorse" in its usual sense. *See Texas v. Travis County*, 17-cv-425, Dkt. Entry 1 ¶ 107 (alleging that a Travis County judge "publicly endorsed" a policy of non-enforcement by making a statement to a local news station as a violation of SB 4).[9]

[9] "An appellate court may take judicial notice of facts, even if such facts were not noticed by the trial court." *United States v. Herrera-Ochoa*, 245 F.3d 495, 501 (5th Cir. 2001) (citing Fed. R. Evid. 201(f); *see Gov't of the Canal Zone v. Burjan*, 596 F.2d 690, 694 (5th Cir.1979)). Plaintiffs also cited the Travis County filing below.

Texas does not contest that, if the District Court's interpretation is correct, the endorsement prohibition encompasses protected speech and therefore violates the First Amendment. This Court's precedent forecloses any argument to the contrary. *See*, *e.g.*, *Int'l Women's Day March Planning Comm. v. City of San Antonio*, 619 F.3d 346, 359 (5th Cir. 2010) ("[V]iewpoint-based burdens [on speech] are unconstitutional.").

2. SB 4 Is Not Susceptible to the Narrowing Construction Texas Proposes.

Rather than grapple with the plain meaning of "endorse," Texas asked the District Court, and asks this Court again, to adopt a strained alternative definition. According to Texas, "endorse" should be read to mean "sanction," which, in turn, should be understood to mean "ratify," "confirm," "authorize," "permit," or "countenance." Texas Br. at 43.

In offering this two-step narrowing construction, Texas asks the Court to go well beyond what is permissible. Although this Court has authority to "impose a limiting construction on a statute" to avoid a constitutional impediment, it may do so "only" if the statute "is readily susceptible to such a construction." *United States v. Stevens*, 559 U.S. 460, 481 (2010). Applying this rule, courts refuse to read a statute to

avoid a constitutional issue when doing so would render terms in the statute superfluous and thus contravene the plain text of the statute. *E.g.*, *United States v. Talebnejad*, 460 F.3d 563, 568 (4th Cir. 2006); *see also Serafine v. Branaman*, 810 F.3d 354, 369 (5th Cir. 2016) (refusing to apply a narrowing construction that would have conflicted with statute's "plain text").

Reading "endorse" as Texas proposes would render that term entirely superfluous. SB 4 already makes it unlawful to "adopt" or "enforce" a policy that "prohibits or materially limits the enforcement of immigration laws." SB 4 § 752.053(a)(1). Texas's definition of "endorse" thus covers no new territory; any covered individual who "ratifies," "confirms," "authorizes," "permits," or "countenances" a policy necessarily "adopts" or "enforces" it.

The two examples Texas provided to the District Court to support its reading of "endorse" further illustrate this fundamental flaw. First, Texas posited that a sheriff who "express[es] her agreement" with a deputy's suggestion not to cooperate with federal immigration officials would "ratify, affirm, authorize, or permit a noncooperation policy" and thereby violate the "endorsement" prohibition. ROA.3881. But if this

expression of agreement communicated sufficient approval to allow the deputy to act, the sheriff necessarily would have "adopted" the proposed policy.[10] Alternatively, if the "expression" is no more than a statement of agreement, then "endorse" is not superfluous, but instead covers precisely the type of speech protected by the First Amendment.

Texas's second example illustrates the flaw in its analysis just as clearly. At the preliminary injunction hearing, Texas explained the "endorsement" prohibition would cover a scenario in which a sheriff his deputies that the "policy that San Francisco has is . . . best for [the] community" and "I expect you to act accordingly." ROA.4373–74. This communication plainly constitutes the "adoption" of a policy, and Texas conceded as much, telling the District Court: "Is that forbidden by SB 4? Absolutely[.] . . . [I]t is a functional equivalent of *adopting* a policy of nonenforcement or *enforcing* a policy of nonenforcement. *It is one and the same*." ROA.4374 (emphasis added). A definition of "endorse" that operates as "one and the same" as adoption or enforcement cannot be

[10] Texas suggested that such approval would not constitute "formally adopting" the suggestion as "a matter of explicit department policy." *Id.* But SB 4 prohibits the adoption and enforcement of *all* policies, including "informal, unwritten polic[ies]," SB 4 § 752.051(6), not just "explicit" or "formal" department-wide policies.

squared with the maxim that courts must "give effect to every word in a statute," *United States v. Monjaras-Castaneda*, 190 F.3d 326, 331 (5th Cir. 1999). SB 4 is thus not susceptible to Texas's attempt at a limiting construction.

Texas attempts to avoid this conclusion by asking the Court to read "endorse" *in pari materia* with the remainder of SB 4 and to apply the canon of *noscitur a sociis*, which counsels that "a word may be known by the company it keeps." *Graham Cty. Soil & Water Conservation Dist. v. U.S. ex rel. Wilson*, 559 U.S. 280, 287 (2010) (quotation marks omitted). According to Texas, resort to these canons reveals that SB 4 as a whole, and § 752.053 specifically, are concerned only with conduct undertaken in "individuals' official capacities as government employees"—such as "authorizing" or "ratifying" a policy—and not with speech that, for example, expresses disagreement. Texas Br. 44-45; *see also* Br. Amicus Curiae of West Virginia, et al. at 16 (arguing that SB 4 "covers acts taken in a local official's *official capacity*").[11]

[11] Amici West Virginia, et al. also argue that applying the canon of *ejusdem generis* yields the same conclusion. *Id.* at 19. But as amici acknowledge, that canon teaches that "where *general words* follow an enumeration of specific terms, the general words are read to apply only to other items like those specifically

Reliance on these canons does not cure the surplusage problem Plaintiffs have identified. SB 4's plain text contains no language limiting the endorsement prohibition to acts taken in one's "official capacity." In fact, reading "endorse" alongside SB 4's other provisions—that is, reading it *in pari materia*—proves precisely the opposite of what Texas contends. SB 4 clearly reaches actions *beyond* those taken in an "official capacit[y] as [a] government employee[]." Section 752.052, titled "Applicability of Subchapter," confirms that SB 4 applies even to officers and employees who are off-duty, *i.e.*, *not* acting in their "official capacity." This provision exempts from SB 4, among others, a "commissioned peace officer employed or contracted by a religious organization *during the officer's employment with the organization or while the officer is performing the contract*." SB 4 § 752.052(c) (emphasis added); *see also* Tex. Crim. Proc. Code § 2.12 (defining "peace officer[s]" to include licensed sheriffs, deputies, and police officers). Of

enumerated." *United States v. Kaluza*, 780 F.3d 647, 660-61 (5th Cir. 2015) (citation omitted, emphasis added). "Endorse" is not a "general word." *Compare id.* at 661 (applying the canon to "other person" in the list "[e]very captain, engineer, pilot, or other person"). In any event, the canon cannot be used to "render general words meaningless," *id.* (citation omitted), which, as already explained, is what Texas's definition accomplishes.

course, an individual acting as an employee of a religious organization cannot "*during* the [individual's] employment with the [religious] organization," at the same time, be acting in an "official capacity as [a] government employee[]." SB 4 § 752.052(c) (emphasis added). This exemption, like others in SB 4, *see, e.g.*, *id.* § 752.052(b)(1) (exempting peace officers employed by hospitals "during the officer's employment"), would therefore be unnecessary if Texas were correct that SB 4 covers only official government action. But the exemption exists, and it confirms that SB 4 is concerned with *more* than action taken in an "official capacity."

Nor does the canon of *noscitur a sociis* support Texas's position. The Supreme Court has explained that "[a] list of three items, each quite distinct from the other no matter how construed, is too short to be particularly illuminating." *Graham*, 559 U.S. at 288. Thus, in *Graham*, the mere fact that "administrative" reports appeared in a list of three with "congressional" and "Government Accountability Office" reports was insufficient to support the argument that the statute at issue applied only to *federal* "administrative" reports. *Id.*; *see also, e.g.*, *United States v. Franklin*, 785 F.3d 1365, 1369 (10th Cir. 2015) (holding

that, as a matter of law, the canon of *noscitur a sociis* does not apply to lists of three or fewer terms). Likewise, here, "adopt," "enforce," and "endorse"—only three terms—are too dissimilar for the canon to apply; they lack a "substantive connection . . . so tight or so self-evident" as to "rob" the term "endorse" of its "ordinary significance." *Graham*, 559 U.S. at 288 (citation omitted).

Moreover, as the Supreme Court has explained, the canon of *noscitur a sociis* must ultimately give way to the context in which the term at issue is found. *See Graham*, 559 U.S. at 289 ("More important, we need to evaluate 'administrative' within the larger scheme of the public disclosure bar."). As explained, that context demonstrates that SB 4 is designed to reach "statements" or speech by public officials, in addition to actions taken in an official capacity. Texas's proposed narrowing construction is, in short, irreconcilable with SB 4 as a whole.

3. Texas's Proposed Interpretation Itself Violates the First Amendment.

Finally, Texas's proposal introduces its own First Amendment problems. As noted, Texas suggests that an official's "expression of agreement" at a meeting could violate the endorsement prohibition. *Supra* at 13-14. But Texas does not explain how this standard can be

workable. It is entirely unclear at what point—or in what context—speech becomes an "expression of agreement" that crosses the line to become "authorization" or "ratification." For instance, an official questioned at a town hall meeting or a press conference about a policy of limited cooperation with immigration authorities may risk liability in doing anything but condemning it. At a minimum, in light of the substantial penalties SB 4 threatens—thousands of dollars per violation and removal from office—Texas's reading would have a substantial chilling effect.

At bottom, Texas's argument is "trust us" with the enforcement of SB 4. *Cf.* ROA.4373 (asserting, with respect to one hypothetical, that "[a]t the Attorney General's Office, we would not go after that sheriff for violating SB 4"). But the law is settled that courts will not "uphold an unconstitutional statute merely because the Government promised to use it responsibly." *Stevens*, 559 U.S. at 480. The District Court did not abuse its discretion in enjoining SB 4's endorsement prohibition.

B. The District Court Did Not Abuse Its Discretion in Enjoining SB 4's Enforcement Assistance Provision as Likely Field and Conflict Preempted.

SB 4 cannot stand because it is preempted by federal immigration law. The Supremacy Clause provides that federal law "shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. As a consequence, state laws must "give way to federal law" when they are either expressly or impliedly preempted by Acts of Congress. *Arizona v. United States*, 567 U.S. 387, 399 (2012). Implied preemption encompasses field and conflict preemption.

1. Congress Has Occupied The Field of Federal-Local Immigration Enforcement Cooperation.

Field preemption occurs where "the depth and breadth of a congressional scheme . . . occupies the legislative field." *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 541 (2001). In such circumstances, Congressional intent to "displace state law altogether can be inferred from a framework of regulation 'so pervasive . . . that Congress left no room for the States to supplement it' or where there is a 'federal interest . . . so dominant that the federal system will be assumed to

preclude enforcement of state laws on the same subject.'" *Arizona*, 567 U.S. at 399. That is the case here.

A web of detailed statutory provisions regulates local involvement in immigration enforcement and permits local enforcement of federal immigration laws only in narrow and carefully defined circumstances. State and local officers, for example, are permitted to make arrests for only a small subset of the many possible violations of immigration law—specifically, the crimes of immigrant smuggling, transporting or harboring. 8 U.S.C. § 1324(c). They may also make arrests to enforce criminal illegal reentry provisions, "but only after the State or local law enforcement officials obtain appropriate confirmation from the Immigration and Naturalization Service of the status of such individual." 8 U.S.C. § 1252c. In addition, the Immigration and Nationality Act (INA) allows the Secretary of Homeland Security to authorize a state or local officer to enforce immigration law after the Secretary has "determine[d] that an actual or imminent mass influx of aliens arriving off the coast of the United States, or near a land border, presents urgent circumstances requiring an immediate Federal response." 8 U.S.C. § 1103(a)(10).

The INA also defines narrow instances in which local jurisdictions may *not* limit their officers' authority: State and local officers *must* be allowed by their jurisdictions to send, receive and maintain "information regarding the citizenship or immigration status" of individuals. 8 U.S.C. §§ 1373, 1644. As to voluntary cooperation, Section 1357(g) creates a program through which qualified officers of states or their political subdivisions may carry out the functions of "investigation, apprehension or detention" of noncitizens after receiving specialized training. 8 U.S.C. § 1357(g)(1)-(8). This may occur, however, only under specified conditions, including a written agreement between a state or its political subdivisions, training and certification for the state or local officers and employees, and direction and supervision by the Attorney General. *Id.*

Section 1357(g) also permits state and local entities, outside of a formal agreement, to communicate immigration-related information to federal authorities. Finally, section 1357(g) permits state or local jurisdictions, again in the absence of a formal agreement, "otherwise to cooperate with the Attorney General in the identification, apprehension, detention, or removal" of undocumented immigrants. Critically,

however, any such informal cooperation "shall be subject to the direction and supervision of the Attorney General." 8 U.S.C. § 1357(g)(3) and (10); *see also Arizona*, 567 U.S. at 409 ("Officers covered by these agreements are subject to the Attorney General's direction and supervision. § 1357(g)(3).").

2. The District Court Correctly Enjoined SB 4's Enforcement Provision as Field Preempted.

This comprehensive regulation of immigration enforcement cooperation makes clear "that Congress left no room for the States" to enact additional or supplementary laws. *Arizona*, 567 U.S. at 399 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). Where Congress has created a "complete scheme" of standards and rules in an area of dominant federal concern—such as immigration enforcement cooperation—a state may not "'curtail or complement' federal law or to 'enforce additional or auxiliary regulations.'" *Id.* at 400-01 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 66–67 (1941)). SB 4 improperly does just that. It enters the field of federal-local cooperation in immigration enforcement by mandating such cooperation in all instances and imposing severe financial and legal penalties on local police officers and their supervisors who do not provide "enforcement

assistance" to federal immigration agents. SB 4 §§ 752.053(b)(3), 752.056, 752.0565.

This is impermissible. SB 4's "enforcement assistance" provision is an intrusion into a field that Congress, "acting within its proper authority . . . determined must be regulated by its exclusive governance." *Arizona*, 567 U.S. at 399. Through extensive regulation of the conditions under which local officials provide "enforcement assistance" to federal agents, including requirements of training and supervision, written agreements, and specific grants of authority to make arrests, "Congress has left no room for state regulation of these matters." *United States v. Locke*, 529 U.S. 89, 111 (2000).

SB 4 has all of the infirmities the state regulations struck down as field preempted in *Locke*. There, without examining whether state rules governing tanker crews and operations were similar to or in conflict with federal law, the Court concluded that state law was preempted because it regulated in "a field reserved to the Federal Government." *Id.* at 113-14. As the Court held, federal law in such a field "may not be supplemented by laws enacted by the States without compromising the uniformity the federal rule itself achieves." *Id.* The

same principle applies here. Although local officers may cooperate with federal authorities pursuant to the INA, federal law can be the only regulation of local officers' conduct in this area.

In its brief, Texas largely ignores the complete scheme of federal law regulating local officers' enforcement of immigration law, stating baldly that "[f]ield preemption does not apply because no statute shows a clear congressional purpose to 'pervasively' regulate and 'displace[] state law altogether' or to 'preclude' States from requiring their localities to cooperate with federal immigration officials." Texas Br. 28. Beyond this conclusory statement, Texas advances no valid field preemption argument. Texas does not engage with Congress's thorough and exclusive regulation of the field of federal-local cooperation in immigration enforcement. Nor does Texas dispute that immigration enforcement is a field in which "the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." *Rice*, 331 U.S. at 230. And Texas's argument that SB 4 steps in to "direct . . . local officials to enforce federal law" further underscores the fact that Texas has entered a field from which it is excluded by federal law. Texas Br. at 28.

At best, Texas argues that because SB 4 purports to fulfill the same goals as Section 1357(g)(10), it cannot be preempted. But field preemption "reflects a congressional decision to foreclose *any* state regulation in the area, even if it is parallel to federal standards." *Arizona*, 567 U.S. at 401 (citing *Silkwood v. Kerr–McGee Corp.*, 464 U.S. 238, 249 (1984)) (emphasis added). "When Congress has taken the particular subject-matter in hand, coincidence is as ineffective as opposition." *Charleston & W. Carolina Ry. Co. v. Varnville Furniture Co.*, 237 U.S. 597, 604 (1915).

Texas also argues that it has "absolute discretion" to "instruct its own local entities and officials." Texas Br. 28. This too is inconsistent with fundamental preemption principles. Although Texas has authority to create rules and obligations for local police in areas historically left to the states, Texas cannot enact a law that intrudes upon the federally occupied field of federal-local cooperation in immigration enforcement. SB 4 imposes prohibitions and penalties not contained in INA; these provisions *require*—by Texas's own admission—local officers and their supervisors to provide "enforcement assistance" to federal immigration officials. *Id.* at 28-29. Such a state law requirement—putting aside the

question whether or not it is consistent with 1357(g)—is field preempted.

3. The District Court Also Correctly Enjoined the Enforcement Assistance Provision as Conflict Preempted.

State and local laws are preempted "when they conflict with federal law." *Arizona*, 567 U.S. at 399. Even where a local law shares the same goals as federal law, it is preempted "if it interferes with the methods by which the federal statute was designed to reach this goal[.]" *Int'l. Paper Co. v. Oullette*, 479 U.S. 481, 494 (1987); *see also Crosby Nat'l Foreign Trade Council*, 530 U.S. 363, 379 (2000). Conflict preemption also occurs when a state enactment "'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Villas at Parkside Partners v. City of Farmers Branch, Tex.*, 726 F.3d 524, 528 (5th Cir. 2013) (en banc) (plurality opinion) (quoting *Arizona*, 567 U.S. at 399). Significantly, a state law that reflects an attempt to achieve the same goals as federal law by a different "method of enforcement" creates an obstacle to Congressional objectives. *Arizona*, 567 U.S. at 406.

Congress struck a careful balance in Section 1357(g) and other provisions of the INA, authorizing local officials to enforce federal immigration law only under narrowly drawn circumstances, and always directed or supervised by the federal government. Section 752.053(b)(3) upsets this balance by (1) requiring individual local police officers and their supervising officers to provide "enforcement assistance" to federal agents, without the "direction and supervision" of the federal government; (2) making routine what the federal government contemplates as case-by-case assistance when provided outside the framework of a written agreement under 8 USC § 1357(g)(1-8); and (3) imposing severe sanctions that Congress never imposed or intended whenever a federal enforcement request is denied or local enforcement assistance is limited or prohibited. Because SB 4 strips away the safeguards of federal training and supervision and penalizes local officials and individual officers who do not enforce federal immigration law, it directly conflicts with Congress's scheme. *See Arizona,* 567 U.S. at 406 ("conflict in technique can be as fully disruptive to the system Congress erected as conflict in overt policy.").

a. SB 4's "enforcement assistance" provision does not require federal supervision or oversight.

Section 752.053(b)(3) contains no explicit requirement that the federal authorities request or supervise the "enforcement assistance" that local officers are now compelled to provide. By contrast, Section 1357(g)(3) mandates that "[i]n performing a function under this subsection, an officer or employee of a State or political subdivision of a State shall be subject to the direction and supervision of the Attorney General." SB 4's "enforcement assistance" provision accordingly authorizes state officers to make immigration arrests in exactly the manner found preempted in *Arizona*. "By authorizing state officers to decide whether an alien should be detained for being removable, [it] violates the principle that the removal process is entrusted to the discretion of the Federal Government." 567 U.S. at 409.

In this area as in others, Texas invokes subsection (10)(B) of Section 1357(g), which permits cooperation in certain circumstances even in the absence of a written agreement. But that argument is foreclosed by *Arizona*, in which the Court rejected the state's contention that the same subsection provides the basis for authorizing local officers to make warrantless immigration arrests. As the Court reasoned,

"[t]here may be some ambiguity as to what constitutes cooperation under the federal law; but no coherent understanding of the term would incorporate the unilateral decision of state officers to arrest an alien for being removable absent any request, approval, or other instruction from the Federal Government." 567 U.S. at 410.

Because Texas ultimately concedes, as it must, that a statute permitting unilateral immigration enforcement activity by local officials would be preempted, Texas is left to assert— incorrectly—that SB 4's "enforcement assistance" provision does not countenance unilateral activity, and that it applies only "when there is first a federal request for assistance." Texas Br. at 29. But this is inconsistent with the plain text of the statute. No language in the enforcement assistance provision requires the federal government to ask first. Similarly, no language in the provision conditions local officer action on a "'request, approval, or other instruction from the Federal Government.'" US Stay Br. at 4 (quoting *Arizona*, 567 U.S. at 410). The absence of such language is not an accident. The legislature knew how to, and did, incorporate language regarding federal "request[s]" in other provisions of the statute; it did precisely that in the detainer provision. SB 4 Art.

2.251. The enforcement assistance provision, however, not only dispenses with the "request" required by federal law but strips away even the ability of local jurisdictions to provide limiting guidance or safeguards, thus leaving individual officers to use their own personal judgment when providing "enforcement assistance" to federal agents. By authorizing unilateral and unsupervised enforcement activity of this sort, SB 4 is plainly in conflict with federal law.

b. The penalty provisions attached to SB 4's "enforcement assistance" provision also conflict with federal law.

As discussed, SB 4 includes draconian penalties for failure to provide "enforcement assistance"—fines of $25,500 per day after the first violation, and removal from office for elected officials. This is not the system contemplated by the INA, which imposes no penalties on local officers related to providing enforcement assistance. Even the INA's provisions prohibiting local jurisdictions from limiting officers' ability to share immigration information with federal authorities impose no sanctions. *See* 8 USC § 1373 and 8 USC § 1644. At worst, a jurisdiction that violates the information-sharing provisions of the INA risks losing certain federal grant money if the jurisdiction pledged to

comply with federal laws and regulations. No other penalties are imposed on local jurisdictions and no penalties at all are imposed on individual local employees.

c. SB 4's "enforcement assistance" provision makes routine what is supposed to be done on a case-by-case basis.

SB 4's "enforcement assistance" provision also conflicts with federal law because it converts the exception embodied in subsection (g)(10)(B) into a rule governing federal-local cooperation. Given the provisions of Section 1357(g) discussed above—which require federal training, certification and supervision—the federal goal in Section 1357(g) is plainly to ensure that local enforcement assistance rendered on a routine, consistent basis is carried out pursuant to the program specified in the statute. With respect to situations in which there is no written agreement—which are covered by subsection (g)(10)— the U.S. Department of Homeland Security explains:

> As contemplated by [Section 1357(g)(10)], DHS has invited and accepted the assistance of state and local law enforcement personnel in a variety of contexts that lie outside of the written agreements provided for by paragraphs (1)–(9) of subsection 1357(g), such as through BESTs, the Criminal Alien Program, Fugitive Operations Task Forces, and Operation Community Shield. Moreover, state and local law enforcement officers render assistance to

> DHS on a case-by-case basis as immigration matters come to their attention in the performance of their regular duties.

DHS Guidance on State and Local Governments' Assistance in Immigration Enforcement and Related Matters 7 (July 16, 2015) available at https://www.dhs.gov/publication/guidance-state-and-local-governments-assistance-immigration-enforcement-and-related. SB 4 turns this scheme on its head, converting a provision meant to cover instances of ad-hoc assistance into a mandatory state-wide scheme.

Texas seeks to defend this scheme by mischaracterizing the District Court's ruling. According to Texas, the District Court, "[b]y holding that formal § 1357(g) agreements are the exclusive means for local officials to cooperate with federal officials in immigration enforcement," purportedly "read §1357(g)(10)(B) out of the INA." Texas Br. at 32. But this is not what the District Court did. On the contrary, the District Court recognized, much like DHS itself, that "cooperation outside formal agreements comes in the form of pre-established programs or on a 'case-by-case basis'"—but then properly concluded that the INA "indicates systematic cooperation should be at behest of the Attorney General rather than motivated by state law." ROA.4149.

d. Neither Arizona nor Whiting Saves SB 4.

Texas next contends that SB 4 survives preemption because it is analogous to the sole provision that survived preemption in *Arizona*, Section 2(B). But the two statutes are critically different. Section 2(B) is a narrow provision: It requires state officers to perform immigration status checks of a detained person during a lawful detention or after release. "The accepted way to perform these status checks is to contact ICE, which maintains a database of immigration records." 567 U.S. at 411. Section 2(B) is thus a limited mandate about communication that interlocks directly with federal mechanisms. SB 4's enforcement provision is far broader; among other things, it is in no way restricted to status checks. In reality, SB 4 is analogous to a different provision of the Arizona statute—Section 6, which empowered local officials to arrest individuals they determined to be removable. *Id.* at 409. The Supreme Court held that Section 6 was preempted because it provided "greater authority" to untrained local officials than Congress had given to trained officers under federal law and allowed local officials to engage in enforcement activities "without any input from the Federal

Government." *Id.* The enforcement assistance provision does the same thing.

Texas also relies improperly on *Chamber of Commerce v. Whiting*, 563 U.S. 582 (2011), to bolster its argument that the "enforcement assistance" provision can be harmonized with the INA. Texas Br. at 27. But the federal statute at issue in *Whiting*—the Immigration Reform and Control Act (IRCA)—explicitly *authorized* states to regulate in the area at issue. The *Whiting* Court rejected a challenge to an Arizona law imposing employer sanctions through licensing laws because the IRCA specifically exempted licensing laws from preemption. *Id.* at 600. Section § 1357(g) contains no such exemption and no language otherwise authorizing Texas to regulate in the area of federal-local cooperation in immigration enforcement. *Whiting* cannot save SB 4.

C. The District Court Should Have Enjoined Additional Provisions as Field and Conflict Preempted.

Although the District Court correctly concluded that Plaintiffs are likely to prevail in showing that SB 4's enforcement assistance provision is preempted, the court erred when it failed to correctly apply the same field and conflict preemption principles to Plaintiffs' challenges to several other provisions of SB 4.

1. Additional prohibitions in Section 752.053

The District Court concluded that "Plaintiffs have shown a likelihood that the federal interest in the field of immigration enforcement is so dominant that it may preclude enforcement of state laws on this subject." ROA.4145. That conclusion applies equally to Sections 752.053 (a)(1), (a)(2), (b)(1) and (b)(2). All four provisions are squarely aimed at the interaction between local and federal immigration enforcement. Subsections (a)(1) and (2) prohibit any local policy that "prohibits or materially limits the enforcement of immigration laws." Subsection (b)(1) provides that local entities may not "prohibit or materially limit" their officers from "inquiring into the immigration status" of detained persons; subsection (b)(2) prohibits limitations on information sharing. Like subsection (b)(3), each is an impermissible intrusion into a field governed by a complete federal scheme.

Subsection (b)(2) is also field preempted because it duplicates the federal information-sharing scheme. As discussed above, 8 USC Sections 1373 and 1644 prohibit state laws that limit information-sharing. Subsection (b)(2) does the same thing, albeit with different

penalties. This is impermissible. Under field preemption, Texas may not adopt a mirror statute, let alone one that imposes harsher penalties on a different set of people (individual police officers and their supervisors) for the same conduct. *Supra* at 27-28; *Crosby*, 530 U.S. at 380; *Arizona*, 567 U.S. at 403-07.

These provisions are also conflict preempted. Subsections (a)(1) and (a)(2), just like the enforcement assistance provision, compel local officers and their supervisors to engage, on a consistent basis, in immigration enforcement without any requirement of federal direction or supervision, and outside the structure of a Section 287(g) agreement. They fail for the same reason subsection (b)(3) fails.

Subsection 752.053(b)(1), the inquiry provision, also fails. The District Court erroneously concluded that this provision is analogous to the Section 2(B) in *Arizona* Court, which, as discussed, was the only statute that survived preemption in that case. *Supra* at 34. But subsection (b)(1)—like (b)(3)—is very different from *Arizona* Section 2(B). *Both* subsections permit unilateral local enforcement of immigration laws. Subsection (b)(1) requires local entities to permit officers to initiate inquiries into immigration; indeed, it does so even

when there is no specter of "cooperation" or "assistance" with federal agents. And the fact that unilateral inquiries under subsection (b)(1) may lead to further unilateral activities under the guise of subsection (b)(3) "enforcement assistance" exacerbates the conflict with the federal scheme, under which all such activities are to be "subject to direction and supervision" of DHS. Subsection (b)(1) is preempted.

2. Penalty provisions

Even if the four provisions just discussed are not preempted in their own right, the accompanying penalty provisions in Sections 752.056 and 752.0565 would be independently preempted. SB 4's draconian penalty provisions are not consistent with anything in federal law. These provisions are conflict preempted because they "undermine[] the congressional calibration of force" applied to local authorities in the immigration context. *Crosby*, 530 U.S. at 380; *see also Farmers Branch*, 726 F.3d at 529.

The Supreme Court made clear in *Arizona* that inconsistent sanctions create a conflict between state and federal law. Among other things, the *Arizona* Court struck down on both field and conflict preemption grounds a provision that created a state misdemeanor for

failure to carry an identification card, and thereby created a new system of penalties. 567 U.S. at 400-03. Where a "state framework of sanctions creates a conflict with the plan Congress put in place," the Court held, that state law cannot stand. *Id.* at 403. For similar reasons, the Court also struck down a provision of the Arizona law making it a crime for an "unauthorized alien" to solicit work. *Id.* at 403-07. The Court explained that even a state law that "attempts to achieve the same goals as federal law" will be subject to conflict preemption if it adopts its own "method of enforcement." *Id.* at 406. Such a "conflict in the method of enforcement" or "conflict in technique" is "fully as disruptive to the system Congress erected as conflict in overt policy." *Id.* at 407. SB 4's penalty provisions create precisely this sort of impermissible conflict.

Texas argued below that the *absence* of comparable penalty provisions in federal immigration law permits state sanctions, and reflects only that the Tenth Amendment prevented Congress from demanding cooperation from local law enforcement. This is wrong for at least two reasons. First, *Arizona* confirms that the lack of penalties in a federal law does not mean that states are always free to fill any

perceived gap. *See* 567 U.S. at 403 (federal law preempts state provision that creates "a state criminal prohibition where no federal counterpart exists"). Second, the existence of Section 1373—which, as discussed above, *compels* state and local jurisdictions to share information with federal authorities—shows that Congress did not believe the Tenth Amendment was an obstacle to federal statutes requiring certain types of local cooperation or to imposing appropriate, modest consequences when local jurisdictions fail to comply. Because the harsh sanctions imposed by SB 4 constitute a technique for enforcing federal immigration law that conflicts with the framework for voluntary participation Congress has constructed, the penalty provisions are preempted.

3. Detainer provisions

The detainer provisions in SB 4, which we discuss in detail immediately below, are preempted for several reasons.

First, the detainer provisions are mandatory. They compel compliance with all detainer requests and thereby strip local jail officials of the ability to appropriately evaluate detainers and exercise local discretion in responding to them. Art. 2.251 (mandating

compliance with all requests made in detainers). This conflicts with—indeed, it is antithetical to—the federal scheme governing detainer requests, under which courts have repeatedly held that compliance is voluntary. *E.g.*, *Galarza v. Szalczyk*, 745 F.3d 634, 640-42 (3d Cir. 2014); *Miranda-Olivares v. Clackamas Cty.*, 2014 WL 1414305, at *5 (D. Or. Apr. 11, 2014).[12] Failure to comply with detainer requests under SB 4 also carries stiff penalties of money fines, jail time and removal from office. Such penalty provisions are preempted for the reasons discussed above.

Second, SB 4's detainer provisions require local law enforcement officials to review documents and make determinations regarding whether an individual "has lawful immigration status in the United States." Art. 2.251(b). Both the Supreme Court and the Fifth Circuit have held that a state or local law is preempted when it requires non-federal officials to make determinations of federal immigration status. *Arizona*, 567 U.S. at 408-09; *Farmers Branch*, 726 F.3d at 531-34 (law

[12] *See also* 8 U.S. § 1357(g)(10) ("Nothing in this subsection shall be construed to require an agreement under this subsection in order for any officer or employee of a State or political subdivision of a State . . . to cooperate with the Attorney General in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States.").

preempted where local actors would need to determine whether non-citizens are "lawfully present") (plurality op.). Federal immigration officials, not local officials, are responsible for status determinations except in "limited circumstance." *Farmers Branch*, 726 F.3d at 531. SB 4's detainer provisions bypass those limitations and place status determinations in the hands of untrained local officials, upsetting the "careful balance" Congress struck in the INA. This is improper.

Texas argued below that the local determination of "lawful immigration status" required by SB 4 is not preempted because it is purely "ameliorative"—that is, it can only help individuals otherwise subject to an ICE detainer, since they will be released if they can produce papers demonstrating their lawful status. Texas once again ignores the fundamental rule that neither good intentions nor commonality of purpose can save a state enactment from conflict preemption. As significantly, DHS routinely places detainers even on individuals who have "lawful immigration status in the United States," with the goal of taking those individuals into custody for removal. *See* 8 U.S.C. § 1227(a)(2). SB 4's mandate that jails *release* the same individuals DHS asks them to detain makes it impossible for local

officials to comply with both the federal request and state law. Such instances of "physical impossibility" are among the clearest cases of conflict preemption. *E.g.*, *Simmons v. Sabine River Auth. Louisiana*, 732 F.3d 469 (5th Cir. 2013).

Texas also argued below that to the extent the "lawful immigration status" provision is problematic, it can simply be excised. This misses the point. As discussed above in connection with SB 4's unconstitutional restriction of speech, courts must take statutes as the legislature has fashioned them, and may not rewrite them at will. In any event, removing the "lawful immigration status" carve-out would simply exacerbate the Fourth Amendment problems discussed below. The District Court erred by declining to enjoin SB 4's detainer provisions on preemption grounds.

D. The District Court Correctly Held That Local Jurisdictions May Not Seize Persons On The Basis Of Removability.

1. Numerous Authorities Hold That Seizures Based On Probable Cause Of Civil Infractions Violate The Fourth Amendment.

Article 2.251 requires local law enforcement agencies to "comply with, honor, and fulfill" all requests made in ICE detainers, regardless of the fact that such requests are not predicated on the commission of a

crime. The District Court concluded that Plaintiffs are likely to succeed with their Fourth Amendment challenge for this reason. That conclusion falls squarely within well-established law. The Fourth Amendment provides for "[t]he right of people to be secure in their persons," and protects against "unreasonable searches and seizures." U.S. Const. amend. IV. As Texas emphasizes, seizures must be reasonable to comply with Fourth Amendment protections, and a seizure is reasonable "only if based on probable cause to believe that the individual has committed a crime." *Gerstein v. Pugh*, 420 U.S. 103, 112 (1975). Texas does not dispute that when local officers hold a person subject to a federal detainer request, they effect a new seizure for Fourth Amendment purposes. *E.g., Morales v. Chadbourne*, 793 F.3d 208, 217 (1st Cir. 2015); *Orellana v. Nobles Cty.,* 230 F. Supp. 3d 934, 944 (D. Minn. 2017). It is immaterial that the subject of a detainer request is in custody at the time the request is fulfilled; the effect of compliance with the request is that a person who would otherwise be free on bond or on another legitimate basis is newly subject to restraint.

Id. This new seizure must be supported by a new finding of probable cause to satisfy the Fourth Amendment. *Id.*[13]

It is also undisputed that unlawful presence in the United States is a civil violation, not a crime. *Padilla v. Kentucky*, 559 U.S. 356, 365 (2010) (deportation and removal proceedings are civil); *Arizona*, 567 U.S. at 407 ("As a general rule, it is not a crime for a removable alien to remain present in the United States"). Two circuits and a variety of district courts have accordingly held that local officials violate the Fourth Amendment when they detain persons based on probable cause or reasonable suspicion that they are removable—as opposed to probable cause or reasonable suspicion that they have committed a crime. *Santos v. Frederick Cty. Bd. of Comm'rs*, 725 F.3d 451, 464-65

[13] These protections extend to undocumented immigrants as well as to citizens. This Court has "explicitly held . . . that the Fourth Amendment applies to aliens" with a substantial connection to the United States; this encompasses the vast majority of immigrants who live and work in the United States. *Martinez-Aguero v. Gonzalez*, 459 F.3d 618, 624 (5th Cir. 2006). Texas nevertheless argues in a footnote that it is "doubtful" that the Fourth Amendment applies to "many aliens subject to ICE detainers." Texas Br. at 13 n.11. The authorities Texas cites do not support that contention. In *Castro v. Cabrera*, 742 F.3d 595, 599 (5th Cir. 2014), this Court recognized that "[a]s a general matter, [the Fourth Amendment] applies to aliens within U.S. territory." *United States v. Portillo-Munoz*, 643 F.3d 437 (5th Cir. 2011), was a Second Amendment decision, and the Court's passing and inconclusive reference, in dicta, to the scope of the Fourth Amendment does not displace the explicit pronouncements of *Martinez-Aguero* and *Castro*.

(4th Cir. 2013) (local officers violated the Fourth Amendment when they arrested plaintiff based on probable cause of removability; citing consistent decisions from district courts); *Melendres v. Arpaio*, 695 F.3d 990, 1001 (9th Cir. 2012) (in affirming preliminary injunction, concluding that "Plaintiffs were likely to succeed on their claim that without more, the Fourth Amendment does not permit a stop or detention based solely on unlawful presence").

Courts have reached the same result in cases where local officers make seizures in response to detainer requests. In this context too, a seizure based on civil immigration infractions as opposed to criminal infractions violates the Fourth Amendment. *Mercado v. Dallas Cty.*, 229 F. Supp. 3d 501, 511-12 (N.D. Tex. 2017) (plaintiffs seized by local officials pursuant to detainer requests "plausibly allege a violation of the Fourth Amendment," given that the detainer requests were predicated on civil immigration infractions); *Trujillo Santoyo v. United States*, 2017 WL 2896021, at *5-7 (W.D. Tex. June 5, 2017) (same); *see also Buquer v. City of Indianapolis*, 2013 WL 1332158, at *10-11 (S.D. Ind. Mar. 28, 2013) (permanently enjoining enforcement of state statute that, among other things, permits compliance with detainer requests

and thereby "authorizes the warrantless arrest of persons for matters and conduct that are not crimes").

These decisions in turn are rooted in a long history of jurisprudence holding that officials violate the Fourth Amendment when they seize persons based on probable cause of a wide range of civil infractions—not limited to infractions of immigration laws—as opposed to infractions of criminal law. *E.g., Doe v. Metro. Police Dep't of D.C.*, 445 F.3d 460, 469 (D.C. Cir. 2006) (reversing dismissal of Section 1983 claim asserted by persons arrested on the basis of civil infractions); *McKinney v. Fields*, 2010 WL 3583017, at *6 (E.D. Mich. Sept. 10, 2010) ("The concept of probable cause makes sense only in relation to criminal offenses . . . the right to be free from arrests for committing non-criminal, civil offenses is clearly established") (citing authorities); *see also Allen v. City of Portland*, 73 F.3d 232, 237 (9th Cir. 1995) ("probable cause cannot arise in a civil context") (collecting authorities).[14] Article 2.251, which not only permits but mandates

[14] Other decisions are similar. *E.g., Barnett v. United States*, 525 A.2d 197, 199 (D.C. 1987) (arrest on the basis of civil traffic infraction violates Fourth Amendment); *Thomas v. State*, 614 So. 2d 468, 471 (Fla. 1993) (same).

seizures on the basis of civil immigration infractions, is baldly inconsistent with well-established Fourth Amendment law.

2. Texas's Attempt To Equate Local With Federal Authority Is Contrary To Law.

Texas's response to this body of law is to argue that federal officers may make seizures based on removability alone, and that therefore local officers may do so too when acting pursuant to a federal request. Texas Br. at 13-20. The US puts the matter even more starkly: "If a seizure is legal under the Fourth Amendment when a federal officer effectuates it, then so too when a state or local officer does so." US Br. at 18. But this premise, which is the core of the both State's and the US's arguments, is demonstrably incorrect.

To begin, although the question of federal officers' authority to make seizures based on removability is largely irrelevant to Plaintiffs' challenge to a *state* statute mandating seizures by *local* officers, Texas greatly oversimplifies the law on this point. Federal officers do not have carte blanche to detain persons based on probable cause of removability. Both the relevant statute, 8 U.S.C. Section 1357(a)(2), and recent case law make plain that federal agents may make warrantless arrests only where they can establish both probable cause

of removability and a reason to believe that the subject will otherwise escape. *Moreno v. Napolitano*, 213 F. Supp. 3d 999, 1007-08 (N.D. Ill. 2016); *Orellana*, 230 F. Supp. 3d at 945. Without a showing of likelihood of escape, federal agents must obtain warrants. *Id.* Article 2.251 nowhere reflects this limitation on federal action, but instead mandates blanket compliance with all detainer requests, whether or not supported by probable cause, by a warrant, or by a likelihood of escape.

The larger difficulty with Texas's position, however, is that differences between federal and state authority are of critical significance in determining whether a seizure based on removability comports with the Fourth Amendment. The District Court explained in detail that federal and state authority to enforce immigration law differ in both scope and origin. ROA.4185-92. Texas does not dispute this; it argues instead that differences in authority are simply irrelevant in a Fourth Amendment analysis. Texas Br. at 16. But this is plainly not true. The question of authority—and differences between federal and state authority—was central to the courts' holdings in *Santos* and *Melendres*, the two circuit-level cases in which local officers were found to have violated the Fourth Amendment when they warrantlessly seized

individuals based on probable cause or reasonable suspicion of removability. In both cases, the Fourth Amendment violation occurred precisely because the local arresting officers—unlike federal officers—lacked the authority to detain on the basis of immigration violations. *Santos*, 725 F.3d at 765; *Melendres*, 695 F.3d at 1001 (affirming finding of likely Fourth Amendment violations by local officers "not empowered to enforce civil immigration violations").[15] And in both cases, significantly, the circuit courts drew on *Arizona*. Although the Supreme Court there struck down state statutes on preemption rather than Fourth Amendment grounds, the Court also noted pointedly that seizures by local officers based on civil immigration violations implicated Fourth Amendment concerns. 567 U.S. at 413 (Fourth Amendment issues arise where state or local officers hold detainees beyond the time at which they would otherwise be released for reasons related to immigration status); *see also, e.g., Ochoa v. Campbell*, 2017

[15] Texas and the US both argue that *Santos* holds that a local officer's seizure on removability grounds becomes lawful under the Fourth Amendment if made at ICE's direction. Texas Br. at 20; US Br. at 14. But *Santos* contains no such holding. The Fourth Circuit held only that a seizure is unlawful when not made at ICE's direction. 725 F.3d at 465-66. The court did not analyze whether or under what circumstances a local officer's compliance with a federal detainer request would comport with the Fourth Amendment.

WL 3476777, at *10 (E.D. Wash. July 31, 2017) (explaining, in the context of a Fourth Amendment challenge to detainer requests, that "state and local law enforcement and other officials are *presumed* to be unqualified and unable to perform the functions of federal immigration law enforcement officers, at least as those functions pertain to enforcement of *civil* immigration violations"), *appeal filed*, No. 17-35679 (9th Cir. Aug. 24, 2017).

Under *Santos*, *Melendres* and *Arizona* itself, a Fourth Amendment violation can occur when potentially removable persons are detained by local officers *precisely because* local officers do not have the same authority as federal officers. Indeed even Texas does not appear to dispute that the distinction between federal and local authority to enforce immigration law is germane to the Fourth Amendment inquiry outside the specific context of detainer requests. Texas does not contend that that local officers could *unilaterally* detain individuals based on probable cause of removability, and similarly does not dispute that such detentions would violate the Fourth Amendment. Texas argues only that local officers may detain purportedly removable persons at the specific behest of federal officers, and only for a period of

48 hours. This in itself shows the fallacy in the argument that whatever federal agents may do consistently with the Fourth Amendment, local officers may therefore do too.

Texas cites scant authority for its central claim that local officers may do whatever state officers may do so long as they do so at a federal officer's direction. Neither Texas nor the US cites a single decision directly embracing that purported principle, and the authorities they do cite are very far afield. Both rely heavily on *Virginia v. Moore*, 553 U.S. 164 (2008), but the seizure in that case was made solely by state officers and was based solely on a violation of state law; the case did not involve differing grants of authority to state and federal officers. The issue the *Virginia* Court confronted was whether state-law protections against seizures that go *beyond* Fourth Amendment protections are incorporated into the Fourth Amendment; the Court held that they are not. *Id.* at 176. The same question was at issue in *Martinez-Medina v. Holder*, 673 F.3d 1029 (9th Cir. 2011), on which the US relies. There too, the court rejected the argument that a violation of state law more protective than the Fourth Amendment constitutes a violation of the

Fourth Amendment. *Id.* at 1036.[16] But that has nothing to do with the issue in this case. Plaintiffs' argument here is that Article 2.251 itself violates the Fourth Amendment. *Virginia* provides no support for Texas's central premise that whatever federal agents may do consistent with the Fourth Amendment, state or local officers may do too.[17]

Texas draws on *Virginia* in a second and more general way as well, arguing that under the framework set forth there, a court is to "begin with history" in any Fourth Amendment analysis and to end the analysis if history resolves the issue. Texas Br. at 17. According to Texas, because detainer requests are part of a "decades-long history,"

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[16] While *Martinez-Medina*, unlike *Virginia*, involved a seizure by local officers on the basis of removability, the Ninth Circuit specifically declined to decide whether such a seizure could be made consistent with the Fourth Amendment. *Id.* at 1034. The court held only that the alleged Fourth Amendment violation was not "egregious" (and hence did not warrant application of the exclusionary rule in the removal setting) because the arresting officer might have reasonably but mistakenly believed at the time of the seizure that removability was a criminal offense. *Id.* at 1035-36. The court went on to explain that removability is in fact a civil offense.

[17] The *Virginia* Court noted that one untoward consequence of incorporating extra-constitutional state-law protections into the Fourth Amendment would be that state officials might then be bound by a higher constitutional standard than federal officials, at least with respect to offenses governed by the state statute. 553 U.S. at 216. But that is a far cry from holding that the Fourth Amendment analysis will always necessarily proceed in the same way regardless of the authority of the arresting officer. The *Arizona* Court plainly indicated the opposite—that a state or local seizure based on removability would raise Fourth Amendment concerns specifically because state and local authority are limited in this area. 567 U.S. at 413.

this is the end of the Fourth Amendment inquiry. *Id.* This is plainly wrong. The "history" at issue in *Virginia* was the history *at the time the Bill of Rights was adopted*, not the history behind a particular species of seizure. 553 U.S. at 168-71. Looking at the 18th century history, the *Virginia* Court concluded that the framers did not intend the Fourth Amendment to track or reiterate existing state protections from certain seizures but rather create an independent constitutional standard, with its own separate protections. *Id.* The seizure at issue in *Virginia* violated state law, which prohibited arrests for certain minor crimes. The Court held that this state-law violation did not also constitute a Fourth Amendment violation, as the Fourth Amendment jurisprudence was clear that even those committing minor crimes in the presence of an officer were susceptible to arrest. *Id.* at 175. The issue in this case is altogether different. Article 2.251 permits seizures based on *civil* infractions, and this plainly *does* implicate Fourth Amendment concerns—indeed, as the many decisions cited above hold, such seizures constitute Fourth Amendment violations.[18] The "history" Texas invokes

[18] The D.C. Circuit has specifically distinguished the situation in which a person is seized based on civil infractions—which constitutes a Fourth Amendment violation—from the situation in cases like *Virginia*, in which a person is seized on

thus does not exempt Article 2.251 from Fourth Amendment scrutiny, nor support Texas's premise that a seizure by a local officer in the absence of probable cause of a crime becomes lawful simply because a federal agent may have effected it without violating the Fourth Amendment or because such a federal agent requests it.

Beyond its reliance on *Virginia*, Texas cites decisions in which the Sixth and Eighth Circuits affirmed dismissals of Section 1983 claims brought by US citizens whom ICE had mis-identified as undocumented immigrants and whom local officers had consequently detained. *Mendoza v. U.S. ICE*, 849 F.3d 408 (8th Cir. 2017); *Ortega v. U.S. ICE*, 737 F.3d 435 (6th Cir. 2013). But in both cases, the courts' decisions were based on qualified immunity, and in neither case did the court directly address the question of whether a local official may, consistent with the Fourth Amendment, seize a person on the basis of removability alone. Texas cites a single decision in which a federal court has considered that question, *United States v. Ovando-Garzo*, 752 F.3d 1161 (8th Cir. 2014), where the Eighth Circuit located such authority in the

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the basis of minor criminal infractions—which may constitute a state-law violation but does not implicate the Fourth Amendment. *Doe*, 445 F.3d at 466-67.

savings clause of Section 1357(g)(10), discussed above. *Id.* at 1164. But in the three years since *Ovando-Garzo* was decided, the US itself has declined to endorse the proposition that Section 1357(g)(10) is an affirmative grant of authority to local officers to seize persons subject to detainer requests. *See Lunn v. Commonwealth*, 78 N.E.3d 1143, 1158-60 (Mass. 2017). Meanwhile, the only court that has subsequently considered the matter in detail—the Massachusetts Supreme Court—has squarely held, after considered analysis, that Section 1357(g)(10) contains no such grant. *Id.*[19]

In the present case too, the US steers clear of any statement that Section 1357(g)(10) affirmatively grants state and local officers authority to make seizures based on probable cause of removability. Indeed, the US does not argue even that *Texas* law provides "inherent or implied authority" to make such seizures. The US's position is only

[19] *Ovando-Garzo* has at best limited application to detainer requests in any event. The defendant in that case was not the subject of a detainer request but rather a passenger in a car whose driver was arrested based on probable cause of a crime. The arresting officer questioned defendant and another passenger to determine whether they were licensed to drive the car and what options might be available other than stranding them on the freezing North Dakota roadside. *Id.* at 1162. The officer came to suspect that the passengers were in the country illegally, and after calling Border Patrol and learning that they were, "offered to transport" them to meet a border patrol agent. *Id.* at 1163. It is not clear at what point the officer detained the passengers.

that SB 4 itself provides such authority. US Br. at 13. The question in this case is thus ultimately whether the grant of authority in Article 2.251 can cure the violation identified in *Santos*, *Melendres*, *Mercado*, *Trujillo Santos* and the line of non-immigration authorities that stand behind those decisions—the Fourth Amendment violation that occurs when a person is seized on the basis of a civil rather than a criminal infraction.

E. SB 4's Grant Of Authority To Effect Seizures Based On Removability Does Not Cure The Fourth Amendment Violation.

1. Article 2.251 Is Critically Different From Other State Statutes That Permit Seizures In The Absence Of Criminal Probable Cause.[20]

In conjunction with its argument that SB 4 itself provides the authority necessary to make seizures outside the criminal context,

[20] Amicus Immigration Reform Law Institute advances an argument never made by Texas or the US in any of the briefs on appeal or below—that probable cause of a criminal infraction can be dispensed with in this case under the "special needs" doctrine. IRLI is wrong. That doctrine generally authorizes searches, and has never been applied to the extended seizure of persons. Its application to the seizure of persons has been confined to checkpoint stops, which are of necessity brief. *E.g., United States v. Martinez-Fuerte*, 428 U.S. 543, 566 (1976) ("we hold that stops *for brief questioning routinely conducted at permanent checkpoints* are consistent with the Fourth Amendment and need not be authorized by warrant") (emphasis added). IRLI cites no case in which the doctrine has been applied to justify the seizure of an allegedly undocumented immigrant outside the context of checkpoint stops.

Texas cites four decisions in which local officials were found not to have violated the Fourth Amendment where they detained persons under state statutes permitting seizure for reasons separate from the commission of a crime. Texas Br. at 18 (citing authorities). In three of the four cases, the statutes at issue authorized seizure of persons whom officers had probable cause to believe were ill, suicidal or incapacitated to such a degree that they were in immediate danger of harming themselves or others. *Cantrell v. City of Murphy*, 666 F.3d 911, 923 (5th Cir. 2012) (Texas statute permits seizure of mentally ill persons who pose serious risk of harm to themselves or others unless immediately restrained); *Maag v. Wessler*, 960 F.2d 773, 775-76 (9th Cir. 1991) (Montana statute permits seizure of persons who appear to be seriously ill and in danger of hurting themselves or others); *Commonwealth v. O'Connor*, 406 Mass. 112, 119-20 (1989) (Massachusetts statute permits seizure of incapacitated persons). In the fourth case, a state statute permitted detention of juvenile runaways, who were to be returned to their parents. *In re Marrhonda G.*, 81 N.Y.2d 942 (1993).

These state statutes differ from Article 2.251 in at least two critical respects. First, they address emergency situations, in which the subject's or another persons' safety is in imminent danger—an area historically within states' powers. The statutes do not address *infractions*, and the object of the seizures they authorize is to ensure safety in the short term and on a temporary basis. Article 2.251 is of course quite different. The persons it targets are not in immediate danger of harming themselves or others. The object of the statute is not to keep detainees safe but to hold them for delivery to ICE, so that ICE may process their civil immigration violations and remove them. Article 2.251, unlike the safety-related statutes in the cases Texas invokes, does exactly what has long been found impermissible. It explicitly authorizes arrests for civil rather than criminal infractions. *Supra* at 46-47 (citing authorities).[21]

[21] Although Texas does not refer to it, the US cites *United States v. Phillips*, 834 F.3d 1176 (11th Cir. 2016), in which the Eleventh Circuit rejected a Fourth Amendment challenge to an arrest made on the basis of a civil contempt writ of bodily attachment. The writ at issue in *Phillips* was a court-ordered warrant of a kind that issues only after a judicial finding, by a preponderance of the evidence, that the subject is liable for contempt. *Id.* at 1180-81. The Eleventh Circuit concluded that seizures under writs of this kind were constitutional given the treatment of bench warrants at the time the Fourth Amendment was adopted. *Id.* The US does not contend that a bench warrant or anything like a bench warrant is required under Article 2.251; nor does it argue that the historical justification the

The statutes to which Texas seeks to analogize are critically different in a second way as well. Unlike Article 2.251, they do not purport to determine probable cause in a categorical manner. Under the terms of the statutes, and on the facts of the cases applying them, arresting officers in each instance make their own determinations of probable cause, based on the particular circumstances with which they are presented. *E.g.*, *Cantrell*, 666 F.3d at 922-23 (statute permits seizure of mentally ill persons who exhibit a substantial risk of serious harm; officers permissibly detained plaintiff who repeatedly made suicidal statements after the accidental hanging of her child); *Maag*, 960 F.2d at 774-76 (seizure under similar statute justified where plaintiff exhibited increasingly irrational behavior after mixing toxic pesticides). Article 2.251 works very differently. It purports to resolve the issue of probable cause for an entire class of cases at a single blow. Under Article 2.251, local officers are never required to determine whether probable cause exists to seize a person subject to a detainer

Phillips court found for permitting seizure pursuant to a civil contempt writ extends to detainer requests.

request. The detainer request itself is simply substituted for any inquiry into probable cause.

This is antithetical to Fourth Amendment law, which requires a *particularized* inquiry into probable cause. The Supreme Court has repeatedly emphasized that probable cause and reasonable suspicion cannot be determined by means of general precepts. *E.g., Illinois v. Wardlow*, 528 U.S. 119, 124 (2000) (rejecting proposed rule that a person present in an area where criminal activity is expected can be reasonably suspected of committing a crime). Instead, "'[w]here the standard is probable cause, a search or seizure of a person must be supported by probable cause *particularized with respect to that person*.'" *Maryland v. Pringle*, 540 U.S. 366, 373 (2003) (quoting *Ybarra v. Illinois*, 444 U.S. 85 (1979)) (emphasis added). Courts accordingly reject attempts to codify the necessarily individualized probable cause determination by means of statutes or other generalized policies or rules. *Moreno*, 213 F. Supp. 3d at 1007-09 (rejecting as incompatible with the Fourth Amendment ICE's "categorical determination" that undocumented immigrants are likely to escape if released from custody); *Buquer*, 2013 WL 1332158, at *2, *10-11 (permanently

enjoining enforcement of state statute permitting seizures of all persons subject to ICE detainer requests, irrespective of particular facts related to probable cause). Article 2.251 is inconsistent with the bedrock principle, reflected in these decisions, that probable cause determinations must be particularized to specific persons and specific facts and cannot be made categorically for an entire class of detainees.

2. The Collective Knowledge Doctrine Cannot Salvage Article 2.251.

Texas seeks to justify this aspect of the statute by reference to the collective knowledge doctrine, which permits officers to aggregate knowledge. According to Texas, (1) federal agents make probable cause determinations before submitting a detainer request, (2) the doctrine of collective knowledge permits those determinations to be imputed to local officers, and (3) the arresting officer is therefore in possession of probable cause. Texas Br. at 20-23. There are two critical flaws in this formulation.

First, Article 2.251 in no way depends on a probable cause determination by federal officers. Both Texas and the US place great stock in a new policy and form of detainer request ICE has recently adopted—Form I-247A—in which ICE agents are to check boxes related

to probable cause determinations and to attach administrative warrants. But there is no evidence in the record suggesting that all detainer requests conform to the new policy and form. Meanwhile, nothing in Article 2.251 limits the obligations of local officials to situations in which the new form—or any form—is used. On the contrary: Local officials must comply with "any" ICE detainer request "including"—but not limited to—requests made by means of Form I-247, in any of its past or future variations. Art. 2.251(a)(1) & § 772.0073(2). Indeed, nothing in Article 2.251 excludes requests by ICE that are not supported by probable cause and not embodied in any form at all but simply made in an informal way. Even oral requests are covered by Article 2.251.[22]

Even I-247A itself, moreover, does not require probable cause in every instance. Texas refers to four boxes on the form, each of which purportedly provides "the basis for probable cause." Texas Br. at 21. But one of the four boxes corresponds only to the statement that

[22] Although the US argued in the District Court that such requests would be inconsistent with its current policy, they actually appear to be contemplated by it. Dep't of Homeland Sec., ICE, Pol. No. 10074.2: Issuance of Immigration Detainers by ICE Immigration Officers, § 2.5 (Apr. 2, 2017), available at: https://www.ice.gov/detainer-policy (referring to situations in which local officials "detain[ ] an alien while an ICE immigration officer responds to the scene").

removal proceedings are "pending." Appellees City of San Antonio et al. Opp. to Motion to Stay, Ex. A. Even more significantly, as an alternative to checking *any* of the four boxes, an ICE agent may indicate simply that DHS intends to assume custody of the detainee to "make an admissibility determination." *Id.* If ICE has yet to determine whether the subject of a detainer request is admissible, then it plainly has not established probable cause that that person is removable. In multiple ways, therefore, detainer requests may and do issue without any finding of probable cause of removability. In these situations, there is simply no "collective knowledge" to pass on to the local officials—who are nevertheless bound by Article 2.251 to seize the subjects of those requests.

Second, even if Article 2.251 could be limited to situations in which a detainer request is supported by a federal agent's statement that probable cause of removability exists—and it cannot—the collective knowledge doctrine could not bridge the gap between the particularized finding required under the Fourth Amendment and the categorical determination effected by SB 4. Collective knowledge is not a limitless principle; the doctrine provides only that "it is not necessary for the

arresting officer to know *all* of the facts amounting to probable cause, as long as there is some degree of communication between the arresting officer and an officer who has knowledge of all the necessary facts." *United States v. Ibarra*, 493 F.3d 526, 530 (5th Cir. 2007) (emphasis added). As Texas's own authorities show, the doctrine simply allows arresting officers, on a case-by-case basis, to aggregate information communicated to them by other officers with their own observations. *Id.* (arresting officer detains trucker based on information provided by DEA agent as well as officer's own observation of "numerous indicators . . . that led him to believe that [defendant was] involved in some type of illegal activity"); *United States v. Hernandez*, 477 F.3d 210, 212, 214-15 (5th Cir. 2007) (challenged stop justified not only by tip relayed over police radio but also by observed facts related to the area in which suspected criminal activity occurred). The same is true of the single decision Texas cites from the immigration detainer context. In *Mendoza*, a case decided on qualified immunity grounds, local officers did not rely solely on ICE's request that they detain a subject (who turned out to be a United States citizen) but also performed their own

examination (however faulty) of conflicting information provided by the detainee. 849 F.3d at 418-19.[23]

The collective knowledge doctrine thus *permits* officers to rely on information provided by others, such that they need not have personal knowledge of *all* relevant facts. Article 2.251 operates altogether differently. It *mandates* that local officers accept the conclusions reached by ICE about removability, and it requires them to do so without regard to the relevant facts.[24] The sole exception is provided by Article 2.251(b), which relieves local officers of their obligation to fulfill detainer requests if a person is able to offer "proof" of citizenship or

[23] The Supreme Court has accepted a variant of the collective knowledge doctrine only in the context of *Terry* stops, and solely in light of the minimal intrusion that occurs during such stops. *United States v. Hensley*, 469 U.S. 221, 231 (1985) (officers may rely on police bulletins in making traffic stops because "the intrusion of personal security is minimal"); *United States v. Ibarra-Sanchez*, 199 F.3d 753, 759-60 (5th Cir. 1999) (applying *Hensley* to traffic stop).

[24] The US argues that SB 4 is not in fact mandatory because it requires only that local officers "honor" detainer requests, which they might do in a number of ways. US Br. at 21. This is belied by the plain language of the statute, which requires that local officers not only "honor" but also "comply with" and "fulfill" detainer requests—which can only mean that they take the requested action of detaining the subject for 48 hours after his or her scheduled release. The US further argues that SB 4's mandatory compliance regime "does not demand blind action" because "[p]art of [ICE] policy is to seek local law enforcement insight—which would include information negating probable cause." Id. But the US cites no evidence supporting this characterization of ICE's "policy"—and even if it could do so, this would not save Article 2.251, which is not limited to situations in which ICE is following any particular policy. Article 2.251 mandates compliance whenever a local officer receives any detainer request at all, regardless of the policy behind it.

"lawful immigration status." But that carve-out scarcely cures the Fourth Amendment violation. It reverses the applicable burdens, improperly placing the onus on detainees to *disprove* that they are subject to seizure. And as the District Court noted, the determination of "immigration status" under subsection (b) must be "made by local officials, who are generally not trained in the complex field of immigration status determinations, and who, if they are mistaken, face the risks of financial penalties, removal from office, and criminal prosecution . . . ." ROA.4194. Moreover, by placing local officers in the position of making such status determinations, subsection (b) runs directly into the exclusively federal territory marked out by this Court in *Farmers Branch*. *Supra* at 41-42.

Article 2.251 ultimately suffers from two fundamental infirmities. First, as discussed above, it impermissibly mandates seizures on the basis of civil infractions. Second, it categorically substitutes detainer requests—whether or not supported by probable cause—for an arresting officer's individual obligation to ensure that a seizure is based on probable cause. *See Evett v. DETNTFF*, 330 F.3d 681, 688 (5th Cir. 2003). The collective knowledge doctrine cannot cure the second

problem, any more than the unsupported formulation that local officers may do anything federal officers may do can cure the first. The Court should affirm the District Court's holding that Plaintiffs have demonstrated a likelihood of success on their Fourth Amendment claim and should uphold the injunction against enforcement of Article 2.251(a) and the related penalty provisions in Section 39.07.

II. The District Court Did Not Clearly Err by Finding a Substantial Threat of Irreparable Injury to Plaintiffs Absent an Injunction.

Texas does not and cannot dispute that a violation of constitutional rights, even for a minimal period of time, constitutes irreparable harm as a matter of law. *See Deerfield Med. Ctr. v. City of Deerfield Beach*, 661 F.2d 328, 338 (5th Cir. Unit B Nov. 1981) (citing *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). ROA.4206. The likelihood of irreparable injury is also implied where state law—and state immigration law in particular—is likely preempted. *See Tex. Midstream Gas Servs., LLC v. City of Grand Prairie*, 608 F.3d 200, 206 (5th Cir. 2010) (likelihood of preemption established harm); *United States v. South Carolina*, 720 F.3d 518, 533 (4th Cir. 2013) (plaintiffs established irreparable injury where "the likelihood of chaos resulting

from South Carolina enforcing its separate immigration regime is apparent"); *Ga. Latino All. for Human Rights v. Governor of Ga.*, 691 F.3d 1250, 1269 (11th Cir. 2012) ("Plaintiffs are under the threat of state prosecution for crimes that conflict with federal law, and we think enforcement of a state law at odds with the federal immigration scheme is neither benign nor equitable.").

Beyond implied harm, the District Court found, on the basis of copious evidence, that Plaintiffs, their officials and their constituents would face "a long list" of imminent and concrete harms if the unconstitutional provisions of SB 4 were enforced. ROA.4207.[25] These harms include:

- Harm to a broad range of local officials facing civil penalties up to $25,500 per offense and removal from office for continuing or even expressing support for practices that differ from SB 4, *id.*;
- Harm to local jail officials facing criminal prosecution and jail time of their own if they do not comply with all ICE detainer requests, *id.*;
- Harm facing Plaintiffs if police forces are unable to craft policies that protect public safety by ensuring communication with all members of the community, ROA.4208.[26]

[25] Texas suggests that Plaintiffs do not face harm because they have not been prosecuted for disregarding SB 4. *See* Texas Br. 48. Harm is not so limited; it includes threats of prosecution. *See*, *e.g.*, *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2342 (2014); *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 380-381 (1992).

[26] Texas asserts that negative impact on resource allocation is not a cognizable harm because local jurisdictions have power to allocate resources only as creatures

Texas did not dispute the evidence of these harms in the District Court, and does not challenge the District Court's detailed findings of harm on appeal.

III. The District Court Did Not Clearly Err by Finding the Balance of Harms to Be in Plaintiffs' Favors and an Injunction to Be in the Public Interest

Against the record of Plaintiffs' harms, Texas identifies only a generalized injury flowing from the fact that its statute is enjoined. Texas Br. 49–50 (citing *Maryland v. King*, 567 U.S 1301, 1301 (2012) (Roberts, C.J., in chambers)). But per se injury from an enjoined statute plainly does not resolve the balance of harms analysis. That injury was not dispositive in *Maryland v. King*, where Chief Justice Roberts weighed it together with additional equities asserted by both sides. No order enjoining the enforcement of a law could ever issue if per se harm was sufficient, and that is clearly not the case. Governmental edicts are routinely enjoined during the pendency of litigation. *See, e.g.*, *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct.

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of Texas, consistent with State directives. Texas Br. 48. However, in this circuit, political subdivisions can sue their parent state in federal court challenging directives as violative of the Supremacy Clause. *See Donelon v. La. Div. of Admin. Law ex rel. Wise*, 522 F.3d 564, 567 (5th Cir. 2008) (citing *Rogers v. Brockette*, 588 F.2d 1057 (5th Cir.1979)).

2080, 2087–88 (2017); *Whole Woman's Health v. Lakey*, 135 S. Ct. 399 (2014); *Texas v. United States*, 787 F.3d 733, 768 (5th Cir. 2015). And the per se harm Texas invokes cuts both ways in this case; under the same rationale, Plaintiff jurisdictions themselves suffer a generalized irreparable harm when their duly enacted policies are restrained—as they are with SB 4.[27]

Beyond its abstract assertion of injury, Texas identifies no concrete harms.[28] *Compare Maryland*, 567 U.S. at 1301. For this reason, Texas is in the same position here as it was in *Texans for Free Enterprise v. Texas Ethics Commission*, 732 F.3d 535 (5th Cir. 2013); there too, it asserted only abstract harms. *Id.* at 539. And there, this Court upheld a preliminary injunction, concluding that Texas's unarticulated injury was outweighed by the harm the plaintiff would suffer if—as here—giving effect to the challenged law would curtail plaintiff's First Amendment freedoms. *Id.*

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[27] *See* ROA.576–08, ROA.2300–2302. ROA.2306–13.

[28] The closest Texas comes is the assertion that "[t]he disputed SB 4 provisions will determine, among other things, whether aliens in the criminal-justice system are held for federal immigration custody or released onto the streets where they can do concrete harm." Br. 50. Texas cites no authority suggesting that the seizure and detention of persons otherwise entitled to be free on bond constitutes a cognizable harm.

Texas does not contest the District Court's factual findings as to Texas's purported harms. Among other things, Texas does not challenge the finding that the status quo—that is, existing local cooperation under the rubric of federal law—will remain unaffected by the injunction of SB 4. ROA.4210. Particularly in light of this undisputed finding, the District Court correctly determined that Texas's purported harms are outweighed by the concrete harms to public safety, personal liberty, and loss of constitutional rights—including First Amendment rights—that will follow enforcement of SB 4. *See*, *e.g.*, *Texans for Free Enter.*, 732 F.3d at 539.

The District Court also correctly determined that an injunction will not disserve the public interest. ROA.4211. As with Plaintiffs' harms, Texas does not challenge the District Court's detailed factual findings that numerous specific and concrete harms would flow from the enforcement of SB 4; nor does it challenge the District Court's conclusion that "there is overwhelming evidence by local officials, including local law enforcement, that SB 4 will erode public trust and make communities and neighborhoods less safe." ROA.4211. This "overwhelming" showing included, among other things:

- Evidence that crime victims will be reluctant to come forward to assist local officials in apprehending and convicting the perpetrators;[29]
- Evidence that undocumented students will be targeted;[30]
- Evidence that undocumented residents and their US-citizen relatives will be reluctant to send their children to school,[31] attend church,[32] report housing problems,[33] and seek health care;[34] and
- Evidence that local jurisdictions will face severe economic consequences from the implementation of SB 4.[35]

ROA.4208-09.

Unable to refute this record, Texas argues that its own interest and harm simply "merge with that of the public." Texas Br. 50 (citing authorities). But this argument depends on Texas's likelihood of success on the merits: The harm a state or the public suffers depends on whether the state's actions are constitutional. As this Court has repeatedly recognized, the public has no interest in the enforcement of unconstitutional laws. *E.g.*, *Texans for Free Enter.*, 732 F.3d at 539 ("injunctions protecting First Amendment freedoms are always in the

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[29] *See* ROA.446, ROA.1251–52, ROA.1256–60, ROA.1285–86, ROA.2358–59, ROA.2449–50, ROA.4260–61, ROA.4333, ROA.4517.

[30] *See* ROA.1100, ROA.1237–38, ROA.1243–44, ROA.2336–39.

[31] *See* ROA.1275, ROA.1277–78, ROA.2358, ROA. 3003–10, ROA.4431, ROA.4517.

[32] *See* ROA.1293–94.

[33] *See* ROA.1266–68.

[34] *See* ROA.1247–49, ROA.2995–3003, ROA.3026–27, ROA.3029–30, ROA.4429.

[35] *See* ROA.1707–11, ROA.1724, ROA.2416–18, ROA.2837–49.

public interest."); *Tex. Midstream Gas Servs.*, 608 F.3d at 206 (likelihood of preemption established harm); *Ingebretsen on Behalf of Ingebretsen v. Jackson Pub. Sch. Dist.*, 88 F.3d 274, 280 (5th Cir. 1996) (public is not disserved by injunction prohibiting unconstitutional law). The Supreme Court also has recognized that unlawful government action is contrary to the public interest. *Nken v. Holder,* 556 U.S. 418, 436 (2009) ("Of course there is a public interest in preventing aliens from being wrongfully removed."). Accordingly, unless Texas had shown that it was likely to succeed on the merits, the public interest favors enjoining SB 4, not enforcing it. The District Court correctly analyzed the issue, explaining that "[t]he best interests of the public will be served by preserving the *status quo* and enjoining . . . the implementation and enforcement of those portions of SB 4 that, on their face, are preempted by federal law and violate the United States Constitution." ROA.4211.

CONCLUSION

For the reasons stated above, the Court should affirm the District Court's ruling enjoining enforcement of the specified provisions of SB 4 and should reverse the District Court's ruling to enjoin enforcement of

the additional provisions contained in Sections 752.053(a)(1) and (2), 752.053(b)(1) and (2), the related penalty provisions, and the detainer request provision and related penalty provisions.

DATED: October 16, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on October 16, 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 on all counsel of record via ECF on all registered counsel and via email on the following counsel:

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/s/ Nina Perales
Nina Perales

CERTIFICATE OF COMPLIANCE

I certify that this document complies with the type-volume limitation of Rule 28.1(e) because it contains no more than 15,300 words. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Century Schoolbook font.

I further certify that, in accordance with Fifth Circuit Rule 25.2 and the Court's ECF Filing Standards: (1) any required privacy redactions have been made; (2) the electronic submission is an exact copy of the paper document; and (3) the document has been scanned with the most recent version of a commercial virus scanning program and is free of viruses.

/s/ Nina Perales
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United States Court of Appeals

FIFTH CIRCUIT
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October 16, 2017

Ms. Nina Perales
Mexican-American Legal Defense & Educational Fund
110 Broadway Street
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No. 17-50762 City of El Cenizo, Texas, et al v. State of Texas, et al
USDC No. 5:17-CV-404
USDC No. 5:17-CV-459
USDC No. 5:17-CV-489

Dear Ms. Perales,

The following pertains to your brief electronically filed on October 13, 2017.

We filed your brief. However, you must make the following corrections by tomorrow, October 17, 2017.

Opposing counsel's briefing time continues to run.

You need to correct or add:

Caption on the brief does not agree with the caption of the case in compliance with FED R. APP. P. 32(a)(2)(C). Caption must exactly match the Court's Official Caption (See Official Caption below)

Statement of the issues presented for review must be double spaced, see FED R. APP. P. 32(a)(4).

The brief content is out of order and must be rearranged. Specifically, the certificate of compliance must be moved to appear after the certificate of service, see 5TH CIR. R. 28.3.

Note: Once you have prepared your sufficient brief, you must electronically file your 'Proposed Sufficient Brief' by selecting from the Briefs category the event, Proposed Sufficient Brief, via the electronic filing system. Please do not send paper copies of the brief until requested to do so by the clerk's office. The brief is not sufficient until final review by the clerk's office. If the brief is in compliance, paper copies will be requested and you will receive a notice of docket activity advising you that the sufficient brief filing has been accepted and no further

corrections are necessary. The certificate of service/proof of service on your proposed sufficient brief **MUST** be dated on the actual date that service is being made. Also, if your brief is sealed, this event automatically seals/restricts any attached documents, therefore you may still use this event to submit a sufficient brief.

Sincerely,

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Mr. David Benjamin Thomas
Ms. Sherine Elizabeth Thomas
Mr. Luis Roberto Vera Jr.
Ms. Robin Eve Wechkin
Mr. Eric A. White
Mr. Richard Paul Yetter

Case No. 17-50762

CITY OF EL CENIZO, TEXAS; RAUL L. REYES, Mayor, City of El Cenizo; TOM SCHMERBER, County Sheriff; MARIO A. HERNANDEZ, Maverick County Constable Pct. 3-1; LEAGUE OF UNITED LATIN AMERICAN CITIZENS; MAVERICK COUNTY; CITY OF EL PASO; JO ANNE BERNAL, County Attorney of El Paso County, in her Official Capacity,

Plaintiffs - Appellees Cross-Appellants

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

Intervenors - Plaintiffs - Appellees Cross-Appellants

v.

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

Defendants - Appellants Cross-Appellees

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

Plaintiffs - Appellees Cross-Appellants

v.

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

Defendants - Appellants Cross-Appellees

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

Plaintiffs - Appellees Cross-Appellants

CITY OF AUSTIN,

Intervenor Plaintiff - Appellees Cross-Appellants

v.

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

Defendants - Appellants Cross-Appellees

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

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NEW ORLEANS, LA 70130

October 17, 2017

Ms. Nina Perales
Mexican-American Legal Defense & Educational Fund
110 Broadway Street
San Antonio, TX 78205

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

Dear Ms. Perales,

We have reviewed your electronically filed cross appellant's brief and it is now sufficient.

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

The paper copies of your brief/record excerpts must **not** contain a header noting "RESTRICTED". Therefore, please be sure that you print your paper copies **from this notice of docket activity** and not the proposed sufficient brief/record excerpts filed event so that it will contain the proper filing header. Alternatively, you may print the sufficient brief/record excerpts directly from your original file without any header.

Sincerely,

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