No. 17-50762

In the United States Court of Appeals for the Fifth Circuit

CITY OF EL CENIZO, TEXAS; RAUL L. REYES; TOM SCHMERBER; MARIO A. HERNANDEZ; LEAGUE OF UNITED LATIN AMERICAN CITIZENS; MAVERICK COUNTY; CITY OF EL PASO; EL PASO COUNTY; RICHARD WILES; TEXAS ORGANIZING PROJECT EDUCATION FUND; CITY OF SAN ANTONIO; REY A. SALDANA; TEXAS ASSOCIATION OF CHICANOS IN HIGHER EDUCATION; LA UNION DEL PUEBLO ENTERO, INC.; WORKERS DEFENSE PROJECT; BEXAR COUNTY, TEXAS; MOVE SAN ANTONIO,

Plaintiffs-Appellees,

CITY OF AUSTIN; JUDGE SARAH ECKHARDT; SHERIFF SALLY HERNANDEZ; TRAVIS COUNTY; CITY OF DALLAS, TEXAS; TEXAS ASSOCIATION OF HISPANIC COUNTY JUDGES AND COUNTY COMMISSIONERS; AND CITY OF HOUSTON,

Intervenor Plaintiffs-Appellees,

v.

STATE OF TEXAS; GREG ABBOTT; KEN PAXTON; STEVE MCCRAW,

Defendants-Appellants.

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

BRIEF OF APPELLEES CITY OF SAN ANTONIO, TEXAS, 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, AND THE TEXAS ORGANIZING PROJECT EDUCATION FUND IN OPPOSITION TO APPELLANT'S EMERGENCY MOTION TO STAY PRELIMINARY INJUNCTION PENDING APPEAL

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(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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INTRODUCTION

The State of Texas argues that it is entitled to a stay to forestall the "emergency" that would result if SB 4 is not made effective immediately. Relying on two-year-old headlines from a different jurisdiction, the State claims that it will suffer irreparable harm if the enforcement of highly controversial legislation is delayed for even a matter of weeks. Setting aside the State's scare tactics, there is no support for the claim that an emergency of any sort is involved here. The State cites no evidence showing that it faces a danger of irreparable harm, and the imagined harms it conjures stem from a misreading of the District Court's order.

Meanwhile, in the proceedings below, the State *conceded* that enforcement of an unconstitutional statute constitutes irreparable harm. The State neither explains away that concession nor attempts to reckon with the District Court's detailed findings that Plaintiffs face harm in the form of steep fines, removal from office and jail time, while the public is threatened with innumerable injuries to its most vulnerable members, as well as the risk of disorder that would follow if local police are unable to ensure that all members of local communities may participate in public safety efforts.

The State has not shown that it is likely to succeed on the merits either. In an exceptionally thorough decision, the District Court

concluded that certain provisions of SB 4 are likely preempted, while others are likely to fail on First Amendment, Fourth Amendment or due process grounds. In each instance, the District Court drew its injunction narrowly, and in each instance its conclusions are solidly grounded in controlling law. The Court should deny the State's motion.

ARGUMENT

I. There Is No "Emergency" And The Applicable Factors Weigh Heavily Against Granting A Stay.

A stay is an "extraordinary remedy." *Belcher v. Birmingham Tr. Nat'l Bank*, 395 F.2d 685, 685 (5th Cir. 1968). A court considers four factors in deciding whether to grant a stay pending appeal:

> (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Nken v. Holder, 556 U.S. 418, 434 (2009). The moving party carries the burden of satisfying these factors. Significantly, "the conditions that are necessary for issuance of a stay are not necessarily sufficient. Even when they all exist, sound equitable discretion will deny the stay when a decided balance of convenience does not support it." *Barnes v. E–Systems, Inc. Grp. Hosp. Med. & Surgical Ins. Plan*, 501 U.S. 1301, 1305 (1991) (Scalia, J., in chambers).

Purported harm to the State. In this case, the balance tilts decisively against a stay. It is the State that seeks to alter the status quo during the pendency of this appeal: SB 4 has never been in effect. Given this, the State is left to argue that "States necessarily suffer irreparable harm when their public-safety statutes are enjoined." Mot. at 19–20 (citing *Maryland v. King*, 567 U.S. 1301, 1301 (2012) (Roberts, C.J., in chambers)). But this observation plainly does not resolve the balance of harms analysis. If it did, then no order enjoining the enforcement of a law could ever issue – and if any injunction were to be entered, it would always be stayed on appeal. This is not the law. Governmental edicts are routinely enjoined during the pendency of litigation, despite requests for stays. *E.g.*, *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 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).

The State also claims that SB 4 must be given effect immediately because the District Court's order would interfere with voluntary compliance programs and cooperation efforts that "have existed throughout the Nation since at least the 1940s." Mot. at 2. This is incorrect. The District Court did not enjoin any voluntary cooperation between localities and federal immigration officials.

This is plainly the case with respect to the District Court's ruling on SB 4's ICE detainer provisions. The Court enjoined, until a hearing

on the merits, enforcement of the provision that makes compliance with detainer requests *mandatory*, together with the accompanying criminal penalty provision. Order at 4; SB 4 §§ 2.251(a)(1) & 39.07. The injunction does not affect any current *voluntary* cooperation between local jurisdictions and the federal government. Indeed, as the State recognizes, local jurisdictions "were already complying with [ICE detainers] . . . based on the federal government's [request]" prior to the enactment of SB 4. Mot. at 1. The District Court's injunction does not change this landscape.[1]

Similarly, the District Court's order permits local jurisdictions to continue to set policy on and supervise their individual officers' cooperation with federal immigration officials. The District Court took pains to explain that local cooperation with federal enforcement efforts, through formal agreement with the Attorney General or otherwise, remains unchanged, as do local practices of voluntary compliance with ICE detainer requests. *E.g.*, Order at 28-30, 78-80, 91.[2]

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[1] This disposes of the State's submission of the declaration of the Tarrant County Sheriff, who expresses concern about whether officials will continue to have the ability to comply with ICE detainers "on a voluntary basis." Ex. 42 ¶ 3. The order does not alter that ability. The Sheriff also states that a formal agreement between his office and ICE under a Section 287(g) contract may be in jeopardy. *Id.* ¶ 5. This too is unfounded. Order at 91 ("Local cooperation, under the rubric of federal law, will not change").

[2] There is accordingly no basis for the concern expressed by the Director of the Texas Department of Public Safety (DPS) that cooperation with

The terms of the District Court's injunction pertain to the enforcement of SB 4 and SB 4 only. Order at 93-94. The legal landscape today is the same as the landscape on August 29, 2017, the day before the District Court issued its order – save for the fact that those provisions of SB 4 whose enforcement was *not* enjoined are now in effect. Neither the State's misreading of the terms of the injunction nor its sky-is-falling rhetoric can manufacture harms.

Harm to Plaintiffs and the public. On the other side of the ledger, the record could not be clearer that Plaintiffs are at risk of irreparable harm. Indeed, it is not difficult to see why the State conceded harm below. As the District Court stated, "federal courts at all levels have recognized that a violation of constitutional rights constitutes irreparable harm as a matter of law and no further showing of irreparable injury is necessary." Order at 88 (citing authorities); *see also, e.g.*, *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)).

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federal immigration officials will be prohibited. *See* Mot. Ex. 41 ¶¶ 2-3. And state actors such as DPS officers are outside the scope of SB 4 in any event. *See* Tex. S.B. 4, 85th Leg., R.S. (2017) ("AN ACT relating to the enforcement *by campus police departments and certain local governmental entities* of state and federal laws governing immigration . . . .") (emphasis added).

Beyond this general 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. Order at 88. These include:

- Harm to a broad range of local officials faced with 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 faced with criminal prosecution and jail time of their own if they do not comply with all ICE detainer requests, *id.*;
- Harm faced by Plaintiffs if police forces are unable to craft policies that protect public safety by ensuring communication with all members of the community, *id.* at 89.

The risk – indeed, the certainty – of harm to the public from enforcement of the challenged provisions is equally clear. The public has no interest in the implementation of an unconstitutional law. *See Ingebretsen on Behalf of Ingebretsen v. Jackson Pub. Sch. Dist.*, 88 F.3d 274, 280 (5th Cir. 1996); *cf. Nken*, 556 U.S. at 436 ("there is a public interest in preventing aliens from being wrongfully removed"). Beyond this general principle, the District Court again found numerous specific and concrete harms, concluding 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." Order at 92. 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, *id.* at 89-90;
- Evidence that undocumented students will be targeted, *id.* at 89;
- Evidence that undocumented residents and their US-citizen relatives will be reluctant to send their children to school, attend church, report housing problems, and seek health care, *id.* at 90;
- Evidence that local jurisdictions will face severe economic consequences from the implementation of SB 4, *id.*

The District Court's factual findings on all of these points are entitled to deference. *Oaks of Mid City Resident Council v. Sibelius*, 723 F.3d 581, 585 (5th Cir. 2013). Notably, these findings are directly relevant to the balance of harm analysis required by the State's stay motion. The harms that the District Court found will occur if enforcement of SB 4 is not enjoined are exactly the same as the harms that will occur if a stay is imposed during appeal and SB 4 becomes effective immediately.

The State nevertheless blithely opines that "a stay pending appeal creates no meaningful possibility of injury to plaintiffs." Mot. at 20. But the State does not even attempt to refute the District Court's findings of harm. Nor does the State try to explain away its own previous concession of irreparable harm to Plaintiffs. Order at 87. The State's conclusory and self-contradictory assurance that Plaintiffs and the public face no harm cannot be credited.

II. The State Is Not Likely To Succeed On The Merits

The State is unlikely to succeed on the merits for all of the reasons set forth in the District Court's exceptionally detailed and thorough

decision. The District Court reviewed hundreds of pages of briefing and considered and heard extensive argument and evidence during a day-long hearing. In its 94-page decision, the District Court meticulously analyzed the parties' complex constitutional arguments and made detailed factual findings. It is difficult to see, given the District Court's careful attention and thorough analysis, why the State is "likely" to succeed where it has failed before.

We discuss below the District Court's holdings on field preemption and on the First and Fourth Amendments. We join and incorporate by reference the El Cenizo Plaintiffs' brief with respect to all other issues.

A. SB 4's Enforcement Assistance Provision Is Preempted

Under the Supremacy Clause, 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 – which is at issue here – encompasses field and conflict preemption, which are independent bases on which state legislation may be preempted. In this case, the District Court concluded that Plaintiffs are likely to succeed in showing that SB 4's enforcement assistance provision is preempted on both field and conflict grounds.

The provision at issue – Section 752.053(b)(3) – bars local entities from prohibiting or "materially limiting" their employees' actions in

"assisting or cooperating with a federal immigration officer as reasonable or necessary, including providing enforcement assistance." The effect of this provision is to strip local police chiefs and sheriffs of the ability to supervise their individual officers in deciding whether, when and how to assist federal immigration agents in their enforcement efforts.

The District Court concluded that this provision is likely preempted because federal law fully regulates local cooperation with federal immigration enforcement. Order at 26. As the District Court properly noted, "when Congress intends federal law to 'occupy the field,' state law in that area is preempted." Order at 6 (citations omitted). The District Court further explained that "field preemption can be inferred from 'pervasive' federal regulation or a federal interest . . . so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." *Id.* at 7 (citing *Arizona*, 567 U.S. at 399).

Reviewing the relevant sections of the Immigration and Naturalization Act (INA), including the detailed provisions governing state and local cooperation with federal enforcement efforts in 8 U.S.C. Section 1357(g), the District Court concluded that the "exacting" federal requirements for local involvement in federal immigration enforcement "indicate [that] Congress intended for the Federal Government – the Attorney General in particular – to provide oversight and direction to

local officers." Order at 25. After considering the INA "as a whole and identifying its purpose and intended effects," the District Court found that, with respect to SB 4's enforcement assistance provision, "the federal interest in the field of immigration enforcement is so dominant that it may preclude enforcement of state laws on this subject and Tex. Gov't Code § 752.053(b)(3) is likely to be field preempted." Order at 26.

The State does not confront this ruling on its terms. Instead, the State confuses the analysis by attacking the District Court's "field and conflict" preemption holdings together, without distinguishing between them. Mot. at 9, 11. But the doctrines of field and conflict preemption are distinct, as are the District Court's two holdings, Order at 24-27 – and each is correct on its own terms.

With respect to field preemption, the State cannot (and does not) deny that the federal government has a dominant interest in regulating local participation in federal immigration enforcement. Indeed, the United States explicitly made this point in the briefing below, arguing that the INA includes a "comprehensive" scheme for "state and local cooperation in enforcement of the INA." Dkt. No. 90 at 2-11, 16-24.

The United States was correct. 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. *See, e.g.,* 8 U.S.C. § 1357(g) (providing for state and local authority to enforce immigration law

pursuant to a written agreement, federal training and federal supervision); 8 U.S.C. § 1252(c) (providing for state and local authority to enforce criminal illegal reentry provisions with prior status confirmation from INS); 8 U.S.C. § 1324(c) (providing state and local authority to enforce federal alien harboring provisions); 8 U.S.C. § 1103(a)(10) (providing state and local authority to enforce immigration laws during a mass influx); *see also Arizona*, 567 U.S. at 401 (concluding based on this framework that provision of Arizona immigration law was field preempted).

The State relies on the narrow savings clause in subsection 1357(g)(10)(B) to argue that this detailed framework can be set aside in addressing the question of whether states are permitted to legislate in this field. *See* Mot. at 9-11. This is not tenable. The savings clause does not trump the rest of the INA. As the District Court properly found, "Congress sought to ensure that the Attorney General and the Federal Government retained enforcement direction and discretion in all local enforcement efforts" – and this specifically includes those efforts "contemplated under subsection (g)(10)." Order at 25.

The State cannot avoid this result with the assertion that SB 4's enforcement assistance provision merely "seek[s] to enforce" or "trace" subsection (10)(B). Mot. at 11 (citing *Chamber of Commerce v. Whiting*, 563 U.S. 582, 602, 607 (2011)). Even if this were correct, it would only prove that the provision is preempted. The Supreme Court has stated

unambiguously that even "complementary" state laws that are "parallel to federal standards" are preempted if the federal government occupies the relevant field. *Arizona*, 567 U.S. at 401. *Whiting*, on which the State relies, is not contrary. *Whiting* is not a field preemption case at all. The regulation there, moreover, was specifically covered by a savings clause related to in-state business licensing – a subject that the Supreme Court expressly stated had "never been considered [] an area of dominant federal concern." *Whiting*, 563 U.S. at 604. Local collaboration in immigration enforcement, by contrast, is a central concern of the INA, and there is no language in the INA authorizing individual local officers to decide whether, when and how to provide federal enforcement assistance. *Whiting* cannot save SB 4's enforcement assistance provisions from field preemption.

B. SB 4's ICE Detainer Provision Violates The Fourth Amendment

The District Court held that Plaintiffs are likely to succeed with their Fourth Amendment challenge to SB 4's detainer provision, which mandates compliance with all ICE detainer requests, regardless of a local officer's own conclusions as to whether he or she has probable cause for a seizure. SB 4 § 2.251(a)(1); Order at 61-81. Each of the State's attacks on the District Court's ruling is fatally flawed.

1. ***Fourth Amendment application to non-citizens.*** The State cannot and does not dispute that when local officials act on a

detainer request, they perpetrate a new seizure for Fourth Amendment purposes. *Morales v. Chadbourne*, 793 F.3d 208, 217 n.3 (1st Cir. 2015). Instead, the State argues that non-citizens simply have no Fourth Amendment rights at all. Mot. at 4. This is wrong. This Court has "explicitly held . . . that the Fourth Amendment applies to aliens." *Martinez-Aguero v. Gonzalez*, 459 F.3d 618, 624 (5th Cir. 2006). Any person with a substantial connection to the United States enjoys the protection of the Fourth Amendment while in this country, *id.*, and this encompasses the vast majority of immigrants who live and work in the United States, whether undocumented or not.[3]

2. ***The relationship between Fourth Amendment and preemption analyses.*** The State's leading argument is that the District Court made a "doctrinal move [that] is unprecedented" when it considered local officials' authority to detain potentially removable persons as part of the Fourth Amendment analysis. Mot. at 5-7.

[3] The State's authorities do not hold otherwise. 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." This is the *opposite* of the proposition for which the State cites the decision. *United States v. Portillo-Munoz*, 643 F.3d 437 (5th Cir. 2011), was a Second Amendment decision, and the Court's passing dictum concerning the scope of the Fourth Amendment does not displace the explicit pronouncements of *Martinez-Aguero* and *Castro*.

According to the State, the question of authority to detain in this context relates solely to preemption, while the question of whether a seizure is constitutional under the Fourth Amendment is determined solely by reference to reasonableness. The State argues that it is error to consider the two issues together.

No authority the State cites supports the proposition that reasonableness under a Fourth Amendment analysis can be divorced from questions relating to the detaining officer's authority. Beyond this, the State's argument is plainly refuted by *Arizona*, where the Supreme Court recognized that matters concerning a local officer's authority to detain persons for immigration violations – which are governed by the Supremacy Clause – are intertwined with issues concerning the detainee's Fourth Amendment rights. The *Arizona* Court thus explained that if "*state officers* [are] required to delay the release of some detainees for no reason other than to verify their immigration status," this "raise[s] constitutional issues" – specifically, Fourth Amendment issues. 567 U.S. at 413 (citing authorities related to unlawful seizures; emphasis added). The Supreme Court's reasoning, by its own terms, applied only to state or local officers; the Court did not suggest that duly authorized *federal* officers need any "other reason" for detaining a person beyond probable cause of removability. But when *local* officers are responsible for such a detention, the Supreme Court

explained, Fourth Amendment concerns are implicated. *Id.* A Fourth Amendment violation can thus occur when potentially removable persons are detained by local officers *precisely because* local officers do not have the same authority as federal officers.

3. ***Criminal probable cause v. probable cause of removability.*** The State next argues that the District Court erred in holding that local officials may "detain individuals only for *crimes*." Mot. at 8 (emphasis in original). But this holding too flows directly from *Arizona*. After noting that unauthorized presence in this country is generally not a crime, the Supreme Court concluded that when a local officer stops or detains a person based on suspicion of removability, "the usual predicate for arrest is absent." 567 U.S. at 407. Local officers who make warrantless seizures based solely on probable cause of removability thus violate the Fourth Amendment. *Santos v. Frederick Cty. Bd. of Comm'rs*, 725 F.3d 451, 464 (4th Cir. 2013) (applying *Arizona* to affirm finding of Fourth Amendment violation under such circumstances). Given the clarity of this law, district courts within this Circuit have now twice held or otherwise stated that probable cause of removability does not cure the Fourth Amendment violation that occurs when local officials detain individuals in the absence of probable cause of

a crime. *Mercado v. Dallas Cty.*, 229 F. Supp. 3d 501, 510-15 (N.D. Tex. 2017); *Santoyo v. United States*, 2017 WL 2896021 (W.D. Tex. June 5, 2017).

Against this background, the District Court properly concluded that Plaintiffs are likely to succeed with their claim that SB 4's detainer provisions are inconsistent with the Fourth Amendment. Those provisions improperly *mandate* that state officials seize individuals on the basis of a federal form stating only that probable cause of removability exists. The State cites no decision holding that local officials may constitutionally detain an individual on probable cause of removability – much less that local officials must cede to third parties their duty to make a probable cause determination.

4. "***Collective knowledge.***" The constitutional infirmity of SB 4 is not cured by the principle of "collective knowledge," pursuant to which the State suggests that "ICE's particularized determination of probable cause" may be imputed to local officials. Mot. at 8. The State cites no authority applying the collective knowledge doctrine to the immigration context, and it is not difficult to see why. That doctrine applies only where 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). But

an ICE detainer request does not relay *facts* about removability, much less facts about which the requesting officer purports to have personal knowledge. Form I-247, on which the State relies, contains only a *conclusion* about removability. Ex. A. In all events, the I-247 Form is a one-way street; it does not reflect the kind of two-sided exchange normally signified by the term "communication."[4]

Beyond this, while the collective knowledge doctrine may in certain circumstances permit the pooling of personal factual knowledge among officers, it does not permit the detaining officer to simply abdicate Fourth Amendment responsibilities. *See Evett v. DETNTFF*, 330 F.3d 681, 688 (5th Cir. 2003) (officers "may not disregard facts tending to dissipate probable cause"). But this is exactly the mechanism of SB 4. Under SB 4, local officers have no ability at all to assess *criminal* probable cause, which appears to be simply left out of the equation. As to probable cause of *removability*, local officials are permitted to decline detainer requests only if a detainee provides "a

[4] The State cites *Santos* for the purported proposition that "state detentions for civil immigration violations are lawful when at 'direction or authorization by federal officials.'" Mot. at 8 (citing *Santos*, 725 F.3d at 466). But *Santos* contains no such holding; the situation in *Santos* did not involve any such "direction or authorization." In any event, *Santos* held that the existence of a civil ICE warrant did *not* provide state officers with probable cause to detain a removable individual. 725 F.3d at 465.

Texas driver's license or similar government-issued identification" showing that he or she is a citizen or has "lawful immigration status." SB 4 § 39.07(c). But that simply opens up new difficulties. Local officials have no training to determine "lawful immigration status," and, indeed, are prohibited from doing so under the Supremacy Clause. *Villas at Parkside Partners v. City of Farmers Branch*, 726 F.3d 524, 531-34 (5th Cir. 2013) (en banc) (law preempted where local actors would need to determine whether non-citizens are "lawfully present") (plurality op.).

5. ***Purported consequences beyond SB 4.*** Finally, the State speculates that the District Court's order may jeopardize contracts between local and federal officials under Section 287(g) of the INA. Mot. at 9. That speculation has no basis in the District Court's order. *Supra* at 3-4. Nor does that ruling reach information-sharing practices, which the State also surmises it may prohibit. Mot. at 9. The order applies only to those provisions of SB 4 that "mandate[]" that law enforcement agencies "effect a seizure simply because it was requested by ICE." Order 75. Information-sharing is not a seizure.

C. SB 4's Endorsement Prohibition Violates The First Amendment

Finally, the State has not shown that it is likely to succeed in its challenge to the District Court's First Amendment holding. In an attack on protected speech, SB 4 makes it unlawful for any officer or employee of a municipality, county or special district to "endorse" a policy that "prohibits or materially limits the enforcement of immigration laws." SB 4 §§ 752.051; 752.053(a)(1).

In holding that Plaintiffs are likely to succeed in their challenge to the "endorsement" clause of Section 752.053(a)(1), the District Court properly concluded that "endorse," as used in the statute, "could mean 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." Order at 41. The State implicitly concedes that if this interpretation is correct, Section 752.053(a)(1) violates the First Amendment. Indeed, no other position is tenable. *See, e.g., Int'l Women's Day March Planning Comm. v. City of San Antonio*, 619 F.3d 346, 359 (5th Cir. 2010) ("viewpoint-based burdens [on speech] are unconstitutional").

1. ***The term "endorse" is not susceptible to the State's revision.*** Given its implicit concession, the State is left to argue that the District Court erred insofar as it declined to accept the State's invitation to construe the term "endorse" to mean "sanction," which in

turn could be understood to mean "ratify[,] confirm, . . . authorize[,] permit[, or] countenance." Mot. at 15.[5] But accepting the State's position would require rewriting, not construing, the statute, and that is impermissible. *United States v. Stevens*, 559 U.S. 460, 481 (2010) (courts "may impose a limiting construction on a statute only if it is readily susceptible to such a construction") (internal quotations omitted); *see also Serafine v. Branaman*, 810 F.3d 354, 369 (5th Cir. 2016) (courts must use caution when considering limiting constructions in overbreadth cases). SB 4 makes it unlawful for local entities to "adopt, enforce, or endorse" certain policies. § 752.053(a)(1). A local entity that "ratifies," "authorizes," or "permits" a policy – the State's interpretation of "endorse" – has also necessarily "adopted" it. Under the State's proposed interpretation, the term "endorse" would thus be rendered surplusage. This too is impermissible. Courts must read statutes to give effect to every word. *E.g., Asadi v. G.E. Energy (USA), L.L.C.*, 720 F.3d 620, 628 (5th Cir. 2013).

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[5] The State erroneously claims that the District Court never considered its argument that "endorse" could be given a narrowing construction. *Id.* This is incorrect. Order at 40 (considering and rejecting State's argument "that 'endorse' could mean 'authorize'").

The State's interpretation of "endorse" is also undermined by other provisions of SB 4 and its legislative history. When the author of SB 4 was questioned about the meaning of "endorse" in a floor debate, he answered that it meant, among other things, to "support" and "identify with." Order at 38. This understanding is reflected in the enacted bill: Section 752.0565(b) provides that "a statement by [a] public officer" – that is, speech itself, without further acts of ratification – constitutes evidence of a Section 752.053 violation.

The State nevertheless seeks to support its interpretation of "endorse" by arguing that SB 4 is concerned only with "local entities' use of their governmental power," and that therefore "endorse" must be limited to official acts of authorization, ratification, or the like. Mot. at 15. This argument too is undermined by the text of the statute. SB 4's endorsement prohibition applies to any "local entity," which is defined to include any "officer or employee" of a municipality, county, or special district. SB 4 § 752.051(5). This includes employees such as janitors, groundskeepers, administrative assistants and parking attendants – certainly not people who undertake official acts of authorization. The broad reach of Section 752.053(a) is incompatible with the State's attempt to limit "endorse" to such acts.

Finally, the State's preferred definition of "endorse" as a synonym of "authorize" or "ratify" would introduce new First Amendment problems of its own. The State argued below that "endorsement," under

its preferred definition, would occur when a superior expresses agreement with a subordinate's suggestion in a meeting. Dkt. No. 172 at 10. But the State identifies no limiting principle that would guide it in deciding when an "expression of agreement" amounts to an "authorization" or "ratification." An "expression of agreement," moreover, might be made not only during a workplace meeting but also during a press conference, at a campaign event, or even potentially in a private setting. At a minimum, enforcement of the "endorse" prohibition – even as the State would define it – will have a substantial chilling effect. In the end, the State seems to be asking the Court to trust it to exercise its discretion to prosecute only when there are no First Amendment concerns. But this cannot be the solution to the constitutional problem plainly posed by SB 4. The law is clear that courts should not "uphold an unconstitutional statute merely because the Government promised to use it responsibly." *Stevens*, 559 U.S. at 480.

2. ***Remedy.*** Alternatively, the State argues that the "district court significantly erred as to remedy" by refusing to sever the word "endorse" from Section 752.053(a)(1). Mot. at 15. This is a straw man. Contrary to the State's assertion, the District Court did not "enjoin[] the entire statutory provision" on First Amendment grounds. *Id.* at 16. The court instead carefully crafted the portion of its injunction resting

on the First Amendment to enjoin only "[t]he *endorsement prohibition* in Tex. Gov't Code § 752.053(a)(1)." Order at 93 (emphasis added). The District Court enjoined the enforcement of other parts of Section 752.053(a)(1) as well, but did so on due process rather than First Amendment grounds. *Id.* at 93-94. The Court did not err as to remedy.

CONCLUSION

The Court should deny the State's motion to stay.

DATED: September 12, 2017

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this document complies with the type-volume limitation of Rule 27(d)(2) because it contains no more than 5,200 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.

/s/ Nina Perales
Nina Perales

CERTIFICATE OF SERVICE

I certify that, on September 12, 2017, a true and correct copy of this brief has been served via the Court's CM/ECF system on all counsel of record.

/s/ Nina Perales
Nina Perales

EXHIBIT A

DEPARTMENT OF HOMELAND SECURITY

IMMIGRATION DETAINER - NOTICE OF ACTION

Subject ID:
Event #:

File No:
Date:

TO: (Name and Title of Institution - OR Any Subsequent Law Enforcement Agency)

FROM: (Department of Homeland Security Office Address)

Name of Alien: ____________________

Date of Birth: __________ Citizenship: __________ Sex: ______

1. DHS HAS DETERMINED THAT PROBABLE CAUSE EXISTS THAT THE SUBJECT IS A REMOVABLE ALIEN. THIS DETERMINATION IS BASED ON *(complete box 1 or 2).*

☐ A final order of removal against the alien;

☐ The pendency of ongoing removal proceedings against the alien;

☐ Biometric confirmation of the alien's identity and a records check of federal databases that affirmatively indicate, by themselves or in addition to other reliable information, that the alien either lacks immigration status or notwithstanding such status is removable under U.S. immigration law; and/or

☐ Statements made by the alien to an immigration officer and/or other reliable evidence that affirmatively indicate the alien either lacks immigration status or notwithstanding such status is removable under U.S. immigration law.

2. DHS TRANSFERRED THE ALIEN TO YOUR CUSTODY FOR A PROCEEDING OR INVESTIGATION *(complete box 1 or 2).*

☐ Upon completion of the proceeding or investigation for which the alien was transferred to your custody, DHS intends to resume custody of the alien to complete processing and/or make an admissibility determination.

IT IS THEREFORE REQUESTED THAT YOU:

- **Notify DHS** as early as practicable (at least 48 hours, if possible) before the alien is released from your custody. Please notify DHS by calling ☐ U.S. Immigration and Customs Enforcement (ICE) or ☐ U.S. Customs and Border Protection (CBP) at ______________. If you cannot reach an official at the number(s) provided, please contact the Law Enforcement Support Center at: (802) 872-6020.
- **Maintain custody** of the alien for a period **NOT TO EXCEED 48 HOURS** beyond the time when he/she would otherwise have been released from your custody to allow DHS to assume custody. The alien **must be served with a copy of this form** for the detainer to take effect. This detainer arises from DHS authorities and should not impact decisions about the alien's bail, rehabilitation, parole, release, diversion, custody classification, work, quarter assignments, or other matters
- Relay this detainer to any other law enforcement agency to which you transfer custody of the alien.
- Notify this office in the event of the alien's death, hospitalization or transfer to another institution.

☐ If checked: please cancel the detainer related to this alien previously submitted to you on ____________ (date).

SAMPLE

(Name and title of Immigration Officer)

(Signature of Immigration Officer) (Sign in ink)

Notice: If the alien may be the victim of a crime or you want the alien to remain in the United States for a law enforcement purpose, notify the ICE Law Enforcement Support Center at (802) 872-6020. You may also call this number if you have any other questions or concerns about this matter.

TO BE COMPLETED BY THE LAW ENFORCEMENT AGENCY CURRENTLY HOLDING THE ALIEN WHO IS THE SUBJECT OF THIS NOTICE:

Please provide the information below, sign, and return to DHS by mailing, emailing or faxing a copy to ______________ .

Local Booking/Inmate #: ______ Estimated release date/time: ______________

Date of latest criminal charge/conviction: __________ Last offense charged/conviction: ______________

This form was served upon the alien on ____________ , in the following manner:

☐ in person ☐ by inmate mail delivery ☐ other (please specify): ______________

(Name and title of Officer)

(Signature of Officer) (Sign in ink)

NOTICE TO THE DETAINEE

The Department of Homeland Security (DHS) has placed an immigration detainer on you. An immigration detainer is a notice to a law enforcement agency that DHS intends to assume custody of you (after you otherwise would be released from custody) because there is probable cause that you are subject to removal from the United States under federal immigration law. DHS has requested that the law enforcement agency that is currently detaining you maintain custody of you for a period not to exceed 48 hours beyond the time when you would have been released based on your criminal charges or convictions. **If DHS does not take you into custody during this additional 48 hour period, you should contact your custodian** (the agency that is holding you now) to inquire about your release. **If you believe you are a United States citizen or the victim of a crime, please advise DHS by calling the ICE Law Enforcement Support Center toll free at (855) 448-6903.**

NOTIFICACIÓN A LA PERSONA DETENIDA

El Departamento de Seguridad Nacional (DHS) le ha puesto una retención de inmigración. Una retención de inmigración es un aviso a una agencia de la ley que DHS tiene la intención de asumir la custodia de usted (después de lo contrario, usted sería puesto en libertad de la custodia) porque hay causa probable que usted está sujeto a que lo expulsen de los Estados Unidos bajo la ley de inmigración federal. DHS ha solicitado que la agencia de la ley que le tiene detenido actualmente mantenga custodia de usted por un periodo de tiempo que no exceda de 48 horas más del tiempo original que habría sido puesto en libertad en base a los cargos judiciales o a sus antecedentes penales. **Si DHS no le pone en custodia durante este periodo adicional de 48 horas, usted debe de contactarse con su custodio** (la agencia que le tiene detenido en este momento) para preguntar acerca de su liberación. **Si usted cree que es un ciudadano de los Estados Unidos o la víctima de un crimen, por favor avise al DHS llamando gratuitamente al Centro de Apoyo a la Aplicación de la Ley ICE al (855) 448-6903.**

AVIS AU DETENU OU À LA DÉTENUE

Le Département de la Sécurité Intérieure (DHS) a placé un dépositaire d'immigration sur vous. Un dépositaire d'immigration est un avis à une agence de force de l'ordre que le DHS a l'intention de vous prendre en garde à vue (après celà vous pourrez par ailleurs être remis en liberté) parce qu'il y a une cause probable que vous soyez sujet à expulsion des États-Unis en vertu de la loi fédérale sur l'immigration. Le DHS a demandé que l'agence de force de l'ordre qui vous détient actuellement puisse vous maintenir en garde pendant une période ne devant pas dépasser 48 heures au-delà du temps après lequel vous auriez été libéré en se basant sur vos accusations criminelles ou condamnations. **Si le DHS ne vous prenne pas en garde à vue au cours de cette période supplémentaire de 48 heures, vous devez contacter votre gardien (ne)** (l'agence qui vous détient maintenant) pour vous renseigner sur votre libération. **Si vous croyez que vous êtes un citoyen ou une citoyenne des États-Unis ou une victime d'un crime, s'il vous plaît aviser le DHS en appelant gratuitement le centre d'assistance de force de l'ordre de l'ICE au (855) 448-6903**

SAMPLE

NOTIFICAÇÃO AO DETENTO

O Departamento de Segurança Nacional (DHS) expediu um mandado de detenção migratória contra você. Um mandado de detenção migratória é uma notificação feita à uma agência de segurança pública que o DHS tem a intenção de assumir a sua custódia (após a qual você, caso contrário, seria liberado da custódia) porque existe causa provável que você está sujeito a ser removido dos Estados Unidos de acordo com a lei federal de imigração. ODHS solicitou à agência de segurança pública onde você está atualmente detido para manter a sua guarda por um período de no máximo 48 horas além do tempo que você teria sido liberado com base nas suas acusações ou condenações criminais. **Se o DHS não leva-lo sob custódia durante este período adicional de 48 horas, você deve entrar em contato com quem tiver a sua custódia** (a agência onde você está atualmente detido) para perguntar a respeito da sua liberação. **Se você acredita ser um cidadão dos Estados Unidos ou a vítima de um crime, por favor informe ao DHS através de uma ligação gratuita ao Centro de Suporte de Segurança Pública do Serviço de Imigração e Alfândega (ICE) pelo telefone (855) 448-6903.**

THÔNG BÁO CHO NGƯỜI BỊ GIAM

Bộ Nội An (DHS) đã ra lệnh giam giữ di trú đối với quý vị. Giam giữ di trú là một thông báo cho cơ quan công lực rằng Bộ Nội An sẽ đảm đương việc lưu giữ quý vị (sau khi quý vị được thả ra) bởi có lý do khả tín quý vị là đối tượng bị trục xuất khỏi Hoa Kỳ theo luật di trú liên bang. Sau khi quý vị đã thi hành đầy đủ thời gian của bản án dựa trên các tội phạm hay các kết án, thay vì được thả tự do, Bộ Nội An đã yêu cầu cơ quan công lực giữ quý vị lại thêm không quá 48 tiếng đồng hồ nữa. Nếu Bộ Nội An không đến bắt quý vị sau 48 tiếng đồng hồ phụ trội đó, quý vị cần liên lạc với cơ quan hiện đang giam giữ quý vị dể tham khảo về việc trả tự do cho quý vị. Nếu quý vị là công dân Hoa Kỳ hay tin rằng mình là nạn nhân của một tội ác, xin vui lòng báo cho Bộ Nội An bằng cách gọi số điện thoại miễn phí 1(855) 448-6903 cho Trung Tâm Hỗ Trợ Cơ Quan Công Lực Di Trú.

被拘留者通知書

國土安全部(Department of Homeland Security，簡稱DHS)已經對你發出移民拘留令。移民拘留令為一給予執法機構的通知書，闡明DHS意欲獲取對你的羈押權(若非有此羈押權，你將會被釋放)；因為根據聯邦移民法例，並基於合理的原由，你將會被遞解離美國國境。DHS亦已要求現正拘留你的執法機構，在你因受到刑事檢控或定罪後，而在本應被釋放的程序下，繼續對你作出不超過四十八小時的監管。若你在這附加的四十八小時內，仍未及移交至**DHS**的監管下，你應當聯絡你的監管人(即現正監管你的機構)查詢有關你釋放的事宜。若你認為你是美國公民或為罪案受害者，請致電**ICE**執法部支援中心**(Law Enforcement Support Center)**知會**DHS**，免費電話號碼：**(855)448-6903**。

SAMPLE