**No. 17-50762**

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE FIFTH CIRCUIT**

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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*

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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*

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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*

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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

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**BRIEF OF AMICI CURIAE CITY OF LAREDO, TEXAS; COUNTY OF SANTA CLARA, CALIFORNIA; 10 ADDITIONAL CITIES AND COUNTIES; THE MAJOR CITIES CHIEFS ASSOCIATION; THE U.S. CONFERENCE OF MAYORS; THE NATIONAL LEAGUE OF CITIES; THE INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION; AND THE INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION IN SUPPORT OF PLAINTIFFS-APPELLEES/CROSS-APPELLANTS**

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## *Complete Listing of Amici Curiae*

The City of Laredo, Texas
The County of Santa Clara, California
The County of Alameda, California
The City of Baltimore, Maryland
The City of Chicago, Illinois
The International City/County Management Association[1]
The International Municipal Lawyers Association[2]
The City of Iowa City, Iowa
King County, Washington
The Major Cities Chiefs Association[3]
The City of McAllen, Texas
The National League of Cities[4]
The City of Oakland, California
The City of Portland, Oregon
The City of Providence, Rhode Island
The U.S. Conference of Mayors[5]
The City of West Hollywood, California

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[1] The International City/County Management Association ("ICMA") is a nonprofit professional and educational organization of over 9,000 appointed chief executives and assistants serving cities, counties, towns, and regional entities. ICMA's mission is to create excellence in local governance by advocating and developing the professional management of local governments throughout the world.

[2] The International Municipal Lawyers Association ("IMLA") has been an advocate and resource for local government attorneys since 1935. Owned solely by its more than 3,000 members, IMLA serves as an international clearinghouse for legal information and cooperation on municipal legal matters.

[3] The Major Cities Chiefs Association is a professional association of chiefs and sheriffs representing the largest cities in the United States, serving more than 68 million people.

[4] The National League of Cities ("NLC") is dedicated to helping city leaders build better communities. NLC is a resource and advocate for 19,000 cities, towns, and villages, representing more than 218 million Americans.

[5] The U.S. Conference of Mayors ("USCM"), founded in 1932, is the official nonpartisan organization of all U.S. cities with a population of more than 30,000 people, which includes over 1,200 cities at present. Each city is represented in the USCM by its chief elected official, the mayor.

# CERTIFICATE OF INTERESTED PARTIES

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

2. Pursuant to Federal Rule of Appellate Procedure 26.1(a) and Fifth Circuit Rule 28.2.1, Amici Curiae cities and counties need not furnish a certificate of interested persons because they are governmental entities.

3. Pursuant to Fifth Circuit Rule 29.2, the undersigned counsel of record certifies that, in addition to those persons listed in Plaintiffs-Appellees/Cross-Appellants' and Defendants-Appellants/Cross-Appellees' Statements of Interested Persons, the following listed persons and 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 in order that the judges of this court may evaluate possible disqualification or recusal.

**Amici Curiae**

- Major Cities Chiefs Association
- U.S. Conference of Mayors
- National League of Cities
- International Municipal Lawyers Association
- International City/County Management Association

**Counsel for Amici Curiae**

- Kristina Laurel Hale

- Cristian Rosas-Grillet
- Alyssa J. Castillon
- James R. Williams
- Kavita Narayan
- Laura S. Trice
- Lynnette K. Miner
- Chirag G. Badlani
- Charles W. Thompson, Jr.

4. Pursuant to Federal Rule of Appellate Procedure 26.1(a) and Fifth Circuit Rule 28.2.1, each of the following Amici certifies that there is no parent corporation or any publicly held corporation that owns 10% or more of its stock:

- Major Cities Chiefs Association
- U.S. Conference of Mayors
- National League of Cities
- International City/County Management Association
- International Municipal Lawyers Association

By: /s Kavita Narayan
Kavita Narayan,
Attorney of Record for Amici Curiae

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## I. INTEREST OF AMICI CURIAE[6]

The City of Laredo, the County of Santa Clara, ten other cities and counties throughout the United States, and five major associations of local governments and officials ("Amici") file this brief as Amici Curiae in support of Plaintiffs-Appellees/Cross-Appellants. Amici have a strong shared interest in ensuring that the major provisions of Texas Senate Bill 4 ("SB 4") remain enjoined as ordered by the district court. Amici cities and counties and our local elected and appointed officials are responsible for providing essential services to the residents of our communities and safeguarding their health, safety, and welfare. Amici cities and counties are also responsible for funding and overseeing the local law enforcement agencies, personnel, and facilities that carry out our paramount goal of keeping our communities safe.

Amici represent a broad spectrum of localities with diverse populations and varying approaches to local policy, but these varying approaches are grounded in a common principle that unites us: the critical importance of tailoring local policies, particularly policies relating to law enforcement, to community needs. SB 4's heavy-handed, one-size-fits-all approach unconstitutionally erodes this principle.

## II. INTRODUCTION

SB 4 represents a dramatic overreach, motivated by politics rather than sound

[6] No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amici or their counsel made a monetary contribution to this brief's preparation or submission.

policy judgment, that will not make Texas's communities safer. Texas's claim that it enacted SB 4 to "keep[] dangerous criminals off our streets," Office of the Tex. Governor, *Texas Bans Sanctuary Cities* (May 7, 2017), *archived at* https://perma.cc/M39P-4LFZ, is misguided at best given that immigrants in the United States are less likely to commit crimes than native-born residents, *see* Michelangelo Landgrave & Alex Nowrasteh, *Criminal Immigrants: Their Numbers, Demographics, and Countries of Origin* 1-2 (2017), Cato Inst., *archived at* https://perma.cc/VDU9-R9V6.

SB 4 strips local governments of their discretion to set sensible law enforcement policy based on the specific needs of their communities, mandating that they reallocate scarce local resources to take on the substantial costs of immigration enforcement. By forcing local entities to follow sweeping state mandates rather than tailor their policies to local needs, SB 4 undermines the community trust in local law enforcement that is critical to public safety. And despite the ill-defined nature of its commands, SB 4 enforces compliance through harsh penalties, including removal from office and criminal charges. Thus, SB 4 places local governments and officials in an impossible position—attempt to follow its vague directives (and undermine local needs, public safety, and the rights of residents), or face harsh punishments.

Because SB 4 offends both constitutional guarantees and sound public policy, Amici urge the Court to affirm the district court's preliminary injunction with respect to the provisions challenged by the State in this appeal.

## III. ARGUMENT

### A. SB 4's Vague Provisions Create Deep Uncertainty and Operational Challenges for Local Governments and Officials.

Amici are deeply concerned about the operational difficulties local governments would encounter in attempting to implement SB 4's imprecise and overreaching mandates. Among other problematic provisions, SB 4's unconstitutionally vague ban on "adopt[ing], enforc[ing], or endors[ing]" a local policy that "materially limits the enforcement of immigration laws," Tex. Gov't Code § 752.053(a)(1), creates uncertainty because it fails to explain the range of conduct it prohibits. *See Hill v. Colorado*, 530 U.S. 703, 732 (2000). With its broad and undefined language, SB 4 appears to require local governments to agree in advance that they will comply with *all* U.S. Immigrations and Customs Enforcement ("ICE") requests for cooperation, regardless of what those requests may ask them to do, because refusing could "materially limit" immigration enforcement.[7] This would have a range of harmful effects on public safety.

For example, local officials have expressed grave concern about ICE's practice of making arrests at courthouses—including, in February 2017, sending multiple agents to apprehend a woman seeking a protective order against her abusive partner. *See* Katie Mettler, *'This is really unprecedented': ICE detains woman seeking domestic abuse*

[7] Texas's brief to this Court confirms that SB 4 "requires localities to engage in . . . assistance and cooperation with the federal government" upon request, with a seemingly unlimited scope. *See* Appellants' Br. 29-30.

*protection at Texas courthouse*, Wash. Post (Feb. 16, 2017), *archived at* https://perma.cc/4ADP-5ELR. This practice deters immigrants not only from reporting crimes committed against them, but also from appearing in court to answer their own charges, thereby hindering local prosecutions. *See* James Queally, *ICE agents make arrests at courthouses, sparking backlash from attorneys & state supreme court*, L.A. Times (Mar. 16, 2017), *archived at* https://perma.cc/S892-XG4F.

Nevertheless, the federal government has announced it will continue sending ICE agents to local courthouses to make arrests, despite the fact that "reporting of crimes like sexual assault and domestic violence are down by one-quarter in immigrant communities" in some localities, and despite strong opposition from local criminal justice officials. CNN Wire, *ICE Agents Will Continue to Make Arrests at Courthouses, Trump Administration Says*, KTLA 5 (Mar. 31, 2017), *archived at* https://perma.cc/5U5K-K2UY; *see* Queally, *supra*. Under SB 4, localities may be forced to facilitate these arrests even if they deny justice to local crime victims.

Similarly, ICE has requested that local probation departments facilitate immigration enforcement efforts against their clients on court-ordered probation by "arrang[ing] meetings with immigrants to help ICE make arrests." Immigrant Def. Project, *Ending ICE/Police Entanglement: From Street Encounter to Custody*, *archived at* https://perma.cc/EMX6-L7BE (last visited Oct. 11, 2017). But local criminal justice systems have a strong interest in ensuring that individuals on probation successfully complete their terms, including paying any court-ordered victim restitution, and

become productive members of local communities. *See Morrissey v. Brewer*, 408 U.S. 471, 477 (1972) (noting the purpose of parole "is to help individuals reintegrate into society as constructive individuals as soon as they are able"). Forcing local probation departments to facilitate ICE arrests places enforcement of federal immigration law ahead of important local interests such as ensuring justice for crime victims and rehabilitation opportunities for offenders. *See Gagnon v. Scarpelli*, 411 U.S. 778, 784 (1973) (noting that "the probation or parole officer's function is . . . to supervise a course of rehabilitation").

SB 4 would also force local governments to comply with ICE requests to participate in raids and other community enforcement actions, despite their negative impact on local public safety. In Louisville, Kentucky, as recently as June 2017, the police department regularly assisted ICE by serving outstanding warrants, making traffic stops, and knocking on doors of individuals purportedly wanted for immigration violations—sometimes with ICE agents standing by to make arrests. Kate Howard, *Louisville Police Don't Enforce Immigration – But Help the Feds Do It*, Ky. Ctr. for Investigative Reporting (Sept. 7, 2017), *archived at* https://perma.cc/CLR9-USQ9. Yet Louisville's Police Chief acknowledged the community is "not going to have that level of trust if they believe we're involved in [immigration] work," *id.*, and for this reason, Louisville announced in September that it will no longer assist ICE except under criminal warrants or in emergency situations, *see* Darcy Costello, *New LMPD policy: No working with immigration officials to enforce federal laws*, Courier-Journal

(Sept. 22, 2017), *archived at* https://perma.cc/89BG-7JQD. Under SB 4, Texas's local officials would lose their discretion to decline such burdensome and far-reaching requests from ICE, and to make choices tailored to benefit their communities.

Further, Amici are concerned that if a police chief or sheriff identifies an important local public safety need unrelated to immigration—such as reducing recidivism by creating reentry programs, or assembling a human trafficking prevention task force or a crimes against children unit— the decision to direct personnel and resources to that need could be deemed to "materially limit" immigration enforcement. Although Texas argues that "SB 4 does not prohibit immigration-neutral local policies regarding bona fide resource allocation," Appellants' Br. 39, this limitation does not appear in the bill, and SB 4's sponsor confirmed the goal of the bill is "removing as much discretion as possible" from local agencies, *see* Decl. of Sen. José Rodríguez Attach. 4 (SB 4 Senate Floor Debate), at A-27, ECF No. 56-5. Yet law enforcement leaders are clear that "locally-tailored strategies" are the best way to prevent crime and protect communities.[8] Police Found., *Law Enforcement Leaders Call for Federal Support & Prioritization of Violent Crime Reduction* (2017), *archived at* https://perma.cc/A6JC-557P.

Finally, SB 4's prohibition on "endors[ing]" policies limiting immigration enforcement appears to broadly ban local officials' constitutionally protected speech.

[8] These concerns are even more salient for home rule jurisdictions like the Cities of Houston, San Antonio, Dallas, Austin, and El Paso, among others, which have a constitutionally protected right to determine how to exercise their police powers. *See* Tex. Const. art. 11, § 5.

The law has been settled for decades "that statements by public officials on matters of public concern must be accorded First Amendment protection." *Pickering v. Bd. of Ed.*, 391 U.S. 563, 574 (1968). But under SB 4, local officials will be hesitant to engage in a range of protected activities that are central to their roles—such as voicing political views during campaigns; discussing those views with the media or the public; debating policies at city council and county commissioner meetings; consulting with colleagues, staff, or constituents on local policy issues; and speaking with state or federal officials regarding local concerns related to immigration enforcement. Despite Texas's attempt to limit the provision's scope before this Court, *see* Appellants' Br. 10-11, the provision as written leaves room for broad enforcement against all of these activities. If local officials must constantly self-censor to avoid SB 4's harsh penalties, they cannot fulfill their duties to their constituents.

### B. SB 4's Threat of Removal from Office for Violations of its Vague Provisions Offends Public Policy and Constitutional Due Process.

SB 4's vagueness is all the more troubling in light of its harsh penalties, including the threat of removal from office. *See City of Chicago v. Morales*, 527 U.S. 41, 55-56 (1999). Under SB 4, the State may seek a judgment removing a local elected or appointed official from office by filing a petition supported by "evidence, including evidence of a statement by the public officer, establishing probable grounds that the public officer" violated a provision of SB 4. Tex. Gov't Code § 752.0565(b). Even a single violation may lead to removal. *See id.* § 752.0565(a).

Under Texas law, a local official may be removed from office *only* for "incompetency," "official misconduct," or "intoxication on or off duty." Tex. Local Gov't Code §§ 21.025(a), 87.013(a); *see also Stern v. State ex rel. Ansel*, 869 S.W.2d 614, 619 (Tex. App. 1994) (these statutes "set[] forth the exclusive grounds for removal of a public officer").[9] This statutory scheme reflects the policy judgment that elected officials should normally be held accountable by the voters, and should be subject to removal by the courts only in narrow circumstances.

SB turns this policy judgment on its head. While SB 4 permits removal of a local official for any *intentional* violation of its mandate to "comply with, honor, and fulfill" any ICE detainer request, *see* Tex. Code Crim. Proc. art. 2.251(a)(1); Tex. Gov't Code § 752.053(a)(3), and defines such a violation as "a misdemeanor involving official misconduct," *see* Tex. Local Gov't Code § 87.031(c); Tex. Penal Code § 39.07, SB 4 also permits removal of a local official for *any* violation of the law's vague ban on adopting, enforcing, or endorsing a policy materially limiting immigration enforcement, *see* Tex. Gov't Code § 752.0565(a). The State makes no attempt to justify this basis for removal from office under any of the applicable statutory grounds. This extreme and unprecedented penalty undermines both sound public policy and constitutional due process principles.

[9] In the case of home rule cities, the power to remove local officials from office, as well as the process for doing so, are prescribed by city charter. *See Lipscomb v. Randall*, 985 S.W.2d 601, 605 (Tex. App. 1999); *see, e.g.*, Dallas, Tex., City Charter ch. III, sec. 16 (2015); Hous., Tex., City Charter art. V, sec. 5 (2017); San Antonio, Tex., City Charter art. II, sec. 7, art. IV, sec. 26 (2015).

First, statements by SB 4's sponsor and supporters during legislative debates suggest they believed a violation of SB 4's ban on adopting, enforcing, or endorsing a policy materially limiting immigration enforcement would amount to "official misconduct." They explained that the bill was intended to "punish" local officials for "insubordination"—including public speech that purportedly "creat[es] a culture of contempt and noncompliance" regarding local assistance with immigration enforcement. *See* Decl. of Sen. José Rodríguez Attach. 4, at A-24, A-53, A-67. Put differently, SB 4 was meant to provide a way "to remove from office any officeholder who promotes sanctuary cities." Decl. of State Rep. Eddie Rodriguez Ex. 4 (SB 4 House Debate), at S58, ECF No. 56-4.

The notion that violations of the unconstitutionally vague ban on adopting, enforcing, or endorsing a policy materially limiting immigration enforcement could be "official misconduct" is wholly at odds with Texas's own statutory scheme for removing local officials from office. "Official misconduct" must be "*intentional* unlawful behavior relating to official duties by an officer entrusted with the administration of justice or the execution of the law." Tex. Local Gov't Code §§ 21.022(4), 87.011(3) (emphasis added); *see also Meyer v. Tunks*, 360 S.W.2d 518, 520 (Tex. 1962) ("[T]o justify removal from office the allegations of the petition shall be specific and certain and the offic[i]al misconduct must be willful . . . ."). But SB 4 purports to permit the State to oust local officials for even *unintentional* violations. This is inconsistent with the public policy rationale justifying removal of a local officer,

which is "not to punish the officer . . . but to protect the public in removing from office by speedy and adequate means those who have been faithless and corrupt and have violated their trust." *Meyer*, 360 S.W.2d at 520.

Second, the rule that removal from office for official misconduct must be rooted in *intentional* or *willful* behavior reflects the baseline constitutional requirement of due process, which requires adequate notice of the types of conduct that may cause an official to lose his or her job. *See Women's Med. Ctr. of Nw. Hous. v. Bell*, 248 F.3d 411, 422 (5th Cir. 2001); *Tarrant Cty. v. Ashmore*, 635 S.W.2d 417, 422-23 (Tex. 1982); *see also Bradley v. State ex rel. White*, 990 S.W.2d 245, 252 (Tex. 1999) (Abbott, J., concurring) ("[F]ew actors deserve more clarity than elected officials who can be removed from office at the hands of other competing elected officials."). SB 4's vague terms provide no such notice. In light of its draconian consequences, due process cannot tolerate SB 4's vagueness. *See City of Chicago*, 527 U.S. at 55-56.

### C. SB 4 Undermines Local Discretion to Determine Law Enforcement Policies Based on Community Needs.

In addition to being impermissibly vague and punitive, SB 4 unwisely prohibits local governments from exercising *any* discretion regarding their participation in the enforcement of federal immigration laws. Because "[t]here are significant complexities involved in enforcing federal immigration law," *Arizona v. United States*, 567 U.S. 387, 408-09 (2012), federal law makes local participation in immigration enforcement efforts strictly voluntary, *see* 8 U.S.C. § 1357(g)(1), (9) (2012). This limitation

recognizes that the primary interest of local law enforcement agencies is to ensure and improve public safety in their communities. SB 4 disrupts this delicate balance. It does not merely impose boundaries on the degree to which cities and counties may offer up local resources in service of federal immigration enforcement efforts. Instead, it tells local governments that they *must* relinquish local resources to serve federal rather than local priorities—eliminating local discretion altogether.

Numerous local governments throughout Texas and across the country have decided that limiting their involvement in federal immigration enforcement best promotes public safety by (1) preserving trust between local law enforcement officers and the communities they serve, and (2) enabling officers to rely on *all* community members—regardless of immigration status—to report crimes, serve as witnesses, and assist in investigations and prosecutions.[10] To date, only 60 state and local law enforcement agencies nationwide (out of a total of 17,985)—including just 18 of Texas's 254 counties—have entered into formal agreements with ICE to enforce immigration law in their jurisdictions. *See* U.S. Immigration & Customs Enf't,

[10] *See* Police Exec. Research Forum, *Advice from Police Chiefs and Community Leaders on Building Trust: "Ask for Help, Work Together, and Show Respect"* (2016), *archived at* https://perma.cc/66PN-SULW (emphasizing the importance of community trust to effective policing); Art Acevedo & James McLaughlin, *Police Chiefs: SB 4 is a 'lose-lose' for Texas*, Hous. Chron. (Apr. 30, 2017), *archived at* https://perma.cc/8CZF-32HQ ("[A] divide between the local police and immigrant groups will result in increased crime against immigrants and in the broader community, create a class of silent victims, and eliminate the potential for assistance from immigrants in solving crimes or preventing crime."); Major Cities Chiefs Ass'n, *Immigration Policy* 1 (2013), *archived at* https://perma.cc/JV3F-T9UH (noting that local police enforcing immigration law "undermines the trust and cooperation with immigrant communities").

*Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act* (2017), *archived at* https://perma.cc/7U9N-M3J6; U.S. Dep't of Justice, Bureau of Justice Statistics, *Census of State and Local Law Enforcement Agencies, 2008* 2 (2011), *archived at* https://perma.cc/7984-676W. Sheriffs and police chiefs across the country agree that "decisions related to how local law enforcement agencies allocate their resources, direct their workforce and define the duties of their employees to best serve and protect their communities"—including decisions on whether to devote resources toward immigration enforcement—"must be left in the control of local governments." Major Cities Chiefs Ass'n, *supra*, at 2.

Recognition of the value of preserving local discretion over law enforcement matters transcends political differences. The International Association of Chiefs of Police ("IACP") takes no position on whether local law enforcement agencies should assist with enforcement of immigration law. Int'l Ass'n of Chiefs of Police, *Enforcing Immigration Law: The Role of State, Tribal and Local Law Enforcement* 1 (2005), *archived at* https://perma.cc/M2J2-LDSL. However, the IACP is not neutral on *who* should make the determination to devote local resources toward such efforts, stating that "local law enforcement's participation in immigration enforcement is an *inherently local decision* that must be made by a police chief, working with their elected officials, community leaders and citizens." *Id.* (emphasis added). By mandating participation and erasing discretion on the part of local officials to set *any* limitations on the

allocation of their own resources toward federal immigration enforcement, SB 4 undermines the ability of localities to meet their communities' needs.

### D. SB 4 Imposes Significant Financial Burdens on Local Governments.

SB 4 not only curtails local discretion to set law enforcement policy based on community needs, but also shifts onto local governments the now-mandatory costs of participating in immigration enforcement. As a group of Texas sheriffs explained just prior to SB 4's passage, the bill "coerce[s] local law enforcement to dedicate frequently scarce resources—such as jail space, on-duty officers and local tax dollars—to a job that is supposed to be done and funded by the federal government." Sally Hernandez et al., *Texas sheriffs: SB4 burdens law enforcement, local taxpayers*, Austin American-Statesman (Apr. 18, 2017), *archived at* https://perma.cc/Z5AG-Q47X. Although SB 4 directs the State to create a "competitive grant program to provide financial assistance to local entities to offset costs" of immigration enforcement, *see* Tex. Gov't Code § 772.0073(b), it is unclear how much funding will be made available and on what terms.[11] If the State redirects funds away from the important local programs it currently supports—such as forensic crime laboratories, specialty courts for defendants with substance abuse and mental health concerns, community-based

[11] SB 4 states that grant funds may offset costs related to "enforcing immigration laws; *or* . . . complying with, honoring, or fulfilling immigration detainer requests." Tex. Gov't Code § 772.0073(b)(1)-(2) (emphasis added). But Texas represents to this Court that the bill "creates a grant program" *only* "to offset costs related to ICE-detainer compliance." Appellants' Br. 7.

Crime Stoppers programs, juvenile delinquency prevention programs, and task forces to investigate cybercrime[12]—Texas's communities will be rendered less safe.

Significantly, SB 4 also mandates that local entities bear the hefty costs of complying with virtually all ICE detainer requests. These requests ask local law enforcement agencies to maintain custody of an inmate for up to 48 hours after he or she would otherwise be released in order to facilitate apprehension by ICE. 8 C.F.R. § 287.7(d) (2017); Dep't of Homeland Sec., *Immigration Detainer – Notice of Action* (2017), *archived at* https://perma.cc/HT7A-Y334 (last visited Oct. 11, 2017). But the costs associated with ICE detainers are not limited to 48 hours of jail housing expenses. For instance, inmates subject to ICE detainers who are in *pretrial* status often cannot obtain a bail bond to facilitate their release. *See* Am. Immigration Council, *Immigration Detainers: An Overview* 3 (2017), *archived at* https://perma.cc/57WD-T4G7. Local jails must maintain custody of these inmates for many days, or even months, pending resolution of local charges, and the costs of doing so are substantial. In 2016, Texas counties spent nearly $61 million in taxpayer dollars to detain local inmates on ICE detainers.[13] Tex. Comm'n on Jail Standards, *2016 Annual Report* 12 (2017), *archived at*

[12] *See* Office of the Tex. Governor, *Criminal Justice Division*, *archived at* https://perma.cc/5MEY-KXGQ (last visited Oct. 11, 2017); Office of the Tex. Governor, *Programs*, *archived at* https://perma.cc/7EG8-2J5N (last visited Oct. 11, 2017).

[13] These costs are likely to be even higher in 2017. In February-March 2017, Texas's law enforcement agencies received more than 5,000 ICE detainer requests. Harris County, Texas received more detainer requests in those months than any other county in the country—an increase of more than 200% over the number it received in 2016. Martín Echenique, *Which States and Counties*

https://perma.cc/UEC4-3LAU. A total of 45,856 inmates in Texas jails were held on ICE detainers that year, and the total number of in-custody days was 1,001,074—an average of *22 days per inmate*. *See id.* Under SB 4, these costs are sure to skyrocket—and they will not be reimbursed by the federal government. *See* 8 C.F.R. § 287.7(e).

SB 4's detainer mandate also burdens Texas localities with the threat of considerable costs associated with liability for holding inmates pursuant to ICE detainer requests, which numerous federal courts have found to violate those inmates' constitutional rights.[14] Judgments can be costly. *See, e.g.*, *Miranda-Olivares v. Clackamas Cty.*, No. 12-02317, 2015 WL 5093752, at *1 (D. Or. Aug. 28, 2015) (awarding attorneys' fees and costs of over $97,000 on top of defendant's $30,100 offer of judgment). And local jurisdictions that opt to settle these cases also incur significant costs,[15] in addition to the expenses associated with litigation.

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*Are Receiving the Most ICE Detention Requests?*, CityLab (Sept. 6, 2017), *archived at* https://perma.cc/DZQ2-XNFV.

[14] *See, e.g.*, *Santoyo v. United States*, No. 16-855, 2017 WL 2896021, at *8 (W.D. Tex. June 5, 2017) (granting summary judgment on claim that county's honoring ICE detainer violated Fourth and Fourteenth Amendments); *Mercado v. Dallas Cty., Tex.*, 229 F. Supp. 3d 501, 515, 519 (N.D. Tex. 2017) (former jail detainees plausibly alleged Fourth Amendment violation when they were detained on ICE detainer requests and denied release on bond); *Orellana v. Nobles Cty.*, 230 F. Supp. 3d 934, 946 (D. Minn. 2017) (concluding that jury could determine that detainee's continued confinement on an ICE detainer after his expected release on state charges violated the Fourth Amendment); *Villars v. Kubiatowski*, 45 F. Supp. 3d 791, 802 (N.D. Ill. 2014) (plaintiff stated a Fourth Amendment claim against local officials in connection with his detention on an ICE detainer after he had posted bond); *Miranda-Olivares v. Clackamas Cty.*, No. 12-02317, 2014 WL 1414305, at *9-11 (D. Or. Apr. 11, 2014) (granting summary judgment to plaintiff under the Fourth Amendment for claim arising from detention based solely on an ICE detainer).

[15] *See, e.g.*, *Harvey v. City of New York*, No. 07-00343 (E.D.N.Y. Apr. 22, 2009) ($145,000 settlement); ACLU of Utah, *ACLU of Utah and Salt Lake County Settle Lawsuit Regarding Immigration Detention Policies*

### E. Local Government Officials Should Be Permitted to Challenge SB 4 Under the Fourth Amendment.

In addition to imposing the operational and financial challenges discussed above, SB 4 would force Texas's local officials to make an untenable choice between violating their oath of office and the trust of their constituents if they comply with SB 4's detainer mandate,[16] and facing substantial penalties (including fines, removal from office, and even a Class A misdemeanor charge) if they do not. *See* Tex. Gov't Code §§ 752.056, 752.0565; Tex. Pen. Code § 39.07; *see also* Br. of Appellees/Cross-Appellants City of El Cenizo et al. 64 n.24. These costs and legal duties support the district court's conclusion that Plaintiffs-Appellees have standing to challenge SB 4 under the Fourth Amendment. *City of El Cenizo v. Texas*, No. 17-404, 2017 WL 3763098, at *28-29 (W.D. Tex. Aug. 30, 2017). Practical considerations further support this determination. Local government officials must be permitted to challenge—*prior* to their effective date—statutes like SB 4 that undermine the constitutional protections local officials vow to uphold, expose local governments to liability, and impair their ability to serve their communities.

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(Aug. 24, 2014), *archived at* https://perma.cc/MA96-748M ($75,000 settlement); Hannah Grover, *County settles immigration lawsuit*, Farmington Daily Times (Aug. 14, 2017), *archived at* https://perma.cc/B2K6-Q3N4 (class action settlement in which county paid $50,000 and insurance paid $300,000); Joel Shannon, *Pa. county: Washington 'trying to bully us' on immigration*, York Daily Record (Apr. 1, 2017), *archived at* https://perma.cc/45HK-AD8W ($95,000 settlement).

[16] Texas sheriffs take an official oath to "preserve, protect, and defend the Constitution and laws of the United States," as required by the Texas Constitution and the Texas Local Government Code. Tex. Const. art. 16, § 1(a); *see* Tex. Local Gov't Code §§ 22.005(a), 85.001(c), 86.002(b).

First, SB4 would make local governments and their officials vulnerable to lawsuits challenging the practice of honoring ICE detainer requests by holding inmates beyond the time when they would otherwise be released. Localities have already faced many such lawsuits, including in Texas. *See Santoyo*, 2017 WL 2896021 (Bexar County); *Mercado*, 229 F. Supp. 3d 501 (Dallas County).[17] Some of these lawsuits have been brought as class actions, *see, e.g.*, *Roy v. Cty. of Los Angeles*, Nos. 12-09012, 13-04416, 2016 WL 5219468, at *21 (C.D. Cal. Sept. 9, 2016) (granting class certification for classes of former detainees challenging additional detention pursuant to ICE detainer requests), which are more complicated and expensive to litigate. As discussed above, numerous federal courts around the country have concluded that local governments may be held liable for Fourth Amendment violations related to honoring ICE detainer requests.[18] SB 4, if not enjoined, would lead to more lawsuits filed against Texas's local entities and result in significant resources diverted toward defending against and/or settling such cases rather than fulfilling important local government functions.[19]

[17] The Second Amended Complaint in *Mercado* asserts claims by forty-five individual plaintiffs who were held in custody by Dallas County pursuant to ICE detainers. Second Am. Compl. 1, *Mercado*, No. 15-03481 (N.D. Tex. June 16, 2017), ECF No. 80.

[18] *See, e.g.*, *Santoyo*, 2017 WL 2896021, at *8; *Mercado*, 229 F. Supp. 3d at 515, 519; *Orellana*, 230 F. Supp. 3d at 946; *Villars*, 45 F. Supp. 3d at 802; *Miranda-Olivares*, 2014 WL 1414305, at *9-11.

[19] Even though SB 4 provides that the Texas Attorney General will defend and indemnify local entities in lawsuits related to immigration detainer requests under certain circumstances, there is significant room for the Attorney General to exercise discretion and not defend a local entity in a particular case. *See* Tex. Gov't Code § 402.0241. In addition, if the Attorney General defends against

Due to their heightened vulnerability to liability, local governments would find themselves in a legally and financially precarious state if they are not permitted to challenge SB 4 prior to its effective date. Indeed, local officials are best suited to bring a facial challenge to SB 4 under the Fourth Amendment because they are the ones who would have to "comply with, honor, and fulfill" every ICE detainer request and manage the corresponding operational challenges and vulnerability to litigation. *See* Tex. Code Crim. Proc. art. 2.251(a)(1). These concerns are not theoretical. *See, e.g.*, *Santoyo*, 2017 WL 2896021; *Mercado*, 229 F. Supp. 3d 501. Thus, it is in the public interest and the interest of judicial economy to allow local officials to facially challenge SB 4 before it goes into effect and leads to a surge in ICE cooperation requests and new lawsuits. They should not be required to wait until *after* they have been sued by a resident whose constitutional rights they were forced to violate.

Second, if local governments were forced to comply with SB 4's detainer mandate, their constituents would suffer. Cities and counties are the level of government most closely connected to the communities they serve. They provide a variety of essential programs and services to meet the social, economic, physical, and environmental needs of all their residents, including public safety services that enable community members to live safe and stable lives. If local officials comply with all ICE detainer requests for fear that any noncompliance could lead to harsh penalties under

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a case, the local entity must relinquish control over whether and how to settle a case. *Id.* § 402.0241(c).

SB 4, their ability to build and maintain community trust and engagement will deteriorate. Once lost, community trust in local law enforcement is difficult to regain. *Border Insecurity: The Rise of MS-13 and Other Transnational Criminal Organizations*, Hearing before the S. Comm. on Homeland Sec. & Governmental Affairs, 115th Cong. (2017) (statement of J. Thomas Manger, Chief of Police, Montgomery County, Maryland) ("The moment [immigrant] victims and witnesses begin to fear that their local police will deport them, cooperation with their police then ceases.").[20] If local officials must divert time and resources away from the programs and functions they have determined best serve their residents, law enforcement's efforts to maintain order and ensure the public safety of their communities will decline.

## IV. CONCLUSION

SB 4 makes Texas less safe by depriving local officials of the discretion to make the policy decisions that are best for their communities, forcibly reallocating their scarce resources away from local priorities, and irreparably damaging community trust in local law enforcement agencies. Local officials throughout Texas have properly challenged the law prior to its effective date because of the severe impact it will have on them and their communities. Because SB 4 offends both constitutional guarantees and sound public policy, the district court's preliminary injunction should be affirmed.

[20] *See also* Nat'l Immigration Law Ctr., *Austin Police Chief: Congress Should Consider Good Policy, Not Politics* (2013), *archived at* https://perma.cc/TJ9R-HTNS ("[I]mmigrants will never help their local police to fight crime once they fear we [local police] have become immigration officers.").

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## CERTIFICATE OF COMPLIANCE

I certify that this document complies with the type-volume limitation set forth in Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(B) because it contains 6,365 words, exclusive of the portions of the brief that are exempted by Rule 32(f).

I certify that this document complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point roman-style Garamond font.

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## CERTIFICATE OF SERVICE

I certify that, on October 23, 2017, a true and correct copy of this brief has been filed and served via the Court's CM/ECF system upon all counsel of record.

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