

POLICY ESSAY

PROVIDING SANCTUARY TO THE RULE OF LAW: SANCTUARY POLICIES, LAWLESSNESS, AND TEXAS’S SENATE BILL 4

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Our Constitution places authority over immigration law in the hands of the federal government, but it entrusts the rule of law’s fate primarily to the care of the states. Today, so-called sanctuary jurisdictions are seeking to thwart not only the legitimate authority of the federal government, but the bedrock principle that we are a nation of laws, not of men. In this article, I will briefly examine the nature and history of the sanctuary jurisdiction movement in the context of the illegal immigration crisis. I will then explain how Texas took a leadership role by passing Senate Bill 4—bold legislation to end the lawlessness of sanctuary jurisdictions. Finally, I will detail how Texas acted properly and within the bounds of the Constitution and why the arguments of those who would seek to invalidate the statute fail as a matter of law.

I. INTRODUCTION

Despite the headlines, the fight over so-called “sanctuary jurisdictions” in America at its core is not about immigration policy.¹ The issue is far more critical and urgent: restoring the rule of law. For much of the twentieth century, America’s borders were unsecured² and the federal government’s enforcement of immigration law changed with the political winds.³ More recently, the federal government’s efforts to restore law and order have been met with open defiance by local governments in disagreement with Con-

¹ For examples of the mainstream media’s attempts to characterize Texas’s law ending so-called sanctuary cities policies as a question of immigration policy, see James Barragán, *What the Passage of ‘Sanctuary Cities’ Bill Says About the State of Texas Politics*, DALLAS MORNING NEWS (June 9, 2017), <https://www.dallasnews.com/news/texas-politics/2017/06/09/passage-sanctuary-cities-bill-says-state-texas-politics> [<https://perma.cc/ZE8X-U7XX>] Alex Horton & Joshua Partlow, *Texas is Getting a New ‘Sanctuary Cities’ Law, and the Mexican Government Isn’t Happy*, WASH. POST (July 6, 2017), https://www.washingtonpost.com/news/worldviews/wp/2017/07/06/texas-is-getting-a-new-sanctuary-cities-law-and-the-mexican-government-isnt-happy/?utm_term=.b36bcb0eb74d [<https://perma.cc/4ATF-E9FS>]. For a rare example of an article that relatively objectively and accurately describes the content and intent of Texas’s law, see Rafael Bernal, *Five Things to Know About Texas’ Sanctuary City Law*, HILL (May 8, 2017), <http://thehill.com/latino/332463-five-things-to-know-about-texas-sanctuary-city-law> [<https://perma.cc/U2NL-G5SB>].

² For a detailed history of the United States’s policies toward the southwest border, see Justin C. Glon, *Good Fences Make Good Neighbors: National Security and Terrorism—Time to Fence in Our Southern Border*, 15 IND. INT’L & COMP. L. REV. 349 (2005). For an opposing take on the history of border security measures, see Vanessa Jimenez, *On the Fence: Sustaining National Security and Defending Environmental Laws at the U.S.-Mexico Border*, 3 SEATTLE J. ENVTL. L. 41, 45–50 (2013).

³ Looking at just the period since 1996, it is relatively clear that elections have impacted trends in immigration enforcement. See generally MARC R. ROSENBLUM & KRISTEN MCCABE, MIGRATION POLICY INST., U.S. IMMIGRATION POLICY PROGRAM, DEPORTATION AND DISCRETION: REVIEWING THE RECORD AND OPTIONS FOR CHANGE (2014), <https://www.migrationpolicy.org/research/deportation-and-discretion-reviewing-record-and-options-change> [<https://perma.cc/P8L4-VMHE>].

gress's policy decisions.⁴ So-called sanctuary jurisdictions are just one subset of the threats to the rule of law in America over recent decades⁵: foreign terrorists have attempted to undermine the rule of law with fear and chaos,⁶ federal judges and bureaucrats have sought to ignore the rule of law by substituting their judgment for that of the people,⁷ presidents have attempted to thwart the rule of law by violating the Constitution outright,⁸ and state and local governments are now refusing to obey or enforce duly enacted laws with which they disagree.⁹ It is this last problem that Texas's Senate Bill 4 addresses.

In this Article, I will explain why state legislation intended to foster state cooperation with federal immigration efforts is consistent with the Constitution and necessary considering the "sanctuary jurisdictions" movement and the lawless state of our borders. Part II of this Article will discuss the background of the sanctuary jurisdiction movement and how that movement led to the passage of Senate Bill 4. Part III will detail the constitutional and

⁴ For a rare instance of a progressive characterization of the "sanctuary jurisdiction" movement in terms of a policymaking process between states and local governments based on policy disagreements, see Rick Su, *The Promise and Peril of Cities and Immigration Policy*, 7 HARV. L. & POL'Y REV. 299 (2013).

⁵ To borrow the well-worn words of James Madison: "[i]n framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself." THE FEDERALIST NO. 51, at 120 (1788) (James Madison) (Michael A. Genovese ed., 2009).

⁶ See Mary Habeck, *What Does Al Qaeda Want?*, FOREIGN POL'Y (Mar. 6, 2012) <http://foreignpolicy.com/2012/03/06/what-does-al-qaeda-want/> [<https://perma.cc/V2HB-2JQM>].

⁷ See, e.g., *Texas v. EPA*, 829 F.3d 405 (5th Cir. 2016) (Texas challenging the federal government's attempt to substitute its judgment for that of the state with regard to reducing haze in wilderness areas); *Ohio v. U.S. Army Corps of Eng'rs*, 259 F. Supp. 3d 732 (N.D. Ohio 2017) (18 states challenging federal overreach with the so-called "waters of the United States rule"); *Planned Parenthood of Greater Tex. Family Planning & Preventative Health Servs. v. Smith*, 236 F. Supp. 3d 974 (W.D. Tex. 2017) (in which a federal judge entered a preliminary injunction against Texas's decision to exclude an abortion provider from the Texas Medicaid program); *Petition for Review at 2*, *West Virginia v. EPA*, (No. 15-1381), (D.C. Cir. Oct. 23, 2015), http://wordpress2.ei.columbia.edu/climate-change-litigation/files/case-documents/2015/20151023_docket-15-1363_petition-for-review.pdf (34 states challenging President Obama's attempt to regulate power plant emissions without congressionally granted authority).

⁸ Attorneys General of Texas have been a vital backstop against executive overreaches by federal executives in several important and high-profile cases. See, e.g., *United States v. Texas*, 136 S. Ct. 2271 (2016) (wherein the Texas Attorney General challenged President Obama's unlawful attempt to confer lawful presence to illegal immigrants contrary to numerous laws enacted by Congress); *Medellin v. Texas*, 552 U.S. 491 (2008) (wherein the Texas Attorney General took a stand against the Bush Administration's unconstitutional attempt to usurp state law under the terms of a non-self-executing treaty where Congress had not enacted any legislation to preempt state law); *Texas v. United States*, No. 7:15-cv-00151-O, 2016 WL 4138632 (N.D. Tex. Aug. 4, 2016) (challenging the Obama Administration's unlawful attempt to tax the State of Texas's managed care Medicare/Medicaid program).

⁹ For example, in addition to the sanctuary policies discussed in this Article, states have attempted to defy duly-enacted federal drug laws by legalizing marijuana for medical or recreational use. See NAT'L CONFERENCE OF STATE LEGISLATURES, STATE MEDICAL MARIJUANA LAWS (last visited Dec. 18, 2017), <http://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx> [<https://perma.cc/7Z43-7TX5>]; NAT'L CONFERENCE OF STATE LEGISLATURES, MARIJUANA DEEP DIVE (last visited Dec. 18, 2017), <http://www.ncsl.org/bookstore/state-legislatures-magazine/marijuana-deep-dive.aspx> [<https://perma.cc/SNP7-J9YX>].

statutory limits on state participation in immigration enforcement. Finally, Part IV will address the constitutional challenges to Senate Bill 4 and explain why these challenges all fail as a matter of law.

II. THE DEFINITION AND HISTORY OF SANCTUARY POLICIES

A. *What is a Sanctuary Policy?*

What constitutes a “sanctuary policy” today is a matter of some debate; however, the term generally refers to at least two different types of policies: (1) policies that prohibit state or local officials from investigating, inquiring into, acting on, or reporting the immigration status of any individual; and (2) policies that prohibit or discourage state or local officials from cooperating with federal investigations or immigration detainers.¹⁰ Because that definition is relatively well accepted and relevant to the provisions of Senate Bill 4,¹¹ this Article will rely on that definition when referring to such policies.

B. *The History of the “Sanctuary Jurisdiction” Movement in America*

Although the concept of a city where those that have broken the law can flee to avoid punishment is old and familiar to Western legal thought,¹² the application of that concept to immigration enforcement seems to date back only to the 1980s. The movement began with churches and religious

¹⁰ For a discussion of these types of policies and an argument about which elements are proper, all of which the author does not necessarily agree with entirely, see Rose Cuison Villazor, *What Is a “Sanctuary”?*, 61 SMU L. REV. 133 (2008).

¹¹ That precise definition seems to have been in the minds of the legislation’s author and sponsors. See TEX. SENATE RESEARCH CTR., 85R3668 SCL/ADM-D, BILL ANALYSIS SB.4 (INTRODUCED) 1 (2017), <https://capitol.texas.gov/tlodocs/85R/analysis/pdf/SB00004I.pdf#navpanes=0> [<https://perma.cc/9MNY-V9SD>] (“Senate Bill 4 looks to prohibit ‘sanctuary city’ policies, that prohibit local law enforcement from inquiring about a person’s immigration status and complying with detainer requests. These policies also often prohibit the sharing of information regarding a person’s immigration status with the federal government.”).

¹² For a lengthy discussion of biblical law and its influence on American law in particular, see John W. Welch, *Biblical Law in America: Historical Perspectives and Potentials for Reform*, 2002 BYU L. REV. 611. See also *Deuteronomy* 4:41–43 (describing the designation of the six cities of the Levites as cities of refuge for those who had unintentionally killed another person). Although supporters of so-called sanctuary city policies have sometimes invoked these cities as a justification for the policy, it is worth noting that those cities were of no avail to those who had intentionally broken the law. See *Numbers* 35 (providing that any person, having killed another person and fled to a city of refuge, should be put on trial before the congregation of the city and allowed refuge only if the congregation found the person not guilty of murder). For a contemporary explanation of this distinction, see Cal Thomas, *Cal Thomas: Sanctuary Cities vs. Hideouts*, BALT. SUN, (Aug. 12, 2017), <http://www.baltimoresun.com/news/opinion/oped/bs-ed-op-0812-cal-thomas-20170810-story.html> [<https://perma.cc/NF3U-FJVT>]. For a discussion of the history of “sanctuary city” policies and an argument that such policies are necessary due to the imperfect nature of human legal systems, see Elizabeth Allen, *Why Sanctuary Cities Must Exist*, L.A. TIMES, (Sept. 17, 2015) <http://www.latimes.com/opinion/op-ed/la-oe-allen-sanctuary-cities-20150917-story.html> [<https://perma.cc/NF8D-4UQM>].

individuals—dissatisfied with the nation’s refugee response to war and unrest in Central America—providing shelter and assistance to illegal immigrants entering the country.¹³ During that time, local jurisdictions enacted policies that prohibited or limited law enforcement’s ability to cooperate with federal immigration enforcement authorities.¹⁴ Although the United States claimed these activities were illegal and successfully prosecuted a number of participants in the movement for their actions,¹⁵ the trend of local jurisdictions refusing to cooperate with immigration enforcement continued.¹⁶

Since the 1980s, immigration law and policy has been characterized by two contradictory trends. First, the population of illegal immigrants in the U.S. has drastically increased. According to the Department of Homeland Security, the population of illegal immigrants has grown from somewhere between two and four million in 1980 to twelve million in 2007.¹⁷ In Texas alone, the illegal immigrant population has grown from an estimated 450,000 in 1990¹⁸ to between 1.6 million¹⁹ and 1.8 million²⁰ in 2016. In 2012, an estimated 1.2 million illegal immigrants are members of the Texas labor force.²¹ That accounts for around 9% of Texas’s labor force.²² After

¹³ See Jennifer L. Gregorin, *Hidden Beneath the Waves of Immigration Debate: San Francisco’s Sanctuary Ordinance*, 6 LIBERTY U. L. REV. 175, 178–183 (2011). See also generally ANN CRITTENDEN, SANCTUARY 20–22 (1988) (discussing failure of 1980s laws to afford Central Americans’ refugee status).

¹⁴ Raina Bhatt, *Pushing an End to Sanctuary Cities: Will it Happen?*, 22 MICH. J. RACE & L. 139, 142 (2017).

¹⁵ Gregory A. Loken & Lisa R. Bambino, *Harboring, Sanctuary, and the Crime of Charity Under Federal Immigration Law*, 28 HARV. C.R.C.L. L. REV. 119, 122–26 (1993) (detailing the early history of the sanctuary movement and the courts’ receptiveness to such prosecutions).

¹⁶ Jennifer C. Critchley & Lisa J. Trembly, *Historical Review, Current Status and Legal Considerations Regarding Sanctuary Cities*, N.J. LAW., June 2017, at 32–33 (discussing the history and growth of the sanctuary city movement).

¹⁷ BRYAN BAKER & NANCY RYTINA, DEP’T OF HOMELAND SEC., ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES: JANUARY 2012, at 3 (2013) https://www.dhs.gov/sites/default/files/publications/Unauthorized%20Immigrant%20Population%20Estimates%20in%20the%20US%20January%202012_0.pdf [<https://perma.cc/SKF5-QVRY>]. There is dispute about the exact size of the current illegal immigrant population, but most estimates agree that it is between 10 million and 12.5 million. See FED’N FOR AM. IMMIGRATION REFORM, HOW MANY ILLEGAL ALIENS CURRENTLY LIVE IN THE UNITED STATES? 1 (2017) https://fairus.org/sites/default/files/2017-10/Factsheet_How_Many_Illegal_Aliens_Currently_Live_in_the_United_States.pdf [<https://perma.cc/G22H-D23W>]; see also STEVEN A. CAMAROTA, CTR. FOR IMMIGRATION STUDIES, NEW DATA: IMMIGRATION SURGED IN 2014 AND 2015, at 7 (2016), https://cis.org/sites/cis.org/files/camarota-surge_0.pdf [<https://perma.cc/B69W-RSNM>] (estimating the total at around 11.7 million for 2016).

¹⁸ PEW RESEARCH CTR., UNAUTHORIZED IMMIGRANT POPULATION TRENDS FOR STATES, BIRTH COUNTRIES, AND REGIONS (2016), <http://www.pewhispanic.org/interactives/unauthorized-trends/> [<https://perma.cc/HLD9-V4QQ>].

¹⁹ *Id.*

²⁰ FED’N FOR AM. IMMIGRATION REFORM, *supra* note 17, at 4 (placing the number at 1,857,000).

²¹ JEFFREY S. PASSEL & D’VERA COHN, PEW RESEARCH CTR., UNAUTHORIZED IMMIGRANT TOTALS RISE IN 7 STATES, FALL IN 14, at 28 (2014).

²² *Id.* at 15–16.

California, Texas has the second highest number of illegal alien residents in the country.²³ Based on the foregoing statistics, this trend has substantially impacted the U.S.—and particularly Texas—since 1980.²⁴

Second, Congress has been increasing both federal and state enforcement authority.²⁵ With the Immigration Reform and Control Act of 1986 (“IRCA”), Congress greatly boosted enforcement resources and authority at the federal level.²⁶ The Antiterrorism and Effective Death Penalty Act of 1996²⁷ and Illegal Immigration Reform and Immigrant Responsibility Act of 1996²⁸ prohibited re-entry for aliens who had overstayed their visas and required mandatory detention of many illegal immigrants prior to deportation.²⁹ The trend toward expanding enforcement resumed after the September 11, 2001 terrorist attacks with the passage of the USA PATRIOT Act of 2001,³⁰ the Enhanced Border Security and Visa Entry Reform Act of 2002,³¹

²³ Jeff Salaman, *Everything You Ever Wanted to Know About Illegal Immigration (But Didn't Know Who to Ask)*, TEX. MONTHLY (Nov. 2010), <http://www.texasmonthly.com/politics/everything-you-ever-wanted-to-know-about-illegal-immigration-but-didnt-know-who-to-ask/> [https://perma.cc/Q2GF-TNJD].

²⁴ According to one estimate, illegal immigration costs the State of Texas \$12.1 billion each year. JACK MARTIN, FED’N FOR AM. IMMIGRATION REFORM, THE FISCAL BURDEN OF ILLEGAL IMMIGRATION ON TEXANS 16 (2014), http://www.fairus.org/DocServer/research-pub/TexasCostStudy_2014.pdf [https://perma.cc/9WFK-YJ48]. That estimate includes \$8.5 billion spent on education, \$1.9 billion spent on healthcare, \$1.1 billion spent on justice and law enforcement, \$47.8 million spent on public assistance, and \$577 million spent on general government services. *Id.*

²⁵ For a helpful discussion of the development of American immigration law and enforcement overall, see 7 U.S. CITIZENSHIP & IMMIGRATION SERVS., POLICY MANUAL, pt. A.1 (2017), <https://www.uscis.gov/policymanual/HTML/PolicyManual-Volume7-PartA-Chapter1.html> [https://perma.cc/AY4C-HAJW].

²⁶ Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 111, 100 Stat. 3359, 3381. In terms of resources at the border, IRCA increased the number of authorized border patrol agents by around 50%, but funding was not provided for those agents to actually be hired. MUZAFFAR CHISHTI & CHARLES KAMASAKI, MIGRATION POLICY INSTITUTE, IRCA IN RETROSPECT: GUIDEPOSTS FOR TODAY’S IMMIGRATION REFORM 5 (2014), <https://www.migrationpolicy.org/research/irca-retrospect-immigration-reform> [https://perma.cc/SD7W-WK35]. In terms of authorities, IRCA’s most prominent feature was the prohibition on employing illegal aliens and the ability to enforce civil and criminal penalties against employers who do so. See Michael J. Wishnie, *Prohibiting the Employment of Unauthorized Immigrants: The Experiment Fails*, 2007 U. CHI. LEGAL F. 193, 194. The most well-known feature of IRCA—the granting of amnesty to the 3 million illegal immigrants in the United States at that time—has perhaps had a more profound impact on the current environment by encouraging further illegal immigration. As one commentator put it, “[g]rants of amnesty, regardless of the form of the reward they give to aliens who knowingly entered or remain the U.S., discourage respect for the law, treat law-breaking aliens better than law-following aliens, and encourage future unlawful immigration into the United States.” DAVID S. ADDINGTON, HERITAGE FOUND., ENCOURAGING LAWFUL IMMIGRATION AND DISCOURAGING UNLAWFUL IMMIGRATION 4 (2013).

²⁷ Pub. L. No. 104-132, 110 Stat. 1214.

²⁸ Pub. L. No. 104-208, 110 Stat. 3009.

²⁹ Sara A. Martin, *Postcards from the Border: A Result-Oriented Analysis of Immigration Reform Under the AEDPA and IIRIRA*, 19 B.C. THIRD WORLD L. J. 683, 684–85 (1999).

³⁰ Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act) Act of 2001. Pub. L. No. 107-56, 115 Stat. 272. The USA PATRIOT Act expanded monitoring of student visa holders and broadened existing terrorism-related grounds for excluding aliens. *Id.* § 416.

the Homeland Security Act of 2002,³² the REAL ID Act of 2005,³³ and the Secure Fence Act of 2006.³⁴ Even the U.S. Senate's 2013 attempt at comprehensive immigration reform included provisions that purported to increase the number of border patrol agents and border security resources.³⁵

While there is much debate about the cause and effect of the current immigration crisis, there are areas about which people of various perspectives agree. Many commentators agree that the lack of interior enforcement has contributed to the current crisis.³⁶ There is also some agreement that business interests and politicians have perverse incentives with respect to ending illegal immigration.³⁷ These widely accepted factors offer one expla-

³¹ Pub. L. No. 107-173, 116 Stat. 543. This legislation required immigration enforcement authorities to make immigration databases interoperable, required federal law enforcement and intelligence agencies to share information on aliens with immigration enforcement authorities, and created security and biometric requirements for travel and entry documents. See ROSEMARY JENKS, CTR. FOR IMMIGRATION STUDIES, *THE ENHANCED BORDER SECURITY AND VISA REFORM ACT OF 2002, A SUMMARY OF H.R. 3525*, at 1 (2002), <https://cis.org/Enhanced-Border-Security-and-Visa-Reform-Act-2002-HR-3525> [<https://perma.cc/T447-FC85>].

³² Pub. L. No. 107-296, 116 Stat. 2135. Although the bill primarily consolidated immigration enforcement and antiterrorism functions that were spread throughout various agencies into the Department of Homeland Security, it created some additional agencies and attempted to consolidate all immigration enforcement into a more aggressive counterterrorism strategy. See Jonathan Thessin, *Department of Homeland Security*, 40 HARV. J. ON LEGIS. 513, 513–20 (2003).

³³ Pub. L. No. 109-13, 119 Stat. 302. In addition to the better-known provisions of this bill attempting to set national standards for identification documents, this legislation also included provisions allowing the waiver of other laws to facilitate the construction of infrastructure for border enforcement, created technology pilot programs for improved surveillance at the border, and added additional removal and inadmissibility provisions for aliens that engage in terrorist activities. See MICHAEL JOHN GARCIA ET AL., CONG. RESEARCH SERV., RL32754, *IMMIGRATION: ANALYSIS OF THE MAJOR PROVISIONS OF THE REAL ID ACT OF 2005*, at 24, 43 (2005).

³⁴ Pub. L. No. 109-367, 120 Stat. 2638. To be more precise, the Secure Fence Act of 2006 expanded on the IIRIRA's border infrastructure requirement by mandating the construction of no less than 700 miles of reinforced fencing. See MICHAEL JOHN GARCIA, CONG. RESEARCH SERV., R43975, *BARRIERS ALONG THE U.S. BORDERS: KEY AUTHORITIES AND REQUIREMENTS 1* (2017).

³⁵ See S. 744, 113th Cong. § 1104 (2013); see also THE HERITAGE FOUNDATION IMMIGRATION AND BORDER SECURITY REFORM TASK FORCE, *THE SENATE'S COMPREHENSIVE IMMIGRATION BILL: TOP 10 CONCERNS* (2013), <http://www.heritage.org/immigration/report/the-senates-comprehensive-immigration-bill-top-10-concerns> [<https://perma.cc/D6FC-ZRAC>] (pointing out the weaknesses of the legislation from a conservative perspective). See generally Nicholas J. Ferraro, *The U.S. Senate Immigration Reform Bill and the Need for Amendments before Passing*, 36 U. LA VERNE L. REV. 17 (2014) (arguing the legislation does not go far enough to fix our current immigration system).

³⁶ Although there is disagreement among political perspectives about deportation, there is at least broad agreement that enforcement of laws against hiring and employing illegal immigrants have not been sufficiently enforced to deter illegal immigration. See, e.g., Gabriela A. Gallegos, *Border Matters: Redefining the National Interest in U.S.-Mexico Immigration and Trade Policy*, 92 CALIF. L. REV. 1729, 1754–55 (2004); Stephanie E. Steele, *Deterrence to Hiring Illegal Immigrant Workers: Will the New Employer Sanction Provisions Work?*, 36 GA. J. INT'L & COMP. L. 475, 492–98 (2008). See generally JERRY KAMMER, *WHAT HAPPENED TO WORKSITE ENFORCEMENT?* (2017) (arguing that various structural and political problems led to lack of enforcement against employers, thus causing the current crisis).

³⁷ See, e.g., Justin Akers Chacón, *Immigrant Rights at a Crossroads*, INT'L SOCIALIST REV. (2012), <https://isreview.org/issue/83/immigrant-rights-crossroads> [<https://perma.cc/8JKG->

nation of the rapid expansion of so-called sanctuary jurisdiction policies. In response to the September 11, 2001 terrorist attacks, the Bush Administration attempted to boost interior enforcement by leveraging state and local law enforcement resources for immigration enforcement.³⁸ The incentives of businesses and politicians were inconsistent with participation in such enforcement efforts.³⁹ As a result, many local jurisdictions began enacting policies prohibiting local law enforcement from inquiring into the immigration status of individuals, honoring immigration detainers from the federal government, or otherwise cooperating with federal authorities attempting to enforce immigration laws.⁴⁰

Despite the disagreement regarding the definition of a sanctuary jurisdiction, it is estimated there are at least several hundred sanctuary jurisdictions in the U.S., including some in Texas.⁴¹ At the time of this writing, the Center for Immigration Studies identifies only Travis and Dallas Counties as sanctuary jurisdictions in Texas.⁴² The Federation for American Immigration Reform lists the City of Austin, Dallas County, the City of San Antonio, and Travis County.⁴³ Regardless of whether these lists are comprehensive, the

RQ66] (arguing from the socialist perspective that the profitability of illegal immigrant labor creates perverse incentives for both political parties); James W. Lucas, *Why Sanctuary Cities Encourage Illegal Immigration*, AM. THINKER (Apr. 13, 2017), http://www.americanthinker.com/articles/2017/04/why_sanctuary_cities_encourage_illegal_immigration.html [https://perma.cc/3BXL-9DRK] (arguing from a pro-enforcement perspective that politicians aggrandize power by generating non-voting population for apportionment purposes).

³⁸ See *President Bush's Plan for Comprehensive Immigration Reform*, 2007 STATE OF THE UNION POLICY INITIATIVES, <https://georgewbush-whitehouse.archives.gov/stateoftheunion/2007/initiatives/immigration.html> [https://perma.cc/M6GN-E5QP].

³⁹ See, e.g., *Chamber of Commerce v. Whiting*, 563 U.S. 582 (2001) (striking down a challenge by the Chamber of Commerce against an Arizona law preventing the hiring and employment of illegal immigrants)

⁴⁰ See Christina M. Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567, 600–05 (2008).

⁴¹ See, e.g., BRYAN GRIFFITH & JESSICA M. VAUGHAN, CTR. FOR IMMIGRATION STUDIES, MAPS: SANCTUARY CITIES, COUNTIES, AND STATES (2017), <https://cis.org/Map-Sanctuary-Cities-Counties-and-States> [https://perma.cc/R5G7-NC2H] (listing approximately 300 jurisdictions); STATE & LOCAL DEP'T, FED'N FOR AM. IMMIGRATION REFORM, SANCTUARY POLICIES ACROSS THE U.S. (2017) (listing 239 sanctuary jurisdictions); Jasmine C. Lee, Rudy Omri & Julia Preston, *What Are Sanctuary Cities?*, N.Y. TIMES (Feb. 6, 2017), <https://www.nytimes.com/interactive/2016/09/02/us/sanctuary-cities.html> [perma.cc/GYR4-M2EM] (citing data from the Immigrant Legal Resource Center estimating that sanctuary jurisdictions include 5 states and at least 633 counties).

⁴² GRIFFITH & VAUGHAN, *supra* note 41.

⁴³ STATE & LOCAL DEP'T, FED'N FOR AM. IMMIGRATION REFORM, *supra* note 41. Most groups agree in listing Austin as a sanctuary policy jurisdiction. Austin has a formal written policy that immigration status will not be considered when determining eligibility for public benefits. AUSTIN, TEX., CODE OF ORDINANCES § 2-8-1 (1992) https://www.municode.com/library/tx/austin/codes/code_of_ordinances?nodeId=TIT2AD_CH2-8FIMAOVPO_ART1GE_PR_S2-8-1CISEPRREIMST [https://perma.cc/7Z9G-SH9F]. The Austin Police Department's policy handbook provides that "[o]fficers shall not detain persons solely for the purpose of determining or investigating a person's immigration status," but that they may detain such persons "beyond a reasonable time needed . . . to complete an investigation or an enforcement activity" when "complying with a formal detainer request issued by Immigration and Customs Enforcement (ICE) or another federal immigration authority." AUSTIN POLICE DEP'T, ADP GENERAL ORDERS 2017-4, § 318.3.2 (Dec. 12, 2017). Thus, the written policies would seem

existence of such jurisdictions in a state that feels the consequences of illegal immigration daily is a serious concern to the Texas Legislature.

C. *The End of Sanctuary Policies in Texas*

Several high-profile news stories have brought sanctuary jurisdictions to the forefront of public discourse over the past several years. The July 1, 2015 death of Kathryn Steinle, a 32-year-old San Francisco resident, due to a gunshot fired by an illegal immigrant sparked a national discussion of sanctuary jurisdiction policies as part of the 2016 presidential race.⁴⁴ A number of other cases involving violent criminal acts committed by illegal immigrants garnered national attention over the following year.⁴⁵ Largely in response to public outrage at these cases, at least 33 states considered legislative proposals to prohibit sanctuary city policies in 2017.⁴⁶

Texas was the vanguard of the trend described above partially because the issue had been at the forefront of Texas policy for years. The issue of whether Houston or Harris County were sanctuary jurisdictions was debated during the 2010 gubernatorial race,⁴⁷ and then-Governor Rick Perry urged

inconclusive as to whether Austin is a sanctuary city. Austin's former Police Chief Art Acevedo, however, made statements that indicated he opposed the involvement of local police in immigration enforcement. Press Release, Nat'l Immigration Law Ctr., Austin Police Chief: Congress Should Consider Good Policy, Not Politics, When Dealing with Immigration (Jun. 25, 2013), <https://www.nilc.org/2013/06/25/austin-police-chief-on-immigration-enforcement/> [https://perma.cc/ST3W-JPJT].

⁴⁴ Evan Sernoffsky, *Pier Killing Suspect, in Jailhouse Interview, Admits Firing Gun*, S.F. CHRON. (Jul. 5, 2015), <http://www.sfchronicle.com/news/article/Pier-killing-suspect-admits-firing-gun-in-6367607.php?t=f4795b9ac500af33be> [https://perma.cc/4YSM-R3WT], Evan Sernoffsky, Hamed Aleaziz & Jenna Lyons, *Woman Mourned, Suspect Held in Random Killing on S.F. Pier*, S.F. CHRON. (Jul. 2, 2015), <http://www.sfchronicle.com/news/article/Woman-killed-on-San-Francisco-pier-identified-6363401.php?t=77e54e491a1210a92f> [https://perma.cc/2MGK-8UVH].

⁴⁵ See, e.g., Associated Press, *Mexican Smuggler Who Hit U.S. Agent with Rock Gets 8-year Term*, U.S. NEWS & WORLD REP. (Aug. 29, 2017), <https://www.usnews.com/news/best-states/california/articles/2017-08-29/smuggler-who-hit-agent-with-rock-sentenced-in-california> [http://perma.cc/5ZSS-R84X]; Brian Rogers, *Satanic Ritual Led to Young Woman's Killing, Witness Tells Police*, HOUS. CHRON. (Mar. 2, 2017), <http://www.houstonchronicle.com/news/houston-texas/houston/article/Satanic-ritual-led-to-young-woman-s-killing-10973251.php> [https://perma.cc/5MWK-6MYH]; Danika Worthington & Kieran Nicholson, *One of Two Suspects in Denver Light Rail Robbery-Murder Released from Jail Despite Being Flagged by ICE Officials*, DENVER POST (Feb. 17, 2017), <http://www.denverpost.com/2017/02/17/rtid-fatal-shooting-charges-tim-cruz/> [https://perma.cc/Q7QU-RVLQ].

⁴⁶ Ann Morse, Lydia Deatherage & Veronica Ibarra, *Sanctuary Policy FAQ*, NAT'L CONFERENCE OF STATE LEGISLATURES (July 28, 2017), <http://www.ncsl.org/research/immigration/sanctuary-policy-faq635991795.aspx> [https://perma.cc/JMV6-W6MG].

⁴⁷ Reeve Hamilton & Matt Stiles, *Is Texas a Sanctuary State?*, TEX. TRIB. (May 4, 2010), <https://www.texastribune.org/2010/05/04/houston-state-cops-have-similar-immigrant-policy> [https://perma.cc/L6FV-5JUS]. Politifact.com concluded that such claims were false, as Harris County was an early participant in the Secure Communities Program; however, it is clear that both jurisdictions follow a policy against officers asking the immigration status of individuals they encounter. See W. Garner Selby, *GOP Chair Cathie Adams Says Bill White Gave Sanctuary to Illegal Immigrants as Mayor of Houston*, POLITIFACT (Mar. 14, 2010), <http://www.poli->

the Texas Legislature to end sanctuary policies in 2011.⁴⁸ In 2015, a great deal of media and political attention focused on Dallas County Sheriff Lupe Valdez's announcement that Dallas County would cease honoring federal immigration detainees on individuals convicted of minor offenses.⁴⁹ Thereafter, the Dallas County Commissioner's Court passed a resolution welcoming illegal immigration.⁵⁰ Partially in response, legislation similar to Senate Bill 4 was introduced in 2015, but did not become law.⁵¹

The issue was finally addressed successfully in 2017. On November 14, 2016, Lieutenant Governor Dan Patrick listed ending sanctuary jurisdictions as one of the top ten priorities for the 2017 legislative session.⁵² The next day, Senator Charles Perry filed the initial text of Senate Bill 4.⁵³ Governor Abbott called on the Legislature to pass such legislation during his State of the State address on January 31,⁵⁴ and the bill received its first public hearing in the Senate State Affairs Committee on February 2, 2017.⁵⁵ The Senate considered nearly forty amendments before passing the bill on February 8.⁵⁶ The Texas House of Representatives likewise passed the bill on April 27, 2017,⁵⁷ and Governor Abbott signed the bill into law on May 7, 2017.⁵⁸ The

tifact.com/texas/statements/2010/mar/14/cathie-adams/gop-chair-cathie-adams-says-bill-white-gave-sanctu/ [https://perma.cc/4VJG-GCTD].

⁴⁸ Elise Hu, *He Sells Sanctuary*, TEX. TRIB. (Jan. 12, 2011), <https://www.texastribune.org/2011/01/12/revisiting-sanctuary-cities-in-texas-policy/> [https://perma.cc/PN66-8K2R].

⁴⁹ See Dianne Solís, *Dallas County Sheriff Eases Immigration Holds on Minor Offenses*, DALL. MORNING NEWS (Oct. 11, 2015), <http://www.dallasnews.com/news/metro/20151011-dallas-county-sheriff-eases-immigration-holds-on-minor-offenses.ece> [https://perma.cc/HF7A-7Y4C]. It is worth noting, however, that Dallas County contended that it had not refused to honor any immigration detainees. Brandi Grissom, *Dallas Sheriff Responds to Texas Governor: All ICE Detainers Honored this Year*, DALL. MORNING NEWS (Oct. 26, 2015), <https://www.dallasnews.com/news/politics/2015/10/26/gov-greg-abbott-wants-dallas-sheriff-to-honor-federal-immigration-detainers> [https://perma.cc/VK8K-M38S].

⁵⁰ See Naomi Martin, *Dallas County Passes Resolution Welcoming Unauthorized Immigrants*, DALL. MORNING NEWS (Feb. 7, 2017), <https://www.dallasnews.com/news/immigration/2017/02/07/tensions-erupt-sanctuary-cities-dallas-county-commissioners-court> [https://perma.cc/XAH2-64X4].

⁵¹ Tony Cantu, *Texas GOP Immigration Crackdown Fizzled . . . What Gives?*, SAN ANTONIO CURRENT (Jun. 10, 2015), <https://www.sacurrent.com/sanantonio/texas-gop-immigration-crackdown-fizzled-what-gives/Content?oid=2445611> [https://perma.cc/9RZG-7C9T].

⁵² Press Release, Lieutenant Governor Dan Patrick, Lt. Governor Patrick Announces Top Ten Legislative Priorities (Nov. 14, 2017), <https://www.ltgov.state.tx.us/2016/11/14/lt-governor-patrick-announces-top-ten-legislative-priorities/> [https://perma.cc/6JJU-UGH2].

⁵³ Press Release, Senator Charles Perry, Perry Files Legislation to Eliminate Sanctuary Cities in Texas (Nov. 15, 2016), <http://www.senate.texas.gov/members/d28/press/en/p20161115a.pdf> [https://perma.cc/6PE7-FEG2].

⁵⁴ Press Release, Governor Greg Abbott, Governor Abbott Delivers State of the State Address (Jan. 31, 2017), https://gov.texas.gov/news/post/governor_abbott_delivers_state_of_the_state_address [https://perma.cc/MQE2-CSRE].

⁵⁵ TX SB4-2017-2018-85th Legislature, LEGISCAN, <https://legiscan.com/TX/bill/SB4/2017> [https://perma.cc/C66M-HGNZ].

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

Texas Attorney General's Office was involved in litigation to uphold the law within days.⁵⁹

III. LIMITS ON STATE PARTICIPATION IN IMMIGRATION ENFORCEMENT

A. *In General*

States have a constitutionally- and statutorily-limited role in immigration enforcement. Federal courts have long taken the position that regulating immigration is the sole prerogative of the federal government.⁶⁰ In recent years, the Supreme Court indicated states may only participate in enforcing immigration laws when enforcement is authorized by and is consistent with Congressional and executive branch policies.⁶¹ Furthermore, the U.S. Department of Homeland Security has argued that federal control over immigration is so firm that state and local officials may not even investigate or inquire into an alien's immigration status unless it is doing so in cooperation with the Department.⁶² That argument was addressed by the Supreme Court in *Arizona v. United States*.⁶³

B. *Arizona v. United States*

In 2010, the State of Arizona enacted SB 1070 to respond to the federal government's failure to address illegal immigration in the state. The Arizona law contained a number of provisions, but the Obama Administration challenged four as interfering with federal primacy over immigration and preempted: (1) a provision making it a state misdemeanor for an alien to fail to comply with a federal alien registration requirement; (2) a provision making it a state misdemeanor for an illegal alien to seek employment or work in Arizona; (3) a provision empowering state law enforcement officers to arrest an alien if they have probable cause to believe the alien had committed any offense that made them removable from the U.S. under federal immigration law; and (4) a provision requiring state officers to verify the immigration status of aliens they encounter during a stop, detention, or arrest.⁶⁴ The Court

⁵⁹ See generally *Texas v. Travis Cty.*, 272 F. Supp. 3d 973 (W.D. Tex. 2017); *City of El Cenizo v. Texas*, 264 F. Supp. 3d 744 (W.D. Tex. 2017).

⁶⁰ See, e.g., *Arizona v. United States*, 132 S. Ct. 2492 (2012); *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950); *Chae Chan Ping v. United States* (The Chinese Exclusion Case), 130 U.S. 581 (1885).

⁶¹ See, e.g., *Arizona*, 132 S. Ct. at 2495; *Chamber of Commerce v. Whiting*, 563 U.S. 582, 600, 606–07 (2011).

⁶² U.S. DEP'T OF HOMELAND SEC., GUIDANCE ON STATE AND LOCAL GOVERNMENTS' ASSISTANCE IN IMMIGRATION ENFORCEMENT AND RELATED MATTERS 12 (2015), <http://www.dhs.gov/sites/default/files/publications/guidance-state-local-assistance-immigration-enforcement.pdf> [https://perma.cc/G9T2-MAJN].

⁶³ 132 S. Ct. at 2492.

⁶⁴ *Id.* at 2497–98; Section 3 of Arizona SB 1070 created a state misdemeanor offense for failure to comply with federal alien registration requirements. *Ariz. Rev. Stat. Ann.* § 13-1509

held that provisions (1) and (2) were preempted, reasoning that Congress had occupied the field of alien registration and illegal alien employment, leaving no room for state regulation.⁶⁵ The Court also held provision (3) preempted because allowing state officers to arrest aliens on suspicion of being removable interfered with the discretion over removal that Congress has entrusted to federal enforcement officials.⁶⁶ The Court, however, declined to hold provision (4) preempted, reasoning that the law could be implemented in such a way that the federal government retains control over the detention and removal of aliens because it required only a “reasonable effort” to verify immigration status.⁶⁷

After *Arizona*, states may participate in the enforcement of immigration laws only to the extent permitted by statute and agreed to by executive branch officials. The avenues for such state participation permitted by current law are discussed in greater detail below.

C. Existing Opportunities for State Participation

1. Congressionally-Authorized Participation

Congress has expressly authorized state and local jurisdictions to enforce immigration laws in specified circumstances. Immigration and Nationality Act (“INA”) Section 274(c) authorizes arrests for violation of the INA’s criminal prohibitions against smuggling, transporting, or harboring aliens not only by federal immigration officers, but also by “all other officers whose duty it is to enforce criminal laws.”⁶⁸ Furthermore, federal law authorizes state and local law enforcement officials to arrest aliens who are unlawfully present in the U.S. and were previously removed after being convicted of a felony if they have confirmed the status of such aliens with ICE.⁶⁹ In addition, Congress empowered the Secretary of Homeland Security to authorize state and local law enforcement to perform functions of federal immigration officers when an “actual or imminent mass influx of aliens . . . presents urgent circumstances requiring an immediate Federal response.”⁷⁰

(2011). Among other things, Section 5 created a state misdemeanor offense for seeking or engaging in work without lawful immigration status. *Id.* § 13-2928(C). Section 6 authorized Arizona law enforcement officers to arrest persons that “the officer ha[d] probable cause to believe . . . ha[d] committed any public offense that ma[de] the person removable from the United States.” *Id.* § 13-3883(A)(5). Section 2(B) requires Arizona law enforcement officers conducting stops, detentions, or arrests to attempt verification of the person’s immigration status with the federal government in some situations. *Id.* § 11-1051(B).

⁶⁵ *Arizona*, 132 S. Ct. at 2501–05.

⁶⁶ *Id.* at 2505–07.

⁶⁷ *Id.* at 2509–10.

⁶⁸ 8 U.S.C. § 1324(c) (2012).

⁶⁹ *Id.* § 1252(c).

⁷⁰ *Id.* § 1103(a)(10).

Congress also authorized the executive branch to approve an expanded role for state and local law enforcement agencies under Immigration and Nationality Act Section 287(g). That statute allows the Department of Homeland Security to enter into written agreements with state and local governments to voluntarily assist with various tasks relating to the “investigation, apprehension, or detention of aliens in the United States.”⁷¹ Where this process is utilized, the state or local government’s activities are limited both by the terms of the agreement and by the INA itself, which, among other conditions, requires that the state and local law enforcement officers who are conducting immigration enforcement operations be “qualified to perform a function of an immigration officer,” have “knowledge of, and adhere to, Federal law relating to the function,” and “have received adequate training regarding the enforcement of relevant Federal immigration laws.”⁷² All functions performed under a 287(g) Agreement must be “subject to the direction and supervision of the [Secretary].”⁷³

Section 287(g) provides authority for state participation even absent a formal agreement. Paragraph (10) of Section 287(g) provides that

[n]othing 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 communicate with the [Secretary] regarding the immigration status of any individual, including reporting knowledge that a particular alien is not lawfully present in the United States.⁷⁴

Paragraph (10) also allows state and local officers to participate in certain aspects of the enforcement of immigration laws outside of a formal written agreement, through formal or informal “cooperat[ion] with the [Secretary].”⁷⁵

2. *Executive Branch Programs Creating Opportunities for Participation*

State participation has been critical to the enforcement programs of the past several presidential administrations. Congress passed the Enhanced Border Security and Visa Entry Reform Act in 2002,⁷⁶ mandating the development and implementation of an interoperable electronic data system between law enforcement and immigration officers.⁷⁷ To meet that objective, a

⁷¹ *Id.* § 1357(g)(1).

⁷² *Id.* § 1357(g)(1)–(2).

⁷³ *Id.* § 1357(g)(3).

⁷⁴ *Id.* § 1357(g)(10)(A).

⁷⁵ *Id.* § 1357(g)(10)(B); *see also* 6 U.S.C. § 251 (authorizing enforcement by Department of Homeland Security).

⁷⁶ Enhanced Border Security and Visa Entry Reform Act, Pub. L. No. 107-173, 116 Stat. 548 (May 14, 2002) (codified at 8 U.S.C. §§ 1701–1778 (2012)).

⁷⁷ *See id.*, sec. 201–04, 116 Stat. 548–52.

number of federal law enforcement agencies entered into a memorandum of understanding on July 1, 2008 integrating fingerprints-based background information of U.S. citizens and aliens, including information related to non-criminal immigration matters, into a single query system.⁷⁸ This system was integrated into an administrative program called the Secure Communities Program.⁷⁹

Under the Secure Communities Program, fingerprint information sent to the FBI by state and local officials after an arrest is also queried against records held in connection with immigration matters.⁸⁰ Although state and local jurisdictions initially had to opt into that aspect of the check, the program was later expanded to include that element regardless of the jurisdiction's policy.⁸¹ Federal officials then use the information obtained by such queries to evaluate cases, issue immigration detainers, and initiate removal proceedings. The Secure Communities Program ended in 2014 and was replaced by the Priority Enforcement Program,⁸² only to be later reinstated by

⁷⁸ See Memorandum of Understanding Among the Dep't of Homeland Sec.; Criminal Justice Info. Servs. Div., FBI, Dep't of Justice; and Bureau of Consular Affairs, Dep't of State, for Improved Information Sharing Services (July 1, 2008), <http://ccrjustice.org/files/FBI-DOS-DHS%20agreement-%20ICE%20FOIA%2010-2674.001718-001736.pdf> [<http://perma.cc/VG3A-5A2C>].

⁷⁹ FED'N FOR AM. IMMIGRATION REFORM, STATE AND LOCAL COOPERATION ON IMMIGRATION ENFORCEMENT: ICE ACCESS (2014), <https://fairus.org/issue/illegal-immigration/state-and-local-cooperation-immigration-enforcement-ice-access> [<http://perma.cc/5J5A-UWBF>].

⁸⁰ U.S. IMMIGRATION & CUSTOMS ENF'T, SECURE COMMUNITIES FACT SHEET (2009), <https://www.hsdl.org/?view&did=29584> [<https://perma.cc/67B7-7X5T>].

⁸¹ For a discussion of the program's history from a critic's perspective, see Christine N. Cimini, *Hands Off Our Fingerprints: State, Local, and Individual Defiance of Federal Immigration Enforcement*, 47 CONN. L. REV. 101, 123–26 (2014).

⁸² Memorandum from Jeh Johnson, Sec'y of Homeland Sec., to Thomas Winkowski, Acting Dir., U.S. Immigration & Customs Enf't et al. (Nov. 20, 2014), http://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf [<http://perma.cc/5WTT-P5TR>]; U.S. Immigration & Customs Enf't, *Priority Enforcement Program* [hereinafter ICE PEP], <https://www.ice.gov/pep> [<http://perma.cc/5V7X-6Y4C>]. Although the Priority Enforcement Program seemed rational enough, its actual result was a reduction in interior enforcement activities. According to Jessica Vaughan, an immigration expert with the Center for Immigration Studies, "the guidelines for enforcement activity were tightened to require criminal convictions before ICE officers could take action, to exempt those who had been deported before January 1, 2014, to exempt those who were convicted of identity theft, immigration fraud, or similar crimes, to apply federal definitions or classification for crimes instead of state definitions, and to exempt from deportation those aliens with a long list of vaguely-defined 'humanitarian' concerns, including U.S.-born or legally resident family members, ties to the community, and health problems, among other conditions. In addition, other DHS enforcement agencies such as the Border Patrol were also told to adjust their practices to comply with these priorities. The result . . . is that enforcement activity has declined significantly since the implementation of PEP. Not only have total interior deportations fallen sharply, but deportations of criminal aliens have also fallen, despite the administration's insistence that criminal aliens are the highest priority for ICE. ICE claims that it is focused like a laser on deporting 'the worst of the worst', but the reality is that these policies are allowing many of 'the worst' to remain in American communities." Jessica Vaughan, *Public Safety Impact of the Obama Administration's Priority Enforcement Program*, CTR. FOR IMMIGRATION STUDIES (Mar. 23, 2016), <https://cis.org/Public-Safety-Impact-Obama-Administrations-Priority-Enforcement-Program> [<http://perma.cc/XW2K-6DM5>] (showing that the PEP decreased detainers and issuance of charging documents to roughly half what they had been in 2013).

President Trump.⁸³ Thus, the federal executive currently provides an opportunity for state and local entities to participate in immigration enforcement every time the entity checks the fingerprints of a prisoner in custody.

When Immigration and Customs Enforcement is interested in removing an alien in custody of a state or local government entity, it normally issues an immigration detainer. A detainer

serves to advise another law enforcement agency that the Department seeks custody of an alien presently in the custody of that agency, for the purpose of arresting and removing the alien. The detainer is a request that such agency advise the Department, prior to the release of the alien, in order for the Department to arrange to assume custody, in situations when gaining immediate physical custody is either impracticable or impossible.⁸⁴

In a nutshell, a detainer is a request for information about an alien or a request that a state or local entity hold such alien for up to 48 hours until the federal government can take custody of him for removal.⁸⁵ In general, federal immigration detainees are not treated as mandatory on state or local governments, but merely as granting those governments authority to hold aliens pursuant to a federal enforcement action.⁸⁶

⁸³ Executive Order No. 13768 Enhancing Public Safety in the Interior of the United States, 82 Fed. Reg. 8799 (Jan. 25, 2017). President Trump's Executive Order specifically and unambiguously states "[i]t is the policy of the executive branch to empower State and local law enforcement agencies across the country to perform the functions of an immigration officer in the interior of the United States to the maximum extent permitted by law." *Id.* at 8800.

⁸⁴ 8 C.F.R. § 287.7(a) (2018).

⁸⁵ During the Obama Administration, there were two different "detainer" documents sent to local jurisdictions in custody of criminal aliens in which ICE is interested: (1) a form I-247N "Request for Voluntary Notification of Release of Suspected Priority Alien," which requested the receiving agency notify ICE of the pending release from custody of a suspected priority removable individual at least 48 hours prior to release, if possible. It did not request or authorize the agency to hold an individual beyond the point at which he or she would otherwise be released; and (2) a form I-247D, a true "immigration detainer," which requested the receiving agency maintain custody of an alien for a period not to exceed 48 hours beyond the time when he or she would have otherwise been released from custody. ICE PEP, *supra* note 82. ICE subsequently collapsed these two forms into a single consolidated form. See U.S. IMMIGRATION & CUSTOMS ENFT, ISSUANCE OF IMMIGRATION DETAINERS BY ICE IMMIGRATION OFFICERS (2017), <https://www.ice.gov/sites/default/files/documents/Document/2017/10074-2.pdf> [<https://perma.cc/R9JD-UR3M>].

⁸⁶ Although immigration detainees have been in existence since the 1950s, statute did not expressly authorize issuance of immigration detainees until 1986. See KATE M. MANUEL, CONG. RESEARCH SERV., R42690, IMMIGRATION DETAINERS: LEGAL ISSUES 4 (2015). Prior to that time, the federal government never treated immigration detainees as mandatory. See *Fernandez-Collado v. INS*, 644 F. Supp. 741, 743 n.1 (D. Conn. 1986) (describing immigration detainer as "merely a method of advising the prison officials to notify the I.N.S. of the petitioner's release or transfer"). Since 1986, there has been much controversy over whether the federal government can require a state or local jurisdiction to comply with an immigration detainer outright. See *Cimini*, *supra* note 81, at 136 n.194. The author has substantial doubts as to whether the federal government has such constitutional authority. See *Printz v. United States*, 521 U.S. 898 (1997) (holding that the federal government cannot commandeer states and force them to carry out federal policies). That is precisely why it is critical for state legisla-

3. Texas's Role in Immigration Enforcement

When consideration of Senate Bill 4 began, specific provisions of Texas law or policy involving state and local entities in immigration enforcement were sparse. The Texas Government Code requires the Texas Health and Human Services Commission to verify the immigration status of applicants for benefits who claim to be “qualified aliens” within the meaning of federal immigration law,⁸⁷ but other state statutes specifically authorize the provision of benefits without regard to the recipients’ immigration status.⁸⁸ Texas Attorney General Opinions also sometimes reached the conclusion that immigration status may not be considered under some circumstances.⁸⁹ The Texas Department of Public Safety⁹⁰ requires its personnel to verify an applicant’s lawful immigration status when obtaining a driver’s license⁹¹ and otherwise cooperate with immigration enforcement.⁹² In addition, at least eighteen jurisdictions in Texas have a 287(g) Agreement with the federal government.⁹³

After enactment of Senate Bill 4, Texas law assures all levels of Texas government will cooperate with immigration enforcement to the maximum extent allowed by federal law. In relevant part, the legislation prohibits Texas state and local government entities from adopting any rule, order, ordinance, or policy preventing the enforcement of federal immigration laws, including policies that prohibit law enforcement officers from inquiring into the immigration status of any person under lawful detention or arrest, sending such information to the relevant federal authorities, or assisting a federal

tures—who do have constitutional authority to direct compliance with immigration detainees—to enact legislation like Texas’s Senate Bill 4.

⁸⁷ TEX. GOV’T CODE ANN. § 531.024181 (West 2015).

⁸⁸ See, e.g., TEX. FAM. CODE ANN. §§ 264.004, 264.006 (West 1997).

⁸⁹ See, e.g., Op. Tex. Att’y Gen., JM-962 (1988); Op. Tex. Att’y Gen., JC-0566 (2002).

⁹⁰ The Texas Department of Public Safety “is an agency of the state to enforce the laws protecting the public safety and provide for the prevention and detection of crime. The department is composed of the Texas Rangers, the Texas Highway Patrol, the administrative division, and other divisions that the [governing commission of the agency] considers necessary.” TEX. GOV’T CODE ANN. § 411.002. In Texas, the Department of Public Safety is also the issuing authority for Texas Driver’s Licenses. See Tex. Dep’t of Pub. Safety, *TxDPS-About DPS*, <https://www.dps.texas.gov/about.htm> [<http://perma.cc/R99P-RU9F>].

⁹¹ See Tex. Dep’t of Pub. Safety, *Verifying Lawful Presence*, <https://www.dps.texas.gov/DriverLicense/documents/verifyingLawfulPresence.pdf> [<http://perma.cc/MW32-EX8Z>].

⁹² Debbie Nathan, *DPSPS Director Steve McCraw Issues Immigration Marching Orders*, AUSTIN CHRON. (July 7, 2017), <https://www.austinchronicle.com/news/2017-07-07/dps-director-steve-mccraw-issues-immigration-marching-orders/> [<http://perma.cc/M5UJ-NM99>]. This is consistent with DPS’s longstanding practice. See, e.g., Reeve Hamilton & Matt Stiles, *Houston, State Cops Have Similar Immigrant Policy*, TEX. TRIB. (May 4, 2010) <http://www.texas-tribune.org/2010/05/04/houston-state-cops-have-similar-immigrant-policy/> [<http://perma.cc/89UF-UCG5>]; Steve Taylor, *DPS Insists Checkpoints Were Not Set up to Catch Undocumented Immigrants*, RIO GRANDE GUARDIAN (Oct. 8, 2014), <https://riograndeguardian.com/dps-insists-checkpoints-were-not-set-up-to-catch-undocumented-immigrants/> [<http://perma.cc/Y5B9-QWJ9>].

⁹³ U.S. Immigration & Customs Enf’t, *Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act*, <https://www.ice.gov/287g> [<http://perma.cc/5Y5T-J3XJ>].

agent in the enforcement of immigration laws.⁹⁴ The legislation also requires government entities to comply with federal immigration detainers⁹⁵ and allows aliens to be transferred to federal custody within the last seven days of the alien's state criminal sentence in order to facilitate removal.⁹⁶

Senate Bill 4 seeks to enforce its prohibition through several mechanisms. First, the legislation creates a civil penalty for entities that attempt to adopt or enforce prohibited policies⁹⁷ and a criminal offense for law enforcement officials who defy immigration detainers.⁹⁸ Furthermore, the legislation empowers individuals and the federal government to submit a complaint to the Office of the Attorney General that a prohibited policy has been enacted and authorizes the Attorney General to seek an injunction against the violation.⁹⁹

IV. CONSTITUTIONAL CHALLENGES AGAINST SENATE BILL 4

Soon after enactment, cities throughout Texas brought litigation against Senate Bill 4 in federal court alleging the law was unconstitutional.¹⁰⁰ The district court initially issued a preliminary injunction against most of the law,¹⁰¹ but the Fifth Circuit has since allowed much of it to go into effect;¹⁰² the Fifth Circuit recently upheld much of the law on the merits.¹⁰³ In their briefs, plaintiffs primarily relied on four arguments: (1) Senate Bill 4's ICE detainer mandate, as expressed in Section 752.053(a)(3) of the Government Code and Article 2.251 of the Code of Criminal Procedure, facially violates the Fourth Amendment; (2) the phrase "materially limit" in Section 752.053(a)(1)–(2) facially violates the Due Process Clause of the Fourteenth Amendment; (3) the term "endorse" violates the Free Speech Clause of the First Amendment; and (4) several provisions in Senate Bill 4 are preempted

⁹⁴ TEX. GOV'T CODE ANN. § 752.053.

⁹⁵ TEX. CODE CRIM. PROC. ANN. art. 2.251 (West 2017).

⁹⁶ *Id.* art. 42.039.

⁹⁷ TEX. GOV'T CODE ANN. § 752.056.

⁹⁸ TEX. PENAL CODE ANN. § 39.07 (West 2017).

⁹⁹ TEX. GOV'T CODE ANN. § 752.055.

¹⁰⁰ Philip Jankowski, *Study Touts Immigrants' Impact as SB 4 Challenge Heads to Appeals Court*, AUSTIN AMERICAN-STATESMAN (Nov. 5, 2017), <http://www.mystatesman.com/news/state—regional/study-touts-immigrants-impact-challenge-heads-appeals-court/YBCHCgQ4ZF7IRnP2B9b8EM/> [<http://perma.cc/4HQM-CWCJ>]. These cities will be referred to hereafter simply as "plaintiffs."

¹⁰¹ See generally *City of El Cenizo v. Texas*, No. SA-17-CV-404-OLG, 2017 WL 3763098 (W.D. Tex. Aug. 30, 2017).

¹⁰² See generally *City of El Cenizo v. Texas*, No. 17-50762, 2017 WL 4250186 (5th Cir. Sept. 25, 2017).

¹⁰³ *City of El Cenizo v. Texas*, No. 17-50762 (5th Cir. Mar. 13, 2018); see also Philip Jankowski, *'Sanctuary Cities' Ban SB 4 Hearing Focuses on the Extent of ICE's Reach*, AUSTIN AMERICAN-STATESMAN (Nov. 7, 2017), <http://www.statesman.com/news/local/sanctuary-cities-ban-hearing-focuses-the-extent-ice-reach/DiIrZIG4QJQ26eN0xV8AqK/> [<http://perma.cc/7HQ7-Y49E>].

by federal law pursuant to the Supremacy Clause.¹⁰⁴ As will be demonstrated below, all of these arguments fail.

A. *Senate Bill 4's ICE-Detainer Mandate Does Not Violate the Fourth Amendment*

Section 752.053(a)(3) provides that a local entity or police department may not, as demonstrated by pattern or practice, intentionally violate Article 2.251 of the Code of Criminal Procedure.¹⁰⁵ Article 2.251—the ICE-detainer mandate—requires a law enforcement agency in custody of a person subject to an immigration detainer to “comply with, honor, and fulfill any request made in the detainer request provided by the federal government” unless the person provides proof of citizenship or lawful immigration status.¹⁰⁶ Plaintiffs allege in their briefing that requiring seizures based on probable cause of *civil* infractions violates the Fourth Amendment.¹⁰⁷ Consequently, they argue state or local law enforcement detentions based only on “probable cause of removability from the country” violates the Fourth Amendment.¹⁰⁸ As I will show below, state and local law enforcement detentions do not violate the Fourth Amendment because (1) the federal government may detain individuals for civil immigration violations, (2) state and local officials may detain aliens based on requests from federal immigration officials, and (3) ICE detainer requests provide local and state officials the requisite probable cause to detain these individuals.

First, the federal government may detain individuals for civil immigration violations because these seizures are reasonable under the Fourth Amendment. Whether a search or seizure violates the Fourth Amendment is determined by the search or seizure’s reasonableness.¹⁰⁹ The reasonableness of a seizure is determined by considering whether it has historically been treated as reasonable.¹¹⁰ If history provides no conclusion, then reasonableness is determined by weighing the seizure’s intrusion into an individual’s privacy against the promotion of a legitimate governmental interest.¹¹¹ The Supreme Court has long recognized the federal government’s authority to detain an individual for civil immigration violations based on probable cause

¹⁰⁴ Brief of City of San Antonio et al. at 27–35, 37, 43, *City of El Cenizo v. Texas* (No. 17-50762), 2017 WL 4250186 (5th Cir. Sept. 25, 2017) [hereinafter Brief of San Antonio]; Brief of El Cenizo Plaintiffs and City of Austin at 10–14, 31–32, 41–42, 44–45, *City of El Cenizo v. Texas* (No. 17-50762), 2017 WL 4250186 (5th Cir. Sept. 25, 2017); Brief of Cities of Houston and Dallas at 41–49, *City of El Cenizo v. Texas* (No. 17-50762), 2017 WL 4250186 (5th Cir. Sept. 25, 2017).

¹⁰⁵ TEX. GOV'T CODE ANN. § 752.053(a)(3).

¹⁰⁶ TEX. CODE CRIM. PROC. ANN. art. 2.251.

¹⁰⁷ Brief of City of San Antonio, *supra* note 104, at 43.

¹⁰⁸ *Id.* at 45.

¹⁰⁹ *Riley v. California*, 134 S. Ct. 2473, 2482 (2014).

¹¹⁰ *Virginia v. Moore*, 553 U.S. 164, 168 (2008).

¹¹¹ *Id.* at 171 (quoting *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999)).

of the individual's removability from the country.¹¹² Moreover, the Court has recognized immigration arrests based on federal officials' removability determinations need not be supported by judicial warrants.¹¹³ Hence, detention for civil immigration violations by federal immigration officials without a judicial warrant satisfies the Fourth Amendment's reasonableness requirement if there is an executive branch finding of probable cause of removability from the country.¹¹⁴

Second, state and local law enforcement detention of aliens based on requests from federal immigration officials also follows the reasonableness requirement of the Fourth Amendment. History definitively supports local compliance with ICE detainer requests. As one district court in the Senate Bill 4 litigation acknowledged, local cooperation with these requests has existed since the 1940s.¹¹⁵ Moreover, in 1987, the federal executive branch enacted regulations codifying the ability of federal immigration authorities to request that local law-enforcement agencies maintain custody of an alien, for up to forty-eight hours after his release date, to allow federal immigration officials to take custody.¹¹⁶ Thus, this decades-long history of local compliance with ICE detainer requests satisfies the reasonableness requirement of the Fourth Amendment.¹¹⁷

Lastly, ICE detainer requests themselves provide local law enforcement the requisite probable cause of removability under the Fourth Amendment. The consolidated ICE-detainer form, which ICE agents must use for a detainer request, explicitly states: "DHS has determined that probable cause exists that the subject is a removable alien" and allows the ICE agent to describe the basis of probable cause as at least one of four findings.¹¹⁸ So, if ICE provides local law enforcement with a detainer request, then ICE has determined probable cause of removability. Once local law enforcement receives the request, probable cause to detain is imputed to them pursuant to the collective knowledge doctrine.¹¹⁹ This doctrine allows one law enforce-

¹¹² *Abel v. United States*, 362 U.S. 217, 233 (1960); *see also Demore v. Kim*, 538 U.S. 510, 523 (2003) (stating, regarding no-bail detention: "this Court has recognized detention during deportation proceedings as a constitutionally valid aspect of the deportation process").

¹¹³ *Abel*, 362 U.S. at 232 (noting that the INA gave "authority to the Attorney General or his delegate to arrest aliens pending deportation proceedings under an administrative warrant, not a judicial warrant within the scope of the Fourth Amendment."); *United States v. Tejada*, 255 F.3d 1, 3 (1st Cir. 2001) ("[T]o comply with the applicable [detention] statute, the arresting authorities needed to bring appellant to an [ICE] examining officer, not a magistrate, 'without unnecessary delay.'").

¹¹⁴ *Abel*, 362 U.S. at 232.

¹¹⁵ *City of El Cenizo v. Texas*, No. SA-17-CV-404-OLG, 2017 WL 3763098, at *30 n.71 (W.D. Tex. Aug. 30, 2017).

¹¹⁶ 8 C.F.R. § 287.7(d) (2017).

¹¹⁷ *El Cenizo*, 2017 WL 3763098, at *30 n.71; 8 C.F.R. § 287.7(d).

¹¹⁸ U.S. DEP'T OF HOMELAND SEC., IMMIGRATION DETAINER - NOTICE OF ACTION, DHS FORM I-247A (3/17) at 1 [hereinafter DHS Form I-247A] <https://www.ice.gov/sites/default/files/documents/Document/2017/I-247A.pdf> [<https://perma.cc/RH4C-5D8Q>].

¹¹⁹ *United States v. Hensley*, 469 U.S. 221, 231 (1985); *accord Mendoza v. U.S. Immigration & Customs Enf't*, 849 F.3d 408, 419 (8th Cir. 2017) ("County employees . . . reasonably

ment officer to establish probable cause by relying on a probable cause determination of another officer, even if the second officer is unaware of the facts the first official used to make a probable cause determination.¹²⁰ Thus, local officials who receive ICE detainer requests have probable cause to detain pursuant to the collective knowledge doctrine.¹²¹

Article 2.251 requires law enforcement agencies to comply with all ICE detainer requests unless the subject provides proof of citizenship or lawful immigration status.¹²² Detention pursuant to this law is valid because (1) the history of allowing federal immigration officers to detain subjects violating civil immigration law based on probable cause for removability and (2) the history of local cooperation for such detentions satisfies the Fourth Amendment reasonableness requirement.¹²³ Additionally, probable cause established by ICE in their detainer requests provides local officials probable cause to detain pursuant to the collective knowledge doctrine.¹²⁴ Accordingly, the ICE-detainer mandate does not violate the Fourth Amendment.¹²⁵

B. Section 752.053(a)(1)–(2)’s “Materially Limit” Phrase Does Not Violate the Fourteenth Amendment

Section 752.053(a)(1)–(2) of the Texas Government Code states,

- (a) a local entity or campus police department may not:
- (1) adopt, enforce, or endorse a policy under which the entity or department prohibits or materially limits the enforcement of immigration laws;
 - (2) as demonstrated by pattern or practice, prohibit or materially limit the enforcement of immigration laws; or¹²⁶

Plaintiffs allege in their briefing that the phrase “materially limit” in these sections is facially vague and thus violates the Due Process Clause of the Fourteenth Amendment.¹²⁷ The courts have long held that a law may only be invalidated as facially vague when “the provision ‘simply has no core.’”¹²⁸ Confirming a clear core for the “materially limit” prohibition, subsections (b)(1)–(4) of Section 752.053 give specific examples of what is prohibited by subsections (a)(1) and (2), including, among others, (1) limiting inquiries

relied on [the ICE agent’s] probable cause determination for the detainer.”); *United States v. Ibarra-Sanchez*, 199 F.3d 753, 759–60 (5th Cir. 1999).

¹²⁰ See *Hensley*, 469 U.S. at 234–35.

¹²¹ See *id.*

¹²² TEX. CODE CRIM. PROC. ANN. art. 2.251 (West 2017).

¹²³ *Abel v. United States*, 362 U.S. 217, 232, 233 (1960).

¹²⁴ DHS Form I-247A, *supra* note 118, at 1.

¹²⁵ TEX. CODE CRIM. PROC. ANN. art. 2.251; *Abel*, 362 U.S. at 232; DHS Form I-247A, *supra* note 118, at 1.

¹²⁶ TEX. GOV’T CODE ANN. § 752.053(a)(1)–(2) (West 2017).

¹²⁷ Brief of San Antonio, *supra* note 104, at 10–14.

¹²⁸ *United States v. Gonzalez-Longoria*, 831 F.3d 670, 675 (5th Cir. 2016) (en banc) (quoting *Smith v. Goguen*, 415 U.S. 566, 578 (1974)).

into the immigration status of a person under a lawful detention or arrest and (2) limiting assistance or cooperation with a federal immigration officer as reasonable or necessary.¹²⁹ Additionally, Section 752.053 expressly concerns policies and practices prohibiting or materially limiting “the enforcement of immigration laws,” as opposed to neutral policies such as overtime and patrolling locations.¹³⁰ So, the phrase “materially limit” does not violate the Due Process Clause of the Fourteenth Amendment because subsections (b)(1)–(b)(4) and the law’s sole applicability to immigration enforcement establishes a clear core to Sections 752.053(a)(1) and (a)(2).¹³¹

C. Section 752.053(a)(1)’s term “endorse” Does Not Violate the First Amendment

As noted above, Section 752.053(a)(1) provides that a local entity or campus police department cannot “adopt, enforce, or endorse a policy under which the entity or department prohibits or materially limits the enforcement of immigration laws.”¹³² Plaintiffs and the district court utilized an expansive definition of “endorse” to encompass “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.”¹³³ Plaintiffs also allege the endorsement prohibition encompasses protected speech and thus violates the Free Speech Clause of the First Amendment.¹³⁴ The U.S. Supreme Court has stated that, in facial challenges, statutory provisions must be interpreted to avoid constitutional concerns.¹³⁵ The Court has repeatedly said “[t]he elementary rule is that *every reasonable construction* must be resorted to, in order to save a statute from unconstitutionality.”¹³⁶ This doctrine of constitutional avoidance clearly applies to the term “endorse” in Section 752.053(a)(1).

Plaintiffs and the district court’s definition of “endorse” is needlessly expansive. A reasonable construction that saves the provision’s constitutionality defines “endorse” as its dictionary definition: “to sanction,” which in turn means “to ratify or confirm,” or “to authorize or permit; countenance.”¹³⁷ “To ratify” or “authorize” something requires the use of official power. Because “authorizations” and “ratifications” of anti-cooperation

¹²⁹ See TEX. GOV’T CODE ANN. § 752.053(b) (“In compliance with Subsection (a) . . .”).

¹³⁰ *Id.* § 752.053(a)(1)–(2).

¹³¹ *Id.* § 752.053.

¹³² TEX. GOV’T CODE ANN. § 752.053(a)(1).

¹³³ Brief of Appellees-Cross Appellants City of San Antonio at 11, *City of El Cenizo v. Texas* (No. 17-50762), 2017 WL 4675500 (5th Cir. Oct. 13, 2017).

¹³⁴ See *id.*

¹³⁵ See, e.g., *Virginia v. Am. Booksellers Ass’n, Inc.*, 484 U.S. 383, 397 (1988).

¹³⁶ *Skilling v. United States*, 561 U.S. 358, 406 (2010).

¹³⁷ WEBSTER’S NEW INTERNATIONAL DICTIONARY 845 (2d ed. 1945); accord WEBSTER’S NEW WORLD COLLEGE DICTIONARY 480, 1286 (5th ed. 2016); 1 OXFORD ENGLISH DICTIONARY 162 (reprint 1971).

policies with immigration enforcement can only be done by individuals in their official capacities as government employees, this definition of “endorse” avoids free speech concerns.¹³⁸ This construction is also reasonable because it is consistent with the purpose of Senate Bill 4, which was to stop local law enforcement from having policies that obstruct cooperation with immigration enforcement.¹³⁹ Senate Bill 4’s goal is furthered by prohibiting “ratifications” and “authorizations” of anti-cooperation policies and practices with immigration officials.

To summarize, the term “endorse” in Section 752.053(a)(1) does not violate the Free Speech Clause of the First Amendment because a reasonable construction of “endorse” is “to sanction.” This definition avoids free speech concerns because it only applies to endorsements of anti-cooperation policies and practices by individuals exercising authority in their official capacities as government employees.¹⁴⁰ Moreover, this construction is reasonable because it coheres with the purpose of Senate Bill 4 to stop law enforcement from having policies that obstruct immigration enforcement.¹⁴¹ Thus, “endorse” in Section 752.053(a)(1) does not violate the Free Speech Clause of the First Amendment.¹⁴²

D. No Part of Senate Bill 4 is Preempted by Federal Law

Plaintiffs allege the ICE-detainer mandate and several, distinct provisions of Section 753.053 are preempted by federal law pursuant to the Supremacy Clause in Article IV of the U.S. Constitution.¹⁴³ Plaintiffs also allege the INA preempts Senate Bill 4 because Senate Bill 4 interferes with INA’s federal scheme to allow localities to voluntarily cooperate with federal immigration officials.¹⁴⁴ All these preemption arguments fail.¹⁴⁵

¹³⁸ As the Supreme Court has recognized, “[w]hen public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes.” *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006).

¹³⁹ See *supra* Part III.

¹⁴⁰ See *Garcetti*, 547 U.S. at 421.

¹⁴¹ See *supra* Part III.

¹⁴² See *Garcetti*, 547 U.S. at 421; see also *supra* Part II.

¹⁴³ Brief of Appellees-Cross Appellants Cities of Houston and Dallas at 41–49, *City of El Cenizo v. Texas* (No. 17-50762), 2017 WL 4675499 (5th Cir. Oct. 17, 2017); Brief of Appellees-Cross Appellants City of El Cenizo at 32–34, *City of El Cenizo v. Texas* (No. 17-50762), 2017 WL 4675501 (5th Cir. Oct. 17, 2017).

¹⁴⁴ Brief of Appellees-Cross Appellants Cities of Houston and Dallas at 41–49, *City of El Cenizo v. Texas* (No. 17-50762), 2017 WL 4675499 (5th Cir. Oct. 17, 2017); Brief of Appellees-Cross Appellants City of El Cenizo at 32–34, *City of El Cenizo v. Texas* (No. 17-50762), 2017 WL 4675501 (5th Cir. Oct. 17, 2017).

¹⁴⁵ Plaintiffs’ preemption arguments are all based on implied preemption. See Brief of Appellees-Cross Appellants Cities of Houston and Dallas at 41–49, *City of El Cenizo v. Texas* (No. 17-50762), 2017 WL 4675499 (5th Cir. Oct. 17, 2017); Brief of Appellees-Cross Appellants City of El Cenizo at 32–34, *City of El Cenizo v. Texas* (No. 17-50762), 2017 WL 4675501 (5th Cir. Oct. 17, 2017). There are two types of implied preemption: conflict preemption and field preemption. *Arizona v. United States*, 567 U.S. 387, 399–400 (2012). Conflict preemption is split into two subcategories: impossibility and obstacle preemption. *Id.* Impossi-

1. *The ICE-detainer Mandate is Not Preempted*

As noted in Part III.C. above, 8 U.S.C. § 1357(g) delineates the terms of “287(g) Agreements,” written agreements between DHS and local and state officials that deputize the latter officials to directly enforce immigration law.¹⁴⁶ Plaintiffs allege these 287(g) agreements preempt local officers’ separate authority, under Article 2.251, to cooperate with federal officials by honoring ICE-detainer requests.¹⁴⁷ However, Section 1357(g)(10)(B) emphatically states nothing in Section 1357(g) requires a formal 287(g) agreement to “cooperate with the [Secretary] in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States.”¹⁴⁸ The term to “cooperate with” means “[t]o act or operate jointly with another or others; to concur in action, effort, or effect.”¹⁴⁹ Local officials complying with detainer requests under Article 2.251 are only cooperating with federal immigration officials, as ICE officials make the probable cause determinations when drafting the requests.¹⁵⁰ Because they do not draft the requests, local officials do not directly enforce immigration laws, as they would be under 287(g) agreements.¹⁵¹ As complying with detainer requests is cooperation under § 1357(g)(10)(B), Article 2.251 is neither conflict preempted nor field preempted. It is not conflict preempted because Article 2.251 compliance constituting § 1357(g)(10)(B) cooperation means local official compliance with both federal and state law is not a “physical impossibility,” and state law presents no “obstacle” to federal law.¹⁵² It is not field preempted because § 1357(g)(10)(B) is a “clear invitation from Congress for state and local agencies to participate in the process of enforcing federal immigration laws.”¹⁵³ Article 2.251 only concerns how Texas accepts this invitation and so operates within the federal scheme created by Congress.¹⁵⁴

bility preemption applies when it is physically impossible to comply with both a state law and federal law at the same time. *Id.* Obstacle preemption applies when a state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” *Id.* at 399 (citing *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). Field preemption applies when Congress has fully occupied the field it has chosen to regulate, leaving no room for even supplemental state regulation. *Id.* The challenged state law provisions must be examined under these preemption principles.

¹⁴⁶ See *supra* Part III.C.

¹⁴⁷ Brief of Appellees-Cross Appellants City of El Cenizo at 44–50, *City of El Cenizo v. Texas* (No. 17-50762), 2017 WL 4675501 (5th Cir. Oct. 17, 2017).

¹⁴⁸ 8 U.S.C. § 1357(g)(10)(B) (2012).

¹⁴⁹ WEBSTER’S NEW INTERNATIONAL DICTIONARY 585 (2d ed. 1945); accord 1 OXFORD ENGLISH DICTIONARY 963 (reprint 1971) (“work together, act in conjunction”).

¹⁵⁰ See TEX. CODE CRIM. PROC. ANN. art. 2.251 (2017); 8 U.S.C. § 1357(g)(10)(B); DHS Form I-247A, *supra* note 118, at 1.

¹⁵¹ See 8 U.S.C. § 1357(g).

¹⁵² *Arizona*, 567 U.S. at 399.

¹⁵³ *United States v. Vasquez-Alvarez*, 176 F.3d 1294, 1300 (10th Cir. 1999); see *Arizona*, 567 U.S. at 410 (discussing examples of permissible forms of enforcement cooperation absent § 1357(g) agreements).

¹⁵⁴ See TEX. CODE CRIM. PROC. ANN. art. 2.251; *Vasquez-Alvarez*, 176 F.3d at 1300.

So, Article 2.251 is not preempted by federal law.¹⁵⁵ As noted above, the Fifth Circuit has since stayed the preliminary injunction issued by the district court prohibiting Article 2.251 from going into effect.¹⁵⁶

2. Section 752.053(b)(3) is Not Preempted

Section 752.053(b)(3) prohibits a local entity or campus police department from materially limiting local officials from “*assisting or cooperating* with a federal immigration officer as reasonable or necessary, including providing enforcement assistance.”¹⁵⁷ The term “assist” means “[t]o give support to in some undertaking or effort.”¹⁵⁸ Similarly, as noted above, to “cooperate with” means to act jointly with others and to concur in action.¹⁵⁹ These definitions show the ancillary role of local officials in enforcing immigration law under Section 752.053(b)(3). The federal government retains enforcement direction; local officials require a “request, approval, or other instruction from the Federal Government” and cannot act unilaterally.¹⁶⁰ Section 752.053(b)(3) is not preempted because “assisting or cooperating with a federal immigration officer” constitutes assistance and cooperation under Section 1357(g)(10)(B).¹⁶¹ So, for the same reasons as Article 2.251, Section 752.053(b)(3) is neither conflict preempted nor field preempted.¹⁶² The Fifth Circuit has since partially stayed the district court’s injunction on this provision, acknowledging that § 1357(g)(10)(B) allows for the assistance and cooperation provided under it.¹⁶³

3. Sections 752.053(a)(1)–(2) Are Not Preempted

As noted above, Sections 752.053(a)(1)–(2) establish a general ban on policies and practices by local officials that prohibit or materially limit the enforcement of immigration laws.¹⁶⁴ Plaintiffs allege these provisions sweep broadly and “write a blank check for local officers to participate in a host of preempted enforcement activities without a training or a formal agreement.”¹⁶⁵ However, these concerns are easily avoided if one adopts the interpretation in Part IV.B establishing a “clear core” to what policies and

¹⁵⁵ See *Vasquez-Alvarez*, 176 F.3d at 1300; see also *Arizona*, 567 U.S. at 399.

¹⁵⁶ See generally *City of El Cenizo v. Texas*, No. 17-50762, 2017 WL 4250186, at *2 (5th Cir. Sept. 25, 2017).

¹⁵⁷ TEX. GOV’T CODE ANN. § 752.053(b)(3) (2017) (emphasis added).

¹⁵⁸ WEBSTER’S NEW INTERNATIONAL DICTIONARY 167 (2d ed. 1945); accord 1 OXFORD ENGLISH DICTIONARY 511 (reprint 1971) (“work together, act in conjunction”).

¹⁵⁹ See *supra* note 149.

¹⁶⁰ *Arizona*, 567 U.S. at 410.

¹⁶¹ TEX. GOV’T CODE ANN. § 752.053(b)(3); 8 U.S.C. § 1357(g)(10)(B) (2012).

¹⁶² See *supra* Part IV.D.1.

¹⁶³ *City of El Cenizo v. Texas*, No. 17-50762, 2017 WL 4250186, at *2 (5th Cir. Sept. 25, 2017).

¹⁶⁴ See TEX. GOV’T CODE ANN. § 752.053(a)(1)–(2).

¹⁶⁵ Brief of Appellees-Cross Appellants *City of El Cenizo* at 32, *City of El Cenizo v. Texas* (No. 17-50762), 2017 WL 4675501 (5th Cir. Oct. 17, 2017).

practices cannot be prohibited or “materially limited.” As stated before, Senate Bill 4 does not allow local officials to engage in preempted unilateral enforcement of immigration law. The federal government always remains in control of immigration enforcement priorities and determines what unlawfully present aliens (if any) should be detained.¹⁶⁶ Thus, Sections 752.053(a)(1)–(2) are not preempted because their “clear core”—Sections 752.053(b)(1)–(4)—fall under § 1357(g)(10)(B) as assistance and cooperation.¹⁶⁷ Thus, for the same reasons as the above two sections, Sections 752.053(a)(1)–(2) are neither conflict preempted nor field preempted.¹⁶⁸

4. Section 752.053(b)(1) is Not Preempted

Section 752.053(b)(1) prohibits a local entity or campus police department from materially limiting local officials from “inquiring into the immigration status of a person under a lawful detention or under arrest.”¹⁶⁹ The Supreme Court in *Arizona* upheld an Arizona law stricter than Section 752.053(b)(1), which *required* immigration status to be determined by a state officer.¹⁷⁰ The Court explained there is “no Fourth Amendment violation where questioning about immigration status did not prolong a stop” and noted it would disrupt the federal framework of immigration law to detain someone solely to verify their immigration status.¹⁷¹ The Court found the Arizona provision would likely survive preemption if the check was done in the course of a lawful arrest, “absent some showing that it has other consequences that are adverse to federal law and its objectives.”¹⁷² Section 752.053(b)(1) tracks this reasoning, as it contemplates inquiries during an otherwise “lawful detention” or “arrest.”¹⁷³ Questioning done in this manner does not constitute a preempted unilateral exercise of immigration law; the federal government still retains control as to who is an unlawfully present alien and who should be detained.¹⁷⁴ Thus, Section 752.053(b)(1) is not preempted because the Court found Arizona’s more stringent law requiring immigration status checks during a lawful arrest to not encroach on federal law.¹⁷⁵

¹⁶⁶ See 8 U.S.C. § 1357(g); *Arizona v. United States*, 567 U.S. 387, 410 (2012); see also *supra* Part IV.D.1–2.

¹⁶⁷ See 8 U.S.C. § 1357(g) (2012); TEX. GOV’T CODE ANN. § 752.053(b)(1)–(4).

¹⁶⁸ See *supra* Part IV.D.1–2.

¹⁶⁹ TEX. GOV’T CODE ANN. § 752.053(b)(1).

¹⁷⁰ *Arizona*, 567 U.S. at 411–16.

¹⁷¹ See *id.* at 413–14.

¹⁷² *Id.* at 414.

¹⁷³ TEX. GOV’T CODE ANN. § 752.053(b)(1).

¹⁷⁴ See *supra* Part IV.D.1.

¹⁷⁵ See *Arizona*, 567 U.S. at 411–16.

5. Section 752.053(b)(2) is Not Preempted

Section 752.053(b)(2) is an information-sharing provision prohibiting material limits on Texas officials sharing immigration status information with federal and state agencies.¹⁷⁶ The Arizona law the Court upheld in *Arizona* required officials to communicate immigrant information status to ICE and so was stricter than Section 752.053(b)(2).¹⁷⁷ In upholding this requirement, the Court reasoned “[c]onsultation between federal and state officials is an important feature of the immigration system,” and “[Congress] has encouraged the sharing of information about possible immigration violations.”¹⁷⁸ The Court looked to two laws to support its reasoning: Section 1357(g)(10)(A), which allows local officers to communicate immigration status information to DHS, and Section 1373, an information sharing provision that Section 752.053(b)(2) substantively mirrors.¹⁷⁹ The Court found the Arizona law was not preempted because it complemented the federal scheme of immigration law, as illustrated by Sections 1357(g)(10)(A) and 1373.¹⁸⁰ Thus, given that Section 752.053(b)(2) is less strict than the Arizona law upheld by the Court, it is also not preempted because it complements the federal information sharing scheme delineated by Sections 1357(g)(10)(A) and 1373.¹⁸¹

6. The INA Does Not Preempt Texas’s Sovereignty to Control its Localities Through Senate Bill 4

Plaintiffs allege the INA preempts Senate Bill 4 because, by requiring local officials to cooperate with federal immigration officials, it interferes with INA’s federal scheme to allow local entities to cooperate *voluntarily*.¹⁸² This argument assumes the federal government, through the INA, conferred special immigration powers on cities and displaced the State’s sovereign power to control its own municipalities’ exercise of the State’s delegated police power. Nowhere in the INA does Congress deny States the ability to control their localities. If it did, that would mean Congress tried to displace State sovereignty reserved by the Tenth Amendment to the States and give it to localities.¹⁸³ Pursuant to the doctrine of constitutional avoidance, such an

¹⁷⁶ See TEX. GOV’T CODE ANN. § 752.053(b)(2).

¹⁷⁷ Compare *id.* with ARIZ. REV. STAT. ANN. § 13-1509 (2017).

¹⁷⁸ *Arizona*, 567 U.S. at 411, 412 (citing 8 U.S.C. § 1357(g)(10)(A) (2012)).

¹⁷⁹ 8 U.S.C. §§ 1357(g)(10)(A), 1373; TEX. GOV’T CODE ANN. § 752.053(b)(2); *Arizona*, 567 U.S. at 412.

¹⁸⁰ See *Arizona*, 567 U.S. at 412–13.

¹⁸¹ See *id.* at 411–16.

¹⁸² Brief of Appellees-Cross Appellants Cities of Houston and Dallas at 41–49, *City of El Cenizo v. Texas* (No. 17-50762), 2017 WL 4675499 (5th Cir. Oct. 17, 2017); Brief of Appellees-Cross Appellants City of El Cenizo at 32–34, *City of El Cenizo v. Texas* (No. 17-50762), 2017 WL 4675501 (5th Cir. Oct. 17, 2017).

¹⁸³ See *City of Abilene v. FCC*, 164 F.3d 49, 51–52 (D.C. Cir. 1999) (rejecting this preemption argument because there was no indication that “Congress ha[d] manifested its inten-

unconstitutional interpretation should be avoided.¹⁸⁴ There is no indication Congress intended to take such a step with the INA. Plaintiffs cite *Lawrence County v. Lead-Deadwood School District No. 40-1*¹⁸⁵ to support their claim that Congress chose to vest final immigration-cooperation decisions with local officials.¹⁸⁶ However, the federal statute in this case (the Payment in Lieu of Taxes Act)¹⁸⁷ involved a conditional-funding statute, which imposed as a condition of “receipt of federal funds” that localities had discretion to spend these funds “for any governmental purpose” and does not mention States at all.¹⁸⁸ The INA is not a conditional-funding statute and Congress never expressed in the INA that states must allow localities to make their own choice whether to cooperate.¹⁸⁹ As discussed above, such an attempt by Congress would be unconstitutional.¹⁹⁰

Additionally, the Tenth Amendment anti-commandeering doctrine limits the federal government’s ability to control state municipalities but does not limit a state’s ability to control its own municipalities.¹⁹¹ Cities are agencies of the State and retain no sovereignty independent of the state.¹⁹² Texas’s ability to shape the policies adopted by its political subdivisions, and regulate its own local officials, is unquestionably an exercise of its traditional police powers.¹⁹³ Thus, Texas’s exercise of its police power to control its localities through Senate Bill 4 is not preempted by the INA.¹⁹⁴

V. CONCLUSION

Agreeing substantially with the reasoning above, the Fifth Circuit Court of Appeals has upheld almost all of Senate Bill 4.¹⁹⁵ In doing so, the court entirely rejected the plaintiff’s claims that: (1) compliance with ICE detainers facially violates the Fourth Amendment; (2) the phrase “materially limits” is void-for-vagueness as used in Section 752.053; and (3) any portion of

tion with unmistakable clarity” to “interfer[e] with the relationship between a State and its political subdivisions,” which “strikes near the heart of State sovereignty.”)

¹⁸⁴ *Skilling v. United States*, 561 U.S. 358, 406 (2010).

¹⁸⁵ 469 U.S. 256 (1985).

¹⁸⁶ See Brief of Appellees-Cross Appellants City of El Cenizo at 38, *City of El Cenizo v. Texas* (No. 17-50762), 2017 WL 4675501 (5th Cir. Oct. 17, 2017).

¹⁸⁷ Pub. L. No. 94-565, 90 Stat. 26,662 (1976).

¹⁸⁸ *Lawrence Cty.*, 469 U.S. at 269–70.

¹⁸⁹ See *supra* Part III.C.

¹⁹⁰ See *City of Abilene v. FCC*, 164 F.3d 49, 51–52 (D.C. Cir. 1999).

¹⁹¹ See *New York v. United States*, 505 U.S. 144, 157 (1992) (“[T]he Tenth Amendment confirms that the power of the Federal Government is subject to limits” (emphasis added)); *Stone v. City of Prescott*, 173 F.3d 1172, 1175 (9th Cir. 1999) (“[I]t is the power of the federal government which is constrained by the Tenth Amendment, not the power of the States.”).

¹⁹² See *City of Beaumont v. Fall*, 291 S.W. 202, 205 (Tex. 1927); *Crownhill Homes, Inc. v. City of San Antonio*, 433 S.W.2d 448, 467 (Tex. Civ. App. 1968).

¹⁹³ See, e.g., *Kelly v. Johnson*, 425 U.S. 238, 247 (1976) (“The promotion of safety of persons and property is unquestionably at the core of the State’s police power”).

¹⁹⁴ See *id.*; *City of Beaumont*, 291 S.W. at 205.

¹⁹⁵ *City of El Cenizo v. Texas*, No. 17-50762 (5th Cir. Mar. 13, 2018).

Senate Bill 4 is preempted by federal law. The court found merit on only one of the plaintiffs' positions, that the word "endorse" is unconstitutional as used in Section 752.053(a)(1) to prohibit local government officials from ratifying or countenancing sanctuary jurisdiction policies.¹⁹⁶ The court concluded the word was not susceptible to the interpretation set forth above and struck the language down as it applies to elected officials' ability to express approval for sanctuary jurisdiction policies.¹⁹⁷ In all other respects, the court concluded that Senate Bill 4 is constitutional.

Senate Bill 4 is not only constitutional but is necessary and critical to a goal far more important than orderly immigration. America's founding generation understood that few things are more central to the preservation of a free and prosperous society as maintaining the rule of law.¹⁹⁸ Today, we face a nation that easily forgets the lessons of its founding. We see state and local politicians tolerate and even celebrate the federal government's constant intrusion into areas reserved to the states by the Tenth Amendment while simultaneously protecting and supporting efforts to prevent the federal government from carrying out one of its few and defined powers—securing our borders and establishing a uniform rule for immigration and naturalization. In such times, perhaps it is the rule of law that needs sanctuary, and Texas must fight to provide it.

¹⁹⁶ *Id.* at 18–24.

¹⁹⁷ *Id.* at 19–23.

¹⁹⁸ For a very interesting discussion of Sir Edward Coke and his influence on the founding generation and their opposition to arbitrariness and government by whim, see Timothy Sandefur, *In Defense of Substantive Due Process, or The Promise of Lawful Rule*, 35 HARV. J.L. & PUB. POL'Y 283, 287–94 (2012).