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. The issue is far more critical and urgent: restoring the rule of law. For much of the twentieth century, America’s borders were unsecured and the federal government’s enforcement of immigration law changed with the political winds. 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-

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gress’s policy decisions. So-called sanctuary jurisdictions are just one subset of the threats to the rule of law in America over recent decades: foreign terrorists have attempted to undermine the rule of law with fear and chaos; federal judges and bureaucrats have sought to ignore the rule of law by substituting their judgment for that of the people; presidents have attempted to thwart the rule of law by violating the Constitution outright; and state and local governments are now refusing to obey or enforce duly enacted laws with which they disagree. 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

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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).


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).

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. Because that definition is relatively well accepted and relevant to the provisions of Senate Bill 4, 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, 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?nav panes=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].
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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

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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. Based on the foregoing statistics, this trend has substantially impacted the U.S.—and particularly Texas—since 1980.

Second, Congress has been increasing both federal and state enforcement authority. With the Immigration Reform and Control Act of 1986 (“IRCA”), Congress greatly boosted enforcement resources and authority at the federal level. The Antiterrorism and Effective Death Penalty Act of 1996 and Illegal Immigration Reform and Immigrant Responsibility Act of 1996 prohibited re-entry for aliens who had overstayed their visas and required mandatory detention of many illegal immigrants prior to deportation. The trend toward expanding enforcement resumed after the September 11, 2001 terrorist attacks with the passage of the USA PATRIOT Act of 2001, the Enhanced Border Security and Visa Entry Reform Act of 2002.


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).


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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-

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).
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).
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. The incentives of businesses and politicians were inconsistent with participation in such enforcement efforts. 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.

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. At the time of this writing, the Center for Immigration Studies identifies only Travis and Dallas Counties as sanctuary jurisdictions in Texas. The Federation for American Immigration Reform lists the City of Austin, Dallas County, the City of San Antonio, and Travis County. Regardless of whether these lists are comprehensive, the
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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. A number of other cases involving violent criminal acts committed by illegal immigrants garnered national attention over the following year. Largely in response to public outrage at these cases, at least 33 states considered legislative proposals to prohibit sanctuary city policies in 2017.

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, 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/.


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-5IUS]. 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, POLITICO (Mar. 14, 2010), http://www.politi...
the Texas Legislature to end sanctuary policies in 2011.\footnote{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 detainers on individuals convicted of minor offenses.\footnote{49} Thereafter, the Dallas County Commissioner’s Court passed a resolution welcoming illegal immigration.\footnote{50} Partially in response, legislation similar to Senate Bill 4 was introduced in 2015, but did not become law.\footnote{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.\footnote{52} The next day, Senator Charles Perry filed the initial text of Senate Bill 4.\footnote{53} Governor Abbott called on the Legislature to pass such legislation during his State of the State address on January 31,\footnote{54} and the bill received its first public hearing in the Senate State Affairs Committee on February 2, 2017.\footnote{55} The Senate considered nearly forty amendments before passing the bill on February 8.\footnote{56} The Texas House of Representatives likewise passed the bill on April 27, 2017,\footnote{57} and Governor Abbott signed the bill into law on May 7, 2017.\footnote{58} The


\footnote{56} Id.

\footnote{57} Id.

\footnote{58} Id.
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. 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. 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. That argument was addressed by the Supreme Court in Arizona v. United States.

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.
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.
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.”

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.” All functions performed under a 287(g) Agreement must be “subject to the direction and supervision of the [Secretary].”

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

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[i]on with the [Secretary].”

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, mandating the development and implementation of an interoperable electronic data system between law enforcement and immigration officers. To meet that objective, a
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. This system was integrated into an administrative program called the Secure Communities Program.

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. 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. 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, only to be later reinstated by

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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].


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-PSTR]; 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-6DMS] (showing that the PEP decreased detainers and issuance of charging documents to roughly half what they had been in 2013).
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President Trump. 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.

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. In general, federal immigration detainers 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.

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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 ENF’T, 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 detainers have been in existence since the 1950s, statute did not expressly authorize issuance of immigration detainers 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 detainers 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, but other state statutes specifically authorize the provision of benefits without regard to the recipients’ immigration status. Texas Attorney General Opinions also sometimes reached the conclusion that immigration status may not be considered under some circumstances. The Texas Department of Public Safety requires its personnel to verify an applicant’s lawful immigration status when obtaining a driver’s license and otherwise cooperate with immigration enforcement. In addition, at least eighteen jurisdictions in Texas have a 287(g) Agreement with the federal government.

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

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, [http://www.dps.texas.gov/about.htm [http://perma.cc/R99P-RU9F].
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-J3X].
agent in the enforcement of immigration laws. The legislation also requires government entities to comply with federal immigration detainers 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.

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 policies and a criminal offense for law enforcement officials who defy immigration detainers. 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.

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. The district court initially issued a preliminary injunction against most of the law, but the Fifth Circuit has since allowed much of it to go into effect; the Fifth Circuit recently upheld much of the law on the merits. 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.
96 Id. art. 42.039.
97 Tex. Gov’t Code Ann. § 752.056.
by federal law pursuant to the Supremacy Clause. 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. 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. Plaintiffs allege in their briefing that requiring seizures based on probable cause of civil infractions violates the Fourth Amendment. Consequently, they argue state or local law enforcement detentions based only on “probable cause of removability from the country” violates the Fourth Amendment. 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. The reasonableness of a seizure is determined by considering whether it has historically been treated as reasonable. 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. The Supreme Court has long recognized the federal government’s authority to detain an individual for civil immigration violations based on probable cause

107 Brief of City of San Antonio, supra note 104, at 43.
108 Id. at 45.
111 Id. at 171 (quoting Wyoming v. Houghton, 526 U.S. 295, 300 (1999)).
of the individual’s removability from the country. Moreover, the Court has recognized immigration arrests based on federal officials’ removability determinations need not be supported by judicial warrants. 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.

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. 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. Thus, this decades-long history of local compliance with ICE detainer requests satisfies the reasonableness requirement of the Fourth Amendment.

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. 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. This doctrine allows one law enforce-


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.


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).


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. Thus, local officials who receive ICE detainer requests have probable cause to detain pursuant to the collective knowledge doctrine.

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. 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. Additionally, probable cause established by ICE in their detainer requests provides local officials probable cause to detain pursuant to the collective knowledge doctrine. Accordingly, the ICE-detainer mandate does not violate the Fourth Amendment.

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; or . . .

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. The courts have long held that a law may only be invalidated as facially vague when “the provision 'simply has no core.'” 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).
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.
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. 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. 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).

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.” 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.” Plaintiffs also allege the endorsement prohibition encompasses protected speech and thus violates the Free Speech Clause of the First Amendment. The U.S. Supreme Court has stated that, in facial challenges, statutory provisions must be interpreted to avoid constitutional concerns. 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.” 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.” “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).
134 See id.
137 WEBSTER’S NEW INTERNATIONAL DICTIONARY 845 (2d ed. 1945); accord WEBSTER’S NEW WORLD COLLEGE DICTIONARY 480, 1286 (5th ed. 2016); 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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{141} Thus, “endorse” in Section 752.053(a)(1) does not violate the Free Speech Clause of the First Amendment.\textsuperscript{142}

\textbf{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.\textsuperscript{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.\textsuperscript{144} All these preemption arguments fail.\textsuperscript{145}

\textsuperscript{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.” 

\textsuperscript{139} See supra Part III.

\textsuperscript{140} See Garcetti, 547 U.S. at 421.

\textsuperscript{141} See supra Part III.

\textsuperscript{142} See Garcetti, 547 U.S. at 421; see also supra Part II.


\textsuperscript{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. Imposs-
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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
So, Article 2.251 is not preempted by federal law.\textsuperscript{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.\textsuperscript{156}

2. \textit{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 “

\textit{assisting or cooperating} with a federal immigration officer as reasonable or necessary, including providing enforcement assistance.”\textsuperscript{157} The term “assist” means “[t]o give support to in some undertaking or effort.”\textsuperscript{158} Similarly, as noted above, to “cooperate with” means to act jointly with others and to concur in action.\textsuperscript{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.\textsuperscript{160} Section 752.053(b)(3) is not preempted because “

\textit{assisting or cooperating} with a federal immigration officer” constitutes assistance and cooperation under Section 1357(g)(10)(B).\textsuperscript{161} So, for the same reasons as Article 2.251, Section 752.053(b)(3) is neither conflict preempted nor field preempted.\textsuperscript{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.\textsuperscript{163}

3. \textit{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.\textsuperscript{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.”\textsuperscript{165} However, these concerns are easily avoided if one adopts the interpretation in Part IV.B establishing a “clear core” to what policies and

\begin{footnotesize}
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\item \textsuperscript{155} See Vasquez-Alvarez, 176 F.3d at 1300; see also Arizona, 567 U.S. at 399.
\item \textsuperscript{156} See generally City of El Cenizo v. Texas, No. 17-50762, 2017 WL 4250186, at *2 (5th Cir. Sept. 25, 2017).
\item \textsuperscript{157} TEX. GOV’T CODE ANN. § 752.053(b)(3) (2017) (emphasis added).
\item \textsuperscript{158} WEBSTER’S NEW INTERNATIONAL DICTIONARY 167 (2d ed. 1945); accord 1 OXFORD ENGLISH DICTIONARY 511 (reprint 1971) (“work together, act in conjunction”).
\item \textsuperscript{159} See supra note 149.
\item \textsuperscript{160} Arizona, 567 U.S. at 410.
\item \textsuperscript{161} TEX. GOV’T CODE ANN. § 752.053(b)(3); 8 U.S.C. § 1357(g)(10)(B) (2012).
\item \textsuperscript{162} See supra Part IV.D.1.
\item \textsuperscript{163} City of El Cenizo v. Texas, No. 17-50762, 2017 WL 4250186, at *2 (5th Cir. Sept. 25, 2017).
\item \textsuperscript{164} See TEX. GOV’T CODE ANN. § 752.053(a)(1)–(2).
\item \textsuperscript{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).
\end{itemize}
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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.\textsuperscript{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.\textsuperscript{167} Thus, for the same reasons as the above two sections, Sections 752.053(a)(1)–(2) are neither conflict preempted nor field preempted.\textsuperscript{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.”\textsuperscript{169} The Supreme Court in \textit{Arizona} upheld an Arizona law stricter than Section 752.053(b)(1), which \textit{required} immigration status to be determined by a state officer.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{172} Section 752.053(b)(1) tracks this reasoning, as it contemplates inquiries during an otherwise “lawful detention” or “arrest.”\textsuperscript{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.\textsuperscript{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.\textsuperscript{175}

\textsuperscript{166} See 8 U.S.C. § 1357(g); \textit{Arizona} v. United States, 567 U.S. 387, 410 (2012); see also \textsuperscript{supra} Part IV.D.1–2.
\textsuperscript{167} See 8 U.S.C. § 1357(g) (2012); TEX. GOV’T CODE ANN. § 752.053(b)(1)–(4).
\textsuperscript{168} See \textsuperscript{supra} Part IV.D.1–2.
\textsuperscript{169} TEX. GOV’T CODE ANN. § 752.053(b)(1).
\textsuperscript{170} Arizona, 567 U.S. at 411–16.
\textsuperscript{171} See id. at 413–14.
\textsuperscript{172} Id. at 414.
\textsuperscript{173} TEX. GOV’T CODE ANN. § 752.053(b)(1).
\textsuperscript{174} See \textsuperscript{supra} Part IV.D.1.
\textsuperscript{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. 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). 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.” 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. 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. 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.

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. 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. Pursuant to the doctrine of constitutional avoidance, such an

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176 See TEX. GOV’T CODE ANN. § 752.053(b)(2).
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.
181 See id. at 411–16.
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.\footnote{Skilling v. United States, 561 U.S. 358, 406 (2010).} There is no indication Congress intended to take such a step with the INA. Plaintiffs cite \footnote{469 U.S. 256 (1985).} Lawrence County v. Lead-Deadwood School District No. 40-1\footnote{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).} to support their claim that Congress chose to vest final immigration-cooperation decisions with local officials.\footnote{Pub. L. No. 94-565, 90 Stat. 26,662 (1976).} However, the federal statute in this case (the Payment in Lieu of Taxes Act)\footnote{Lawrence Cty., 469 U.S. at 269–70.} 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.\footnote{Lawrence Cty., 469 U.S. at 269–70.} 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.\footnote{See supra Part III.C.} As discussed above, such an attempt by Congress would be unconstitutional.\footnote{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).}

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.\footnote{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.”).} Cities are agencies of the State and retain no sovereignty independent of the state.\footnote{See City of Abilene v. FCC, 164 F.3d 49, 51–52 (D.C. Cir. 1999).} 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.\footnote{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 . . . .”).} Thus, Texas’s exercise of its police power to control its localities through Senate Bill 4 is not preempted by the INA.\footnote{See id.; City of Beaumont, 291 S.W. at 205.}

V. CONCLUSION

Agreeing substantially with the reasoning above, the Fifth Circuit Court of Appeals has upheld almost all of Senate Bill 4.\footnote{City of El Cenizo v. Texas, No. 17-50762 (5th Cir. Mar. 13, 2018).} In doing so, the court entirely rejected the plaintiff’s claims that: (1) compliance with ICE detainees 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
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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.

\textsuperscript{196} Id. at 18–24.
\textsuperscript{197} Id. at 19–23.