

**APPENDIX**

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Appendix A

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF TEXAS  
AUSTIN DIVISION

**FILED**

February 29, 2024  
CLERK, U.S. DISTRICT COURT  
WESTERN DISTRICT OF TEXAS

BY: \_\_\_\_\_ ps \_\_\_\_\_  
DEPUTY

UNITED STATES OF AMERICA,	§	No. 1:24-CV-8-DAE
	§	(lead case)
Plaintiff,	§	
vs.	§	
	§	
STATE OF TEXAS, GREG ABBOTT,	§	
<i>in his official capacity as Governor of</i>	§	
<i>Texas</i> , TEXAS DEPARTMENT OF	§	
PUBLIC SAFETY , and STEVEN C.	§	
MCCRAW, <i>in his official capacity as</i>	§	
<i>Director of Texas Department of Public</i>	§	
<i>Safety</i> ,	§	
	§	
Defendants.	§	

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LAS AMERICAS IMMIGRANT	§	No. 1:23-CV-1537-DAE
ADVOCACY CENTER, AMERICAN	§	(consol. case)
GATEWAYS, and COUNTY OF EL	§	
PASO, TEXAS,	§	
	§	
Plaintiffs,	§	
vs.	§	
	§	
STEVEN C. MCCRAW, <i>in his official</i>	§	
<i>capacity as Director of Texas</i>	§	
<i>Department of Public Safety</i> , and BILL	§	
D. HICKS, <i>in his official capacity as</i>	§	
<i>District Attorney for the 34th District</i> ,	§	
	§	
Defendants.	§	

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ORDER GRANTING PRELIMINARY INJUNCTION

Before the Court is Plaintiff United States of America’s Motion for a Preliminary Injunction, (Dkt. # 14). Also before the Court is Plaintiffs Las Americas Immigrant Advocacy Center (“Las Americas”), American Gateways, and County of El Paso, Texas’s (“El Paso County”) (collectively, the “Organizational Plaintiffs”) Motion for a Preliminary Injunction.<sup>1</sup> Defendants State of Texas, Greg Abbott (“Abbott”), Texas Department of Public Safety (“DPS”), Steven C. McCraw (“McCraw”), and Bill D. Hicks (“Hicks”) (collectively, “Defendants” or “Texas”) filed a consolidated response to the motions. (Dkt. # 25). Plaintiffs filed separate replies. (Dkts. # 32, 33). The Court held a hearing on the motions on February 15, 2024. (Dkt. # 41). Having considered the parties’ briefing and the relevant law, the Court will preliminarily enjoin Defendants from enforcing SB 4.

Several factors warrant an injunction. First, the Supremacy Clause and Supreme Court precedent affirm that states may not exercise immigration enforcement power except as authorized by the federal government. Second, SB 4 conflicts with key provisions of federal immigration law, to the detriment of the United States’ foreign relations and treaty obligations. Third, surges in

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<sup>1</sup> The Organizational Plaintiffs filed their preliminary injunction in the member case, Las Americas Immigrant Advocacy Ctr. v. McCraw, No. 1:23-CV-1537-DAE (W.D. Tex. filed Dec. 19, 2023) (“Las Americas”), prior to consolidation.

immigration do not constitute an “invasion” within the meaning of the Constitution, nor is Texas engaging in war by enforcing SB 4. Finally, to allow Texas to permanently supersede federal directives on the basis of an invasion would amount to nullification of federal law and authority—a notion that is antithetical to the Constitution and has been unequivocally rejected by federal courts since the Civil War.

### BACKGROUND

This case concerns a law passed by Texas that makes it a crime under state law for a noncitizen to commit certain immigration offenses. Senate Bill 4, § 2, 88th Legis., 4th Spec. Sess. (Tex. 2023) (codified at Tex. Penal Code § 51.02(a)) (“SB 4”). The Court will first describe the Parties and SB 4 before turning to the merits of the case.

#### I. The Parties

The United States filed suit on January 3, 2024, to enjoin SB 4 under the Supremacy Clause and Dormant Commerce Clause. (Dkt. # 1 at 1). In addition to the United States, three other plaintiffs have jointly sued to enjoin the law.

First, Plaintiff Las Americas is a nonprofit legal organization that serves the needs of low-income noncitizens and asylum seekers in West Texas, Southern New Mexico, and Ciudad Juarez, Mexico. Las Americas (Dkt. # 1 at 2). Las Americas aims to provide legal services to low-income immigrants and ensure

that they can avail themselves of humanitarian protections under federal law and integrate into the community. (Id. at 3). Las Americas alleges that SB 4 will force the organization to restructure its services, hinder its ability to inform asylum seekers about the application process and credible fear interviews, and reduce the effectiveness of programs that help noncitizen victims of violent crimes, abuse, and trafficking. (Id. at 11–12).

American Gateways is another nonprofit legal organization. It provides legal services to noncitizens, particularly around Austin, San Antonio, and Waco. (Id. at 3). It represents asylum seekers, victims of family violence, sexual assault, and human trafficking. (Id.). American Gateways alleges that SB 4 will frustrate its organizational mission because noncitizens will be arrested or deported before receiving asylum. (Id. at 14). Other noncitizen clients of American Gateways may fear reporting crimes of abuse or trafficking to police officers that will now be vested with the power to arrest them for immigration offenses under SB 4. (Id.). Like Las Americas, American Gateways states that it will have to spend more funds, resources, and time to achieve its same organizational goals. (Id.).

El Paso County is tasked with administering programs for its residents, including its county judicial system and jails, providing health and social services, and raising revenue. (Id. at 4). El Paso County states that its immigrant

community pays \$591,800,000 annually in taxes, much of which goes back to the County. (Id.).

El Paso County operates several programs that may suffer as a result of SB 4. First, El Paso County plans to establish the Office of New Americans, a program to improve the inclusion and integration of the County's immigrants through citizenship workshops, English as a Second Language classes, and education of legal rights. (Id. at 15). El Paso County also manages a migrant services support center, which assisted over 56,000 asylum seekers in 2022 to travel to United States destinations if they have proof of a sponsor in the country. (Id.). El Paso County alleges that SB 4 will interfere with these programs by subjugating noncitizens to criminal prosecution, hurting the County's ability to work with noncitizens, and interfering with the County's relationship with Mexico and other international partners. (Id. at 16).

El Paso County also alleges that SB 4 will strain its jail system. The County estimates that it may see an additional 8,000 state arrests per year under SB 4. (Id. at 17). The County will have to pay for the additional jail space, public defenders, and the judicial system that these arrests will require. (Id.). Because federal use of the County's jail is the third-largest source of its revenue, SB 4 will significantly reduce the County's budget by forcing the jail to house inmates arrested under the state's immigration law. (Id.). SB 4 will also interfere with El

Paso County’s organizational goals by forcing it to incarcerate individuals who are not a risk to public safety and diminishing trust between noncitizens and the County’s law enforcement agencies. (Id.).

Turning to the Defendants, the United States sues Greg Abbott, in his official capacity as Governor of Texas, the State of Texas, and the Texas Department of Public Safety. The Organizational Plaintiffs sue two other Defendants. First, they bring suit against Defendant Steven C. McCraw, who is the Director and Colonel of the Texas DPS. Las Americas, (Dkt. #1 at 4). He is “directly responsible . . . for the conduct of the department’s affairs” and serves as “executive director of the department,” among other duties and responsibilities, and has stated that DPS will enforce SB 4. (Id.) (citing Tex. Gov’t Code § 411.006(a)(1)-(2)). He is sued in his official capacity. (Id.).

Second, the Organizational Plaintiffs bring suit Defendant Bill D. Hicks, who is the District Attorney for the 34th Judicial District, which includes El Paso County. (Id.) (citing Tex. Gov’t Code § 43.120(a)). Hicks “represents the state in all criminal cases before every district court having jurisdiction in El Paso County” and “represents the state in all criminal cases pending in the inferior courts having jurisdiction in El Paso County,” which will include charges brought under SB 4. (Id.) (citing Tex. Gov’t Code §§ 43.120(b), (c)). Hicks is sued in his official capacity.

**II. SB 4**

At a broad level, SB 4 criminalizes at the state level unauthorized entry or re-entry of noncitizens into Texas from outside the country, authorizes noncitizen removals to Mexico, and instructs state court judges not to abate proceedings on the basis of a pending federal determination of admissibility. Tex. Penal Code §§ 51.02–03; Tex. Code of Crim. Proc. arts. 5(B).002–003. In greater detail, SB 4 first makes it a crime for a noncitizen to “enter[] or attempt[] to enter [Texas] directly from a foreign nation at any location other than a lawful port of entry.” Tex. Penal Code § 51.02(a). It is an affirmative defense to violations of § 51.02 if “the federal government has granted the defendant . . . lawful presence in the United States or asylum . . . .” Id. § 51.02(c). SB 4 does not define “lawful presence.” Id. Individuals approved under the Deferred Action for Childhood Arrivals (“DACA”) program have an affirmative defense, while those approved under the Deferred Action for Parents of Americans (“DAPA”) and Lawful Permanent Residents program do not have an affirmative defense. Id. §§ 51.02(c)–(d)

Violations of § 51.02 are Class B misdemeanors under Texas law, punishable by up to \$2,000 in fines and 180 days of imprisonment. Id. § 51.02(b); § 12.22. However, if a noncitizen has previously been convicted under § 51.02, a



subsequent violation is a felony, punishable by fines up to \$10,000 and imprisonment between 180 days and two years. Id. § 12.35.

Second, SB 4 makes it a crime for noncitizens to “enter[], attempt to enter,” or be found in Texas after they have “been denied admission to” or removed from the United States or departed the United States while an order of “removal is outstanding.” Id. § 51.03.<sup>2</sup> The section has no affirmative defenses. Violations of § 51.03 are Class A misdemeanors, punishable by fines up to \$4,000 and imprisonment for up to one year. Id. § 51.03(b); § 12.21. Certain prior offenses may either elevate violations of § 51.03 to third-degree felonies, punishable by fines up to \$10,000 and imprisonment between two and ten years, or second-degree felonies, punishable by fines up to \$10,000 and imprisonment between two and twenty years. Id. § 12.21–23.

Third, SB 4 allows state judges to request or order the removal of noncitizens under certain circumstances. Tex. Code of Crim. Proc. art. 5(B).002. When an individual is charged with offenses under § 51.02 or § 51.03—but not yet convicted—a magistrate or state judge may “discharge the person and require the person to return to the foreign nation from which the person entered or attempted

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<sup>2</sup> Section 51.02 criminalizes entry directly into Texas, so a noncitizen who enters directly into New Mexico and then crosses the state border into Texas does not violate the law. Tex. Penal Code § 51.02(a). Section 51.03, however, criminalizes a noncitizen who “is at any time found in” Texas after a removal order—regardless of whether they crossed directly back into Texas or through another state. Id. § 51.03(a).

to enter” if “the person agrees to the order” and has not “previously been” charged with or convicted of specific crimes. Id. art. 5(B).002(a)–(c). If a noncitizen is convicted under SB 4, the judge “shall enter” an “order requiring the person to return to the foreign nation from which the person entered or attempted to enter” after serving their prison sentence. Id. art. 5(B).002(d).<sup>3</sup> Texas law enforcement must monitor the noncitizen’s compliance with the state removal order. Id. art. 5(B).002(e). Failure to comply with the removal order is an additional second-degree felony. Tex. Penal Code § 51.04.

Fourth and finally, SB 4 states that a “court may not abate the prosecution” of one of these offenses “on the basis that a federal determination regarding the immigration status of the defendant is pending or will be initiated.” Tex. Code of Crim. Proc. art. 5(B).003.<sup>4</sup>

### LEGAL STANDARD

A preliminary injunction is an extraordinary remedy, and the decision to grant such relief is to be treated as the exception rather than the rule. Valley v. Rapides Par. Sch. Bd., 118 F.3d 1047, 1050 (5th Cir. 1997). “A plaintiff seeking a

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<sup>3</sup> Texas’s response to the preliminary injunction effectively states that all removals under SB 4 will be to Mexico. (Escalon Decl., Dkt. # 25 at 2–4).

<sup>4</sup> SB 4 contains other miscellaneous provisions. It prohibits enforcement in certain buildings, such as primary schools and places of worship. Tex. Code of Crim. Proc. art. 5(B).001. SB 4 also instructs that violations of the law should be added to criminal record databases Id. art. 42A.059. Finally, it indemnifies officers enforcing the law. Tex. Civ. Prac. & Rem. Code § 117.002.

preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.” Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 20 (2008). The party seeking injunctive relief carries the burden of persuasion on all four requirements. PCI Transp. Inc. v. W. R.R. Co., 418 F.3d 535, 545 (5th Cir. 2005).

Plaintiffs have met this high burden and have shown that a preliminary injunction is warranted. Before reaching the merits of their motions, however, the Court must first address threshold issues of standing, sovereign immunity, and causes of action.

## JUSTICIABILITY

### **I. Standing**

#### *A. Nonprofit Plaintiffs*

Texas first contests the standing of the two nonprofit plaintiffs: Las Americas and American Gateways (“Nonprofit Plaintiffs”). (Dkt. # 25 at 42). At the preliminary-injunction stage, a plaintiff must make a “clear showing” that they have standing. Barber v. Bryant, 860 F.3d 345, 352 (5th Cir. 2017). In particular, a plaintiff must show: (1) an actual or imminent, concrete and particularized “injury-in-fact”; (2) that is fairly traceable to the challenged action of the defendant; and

(3) that is likely to be redressed by a favorable decision. See, e.g., El Paso Cnty. v. Trump, 982 F.3d 332, 337 (5th Cir. 2020).

In certain pre-enforcement challenges, a plaintiff must show “an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder.” Susan B. Anthony List v. Driehaus, 573 U.S. 149, 160 (2014) (quoting Babbitt v. United Farm Workers Nat. Union, 442 U.S. 289, 298 (1979)). Because Plaintiffs bring a pre-enforcement challenge, Texas assumes that Susan B. Anthony applies and thereby suggests that the Nonprofit Plaintiffs lack a valid injury because their conduct is neither proscribed by statute nor threatened with prosecution. (Dkt. # 25 at 42–43).

However, the Babbitt/Susan B. Anthony line of cases sets out a test only for when a *directly* regulated party challenges a statute. See, e.g., Babbitt, 442 U.S. at 298; Susan B. Anthony, 572 U.S. at 160; Virginia v. Am. Booksellers Assn. Inc., 484 U.S. 383 (1988) (same). The test is simply not applicable to the Nonprofit Plaintiffs, who allege *indirect* harms under the law. The Nonprofit Plaintiffs allege impairment and frustration of their organizational purposes—not a direct threat of prosecution or regulation. Las Americas, (Dkt. # 1 at 11–14). Because no Plaintiffs claim that their injury stems from direct threats of prosecution, Babbitt does not apply. See Warth v. Seldin, 422 U.S. 490, 505 (1975) (“When a governmental

prohibition or restriction imposed on one party causes specific harm to a third party, . . . the indirectness of the injury does not necessarily deprive the person harmed of standing to vindicate his rights.”).

A different test for pre-enforcement injury applies when a law’s regulation *indirectly* harms a plaintiff. In this context, a plaintiff organization “may establish injury in fact by showing that it had diverted significant resources to counteract the defendant’s conduct” and “the defendant’s conduct significantly and ‘perceptibly impaired’ the organization’s ability to provide its ‘activities—with the consequent drain on the organization’s resources.’” NAACP v. City of Kyle, Tex., 626 F.3d 233, 238 (5th Cir. 2010) (quoting Havens Realty Corp. v. Coleman, 455 U.S. 363, 379 (1982)).

Diversion of resources alone does not always suffice to confer standing. “The mere fact that an organization redirects some of its resources to litigation and legal counseling in response to actions or inactions of another party is insufficient to impart standing upon the organization.” Ass’n for Retarded Citizens v. Dallas Cnty. Mental Health & Mental Retardation Ctr. Bd. Of Trustees, 19 F.3d 241, 244 (5th Cir. 1994). Still, “the injury in fact requirement under Article III is qualitative, not quantitative in nature.” Ass’n of Cmty. Organizations for Reform Now v. Fowler, 178 F.3d 350, 357–58 (5th Cir. 1999) (“ACORN”). The injury “need not measure more than an identifiable trifle” so long as it is concrete

and particularized and actual or imminent. Id. at 358 (internal quotations omitted). The question is not whether the Nonprofit Plaintiffs face direct prosecution, but whether they have shown a sufficiently concrete and identifiable injury that extends beyond upsetting their abstract social or political goals. Warth, 422 U.S. at 505; Havens, 455 U.S. at 379.

The Nonprofit Plaintiffs have met this burden. SB 4 will “completely change[] the manner in which Plaintiffs must reach, counsel, and represent noncitizens,” including forcing them to identify clients earlier, help noncitizens navigate the federal immigration process while in state prison, and seek federal relief as quickly as possible before a removal under state law. Las Americas, (Dkt. # 33 at 15). SB 4 will require them to spend *more* resources on education and outreach only to achieve the same outcomes. (Id. at 14–15). The organizations will have to “divert resources from community representation to the resource intensive process of representing people detained under SB 4, decreasing the total number of people served in obtaining immigration relief.” Las Americas, (Dkt. # 30 at 18; Babaie Decl., Dkt. # 30-1 at 9; Yang Decl., Dkt. # 30-2 at 2–4).

SB 4 will also moot many asylum applications, because pending asylum determinations must be disregarded by state court judges under the law. Tex. Code of Crim. Proc. Art. 5(B).003. The Nonprofit Plaintiffs will risk expending substantial time and resources on an application that will end up

irrelevant if their client is removed by state officials prior to a federal asylum ruling. The Nonprofit Plaintiffs will be forced to expedite asylum applications in the hopes of achieving a determination prior to a conviction or removal order under SB 4. In sum, SB 4's prohibition on abating the removal of asylum applicants will frustrate a core part of Las Americas' and American Gateways' mission.

SB 4 will also frustrate the preparation of asylum applications by incarcerating noncitizens prior to removal and making it substantially harder for those noncitizens to apply for asylum within one year of entry. See 8 U.S.C. § 1158(a)(2)(B). Because the Nonprofit Plaintiffs assert that they currently lack contacts in state court jails, see Las Americas, (Babaie Decl., Dkt. # 30-1 at 7–9; Yang Decl., Dkt. # 30-2 at 3–5), they will have reduced ability to find asylum seekers. For example, Las Americas represents clients once they have passed credible fear interviews (“CFIs”). (Babaie Decl., Dkt. # 30-1 at 7–9). Since state officials cannot conduct official CFIs, Las Americas will likely struggle to prioritize successful asylum claims (if those claims may even be adjudicated before removal). Incarceration will also limit Las Americas' and American Gateways' contact with their clients, making it harder to conduct client interviews, obtain application materials, and counsel clients on their hearings. (See id.).

In addition, the Nonprofit Plaintiffs have shown that SB 4 will frustrate their programs that seek to aid victims of sex crimes and human

trafficking.<sup>5</sup> Currently, Las Americas operates a “crime victims practice,” which helps noncitizens who have suffered crimes, and a Human Trafficking Program, which assists noncitizens in reporting their trafficking to law enforcement. (Id. at 11–12). American Gateways similarly focuses much of its efforts on assisting noncitizen victims of abuse or trafficking. (Yang Decl., Dkt. # 30-2 at 5–6).

Currently, under federal immigration law, victims of criminal activity may be offered a “U visa” that allows them to stay in the country if they have suffered certain crimes and are willing to assist law enforcement in the prosecution of the crime. 8 C.F.R. § 214.14. Alternatively, victims of human trafficking may apply for a “T visa” if they assist with any requests from law enforcement and would suffer extreme hardship if removed from the country. Id. § 214.11. Both Las Americas and American Gateways assist victims through the process of reporting crimes and obtaining U or T visas. See Las Americas, (Babaie Decl., Dkt. # 30-1 at 11–13; Yang Decl., Dkt. # 30-2 at 4–5). SB 4 will stifle those programs. Victims of crimes will likely fear reporting crimes to local law enforcement that has the authority to arrest or remove them under SB 4 for a previous unlawful entry. And SB 4 has no U or T visa counterpart. One of the organizations’ key purposes—to protect noncitizen victims of crime—will become significantly tougher to

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<sup>5</sup> El Paso County will suffer a similar harm. By criminalizing immigration offenses at the state level, SB 4 will make it less likely that victims of domestic violence and abuse report these crimes to police officers with the power to arrest noncitizens. The removal provisions will also result in the loss of the witnesses of these crimes.



accomplish, if not altogether impractical. The impairment of their mission and the drain of organizational funds extends far beyond an abstract social harm and suffices to show injury. City of Kyle, 626 F.3d at 237.

In response, Texas first argues that “Nonprofit Plaintiffs’ diversion of resource theory fails as it stems from voluntary strategic and budgetary choices.” (Dkt. # 25 at 44) (citing Lane v. Holder, 703 F.3d 668, 675 (4th Cir. 2012)). Texas might be correct if the Nonprofit Plaintiffs *solely* alleged the mere diversion of resources. But their alleged injury goes further, alleging that SB 4 will frustrate their organizational missions, disrupt programming, and increase the risks associated with asylum applications and crime reporting. See Las Americas, (Dkt. # 33 at 14–15); OCA-Greater Houston v. Tex., 867 F.3d 604, 612 (5th Cir. 2017) (finding an “undertaking that consumed [an organization’s] time and resources in a way they would not have been spent absent the Texas law” conferred standing). This is a perceptible and concrete drain of resources. See Havens, 455 U.S. at 379.

Next, Texas argues that the Nonprofit Plaintiffs lack third-party standing to assert the rights of their immigrant clients. (Dkt. # 25 at 46) (“Nonprofit Plaintiffs cannot obtain standing by expressing concern that a third party not before this court may be harmed by the challenged law.”). Again, Texas is correct on the legal principle but wrong on its application to the case. The Nonprofit Plaintiffs need not assert the rights of their clients or other noncitizens

detained under SB 4 to show standing. The Nonprofit Plaintiffs, as organizations, face discrete injuries distinct from those suffered by their members or clients. See OCA-Greater Houston, 867 F.3d at 610 (“The organization can establish standing in its own name if it meets the same standing test that applies to individuals.”) (citations omitted). The organizations may challenge SB 4 without asserting the constitutional rights of their clients.

Finally, Texas argues that the Nonprofit Plaintiffs only allege a speculative injury. (Dkt. # 25 at 46–47). Because Texas has yet to implement the law or promulgate regulations about how it will take effect, Texas alleges the Nonprofit Plaintiffs cannot know that their injuries are certain. (Id.). As SB 4 is set to take effect mere days from today on March 5, the injury is imminent. As for how Texas intends to enforce the law, the Court need only look at Texas’s response. In defense of SB 4, Texas has taken the position that the law is necessary to prevent a “complete and total invasion” of transnational criminal cartels coming from a “failed narco-state” “preying on the American people” “shuttle[ing] deadly and illegal narcotics like fentanyl from Mexico into every corner of this country.” (Dkt. # 25 at 2–3). This plainly contrasts with its standing contention, where Texas alleges there is no real risk it will enforce the law or any guarantee that SB 4 will result in more arrests. (Id. at 46–47). Texas cannot have it both ways. If SB 4 is

necessary to stop an “invasion,” then the risk of enforcement cannot be speculative.<sup>6</sup>

*B. El Paso County*

1. El Paso is not barred from suit as a state subdivision

Texas next focuses its arguments on El Paso County. Texas asserts, “Precedent firmly establishes that local governments lack standing to sue their parent States.” (Dkt. # 25 at 48) (citing City of Trenton v. New Jersey, 262 U.S. 182, 188 (1923); Town of Ball v. Rapides Par. Police Jury, 746 F.2d 1049, 1051 n.1 (5th Cir. 1984))). The precedent is not as firm as Texas posits. The Supreme Court has long since clarified that “legislative control of municipalities, no less than other state power, lies within the scope of relevant limitations imposed by the United States Constitution.” Gomillion v. Lightfoot, 364 U.S. 339, 344–45 (1960). On at least six other occasions, the Supreme Court has decided suits between a state and its political subdivision. See Tweed-New Haven Airport Auth. V. Tong, 930 F.3d 65, 73 (2d Cir. 2019) (collecting cases).

The Fifth Circuit has explicitly recognized that a subdivision may sue the state under the Supremacy Clause. See Rogers v. Brockett, 588 F.2d 1057, 1070 (5th Cir. 1979) (affirming school district’s standing to sue state under

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<sup>6</sup> Far from “disavow[ing] any intention of invoking the criminal penalty provision,” Texas has made clear it intends to rigorously enforce SB 4. Babbitt, 442 U.S. at 302; (Dkt. # 25 at 2–5).

Supremacy Clause); Harrison v. Jefferson Par. Sch. Bd., No. CV 20-2916, 2021 WL 3286456, at \*6 (E.D. La. Aug. 2, 2021) (“[A] subdivision can sue a state when challenging state action under the Supremacy Clause.”).<sup>7</sup> Both Rogers and Gomillion limit the City of Trenton line of cases to claims under the Fourteenth Amendment and Contract Clause. See Gomillion, 364 U.S. at 344 (cabining City of Trenton and related cases to “the particular prohibitions of the Constitution considered in those cases”); Rogers, 588 F.2d at 1058 (noting same); see also Note, Brian P. Keenan, Subdivisions, Standing and the Supremacy Clause: Can a Political Subdivision Sue Its Parent State Under Federal Law, 103 Mich. L. Rev. 1899, 1905 (2005) (“A review of the Supreme Court’s holdings in this area shows that they were limited to the clauses at issue in the cases, the Fourteenth Amendment and the Contract Clause.”).<sup>8</sup>

To the contrary, Rogers states explicitly that the “Trenton line of cases do[es] not, properly speaking, deal with a municipality’s standing to sue the state

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<sup>7</sup> Texas argues that the Court ought to distinguish Rogers on the facts, as that case dealt with Texas depriving a federal breakfast program to a school district. *Id.* at 1061. Texas argues that Rogers should apply only to cases where the state interferes with a federal statutory right (such as school breakfast programs). (Dkt. # 25 at 48). The distinction is unavailing. Nothing in Rogers limited its holding to cases where Congress had interfered with the states to create a federal statutory right. Rogers, 588 F.2d at 1070. Neither Rogers itself nor any subsequent cases citing Rogers appear to make this distinction.

<sup>8</sup> Other circuits have since followed suit. See Branson Sch. Dist. RE-82 v. Romer, 161 F.3d 619 (10th Cir. 1998); Tweed-New Haven Airport, 930 F.3d at 73 (“A subdivision may sue its state under the Supremacy Clause. In reaching this conclusion we join the Fifth and Tenth Circuits.”). But see Burbank-Glendale-Pasadena Airport Auth. v. City of Burbank, 136 F.3d 1360 (9th Cir. 1998) (denying standing to sue under Supremacy Clause).

that created it.” 588 F.2d at 1070; see also Branson Sch. Dist. RE-82 v. Romer, 161 F.3d 619, 629 (10th Cir. 1998) (“Neither the [Trenton] line of cases nor any other subsequent Supreme Court case has held that a political subdivision is barred from asserting the structural protections of the Supremacy Clause of Article VI in a suit against its creating state.”). Put simply, the Supreme Court has long shifted away from Texas’s broad reading of City of Trenton, and under binding Fifth Circuit precedent, a political subdivision is not barred from suing the state under the Supremacy Clause. Rogers, 588 F.2d at 1070.

2. El Paso County asserts a valid Article III injury.

El Paso County also asserts a valid injury in fact. El Paso County estimates that SB 4 will lead to 8,000 more annual arrests in the County, leading to a corresponding 8,000 more jail bookings. Las Americas, (Dkt. # 30 at 19). The County will have to increase expenditures to provide counsel for these defendants and hire additional sheriff staff and policy officers. (Id.). Texas disputes this number, alleging that it comes from testimony that “the Director of the Texas Department of Public Safety gave the House State Affairs Committee before the legislation was ever finalized and enacted.” (Dkt. # 25 at 49) (citing Las Americas, (Carrillo Decl., Dkt. # 3 at 3)). However, the declarant—Steven McCraw—is not just a legislative witness, but the principal state officer in charge of DPS and a Defendant in this case. McCraw could, but did not, personally dispute this number

in his response. And Texas provides no other evidence to impeach McCraw's testimony. That McCraw testified prior to SB 4's passage is irrelevant. Virtually all legislative testimony comes prior to a bill's enactment. It is not evident why this timing should reduce the testimony's credibility.

At any rate, El Paso County does not need to predict the number of arrests with pressing exactitude. Rather, the inquiry is whether the additional costs amount to more than an "identifiable trifle." ACORN, 178 F.3d at 358. Texas's own declarant, Victor Escalon, states that DPS expects to house and process noncitizens detained under SB 4 "primarily in State-owned facilities and does not anticipate a need for extensive use of county-owned jails." (Escalon Decl., Dkt. # 25-3 at 2). But extensive use is not required for standing—and even some use will amount to more than an "identifiable trifle." And again, given Texas's own statements that it plans to deploy SB 4 to stop a "warlike invasion" of fentanyl-smuggling cartels,<sup>9</sup> it is not unreasonable to expect that many of those arrests will be in El Paso County.

Texas suggests that "in practice the State may make alternative arrangements or provide additional funds and infrastructure to defray the costs."

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<sup>9</sup> See United States v. Abbott, No. 23-50632, 2024 WL 551412, at \*5 (5th Cir. Feb. 9, 2024) ("Our Nation is presently faced with a historic national security crisis at the border. The State of Texas has determined that the United States is failing to protect Texans from this danger, and has thus taken its own measures to combat the uncontrolled outbreak of illegal border crossings.") (dissenting opinion); (Dkt. # 25 at 3) ("These violent criminal organizations shuttle deadly and illegal narcotics like fentanyl from Mexico into every corner of this country.").

(Dkt. # 25 at 50). But Texas has not yet done so. Just as the Court cannot recognize mere speculation as injury, the Court cannot reject El Paso County's harm based on unsupported speculation about what the state might or might not do to mitigate those harms. SB 4 is set to take effect in days, and Texas has provided no evidence it actually intends to defray El Paso County's costs. As it stands, El Paso County has made a clear showing that SB 4 will force it to increase expenditures and jail capacity. That imminent harm is sufficient to confer standing.

## **II. Sovereign Immunity**

Texas argues that the two Defendants in the Las Americas case, DPS Director McCraw and District Attorney Hicks are both entitled to sovereign immunity. (Dkt. # 25 at 52). Hicks, as a district attorney, is not entitled to sovereign immunity. The Fifth Circuit has repeatedly held “that Texas district attorneys are not protected by the Eleventh Amendment precisely because they are county officials, not state officials.” Nat’l Press Photographers Ass’n v. McCraw, 90 F.4th 770, 787 (5th Cir. 2024) (quoting Hudson v. City of New Orleans, 174 F.3d 677, 682 (5th Cir. 1999)) (cleaned up). Texas cites a recent Fifth Circuit case for the proposition that “Texas district attorneys are agents of the State when sued regarding their prosecutorial enforcement of state laws like SB4.” (Dkt. # 25 at 52) (citing Arnone v. Dallas Cnty., 29 F.4th 262, 267 (5th Cir. 2022)). That citation is inapplicable. Arnone dealt with whether district attorneys act as state or county

policymakers under Section 1983—not whether they are entitled to sovereign immunity. 29 F.4th at 267. Indeed, Texas omits a key sentence from the case, stating the Section 1983 policymaker “inquiry is distinct from what we use to decide whether an official is a state actor for Eleventh Amendment purposes.” *Id.*

As to Defendant McCraw, the relevant question is whether Ex parte Young applies. “Ex parte Young allows suits for injunctive or declaratory relief against state officials, provided they have sufficient “connection” to enforcing an allegedly unconstitutional law.” In re Abbott, 956 F.3d 696, 708 (5th Cir. 2020) (citations omitted), cert. granted, judgment vacated as moot sub nom, Planned Parenthood Ctr. for Choice v. Abbott, 141 S. Ct. 1261 (2021). To have the requisite connection, the official must have “the particular duty to enforce the statute in question and a demonstrated willingness to exercise that duty.” Tex. Democratic Party v. Abbott, 978 F.3d 168, 179 (5th Cir. 2020) (citation omitted).

Texas argues that the “Organizational Plaintiffs do not establish—or even allege—a waiver of sovereign immunity or how they satisfy an exception under Ex parte Young.” (Dkt. # 25 at 53). As to the particular duty to enforce the state’s criminal laws, McCraw’s enforcement position as head of DPS has already been established:

Director McCraw [has] more than just the general duty to see that the state’s laws are implemented—[he is] directly responsible for enforcing Texas’s criminal laws . . . . DPS



[] officers arrest people for violating Texas law, exercising “compulsion or constraint” in service of the law.

Nat’l Press Photographers, 90 F.4th at 786.

McCraw has also demonstrated a clear willingness to enforce SB 4. Once again, this is evident from the face of Texas’s response, alleging “unprecedented influx of unlawful immigration for which the cartels are responsible,” “deadly drug smuggling, human trafficking, and infiltration by suspected terrorists,” “rampant criminal activity” and that the federal government has “has chosen to ‘accept a failed narco-state.’” (Dkt. # 25 at 2–3). Indeed, the whole purpose of SB 4, as described by Texas, is to enforce immigration law where the federal government allegedly will not. A “scintilla of enforcement by the relevant state official with respect to the challenged law” will do, and McCraw has easily met that threshold. City of Austin v. Paxton, 943 F.3d 993, 1002 (5th Cir. 2019). In sum, McCraw has the legal authority to enforce SB 4 and has concretely demonstrated a willingness to do so, and therefore falls under the Ex parte Young exception. Thus, neither McCraw nor Hicks are entitled to sovereign immunity.

### **III. Cause of Action**

Relying principally on a 2015 Supreme Court case, Texas contends that the United States lacks a valid cause of action. (Dkt. # 25 at 35–36) (citing Armstrong v. Exceptional Child Ctr., Inc., 575 U.S. 320, 324–25 (2015)). In Armstrong, the Supreme Court clarified that there is no implied cause of action

under the Supremacy Clause. 575 U.S. at 323–28 (“It is equally apparent that the Supremacy Clause is not the source of any federal rights and certainly does not create a cause of action. It instructs courts what to do when state and federal law clash, but is silent regarding who may enforce federal laws in court, and in what circumstances they may do so.”) (cleaned up). Because the United States lacks an implied cause of action under the Supremacy Clause, Texas believes that the United States “therefore [has] no cause of action to enforce the supremacy of federal law.” (Dkt. # 25 at 35).

Texas misreads Armstrong. The absence of an implied cause of action is not necessarily a bar to suit altogether. Armstrong itself shows this. There, the Supreme Court found no implied cause of action and then immediately turned to whether it could entertain the suit in equity. 575 U.S. at 327 (“We turn next to respondents’ contention that, quite apart from any cause of action conferred by the Supremacy Clause, this suit can proceed against Idaho in equity.”). Nothing in Armstrong bars suits in equity that are not displaced by Congress.

The plaintiffs’ case in Armstrong was not dismissed solely for lack of a statutory cause of action, but also because the equitable cause had been displaced. Id. at 327–30. Armstrong noted that suits in equity are “subject to express and implied statutory limitations” that cannot be disregarded. Id. at 327. The act at issue in Armstrong—the Medicaid Act—precluded certain enforcement

actions by private parties, establishing a congressional “intent to foreclose equitable relief.” Id. at 328 (internal quotations omitted). That foreclosure, combined with the “judicially administrative nature of” the Medicaid Act, left the plaintiffs in Armstrong without a cause of action. Id.

Displacement by federal statutory causes of action does not apply here. Id. at 329 (noting that “equitable relief is traditionally available to enforce federal law” by a proper plaintiff unless Congress has “displace[d]” it). Texas does not identify any displacement. It alleges only that the United States<sup>10</sup> has failed to identify a cause of action. But for Texas’s argument to succeed, Texas must identify some law that has displaced equitable relief, and it has not done so here.

Unsurprisingly, courts before and after Armstrong have allowed suits in equity under the Supremacy Clause. See United States v. Texas, 557 F. Supp. 3d

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<sup>10</sup> Texas focuses its argument on the United States, but at times suggests that the Organizational Plaintiffs also lack a valid cause of action. (Dkt. # 25 at 34–35). However, Armstrong itself reaffirmed the availability of Ex parte Young as an example of a permissible suit. 575 U.S. at 326 (“[A]s we have long recognized, if an individual claims federal law immunizes him from state regulation, the court may issue an injunction upon finding the state regulatory actions preempted.” (citing Ex parte Young, 209 U.S. at 155–56). And although the opinion mentions a direct enforcement challenge as an example of Ex parte Young, the doctrine is not limited to potential defendants of a state criminal regulation. See Tex. Democratic Party v. Abbott, 978 F.3d 168, 179 (5th Cir. 2020) (finding Texas Democratic Party asserted valid Ex parte Young challenge against secretary of state in challenge to absentee voting provisions); Virginia Office for Prot. & Advocacy v. Stewart, 563 U.S. 247, 256 (2011) (“Although respondents argue that [plaintiff’s] status as a state agency changes the calculus, there is no warrant in our cases for making the validity of an Ex parte Young action turn on the identity of the plaintiff.”).

810, 820 (W.D. Tex. 2021) (listing, as an example, six cases after Armstrong where the United States brought lawsuits under the Supremacy Clause). Arizona v. United States, the most recent Supreme Court immigration preemption case, was based off equitable remedies under the Supremacy Clause, like many preemption cases before it. 567 U.S. 387, 392 (2012); see also Sanitary Dist. of Chicago v. United States, 266 U.S. 405 (1925) (“The Attorney General [] may bring this proceeding [to carry out treaty obligations] and no statute is necessary to authorize the suit.”). And the availability of suits in equity under the Supremacy Clause is established precedent in the Fifth Circuit. See Crown Castle Fiber, L.L.C. v. City of Pasadena, Tex., 76 F.4th 425, 434–35 (5th Cir. 2023) (“Even though [the statute] does not confer a private right, a plaintiff is not prevented from gaining equitable relief on preemption grounds. Accordingly, [plaintiff] can bring its federal preemption claim.”). Another circuit even emphasized that Armstrong “counsels in favor of—not against—permitting the United States to invoke preemption in order to protect its interest.” United States v. Supreme Ct. of N.M., 839 F.3d 888, 906 n.9 (10th Cir. 2016). Here, as there, “Defendants’ reliance on Armstrong is misguided.” Id.

#### **IV. Abstention**

Texas also argues that the Court should abstain from deciding Plaintiffs’ motions for preliminary injunctions under Pullman abstention. (Dkt. #

25 at 58–60). Pullman counsels that federal courts may abstain from resolving the constitutionality of a state law “so as to eliminate or at least to alter materially, the constitutional question presented.” Ohio Bureau of Emp. Servs. v. Hodory, 431 U.S. 471, 477 (1977); (citing R.R. Comm’n of Tex. v. Pullman Co., 312 U.S. 496 (1941)). Key to Pullman abstention is that “the challenged state statute is susceptible of a construction by the state judiciary that would avoid or modify the necessity of reaching a federal constitutional question.” Babbitt, 442 U.S. at 306.

Generally, Pullman abstention does not apply to preemption claims. See, e.g., United Servs. Auto. Ass’n v. Muir, 792 F.2d 356, 363 (3d Cir. 1986) (“The holdings of [Pullman and Hodory], read together, suggest that a federal court should not abstain under Pullman from interpreting a state law that might be preempted by a federal law . . . .”). Nor does Texas identify “uncertain state law” issues that would “render unnecessary or substantially modify” the preemption issues. Baran v. Port of Beaumont Nav. Dist., 57 F.3d 436, 442 (5th Cir. 1995) (cleaned up). Field preemption applies no matter how Texas courts interpret ambiguities in SB 4. See *infra*, p. 29–52. And as the Court will explain in its discussion of conflict preemption, the Court need not wait to see if state courts abate proceedings under SB 4 pending federal determinations of admissibility, because SB 4 specifically prohibits them from doing so. See *infra*, p. 52–61.

Because Texas identifies no material ambiguity, there would be no value in abstaining.

## LIKELIHOOD OF SUCCESS ON THE MERITS

### **I. Field Preemption**

Next, the Court turns to the merits, beginning with field preemption.

“The Government of the United States has broad, undoubted power over the subject of immigration and the status of [noncitizens].” Arizona, 567 U.S. at 394.

The U.S. Constitution empowers the federal government to “regulate commerce with foreign nations” and “establish a uniform Rule of naturalization.” U.S. Const. art. I, § 8; id. art. II, § 2. Pursuant to this authority, Congress has created a complex and expansive system to regulate entry into and removal from the United States.

See, e.g., De Canas v. Bica, 424 U.S. 351, 353 (1976); Toll v. Moreno, 458 U.S. 1 (1982); Padilla v. Kentucky, 559 U.S. 356 (2010).

SB 4 directly challenges the federal government’s long-held power to control immigration, naturalization, and removal.<sup>11</sup> SB 4 extends federal immigration penalties by authorizing Texas state officials to detain, arrest,

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<sup>11</sup> Despite Texas’s argument that SB 4 does nothing more than complement federal law. (Dkt. # 25), Greg Abbott himself declared that SB 4 was an exercise of constitutional authority superseding federal immigration laws. See Press Release, Greg Abbott, Governor of Texas, Statement on Texas’s Constitutional Right to Self-Defense, (Jan. 24, 2024), [https://gov.texas.gov/uploads/files/press/Border\\_Statement\\_1.24.2024.pdf](https://gov.texas.gov/uploads/files/press/Border_Statement_1.24.2024.pdf). (noting that “Texas’s constitutional authority to defend and protect itself . . . is the supreme law of the land and supersedes any federal statutes to the contrary.”).

prosecute, and remove noncitizens without federal supervision. Supreme Court precedent squarely holds that SB 4’s attempt to regulate the unlawful entry of noncitizens is field preempted. Arizona, 567 U.S. at 399. Field preemption “can be inferred” both from “a federal interest so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject” and from “a framework of regulation so pervasive that Congress left no room for the States to supplement it.” Id. Applied to the field of immigration, the federal government has both a dominant interest and a pervasive regulatory framework that preclude state regulation in the area.

*A. The United States has a dominant interest in regulating immigration.*

As over a century of Supreme Court cases hold, “The authority to control immigration—to admit or exclude [noncitizens]—is vested *solely* in the Federal Government.” Truax v. Raich, 239 U.S. 33, 42 (1915) (emphasis added) (citing Fong Yue Ting v. United States, 149 U.S. 698 (1893)). The Supreme Court has repeatedly stressed that “the regulation of [noncitizens] is so intimately blended and intertwined with responsibilities of the national government that where it acts, and the [S]tate also acts on the same subject,” the state law must give way. Hines v. Davidowitz, 312 U.S. 52, 62 (1941); see also Hillsborough Cnty. v. Automated Med. Lab’ys., Inc., 471 U.S. 707, 719 (1985) (recognizing “the dominance of the federal interest” in immigration and foreign affairs as the

paradigmatic example of field preemption); Takahashi v. Fish & Game Comm’n, 334 U.S. 410, 419 (1948) (acknowledging that States “can neither add to nor take from the conditions lawfully imposed by Congress upon admission, naturalization and residence of [noncitizens] in the United States or the several states”); United States v. Valenzuela-Bernal, 458 U.S. 858, 864 (1982) (“The power to regulate immigration—an attribute of sovereignty essential to the preservation of any nation—has been entrusted by the Constitution to the political branches of the Federal Government.”); Chy Lung v. Freeman, 92 U.S. 275, 280 (1875) (“The passage of laws which concern the admission of citizens and subjects of foreign nations to our shores belongs to Congress, and not to the States.”); De Canas, 424 U.S. at 354 (“Power to regulate immigration is unquestionably exclusively a federal power.”); Arizona, 567 U.S. at 409 (“[T]he removal process is entrusted to the discretion of the Federal Government.”).

Beyond the federal government’s interest in the admission and removal of noncitizens, the field of immigration is also deeply intertwined with the United States’ foreign relations. First, “[i]mmigration policy can affect trade, investment, tourism, and diplomatic relations for the entire Nation, as well as the perceptions and expectations of [noncitizens] in this country who seek the full protection of its laws.” Arizona, 567 U.S. at 395. It is “fundamental” that “foreign countries concerned about the status, safety, and security of their nationals in the



United States must be able to confer and communicate on this subject with one national sovereign, not the 50 separate States.” Id. The “perceived mistreatment of [noncitizens] in the United States may lead to harmful reciprocal treatment of American citizens abroad.” Id. “Our system of government is such that the interest of the cities, counties and states, no less than the interest of the people of the whole nation, imperatively requires that federal power in the field affecting foreign relations be left entirely free from local interference.” Hines, 312 U.S. at 63.

Second, “discretionary decisions” on how to enforce the nation’s immigration laws “involve policy choices that bear on this Nation’s international relations” and the “dynamic nature of relations with other countries requires the Executive Branch to ensure that enforcement policies are consistent with this Nation’s foreign policy.” Id. at 396–97. That is particularly true for removal decisions. Such decisions include “the selection of a removed [noncitizen]’s destination” which “may implicate our relations with foreign powers,” requiring “consideration of changing political and economic circumstances.” Jama v. Immigr. & Customs Enf’t, 543 U.S. 335, 348 (2005) (citation omitted). The “removal process” must be “entrusted to the discretion of the Federal Government” because it touches “on foreign relations and must be made with one voice.” Arizona, 567 U.S. at 409.

Third, the federal government must be entrusted with the power to control the country’s international borders. “[T]his country’s border-control policies are of crucial importance to the national security and foreign policy of the United States,” Hernandez v. Mesa, 885 F.3d 811, 819 (5th Cir. 2018) (quoting United States v. Delgado-Garcia, 374 F.3d 1337, 1345 (D.C. Cir. 2004)), aff’d, 140 S. Ct. 735 (2020), and “[n]ational-security policy” and foreign policy are “the prerogative of the Congress and President,” Ziglar v. Abbasi, 582 U.S. 120, 142 (2017). Determination of which noncitizens may enter and remain in the United States “is unquestionably exclusively a federal power.” De Canas, 424 U.S. at 354.

In short, it is undisputed that the federal government has a dominant and supreme interest in the field of immigration. Texas’s own state courts acknowledge “the matter of entry into the United States” is “wholly preempted by federal law,” Hernandez v. State, 613 S.W.2d 287, 290 (Tex. Crim. App. 1980), as are “matters involving deportation.” Gutierrez v. State, 380 S.W.3d 167, 173, 176 (Tex. Crim. App. 2012). By regulating a sphere dominated by federal interests, SB 4 violates the Supremacy Clause.

*B. Congress has enacted a pervasive regulatory framework.*

In regulating immigration, the federal government has also enacted a “framework of regulation so pervasive that Congress left no room for the States to supplement it.” Arizona, 567 U.S. at 399 (internal quotations omitted); see also

Texas v. United States, 50 F.4th 498, 516 (5th Cir. 2022) (“[B]ecause policies pertaining to the entry of [noncitizens] and their right to remain here are entrusted exclusively to Congress[,] [a]n attempt by Texas to establish an alternative classification system . . . would be preempted.”) (cleaned up). Congress has created a comprehensive framework “of federal statutes criminalizing the acts undertaken by [noncitizens] and those who assist them in coming to” the United States. Ga. Latino All. for Hum. Rts. v. Governor of Ga., 691 F.3d 1250, 1264 (11th Cir. 2012) (“GLAHR”).

Congress regulates immigration through countless statutes and treaties,<sup>12</sup> far too numerous to list in full. Congress has “authorized criminal penalties for individuals who bring [noncitizens] into the United States,” GLAHR, 691 F.3d at 1264 (citing 8 U.S.C. § 1323), has “penalize[d] the transportation, concealment, and inducement of unlawfully present [noncitizens],” id. (citing 8 U.S.C. § 1324), has “impose[d] civil and criminal penalties for unlawful entry” and re-entry, id. (citing 8 U.S.C. § 1325–26), has prohibited “aid[ing] the entry of an

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<sup>12</sup> See, e.g., Immigration and Nationality Act of 1952, Pub. L. 82-414, 66 Stat. 163 (codified as amended in scattered sections of 8 U.S.C.); Refugee Act of 1980, Pub. L. 96-212, 94 Stat. 102 (codified as amended in scattered sections of 8 U.S.C.); Immigration Act of 1990, Pub. L. 101-649, 104 Stat. 4978 (codified in scattered sections of 8 U.S.C.); Antiterrorism and Effective Death Penalty Act (“AEDPA”), Pub. L. 104-132, 110 Stat. 1214, 28 U.S.C. § 2254 et. seq.; REAL ID Act of 2005, Pub. L. 109-13, 119 Stat. 3028 (codified in scattered sections of 8 U.S.C.); Homeland Security Act of 2002, Pub. L. 107-296, 116 Stat. 2135 (codified in scattered sections of 6 U.S.C.); USA Patriot Act, Pub. L. 107-56, 115 Stat. 272 (codified as amended in scattered sections of 8 U.S.C., 12 U.S.C., 15 U.S.C., 18 U.S.C., 31 U.S.C., and 42 U.S.C.); Illegal Immigration Reform and Immigrant Responsibility Act of 1986, Pub. L. 99-603, 100 Stat. 3445 (codified as amended in scattered sections of 8 U.S.C. and 42 U.S.C.).

inadmissible [noncitizen],” *id.* (citing 8 U.S.C. § 1327), and has banned the “import [of] [a noncitizen] for an immoral purpose,” *id.* (citing 8 U.S.C. § 1328). As one circuit court has held, the country’s immigration laws have “been described as second only to the Internal Revenue Code in complexity.” *Singh v. Gonzales*, 499 F.3d 969, 980 (9th Cir. 2007) (cleaned up). Another has noted the striking resemblance between immigration law and “King Minos’s labyrinth in ancient Crete.” *Lok v. INS*, 548 F.2d 37, 37 (2d Cir. 1977). The country’s immigration laws are massive, sprawling, detailed, complex, and pervasive.

Although Texas claims that the Biden Administration<sup>13</sup> has abandoned the field, Congress has vested DHS and other executive agencies with substantial enforcement power and duties.<sup>14</sup> DHS has “the power and duty to control and guard the boundaries and borders of the United States.” 8 U.S.C. § 1103(a)(5). DHS and its subagencies retain the sole responsibility for “enforc[ing] and administer[ing] all immigration laws,” especially “the inspection, processing, and admission of persons who seek to enter” the United States and “the detection,

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<sup>13</sup> Throughout its briefing, Texas faults only the Executive Branch for abandoning the field of immigration. But congressional regulation of a field is far more relevant to preemption, or else the preemption analysis would constantly fluctuate depending on an agency’s or administration’s enforcement priorities.

<sup>14</sup> At the preliminary injunction hearing, the United States emphasized the scope of its recent immigration enforcement actions, noting that it removed 472,000 individuals between May through December of 2023—more than any single year since 2015. (Dkt. # 40 at 12).

interdiction, removal, [and] departure from the United States” of those here unlawfully. 6 U.S.C. § 211(c)(8).<sup>15</sup>

Congress has also made clear it occupies the field. Under the Immigration and Nationality Act (“INA”), a removal proceeding shall be “the sole and exclusive procedure for determining whether [a noncitizen] may be admitted to the United States or, if the [noncitizen] has been so admitted, removed from the United States.” 8 U.S.C. § 1229a(a)(3).<sup>16</sup> The federal government alone is vested “with the powers of external sovereignty” and “the power to expel” noncitizens. United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 318 (1936). The power of removal is “inherently inseparably from the conception of nationality.” Id.

In sum, there is no genuine question that the federal government occupies the field of immigration. Accordingly, the Court will next turn to whether SB 4 unlawfully intrudes upon the federal government’s immigration authority.

*C. SB 4’s criminalization of unlawful entry and re-entry intrudes into the federal government’s field.*

Beginning with Texas’s prohibitions on unlawful entry and re-entry, Arizona expressly forbids the sort of “concurrent” criminalization that Texas seeks to impose. 567 U.S. at 400; Tex. Penal Code § 51.02–51.03. There, in response to

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<sup>15</sup> State authorities may assist in this enforcement under federal supervision. E.g., 8 U.S.C. § 1357(g).

<sup>16</sup> Subject to certain other federal provisions.

surging numbers of immigrants crossing its southern border, Arizona passed SB 1070 to “discourage and deter the unlawful entry and presence of” noncitizens in the country. *Id.* at 392–93. SB 1070 had four separate provisions: Section 3, which made it a state crime to comply with federal registration requirements; Section 5(c), which made it a state crime for an unauthorized noncitizen to seek or engage in work in Arizona; Section 6, which authorized officers to arrest a person without a warrant if there was probable cause to believe they were removable; and Section 2(B), which allowed officers conducting stops or arrests to verify a person’s immigration status. *Id.* at 393–94. The Court found that all provisions were preempted, except for Section 2(B), which the Court believed would be better suited to resolution after the law took effect. *Id.* at 415–16.

SB 4 and SB 1070 contain striking similarities. As SB 1070 did previously, SB 4 attempts to “add[] a state-law penalty for conduct proscribed by federal law.” *Arizona*, 567 U.S. at 400; *see* Tex. Penal Code §§ 51.02–51.03 (criminalizing under Texas law violations that mostly match 8 U.S.C. § 1325(a) and 8 U.S.C. § 1326(a)). As the Supreme Court found in *Arizona*, these federal provisions already act as “a full set of standards” “designed as a harmonious whole.” *Arizona*, 567 U.S. at 401. Even accepting for purposes of argument that SB 4 merely imposes state law penalties for existing federal crimes, “[p]ermitting the State to impose its own penalties for the federal offenses [] would conflict with

the careful framework Congress adopted.” Id. at 402. SB 4 allows the state to “bring criminal charges against individuals for violating a federal law even in circumstances where federal officials in charge of the comprehensive scheme determine that prosecution would frustrate federal policies.” Id. at 402. For that reason, “[w]here Congress occupies an entire field, as it has in the field of [noncitizen] registration, complementary state regulation is impermissible.” Id. at 401. “Field preemption reflects a congressional decision to foreclose any state regulation in the area, even if it is parallel to federal standards.” Id. (citing Silkwood v. Kerr–McGee Corp., 464 U.S. 238, 249 (1984)).

In sum, Sections 51.02 and 51.03 of SB 4 cannot be differentiated from Section 3 of SB 1070. Tex. Penal Code § 51.02–51.03. Both laws attempt to vest a state with the power to punish federal immigration offenses. But the “basic premise of field preemption,” reaffirmed in Arizona, is that “[s]tates may not enter, in any respect, an area the Federal Government has reserved for itself[.]” Id. at 402. Under the holding of Arizona, SB 4 must be pre-empted.

*D. SB 4’s removal authorization is patently unconstitutional.*

Texas’s criminalization of unauthorized entry and re-entry is preempted under Arizona and the federal government’s dominant interest in regulating immigration enforcement. Article 5(B).002 of SB 4, however, is an especially problematic intrusion on federal prerogatives. Tex. Code of Crim. Proc.

art. 5(B).002. Article 5(B).002 goes even further than Arizona’s SB 1070 by authorizing Texas state or magistrate judges to remove noncitizens from the United States without notice or consent from the federal government. Id. Before conviction, a judge may only order removal if a noncitizen consents, but after conviction, a state judge “*shall* enter” a removal order. Id. art. 5(B).002(a)–(d) (emphasis added).

This exceeds even what the dissenting Justices in Arizona believed to be constitutional. Arizona, 567 U.S. at 427 (Scalia, J., dissenting in part) (arguing that SB 1070 was constitutional because it only allowed detention and “does not represent commencement of the removal process unless the Federal Government makes it so”); id. at 438 (Thomas, J., dissenting in part) (suggesting states have power to make arrests but not discussing power of removals); id. at 457 (Alito, J., dissenting in part) (“State and local officers do not frustrate the removal process by arresting criminal [noncitizens]. The Executive retains complete discretion over whether those [noncitizens] are ultimately removed.”).

Removal touches upon some of the most sensitive foreign affairs considerations of federal immigration policy. Id. at 409 (majority opinion) (“A decision on removability requires a determination whether it is appropriate to allow a foreign national to continue living in the United States. Decisions of this nature touch on foreign relations and must be made with one voice.”); Jama, 543 U.S. at



348 (“Removal decisions, including the selection of a removed [noncitizen’s] destination, may implicate [the United States’] relations with foreign powers and require consideration of changing political and economic circumstances.”) (internal quotation marks omitted). To that end, the INA vests removal authority exclusively with the federal government. 8 U.S.C. § 1229a(a)(3) (“[A] proceeding under this section shall be the sole and exclusive procedure for determining whether a [noncitizen] may be admitted [or] removed from the United States.”). To allow Article 5(B).002 to take effect would allow states and state-court judges to shape a key aspect of American foreign policy and intrude upon a field explicitly entrusted to federal control by Congress. The federal government’s domain over removal prohibits concurrent state regulation. By authorizing state officials to conduct removals, Article 5(B).002 of SB 4 intrudes into a particularly sensitive area of foreign affairs and is field preempted.

*E. Arguments Against Field Preemption*

1. Nothing in Arizona limited field preemption to noncitizen registration.

Given that SB 4 goes even further to regulate immigration than SB 1070, the law is likely field preempted. Texas’s arguments against field preemption are unavailing.

First, in response to the Plaintiffs’ arguments on field preempted, Texas first argues that the “only field preemption recognized in Arizona is the

‘field of [noncitizen] registration.’” (Dkt. # 25 at 15) (quoting Arizona, 567 U.S. at 403). This is simply not an accurate recitation of Arizona, which explicitly applied field preemption to parts of SB 1070 besides noncitizen registration. 567 U.S. at 403–11. Nothing in Arizona suggests [noncitizen] registration was the *sole* area of immigration to be field preempted. Id. The Supreme Court merely used the phrase “field of [noncitizen] registration” because it was discussing the specific portion of SB 1070 that regulated registration in that quote.

Arizona’s preemption of other portions of SB 1070 shows that the decision was not limited to noncitizen registration. In its discussion of Section 6, Arizona explicitly ruled, “By authorizing state officers to decide whether [a noncitizen] should be detained for being removable, [Section 6 of SB 1070] violates the principle that the removal process is entrusted to the discretion of the Federal Government.” Id. at 409.

In fact, the Supreme Court’s treatment of SB 1070’s provision on removability determinations was even more harsh than its discussion of the provision on noncitizen registration. See Arizona, 567 U.S. at 401–09. SB 4’s regulation of unauthorized entry and removability cuts against—not for—the constitutionality of the law. Regulation of unlawful entry has an even stronger connection to federal interests than noncitizen registration. Unlawful entry implicates key federal interests, including regulation of the border, the power of

removal, and diplomatic considerations such as when and where noncitizens may apply for asylum. See, e.g., id. at 401–11; Hines, 312 U.S. at 64–66. For those reasons, Congress has explicitly stated that federal immigration law is the “sole and exclusive” means of determining admissibility. 8 U.S.C. § 1229a(a)(3). Texas cannot dispute that “[t]he federal statutory directives” here “provide a full set of standards,” including “punishment for noncompliance,” and that SB 4 “adds a state-law penalty for conduct proscribed by federal law.” Arizona, 567 U.S. at 400–01. Field preemption applies to the regulation of unlawful entry under SB 4, just as much as it applied to noncitizen registration and removability determinations in Arizona.

2. SB 4 authorizes the removal of noncitizens, and the power of removal is preempted.

Next, Texas argues that orders under SB 4 are not “removals.” (Dkt. # 25 at 16). Texas relies on a declaration from a regional DPS director stating that Texas will not remove detainees from the state, but instead “have an officer escort the [noncitizen] to a port of entry.” (Escalon Decl., Dkt. # 25-3 at 2). Despite stating that Mexico is a “failed narcostate” (Dkt. # 25 at 2), Texas’s declarant Victor Escalon insists that Texas DPS “enjoys a cooperative relationship with” Mexican police and “expects to work with Mexican authorities to request they allow entry of [noncitizen] returnees.” (Escalon Decl., Dkt. # 25-3 at 2–3). “If Mexican authorities do not accept the entrance of [a noncitizen] subject to an order

to return, the escorting DPS officer will deliver him to the American side of a port of entry and observe the [noncitizen] go to the Mexican side.” (Id.).

Under Escalon’s description, an officer takes a noncitizen, escorts them to another country, and departs after the noncitizen enters the other country. This is the same thing as a removal. Removal, Black’s Law Dictionary (11th ed. 2019) (“The transfer or moving of a person or thing from one location, position, or residence to another.”); see also Deportation, Black’s Law Dictionary (11th ed. 2019) (“The act or an instance of removing a person to another country; esp., the expulsion or transfer of [a noncitizen] from a country.”). Texas escorts a noncitizen to the border and they either depart into Mexico or are face 20 years in prison if they do not. Given that Texas may incarcerate someone for 20 years if they do not cross into Mexico, it is rather absurd to argue, as Texas does, that DPS officers are not “forcing” the noncitizen to cross. Tex. Penal Code § 51.04(b).

Texas contends, “Effectuating any forced removal from the country remains the task of federal CBP officers.” (Dkt. # 25 at 16). This is simply not what Texas’s declarant says. Escalon states that a Texas officer will deliver a noncitizen to a port of entry and the noncitizen will be charged with a second-degree felony if they do not then enter Mexico. (Escalon Decl., Dkt. # 25-3 at 2–3); Tex. Penal Code § 51.04. The sole difference, then, is whether the removal occurs

in handcuffs or under threat of handcuffs (and 20 years of prison), and that is not a distinction of constitutional significance.

Texas seems to argue that there are no foreign affairs considerations implicated by these removals so long as Mexican border officers consent to the entry. (Dkt. # 25 at 16). Mexico’s own position on SB 4 flatly contradicts this theory. Despite Escalon’s statement that DPS has a solid working relationship with Mexico, the country has repeatedly condemned SB 4. When SB 4 was adopted, Mexico expressed its opposition. See Press Release 476, Mexican Government opposes the anti-immigrant legislation passed in Texas, Secretary of Foreign Relations of Mexico (Nov. 15, 2023), available at <https://perma.cc/RP7H-JXZR>. Mexico noted that SB 4 would violate its own sovereign right “to determine its own policies regarding entry into its territory.” Id. Mexico’s President, Andrés Manuel López Obrador, called SB 4 “inhumane” and protested the law with the United States federal government. (Jacobstein Decl., Dkt. # 14-1 at 4). A representative of the U.S. State Department notes that “Mexico has signaled emphatically that” “removal orders under SB 4” would “frustrate the United States’ relations with Mexico regarding noncitizen removals and likely other important bilateral issues.” (Id. at 5). In sum, there is no need to engage in theoretical discussions about why removals *might* impact foreign affairs—it is

clear from the evidence that SB 4 *already has* impacted the United States' foreign relations.

Supreme Court precedent shows that only the federal government may remove noncitizens. Arizona, 467 U.S. at 409 (majority opinion); Jama, 543 U.S. at 348. Texas's attempts to circumvent this well-established precedent are unavailing. Regardless of whether DPS officers physically force noncitizens across the border, or if Mexican police officers agree to a removal, SB 4's removal provision significant implicates foreign affairs. These foreign policy decisions must be made by one voice: the federal government's.

2. Immigration enforcement laws with “concurrent” purposes are preempted.

Texas next argues that SB 4 “mirror[s] federal law” and is “consistent with” its federal counterparts. (Dkt. # 25 at 17-18). But Congress has spoken clearly on the issue, noting that federal statutes are the “the sole and exclusive procedure” for determining admissibility and removability of noncitizens. 8 U.S.C. § 1229a(a)(3). However, by permitting removals, SB 4 effectively allows state officials to make removability determinations, thereby authorizing state regulation of an exclusive federal field. There can be no “consistent” state regulation when Congress has explicitly designated federal law as the “sole and exclusive” authority. See Villas at Parkside Partners v. City of Farmers Branch, 726 F.3d 524, 531–32 (5th Cir. 2013) (plurality) (holding that an ordinance “interferes with the

careful balance struck by Congress” by “giving state officials authority to act as immigration officers outside the limited circumstances specified by federal law” (internal quotation marks omitted)).

Again, this was squarely addressed by Arizona. 567 U.S. at 408. Arizona makes clear that even concurrent laws risk thwarting federal immigration objectives. Id.; see also GLAHR, 691 F.3d at 1264 (noting from Arizona that “the Supreme Court dismissed the state’s argument that its goal of concurrent enforcement was appropriate in a field occupied by federal regulation.”). Allowing state officers to arrest noncitizens based on removability “would allow the State to achieve its own immigration policy. The result could be unnecessary harassment of some [noncitizens] . . . who federal officials determine should not be removed.” Id. That is especially the case with SB 4, which will lead to the arrest and incarceration of (eventual) successful asylum applicants, noncitizens with credible fears of torture, and victims of abuse and trafficking who report their crimes to the police.

Due to the careful considerations involved in determining admissibility and how to treat removable noncitizens, Arizona specifies that Congress created a system with “limited circumstances in which state officers may perform the functions of an immigration officer.” Id. SB 4 goes beyond those limited circumstances and exceeds the role Congress has granted the states in

immigration enforcement. For the same reason, courts have found state laws on human-smuggling preempted by federal immigration law. See, e.g., GLAHR, 691 F.3d at 1263–64 (finding a state human smuggling law preempted by comprehensive federal immigration provisions); United States v. South Carolina, 720 F.3d 518, 530-31 (4th Cir. 2013) (same); Valle del Sol Inc. v. Whiting, 732 F.3d 1006, 1024-25 (9th Cir. 2013) (same). “Congress has provided a broad and comprehensive plan describing the terms and conditions upon which [noncitizens] may enter this country, how they may acquire citizenship, and the manner in which they may be deported.” Hines, 312 U.S. at 69. Congress “plainly manifested a purpose to do so in such a way as to protect the personal liberties of law-abiding [noncitizens] . . . and to leave them free from the possibility of inquisitorial practices and police surveillance.” Id. at 74. States “cannot, inconsistently with the purpose of Congress, conflict or interfere with, curtail or complement, the federal law, or enforce additional or auxiliary regulations.” Id. at 66–67. SB 4’s supposed concurrent purpose with federal law cannot save it from preemption.

3. Texas’s dissatisfaction with immigration enforcement does not show complete abandonment by the United States.

Texas takes aim at existing Supreme Court precedent, suggesting that “[s]everal members of the Supreme court have questioned the more recent and profligate use of field preemption . . . .” (Dkt. # 25 at 19). A district or appeals court is not at liberty to disavow Supreme Court precedent based off freewheeling



speculation about whether the Supreme Court will change its mind. Stare decisis commands that “today’s Court should stand by yesterday’s decisions” and this rule applies inflexibly to lower courts. Kimble v. Marvel Entm’t, LLC, 576 U.S. 446, 456 (2015). Whether Texas agrees with field preemption or not, Arizona unambiguously instructs that field preemption forecloses state attempts to regulate entry and removal. 567 U.S. at 400.<sup>17</sup>

Nonetheless, Texas argues, field preemption does not apply because the federal government has abandoned the role of immigration enforcement.<sup>18</sup> (Dkt. # 25 at 19-20) (“[T]he federal executive branch has abandoned the very field it now purports to occupy.”). Texas relies on dicta in a recent decision from another court in this district that found “[t]he evidence presented amply demonstrates the utter failure of [DHS] to deter, prevent, and halt unlawful entry into the United States.” Texas v. DHS, No. DR-23-CV-00055-AM, 2023 WL

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<sup>17</sup> The principle of stare decisis is particularly important in the context of a preliminary injunction. Preliminary relief is granted to maintain the status quo. See Ruiz v. Estelle, 650 F.2d 555, 565 (5th Cir. 1981). A change in precedent, by definition, cannot serve to maintain the status quo.

<sup>18</sup> In making this argument, Texas parrots the statements made by its governor and state politicians decrying the federal government’s immigration policy. See, e.g., Greg Abbott, Press Release, Greg Abbott, Governor of Texas, Statement on Texas’s Constitutional Right to Self-Defense, (Jan. 24, 2024), [https://gov.texas.gov/uploads/files/press/Border\\_Statement\\_1.24.2024.pdf](https://gov.texas.gov/uploads/files/press/Border_Statement_1.24.2024.pdf) (“President Biden has refused to enforce [immigration] laws . . .”). Political hyperbole cannot substitute for legal argument. The Court must decide issues based the laws and facts before it. It is improper for courts to accept a fact as true simply because a governor has declared it so or the House of Representatives narrowly declares so in a non-binding resolution.

8285223 (W.D. Tex. Nov. 29, 2023); rev'd by injunction pending appeal, 88 F.4th 1127 (5th Cir. 2023), vacated, No. 23A607, 2024 WL 222180 (U.S. Jan. 22, 2024).

The Court cannot transfer the evidentiary findings of one case into this one.<sup>19</sup> The record before this Court in this case does not establish abandonment—in Texas or otherwise in the United States.<sup>20</sup> The Court is sympathetic to Texas's concerns at the border, but to say that the Biden Administration has “abandoned” the field of immigration is to take hyperbolic criticism literally. Contrary to Texas's position, the record is replete with examples and evidence of the federal government carrying out its immigration duties. DHS's Executive Office for Immigration Review (“EOIR”) employs 6,000 immigration officers nationwide, while Homeland Security employs 6,100 special agents. (Hott Decl., Dkt. # 14-4 at 2–3). Immigration and Customs Enforcement (“ICE”) manages a docket of 6.8 million cases, including noncitizens in removal proceedings or those who have received removal orders. (Id.). ICE has 19,102 beds for detained noncitizens in Texas alone. (Id. at 5).

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<sup>19</sup> And at any rate, the failure to prevent all unlawful entries does not equate to abandonment. Texas cites no cases for the proposition that the failure to regulate with complete effectiveness constitutes abandonment.

<sup>20</sup> A party cannot simply rest on the dicta of a previous district court case to estop this court's fact-finding role. That is especially true when Texas described that district court's reasoning elsewhere as “mistaken” “unavailing” and an “outlier holding” parting ways with established circuit precedent. Texas v. DHS, 88 F.4th 1127 (5th Cir. 2023), (Pet. Br., Dkt. # 25 at 12, 17; Reply, Dkt. # 47 at 4).

From May 2023 to November 2023, DHS “removed or returned over 400,000 [individuals]”, the vast majority at the southwest border. CBP, CBP releases November 2023 monthly update (Dec. 22, 2023), <https://perma.cc/XQW4-55XW>. These numbers “nearly [equal] the number removed and returned in all of fiscal year 2019 and exceeds the annual totals for each year 2015 – 2018.” Id. “Daily removals and enforcement returns per day are nearly double what they were compared to the pre-pandemic average (2014 – 2019).” Id.

Beyond arresting and removing noncitizens, the United States has engaged in successful diplomatic talks to reduce unauthorized immigration. For example, the United States has “secured commitments from partner governments to” advance two programs designed to reduce immigration flows: the “Root Causes Strategy, which focuses on the main challenges that drive irregular migration, and the Collaborative Management Strategy, which is devoted to fostering the international cooperation necessary to enhance safety . . . and reduce irregular migration.” (Jacobstein Decl., Dkt. # 25-1 at 6–7). The United States has partnered with Mexico for both initiatives and led a multilateral framework in Central America to reduce irregular migration. (Id.). Most recently, high-ranking cabinet officials met with President López Obrador in December 2023 stressing the need to reduce irregular migration and enhance border security efforts. (Id.; Dkt. # 14, at 10). Again, Texas may disagree with diplomatic efforts or contest their

effectiveness, but it cannot maintain in good faith that those efforts constitute “abandonment.”

It is simply not accurate to say that hundreds of thousands of removals constitute abandonment. Texas mistakes the figurative for the literal. Whatever hyperbole Texas employs, DHS’s actions do not constitute genuine abandonment as a legal determination. Texas may disagree with the number of removals or the way that DHS goes about immigration enforcement, but it cannot legitimately maintain that DHS does *nothing* at the southwest border.<sup>21</sup>

Again, Texas’s argument on this point is foreclosed by Arizona. There, the Court recognized in the very first sentence of its opinion that Arizona passed SB 1070 “[t]o address pressing issues related to the large number of [noncitizens] within its borders who do not have a lawful right to be in this country.” Arizona, 567 U.S. at 392. Nonetheless, it ruled that three of SB 1070’s operative provisions were preempted. Id. Texas contends that Arizona was premised “on the idea that the federal government was, at the time, making good-

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<sup>21</sup> Texas’s sole citation on this point is to Parker v. Brown, 317 U.S. 341, 358 (1943). (Dkt. # 25 at 20). In Parker, California had established programs to restrict competition among farmers to help stabilize prices. Id. at 344–48. Brown, a farmer, sued, arguing the law was preempted by the federal Sherman Act and the Commerce Clause. Id. In particular, Brown argued that the federal Agricultural Marketing Agreement Act, which authorized the Department of Agriculture to limit certain agricultural quantity sales, preempted the law. The Court rejected that argument, noting that the Secretary had not issued any order “putting [the law] into effect.” Id. at 358. That is plainly not the case here, where DHS and a litany of other federal agencies have issued hundreds of regulations related to immigration enforcement and conduct thousands of removals each day. See generally 8 C.F.R. §§ 1001. et. seq.

faith efforts to carry out its obligations under federal immigration statutes.” (Dkt. # 25, at 21). But Arizona made the same arguments about abandonment as Texas does. Arizona’s brief before the Supreme Court complains at length about the federal government’s allegedly deficient immigration enforcement. See id., Brief in Support of Petitioners, Arizona, 567 U.S. 387 (No. 11-182), 2012 WL 416748, at \*1 (“The President fairly describes our Nation’s system of immigration regulation and enforcement as ‘broken.’”); id. at \*8 (“Arizona has repeatedly asked the federal government for more vigorous federal enforcement, but to no avail.”). Over these objections, the Supreme Court ruled that “authorizing state and local officers to engage in [removal] enforcement activities as a general matter . . . creates an obstacle to the full purposes and objectives of Congress” and should be preempted. Arizona, 567 U.S. at 410.<sup>22</sup>

In sum, the federal government has not abandoned the field of immigration. Undoubtedly, these government efforts fail to deter all unlawful migration, and the federal government does not detain or timely remove all

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<sup>22</sup> If Texas disagrees with the scope or allocation of federal resources to the border, it may still assist with immigration enforcement under the current congressional scheme. Under 8 U.S.C. § 1357(g), DHS may “enter into a written agreement with the state” to carry out “a function of an immigration officer in relation to the investigation, apprehension, or detention of [noncitizens]” in the United States. DHS has signed 150 agreements with local law enforcement, more than half of which have been signed after 2011. Congressional Research Service, The 287(g) Program: State and Local Immigration Enforcement (Aug. 12, 2021), <https://perma.cc/GQN4-DVVF>. Twenty-six Texas Sheriff’s Offices have agreements with the federal government under § 1357(g). (Dkt. # 14 at 8).

noncitizens who unlawfully enter its borders. But those failures are a far cry from abandonment. The federal government retains a dominant interest in immigration and a complex legal framework to regulate noncitizen entry and removal. SB 4's intrusion into that federal arena is field preempted.

## **II. Conflict Preemption**

Beyond field preemption, SB 4 is conflict preempted. A state law is preempted where it “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” Hines, 312 U.S. at 67. To show conflict preemption, Plaintiffs need not show that the laws achieve different ends. Rather, a “[c]onflict in technique can be fully as disruptive to the system Congress erected as conflict in overt policy.” Motor Coach Employees v. Lockridge, 403 U.S. 274, 287 (1971).

Arizona is again instructive. There, Section 5(c) of SB 1070 made it a state misdemeanor for “an unauthorized [noncitizen] to knowingly apply for work, solicit work in a public place or perform work as an employee or independent contractor.” Arizona, 567 U.S. at 403.<sup>23</sup> The Court found that “Congress enacted . . . a comprehensive framework for combatting the employment of illegal [noncitizens].” Id. Namely, Congress combatted this by regulating domestic

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<sup>23</sup> In a brief discussion, the Supreme Court also found Section 3 to be conflict preempted. See Arizona, 567 U.S. at 402–03.

employers under the INA, whereas SB 1070 punished noncitizen employees. Id. Although federal law and SB 1070 both generally punished the employment of noncitizens, the Court found that SB 1070’s differing enforcement mechanism “would interfere with the careful balance struck by Congress with respect to unauthorized employment of [noncitizens].” Id. at 406.

Arizona shows that state restrictions on immigration that exceed or differ in enforcement mechanisms from federal regulations are preempted. The question for SB 4 is whether its operative provisions conflict with federal law, stand as an obstacle to the objectives of Congress, or employ disruptive or conflicting techniques. See id. at 405–06.

At the broadest level, SB 4 conflicts with federal immigration law because it provides state officials the power to enforce federal law without federal supervision. See Farmers Branch, 726 F.3d at 531–32 (ordinance preempted where it gives “state officials authority to act as immigration officers outside the limited circumstances specified by federal law”); Arizona, 567 U.S. at 408 (noting that federal law specifies only “limited circumstances in which state officers may perform the functions of an immigration officer”). Congress has enacted a statutory scheme to ensure that federal immigration law is conducted under the watch of federal officials in a uniform way across all 50 states, and SB 4 interferes with that goal. See 8 U.S.C. § 1057(g).

SB 4 also divests federal immigration authorities of the discretion of the enforcement of immigration laws, which touches on delicate considerations of foreign affairs. Several circuit courts have held similar laws to be conflict preempted for this reason. See GLAHR, 691 F.3d at 1265 (“The [state laws], however, are not conditioned on respect for the federal concerns or the priorities that Congress has explicitly granted executive agencies the authority to establish.”); Valle del Sol, 732 F.3d at 1027 (“[State law] conflicts with the federal scheme by divesting federal authorities of the exclusive power to prosecute these crimes.”); United States v. Alabama, 691 F.3d 1269, 1287 (11th Cir. 2012) (“[State law] undermines the intent of Congress to confer discretion on the Executive Branch in matters concerning immigration.”); United States v. South Carolina, 720 F.3d at 532 (finding conflict because the state law would “strip federal officials of the authority and discretion necessary in managing foreign affairs”).

As the United States argues, SB 4’s removal orders will also “prevent noncitizens from asserting affirmative defenses to removal that would have been available in the federal system, including asylum, see 8 U.S.C. § 1158(a)(1), withholding of removal, see id. § 1231(b)(3), or protections under the Convention Against Torture, see 8 C.F.R. § 1208.16(c)(2). (Dkt. # 14 at 22). SB 4 specifies that “a court may not abate the prosecution” on “the basis that a federal determination



regarding the immigration status of the defendant is pending or will be initiated.”

Tex. Code of Crim. Proc. art. 5B.003.

In response, Texas contends that “to the extent SB 4’s text omits other defenses available under federal law, it does not preclude them” because Texas “courts must determine whether federal law prevents enforcement of a conflicting state law[.]” (Dkt. # 25 at 14) (citing In re Academy, Ltd., 625 S.W.3d 19, 35 n.19 (Tex. 2021)). But Texas ignores the provision of SB 4 that specifically instructs its courts “not [to] abate the prosecution” of noncitizens on “the basis that a federal determination regarding the immigration status of the defendant is pending or will be initiated.” Tex. Code of Crim. Proc. Art. 5B.003. SB 4 plainly conflicts with federal law by instructing state judges to disregard pending federal defenses.

Texas invokes constitutional avoidance, but that doctrine is inapplicable to SB 4. “Under the doctrine of constitutional avoidance, where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.” Hersh v. U.S. ex rel. Mukasey, 553 F.3d 743, 753–54 (5th Cir. 2008) (cleaned up). However, the “canon of constitutional avoidance ‘comes into play only when, after the application of ordinary textual analysis, the statute is found to be susceptible of more than one construction.’” Jennings v. Rodriguez, 583 U.S. 281, 296 (2018) (quoting Clark v.

Martinez, 543 U.S. 371, 385 (2005)). “In the absence of ambiguity, the canon simply ‘has no application.’” Id. (quoting Warger v. Shauers, 574 U.S. 40, 50 (2014)). Here, there is only one plausible interpretation of Article 5B.003: State courts may not abate a prosecution based on the pending federal determination of a noncitizen’s immigration status. Tex. Code of Crim. Proc. Art. 5B.003.<sup>24</sup> By expressly disallowing the consideration of federal admissibility determinations, SB 4 conflicts with federal law. No substantive canons statutory construction can save the law from that conclusion.

Asylum, withholding, and protection against torture are all federal methods of determining a noncitizen’s immigration status. *See* 8 U.S.C. § 1158(a)(1), id. § 1231(b)(3); 8 C.F.R. § 1208.16(c)(2). Refusal to abate removal pending these determinations undermines federal law. *See* 8 U.S.C. § 1158(a)(1) (“Any [noncitizen] who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival . . .), irrespective of such [noncitizen’s] status, may apply for asylum.”); id. § 1158(c)(3) (authorizing removal upon determination of inadmissibility). A noncitizen cannot readily avail

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<sup>24</sup> In addition, SB 4 supplants the role of Article I and Article III judges. At the preliminary injunction hearing, Texas attempted to defend SB 4 by suggesting that state court judges will interpret the state law consistent with the U.S. Constitution and federal law, including asylum defenses. But only federal judges may make these determinations. *See, e.g.*, 8 U.S.C. § 1158(d)(1); id. § 1252; 8 C.F.R. § 1003.10; id. § 1003.1(b). A state court may not substitute a federal determination of credible fear of persecution for its own assessment. There can be no consistency in the state’s assumption of powers delegated exclusively to the federal government.

themselves of these defenses if the state court cannot abate removal pending its determination. Because a state court cannot follow both SB 4 and federal immigration defenses, they conflict. Like SB 1070, SB 4’s removal provision “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” Arizona, 567 U.S. at 399.

SB 4 also conflicts with federal law because noncitizens will be removed to Mexico, regardless of their country of origin and in contrast to federal law on removal destinations. (Dkt. # 14 at 22; Escalon Decl., Dkt. # 25 at 2–3). Federal law sets out the circumstances for where the federal government may remove a noncitizen, and the United States regularly engages in diplomatic discussions with foreign governments to determine whether they will accept noncitizens. See 8 U.S.C. § 1231(b). SB 4 states a judge may order a person “to the foreign nation from which the person entered or attempted to enter . . . .” Tex. Code of Crim. Proc. art. 5(B).002. Texas’s response makes clear that these removals will all be to Mexico. (See Escalon Decl., Dkt. # 25-3 at 2–4). That policy decision conflicts with federal law, which requires officials to remove a noncitizen to their designated country of removal, subject only to certain exceptions. See 8 U.S.C. §§ 231(b)(2)(A), (C). The Department of State, for its part, has made clear that Texas’s removal policy will hamper diplomatic discussions regarding immigration with Mexico. (Jacobstein Decl., Dkt. # 14-1 at

4–5, 10). Texas’s decision to remove all noncitizens detained under SB 4 to Mexico will cause the federal government to lose the ability to speak “with one voice” on removals. Arizona, 567 U.S. at 409; Jama, 543 U.S. at 348.

Mexico’s objection to SB 4 shows why SB 4’s choice-of-country removal is a serious problem. SB 4 will directly harm the United States’s relationship with Mexico. Even before SB 4’s enactment, Mexico “categorically reject[ed] any measure that,” like SB 4, “allows state or local authorities to detain and return Mexican or foreign nationals to Mexican territory.” Press Release, Secretaría de Relaciones Exteriores (Nov. 15, 2023), available at <https://perma.cc/RP7H-JXZR>. The Supreme Court recently explained that attempting to force “non-Mexican nationals” to return to Mexico “impose[s] a significant burden upon the Executive’s ability to conduct diplomatic relations with Mexico[.]” Biden v. Texas, 597 U.S. 785, 806 (2022).

Texas suggests that state laws should not be enjoined on the basis that it strains foreign relations. (Dkt. # 25 at 34–35) (citing Medellín v. Texas, 552 U.S. 491, 496–98 (2008)). Medellín dealt with the execution of a Mexican citizen in violation of the Vienna Convention on Consular Relations as determined by a non-self-executing decision of the International Court of Justice (“ICJ”). 552 U.S. at 493–96. In Medellín, Texas acted within its domestic police powers with no “directly enforceable federal law that pre-empt[ed] state limitations . . . .” Id. at

498. Here, by contrast, Texas attempts to act within a field directly related to foreign affairs that is governed by vast and sensitive agreements, treaties, and laws made by the federal government. (See Dkt. # 14 at 22–23; Jacobstein Decl., Dkt. # 14-1 at 4–5, 10). Put another way, Medellín deals with foreign policy’s ability to regulate a state’s police powers, not a state’s ability to regulate foreign policy.

SB 4 conflicts with federal immigration law in other ways, too. It authorizes an affirmative defense for individuals who are “lawfully present” in the country, even though the Fifth Circuit has held that state judges may not make admissibility determinations due to the complexities of federal immigration law. Tex. Penal Code § 51.02(c)(1)(A); Farmers Branch, 726 F.3d at 535–36. SB 4 also lacks consent exceptions for re-entry into the United States, even though federal immigration law will allow it. See 8 U.S.C. § 1326. Penalties under SB 4 also exceed those under federal law. For example, failure to comply with a federal removal order generally includes a sentence of up to four years, see 8 U.S.C. § 1253; 8 U.S.C. § 1253(a)(1), but the penalty up to 20 years for violating a state removal order under SB 4. See Tex. Penal Code § 51.04.

Finally, the United States argues that SB 4 “conflicts with the statutory scheme Congress enacted that ‘specifies [the] limited circumstances in which state officers may’ assist with immigration enforcement.” (Dkt. # 14 at 24) (citing Arizona, 567 U.S. at 408). 8 U.S.C. § 1357(g) specifies how and when a

state may cooperate with federal law enforcement to assist with immigration enforcement. Section 1357(g) serve a dual role, allowing the federal government to utilize state and local personnel to assist with enforcement while retaining ultimate monitoring and implementation control for the federal government. Arizona, 567 U.S. at 409; see also 142 Cong. Rec. H2378-05, H2445, 1996 WL 120181 (Mar. 19, 1996) (Rep. Cox) (noting the purpose of § 1357(g) was to “expand the number of personnel who are involved in picking up people in violation of the law” while ensuring “everything will be conducted under the watch of the [federal government] and the [Secretary of Homeland Security] in conformity with Federal standards.”). Texas does not argue this point, and its response makes no mention of § 1357(g) at all. (See Dkt. # 25). SB 4 and § 1357(g) conflict because Congress cannot limit the authority of state officials to assist with enforcement while the state itself claims unlimited concurrent immigration authority.

Given the “significant complexities involved in enforcing federal immigration law,” Congress delegated enforcement authority to state officials only under the supervision of DHS. Arizona, 567 U.S. at 409; 8 U.S.C. § 1357(g). “[N]o coherent understanding” of “cooperation” would “incorporate the unilateral decision of state officers to arrest [a noncitizen] for being removable absent any request, approval, or other instruction from the Federal Government.” Arizona, 567

U.S. at 410. SB 4 frustrates key aspects of federal immigration law and is conflict preempted.

### **III. Foreign Commerce Clause**

The United States<sup>25</sup> argues that SB 4 violates the Foreign Commerce Clause because it regulates the movement of noncitizens across an international border. (Dkt. # 14 at 27–28). The Constitution provides that Congress may “regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.” U.S. Const. art. I, § 8, cl. 3. “[P]recedents firmly establish[] that the federal commerce power surely encompasses the movement in interstate commerce of persons as well as commodities.” United States v. Guest, 383 U.S. 745, 758–59 (1966); see also Edwards v. People of State of California, 314 U.S. 160, 172 (1941) (“[I]t is settled beyond question that the transportation of persons is ‘commerce’, within the meaning of that provision.”). “State regulations violate the dormant Commerce Clause by discriminating against or unduly burdening foreign or interstate commerce.” Piazza’s Seafood World, LLC v. Odom, 448 F.3d 744, 749 (5th Cir. 2006). “Regulations that facially discriminate” against foreign commerce “are virtually per se invalid.” Id. Conversely, “nondiscriminatory state regulations affecting foreign commerce are invalid if they (1) create a substantial risk of conflicts with foreign governments; or (2) undermine the ability of the

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<sup>25</sup> The Organizational Plaintiffs do not raise a Foreign Commerce Clause claim.

federal government to ‘speak with one voice’ in regulating commercial affairs with foreign states.” Id. at 750.

In response, Texas argues that courts have long shifted the federal government’s authority to control immigration away from the Commerce Clause and towards an inherent aspect of federal sovereignty. (Dkt. # 25 at 32–35). Ultimately, Texas is correct that courts have shifted away from rooting the federal government’s power to regulate immigration in the Commerce Clause towards the plenary power doctrine. See Jennifer Gordon, Immigration as Commerce: A New Look at the Federal Immigration Power and the Constitution, 93 Ind. L.J. 653, 671 (2018). But those cases do not signal a rejection of the Commerce Clause’s ability to regulate immigration as much as a preference to locate that power in the nation’s sovereignty and foreign affairs. Id. at 672–78 (discussing how the Supreme Court’s opinion “offers no explanation for the Court’s abandonment of the Commerce Clause as the primary source of the immigration power, and few commentators have explored the question.”). Indeed, Texas cites no cases<sup>26</sup> holding the Commerce Clause to be inapplicable to immigration even after the shift in the late Nineteenth Century. See Chae Chan Ping v. United States, 130 U.S. 581, 609 (1889). The Supreme Court has repeatedly emphasized that the movement of

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<sup>26</sup> Texas does cite Equal Access Educ. v. Merten, 305 F. Supp. 2d 585, 608–11 (E.D. Va. 2004), but that case applied a Dormant Commerce Clause test and found that the plaintiff had not met their burden under that standard. It does not hold that the standard is altogether inapplicable.



persons between states is commerce. See, e.g., Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 255–56 (1964); Taylor v. United States, 579 U.S. 301, 306 (2016) (“Congress may regulate under its commerce power . . . persons or things in interstate commerce.”). That SB 4 may be preempted under federal immigration power does not negate the possibility it also violates the Dormant Commerce Clause.

Turning to the Fifth Circuit’s Dormant Commerce Clause test, “regulations that facially discriminate” against foreign commerce “are virtually per se invalid,” and “nondiscriminatory state regulations affecting foreign commerce are invalid if they (1) create a substantial risk of conflicts with foreign governments; or (2) undermine the ability of the federal government to ‘speak with one voice’ in regulating commercial affairs with foreign states.” Piazza’s Seafood, 448 F.3d at 750. On its face, SB 4 discriminates against foreign commerce: it criminalizes solely the movement of noncitizens across an international boundary into Texas but says nothing about movement within or out of Texas or movement by U.S. citizens.<sup>27</sup> If SB 4 were not facially discriminatory, it would still violate the Dormant Commerce Clause by “undermin[ing] the ability of the federal government to speak with one voice in regulating commercial affairs with foreign

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<sup>27</sup> Even if SB 4 is consistent with federal purposes, it “cannot be saved by a showing that it is consistent with the purposes behind federal law.” Piazza’s Seafood, 448 F.3d at 751.

states.” Id. at 750 (internal quotations omitted). Forcing “non-Mexican nationals” to return to Mexico “impose[s] a significant burden upon the Executive’s ability to conduct diplomatic relations with Mexico.” Biden, 597 U.S. at 806. Under the standard set out in Piazza’s Seafood, SB 4 violates the Dormant Commerce Clause.

### TEXAS’S “INVASION” DEFENSE

In Governor Abbott’s words, these federal laws do not apply because “Texas’s constitutional authority to defend and protect itself” against an invasion “is the supreme law of the land and supersedes any federal statutes to the contrary.” Press Release, Greg Abbott, Governor of Texas, Statement on Texas’s Constitutional Right to Self-Defense, (Jan. 24, 2024), [https://gov.texas.gov/uploads/files/press/Border\\_Statement\\_1.24.2024.pdf](https://gov.texas.gov/uploads/files/press/Border_Statement_1.24.2024.pdf). To discuss “invasion” at length is to take the argument more seriously than it deserves. Still, in a dissenting opinion in a separate but related case, several judges on the Fifth Circuit expressed the importance of analyzing Texas’s invasion claim. See United States v. Abbott, No. 23-50632, 2024 WL 551412, at \*7–8 (5th Cir. Feb. 9, 2024) (dissenting opinion). That discussion, even if non-binding, weighs on this case. Accordingly, the Court will thoroughly discuss—but ultimately reject—Texas’s invasion defense.

In short, Texas’s argument fails for at least three reasons. First, unauthorized immigration does not constitute an “invasion” within the meaning of

the U.S. Constitution. Second, Texas is not “engag[ing] in war” by enforcing SB 4. Third, if Texas were engaging in a war, it would have to abide by federal directives in waging that war.

## **I. Overview**

Article I, Section 10 of the U.S. Constitution limits the states’ power to undertake certain activities. U.S. Const. art. 1, § 10. Apart from the final few words, Section 10 describes what a state may *not* do, specifying that a state may not coin money, pass a bill of attainder or an ex post facto law, impose duties, keep troops, enter into foreign agreements, or “engage in war.” Id. Clause 3 (the “State War Clause”) says in full:

No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

Id. art. 1, § 10, cl. 3.

In short, the State War Clause provides that a state shall *not* engage in war, with a narrow exception of when it is “actually invaded[.]” When a state—and by extension the United States—is invaded, the federal government must protect from the invasion. As Article IV, Section 4 (the “Guarantee Clause”) states:

The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application

of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

Id. art. IV, § 4.

Together, these provisions, along with the broad, interrelated provisions of the federal government’s authority to wage war, lay out a structure where the state may respond to immediate military threats until “resources of the federal government can reach the invasion.” United States v. Abbott, No. 1:23-CV-863, 2023 WL 5740596, at \*12 (W.D. Tex. Sept. 6, 2023); Torres v. Tex. Dep’t of Pub. Safety, 597 U.S. 580, 590 (2022) (detailing federal government’s authority over war).

## **II. Immigration does not constitute an invasion under Section 10.**

To start, surges in unauthorized immigration alone do not qualify as an “invasion” as described in the Constitution. A court “must interpret the Constitution in light of its text, structure, and original understanding—as informed by history and tradition.” See Abbott v. Biden, 70 F.4th 817, 827 (5th Cir. 2023) (internal quotations omitted). Therefore, the Court will analyze the phrase “actually invaded” through the definition of the term in the Eighteenth Century, its position within the Constitution, and the history and tradition of war powers and immigration.

Ultimately, all tools of constitutional construction cut against Texas’s position. Contemporary definitions of “invasion” and “actually invaded” as well as common usage of the term in the late Eighteenth Century predominantly referred to an “invasion” as a hostile and organized military force, too powerful to be dealt with by ordinary judicial proceedings. This Court could not locate a single contemporaneous use of the term to refer to surges in unauthorized foreign immigration. The text and structure of the State War Clause imply that “invasion” was to be used sparingly for temporary, exigent, and dangerous circumstances. Put simply, the overwhelming textual and historical evidence does not support Texas’s understanding of the State War Clause.

*A. Circuit courts have unanimously rejected Texas’s position.*

Before undertaking this textual and historical analysis, however, the Court notes that each circuit court to have discussed whether immigration qualifies as an invasion has rejected that characterization. See California v. United States, 104 F.3d 1086, 1090–91 (9th Cir. 1997) (noting the State War Clause “afford[s] protection in situations wherein a state is exposed to armed hostility from another political entity” and “not intended to be used as urged” in the context of immigration); New Jersey v. United States, 91 F.3d 463, 469–70 (3d Cir. 1996) (noting the state failed to show “‘invasion’ to mean anything other than a military invasion”); Padavan v. United States, 82 F.3d 23, 28 (2d Cir. 1996) (“invasion”

must involve “armed hostility from another political entity” and does not encompass “the influx of legal and illegal [noncitizens] into” the state). No case differs from this unanimous position.

*B. “Actually invaded” refers to an armed and organized hostile force.*

1. Definitions of “invasion” and “actually invaded” do not accord with Texas’s understanding

Turning to the text, the Court’s “analysis must begin with the language of the instrument, which offers a fixed standard for ascertaining what our founding document means.” Dobbs v. Jackson Women’s Health Org., 142 S. Ct. 2228, 2244–45 (2022) (cleaned up); see also N.Y. State Rifle & Pistol Ass’n v. Bruen, 597 U.S. 1, 36 (2022) (“[T]o the extent later history contradicts what the text says, the text controls.”). Definitions of “actually invaded” and “invasion” show that the terms refer to an armed, hostile, organized force entering an area to conquer or plunder. Immigration does not accord with this definition.

“Invade” is defined as: “To enter (a country, city, or area) using military force, in order to take control of it” Invade, Black’s Law Dictionary (11th ed. 2019). “Invasion” is defined as the “incursion of an army for conquest or plunder.” Invasion, Black’s Law Dictionary (11th ed. 2019).<sup>28</sup> Webster’s 1828

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<sup>28</sup> Black’s Law Dictionary also defines “invasion” to mean a “hostile or forcible encroachment on the rights of another.” Invasion, Black’s Law Dictionary (11th ed. 2019). An “invasion of rights” is an alternative definition not employed by the Constitution or by Texas.

Dictionary defines the term as a “hostile entrance into the possessions of another; particularly, the entrance of a hostile army into a country for the purpose of conquest or plunder, or the attack of a military force.” 1 Noah Webster, *American Dictionary of the English Language* 113 (1828).<sup>29</sup> The 1828 Webster’s dictionary defines “invade” as: “To enter a country, as an army with hostile intentions; to enter as an enemy, with a view to conquest or plunder; to attack.” *Id.* As an example, it gives, “The French armies invaded Holland in 1795. They invaded Russia and perished.” *Id.* Other definitions include, “To attack; to assault; to assail” and “To violate with the first act of hostility; to attack, not defend.” Samuel Johnson, [Johnson’s] *Dictionary* (reprint, Boston 1828).

It is not enough that Texas, scouring the contemporary dictionaries, argues that illegal immigration could be an invasion because it could arguably be considered “a hostile entrance.” (Dkt. # 25 at 28). Courts look to the natural or normal meaning, not the broadest possible meaning. *Noel Canning v. N.L.R.B.*, 705 F.3d 490, 500 (D.C. Cir. 2013), *aff’d*, 573 U.S. 513 (2014); *Abbott*, 70 F.4th at 829 (“[W]e start with the original public meaning of the Constitution’s text.”)

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<sup>29</sup> The 1806 definition of “invasion” states, “a hostile entrance, attack, assault.” Noah Webster, *A Compendious Dictionary of the English Language* 164 (1806). It defines “invade” as “to enter or seize in a hostile manner.” *Id.* Johnson’s dictionary defines “invasion” as a “hostile encroachment.” Samuel Johnson, [Johnson’s] *Dictionary* (reprint, Boston 1828). Providing an example of the term, the dictionary states, “We made an invasion upon the Cherethites,” *id.*, referring to military hostilities between King David and the Amalekites. 1 Samuel 30:14 (King James).

(quotation omitted). The natural and normal meaning of “invade,” as shown by the predominant dictionary definition, is to enter a country with hostile intent, typically to assault, attack, seize, or plunder. Even accepting that some small number of immigrants do traffic drugs or have cartel affiliations, Texas cannot genuinely maintain that noncitizens crossing the border are an organized military force aimed at conquest or plunder.

As for the definition of “actually invaded,” crucially, this phrase appears as a term of art in the late eighteenth century, referring specifically to military occupation that is ongoing (as opposed to imminent).<sup>30</sup> It is not, as a modern reader might suppose, synonymous with “genuinely invaded” but instead was used exclusively to describe ongoing military incursions. As one researcher notes, a search of the phrase “actually invaded” (or “actual invasion”) appears multiple times in the correspondence of the Founding Fathers. See Founders Online, Nat’l Archives, <https://founders.archives.gov>.<sup>31</sup> Each example refers to “actually invaded” as a wartime description of military hostilities. For example, George Washington wrote a colonel during the Revolutionary War,

Application having been made to me by Governor Trumbull for Liberty to draw a Quantity of Arms out of

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<sup>30</sup> See Joshua Treviño, The Meaning of Invasion Under the Compact Clause of the U.S. Constitution, at 6, Tex. Pub. Pol. Foundation (Nov. 2022) (analyzing uses of the phrase “actually invaded” and noting that the “phrase was used as a common term of art, first appearing in Georgia’s 1732 colonial charter and at least 60 times in the Revolutionary- and Framing-era correspondence found in the National Archives’ online database.”).

<sup>31</sup> Id.



the Magazine at springfield for the Militia of that state in case it should be invaded, I have complied with his request upon the following Conditions which you will please observe. That should the state be *actually invaded*, & a sufficiency of Arms remains in the Magazine after complying with the Orders which you will receive from me in a short time under these Circumstances you are to furnish him with a thousand stand . . . .

Letter from Gen. Goerge Washington to Col. Ezekiel Cheever, (July 7, 1777),

<https://founders.archives.gov/documents/Washington/03-10-02-0205> (emphasis added).

In another passage, Patrick Henry wrote to Henry Laurens:

When the requisition arrived here the Assembly was sitting. It became necessary to lay the matter before them as the Law gave the power of marching the Militia to a Sister State only in cases of *actual Invasion*. An Act was thereupon passed to enable the Executive to send out the Militia when certain Intelligence of an intended Invasion should be received.

Letter from Patrick Henry to Henry Laurens, (Nov. 23, 1778),

<https://founders.archives.gov/documents/Madison/01-01-02-0088> (emphasis added).

Dozens more examples abound,<sup>32</sup> each time in the context of war or a military incursion. In the expansive sources reviewed by this Court, the Framers

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<sup>32</sup> Governor William Livingston of New Jersey wrote to George Washington for requisitions, stating that New Jersey had “been during all that time either actually invaded, or having the Enemy so near us, as to require a constant Guard . . . .” Letter from William Livingston to George Washington, (15–16 Aug 1777), <https://founders.archives.gov/documents/Washington/03-10-02-0613>. Maryland delegates wrote

never use “actually invaded” to refer to immigration or anything less than a coordinated armed hostile foreign power. The historical use of “actually invaded” refers specifically to ongoing hostilities by a coordinated armed hostile military force. While some small fraction of immigrants may cross the border with malicious intent and some small fraction may be affiliated with paramilitary cartels, SB 4 simply does not target a coordinated armed hostile military force.

2. Texas’s interpretation does not accord with the structure or context of the Constitution.

Beyond the definition, the Constitution’s structure does not support Texas’s broad reading of invasion. Article I specifies the powers granted to Congress, including powers related to foreign affairs and immigration. U.S. Const. art. 1; U.S. ex rel. Knauff v. Shaughnessy, 338 U.S. 537 (1950). Section 10 is often called the “Powers Denied States Clause” because it specifies what states may *not* do. U.S. Const. art. 1 § 10. It declares that “[n]o State shall, without the Consent of Congress, . . . engage in war.” Id. The power to “engage in war” when “actually

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to Washington, “[W]e do not look for any immediate aid from the main Army. Such as is consistent with the good of the whole, should the State be actually invaded.” Letter from Maryland Delegates to George Washington, (May 23, 1779), <https://founders.archives.gov/documents/Washington/03-20-02-0529>.

As another example, a letter from Thomas Jefferson states, “I have ever understood that the rule of Congress was to admit no expences to be Continental which were incurred by any state merely under an apprehension of an invasion, but that whenever a state was actually invaded all expences became Continental.” Letter from Thomas Jefferson to Friedrich Wilhelm von Steuben, (Jan. 9, 1781), <https://founders.archives.gov/documents/Jefferson/01-04-02-0397> (emphasis added).

invaded” is not a broad grant of power but a narrow, temporary exception to a restriction on the states.

It is not a plausible interpretation that the Framers, in carefully specifying Congress’s exclusive duty to wage war and control immigration, intended to grant states the unilateral power to disrupt that balance whenever they disagreed with federal immigration policy. To borrow a phrase from statutory construction, the Framers did not hide an elephant in a mousehole. See Whitman v. Am. Trucking Ass’ns, 531 U.S. 457, 468 (2001). The natural and plain meaning of “invasion” within the State War Clause is a narrow and time-constrained response in the face of imminent military emergency. The extreme reading adopted by Texas is inconsistent with a rational understanding of “invasion” and the structure of the Constitution.

The natural meaning of the State War Clause grants states the power to engage in war for a very limited time before the federal government can respond. This is clear from the phrase “in such imminent Danger as will not admit of delay,” which places “actually invaded” in context. U.S. Const. art. 1, § 10, cl. 3. Again, borrowing from statutory construction, “[A] word is known by the company it keeps[.]” Yates v. United States, 574 U.S. 528, 543 (2015) (holding that words should be read in immediate context to avoid giving “unintended breadth” to certain words). It would be internally inconsistent for the Constitution

to refer to “invasion” as the regular and ongoing intrusion of immigrants into the state, while referring to “imminent danger” as an immediate military threat to which the federal government must rush to respond.<sup>33</sup>

3. Other mentions of “invasion” in the Constitution do not support Texas’s expansive interpretation.

The Constitution mentions “invasion” three other times. No instance supports Texas’s broad reading. See U.S. Const. art I, § 8 cl. 15; id. art. I, § 9, cl. 2; id. art. IV, § 4. First, Article I, Section 8 states that “Congress shall have Power To . . . provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and *repel Invasions*.” Id. art. 1, § 8, cl. 1, 15 (emphasis added). If an “invasion” requires “calling forth the militia,” it cannot naturally refer to routine unlawful immigration that is enforced by DPS or DHS officers through routine bureaucratic judicial proceedings.

Second, Article 1, Section 9 mentions “invasion” to note that the “Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.” Id. art. 1, § 9, cl. 2. The suspension of habeas corpus is a stunning exercise of power. The Writ of Habeas Corpus has been suspended only four times in this country’s history: the

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<sup>33</sup> Similarly, being “actually invaded” must be something to prompt the state to “engage in war.” U.S. Const. art. 1, § 10, cl. 3. Unauthorized immigration, even if some small number of immigrants have cartel affiliations, does not provoke states to “engage in war.” Id.

Civil War,<sup>34</sup> KKK insurrections during Reconstruction, a guerilla war in the Philippines, and in Hawaii during World War II.<sup>35</sup> See Amanda L. Tyler, *Suspension as an Emergency Power*, 118 Yale L.J. 600, 662–64 (2009). These examples show that the Writ of Habeas Corpus has only ever been suspended in the face of imminent and overwhelming violent direct threats to the stability of the state or federal government.

Immigration, however large and taxing on a state's resources, does not accord with these instances. Unauthorized immigration is not akin to armed and organized insurrection against the government. Even as Texas points to cartel violence, it cannot maintain in good faith that the cartels will imminently overthrow the state government. Nor can the mere presence of ongoing organized crime, which has long existed in the United States, suffice to justify the suspension of habeas corpus. Despite the serious threat to public safety that cartels may pose, it is difficult to accept that the threat is so severe as to justify the wholesale suspension of Due Process rights in Texas.

Indeed, British suspension of the writ of habeas corpus was a leading concern among American Revolutionaries and carefully limited by the Framers in

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<sup>34</sup> See *Ex parte Merryman*, 17 F. Cas. 144, 151–152 (C.D. Md. 1861) (rejecting Lincoln's suspension as unconstitutional).

<sup>35</sup> The writ was also restricted to certain enemy combatants in 2006 before that restriction was ruled unconstitutional. See Military Commissions Act of 2006, 10 U.S.C. 948, Pub. L. 109-366, 120 Stat. 2600; *Boumediene v. Bush*, 553 U.S. 723 (2008).

the Constitution. See Amanda L. Tyler, Habeas Corpus and the American Revolution, 103 Cal. L. Rev. 645 (2014); Boumediene, 553 U.S. at 739–40 (“The Framers viewed freedom from unlawful restraint as a fundamental precept of liberty, and they understood the writ of habeas corpus as a vital instrument to secure that freedom.”). For that reason, the Framers drafted the Constitution such that the writ could be suspended only in times of great emergency. See id. (“[H]istory counseled the necessity for specific language in the Constitution to secure the writ and ensure its place in our legal system.”); Akhil R. Amar, Of Sovereignty and Federalism, 96 Yale L.J. 1425, 1509, n.329 (1987) (“[T]he non-suspension clause is the original Constitution’s most explicit reference to remedies”). And as the Court explained in Boumediene, the Framers enacted the Constitution with structural barriers to prevent abusive suspension of the writ. Boumediene, 553 U.S. at 739–40. It is not plausible that the Framers, so cognizant of past abuses of the writ and so careful to protect against future abuses, would have granted states the unquestioned authority to suspend the writ based on the presence of undocumented immigrants.<sup>36</sup>

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<sup>36</sup> Accepting, for the purposes of argument, that Texas is under invasion, the power to suspend the writ would lead to enormously disproportionate consequences. The Governor and the President would have unilateral and unchecked authority to detain anyone who might be suspected of entering the United States illegally. Anyone suspected of drug or arms trafficking could be arrested and indefinitely imprisoned without review. That suspension would carry on indefinitely, so long as there remained some level of unauthorized immigration or some threat of organized crime.

Finally, the Constitution mentions “invasion” in reference to the Guarantee Clause.<sup>37</sup> The Guarantee Clause is noteworthy because it differentiates “invasion” from “domestic violence.” Texas’s argument, however, rests on equating domestic criminal activity with a military “invasion.” (See Dkt. # 25 at 25) (noting that Texas has launched operations to respond to “non-state actors perpetrating human slavery, violent assaults, weapon- and drug smuggling” within Texas). Again, the Court need not downplay the cartels’ criminal activity to show that it does not speak to the wartime activity envisioned by “invasion” within the meaning of the Constitution.

In sum, the uses of “invasion” in the Constitution refer to pressing military emergencies. The power to suspend the writ of habeas corpus or repel invasions with militias strongly suggests that an “invasion” was not a term used lightly or metaphorically. In light of the Constitution’s structure and contemporary use of “invasion,” the original public meaning of the term would have referred to an exceptionally dangerous incursion of organized armed hostiles.

*C. The historical tradition of the United States refers to invasion as an armed hostile force.*

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<sup>37</sup> Texas posits that the Clause “establishes two different rules for dealing with two different scenarios.” (Dkt. # 25 at 24). In domestic violence, a state “may seek help from the federal government,” but for an “invasion,” a state “need not invite federal protection.” *Id.* Texas interprets the clause backwards. The federal government always retains the guarantee to “protect . . . against Invasion” but only has the same duty to protect against “domestic violence” if requested by the state. U.S. Const. art. IV, § 4. In other words, the federal government has more, not less, authority to protect against invasion than domestic violence.

### 1. The Federalist Papers

The history and tradition of the United States does not support the broad reading of invasion that Texas suggests. From the Federalist Papers to ratification debates, scant evidence supports Texas’s understanding of invasion. In the Federalist Papers, every relevant invocation of the word speaks in terms of organized, hostile military or naval actions.

In support of its argument, Texas cites Federalist 43 for the proposition that a federal government’s power to assist an invasion “will be a harmless superfluity” if the state is able to defend itself. (Dkt. # 25 at 25). Texas, however, cites a line that does not refer to “invasion”—much less to one under the State War Clause. (Id. at 25) (citing The Federalist No. 43 (Madison)). In the passage that Texas quotes, Madison discusses why the federal government must ensure a republican form of state governments under the Guarantee Clause—not why it must repel invasion. Id. The “harmless superfluity” is that the federal government will not need to intervene if a state already has a republican form of government. Id. Madison’s quote does not refer to invasion.

To the contrary, Madison’s actual discussion of “invasion” in Federalist 43 shows that the term referred to the incursion of hostile foreign militaries. Madison states, “A protection against invasion is due from every society to the parts composing it,” again emphasizing the need for a *federal* response to



invasion. The Federalist No. 43 (Madison), at 275 (Clinton Rossiter ed., 1961). His discussion of “invasion” then invokes the Revolutionary War—“[a] recent and well-known event among ourselves [that] has warned us to be prepared for emergencies of a like nature.” Id.

In his next essay, Madison again appears to reject Texas’s broad expansion of the State War Clause. Federalist No. 44 (Madison). Rather than understanding the invasion clause to grant unchecked emergency powers to a state, Madison passes over the clause entirely, stating, “The remaining particulars of this clause fall within reasonings which are either so obvious, or have been so fully developed, that they may be passed over without remark.” Federalist No. 44 (Madison), at 283 (Clinton Rossiter ed., 1961). Again, elephants do not hide in mouseholes. The natural and plain reading of the invasion clause, which allows Madison to pass it over without remark, is that the states may employ the war power as a stopgap military measure—not that states may unilaterally nullify the Supremacy Clause and indefinitely regulate immigration.

The other mentions of “invasion” in the Federalist Papers accord with the United States’s view. In Federalist 41, for example, Madison refers to invaders as “predatory” and “licentious” pirates who force residents to “yield[] to their exactions” with residents “compelled to ransom themselves from the terrors of a conflagration . . . .” The Federalist No. 41 (Madison), at 261 (Clinton Rossiter ed.,

1961). Even as Texas might compare modern-day cartels to founding-era pirates, there is no evidence that cartels intend to seize American land, militarily plunder cities, or ransom U.S. citizens, as Madison discusses. Their crimes are not aimed at violently overwhelming domestic police and are not repelled via military responses.

Hamilton, meanwhile, repeatedly writes of “invasion” in the context of war, primarily to emphasize the need for a federal response to war.<sup>38</sup> Criticizing those who argued against two-year appropriations for military funds, Hamilton writes, “Few persons will be so visionary as seriously to contend that military forces ought not to be raised to quell a rebellion or resist an invasion.” The Federalist No. 26 (Hamilton), at 187 (Clinton Rossiter ed., 1961). In the Federalist 25, Hamilton again writes that the United States must be able to raise armies so it is not “incapacitated by its Constitution to prepare for defense, before it was actually invaded.” The Federalist No. 25 (Hamilton), at 165 (Clinton Rossiter ed.,

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<sup>38</sup> In one essay, Hamilton encourages the federal government’s power to raise duties by asking, “But would it be wise, or would it not rather be the extreme of folly, to stop at this point, and to leave the government intrusted with the care of the national defense in a state of absolute incapacity to provide for the protection of the community against future *invasions* of the public peace, *by foreign war or domestic convulsions?*” The Federalist No. 34 (Hamilton), at 207 (Clinton Rossiter ed., 1961) (emphasis added).

In another, Hamilton writes, “In times of insurrection, or *invasion*, *it would be natural and proper that the militia of a neighboring State should be marched into another, to resist a common enemy, or to guard the republic against the violence of faction or sedition. . . .* If the power of affording it be placed under the direction of the Union, there will be no danger of a supine and listless inattention to the dangers of a neighbor . . . .” The Federalist No. 29 (Hamilton), at 187 (Clinton Rossiter ed., 1961) (emphasis added).

1961). In the Federalist 8, Hamilton discusses how “chains of fortified places . . . mutually obstruct invasion.” The Federalist No. 8 (Hamilton), at 66 (Clinton Rossiter ed., 1961). He explains that Great Britain’s insular geography “guard[s] it in a great measure against the possibility of foreign invasion” and therefore does not need a large standing army within the kingdom. *Id.*

The third Federalist Paper author, John Jay, specifically used the term “invasion” to refer to war. In the Federalist 4, Jay warns against independent state responses to invasion, asking,

What would the militia of Britain be if the English militia obeyed the government of England, if the Scotch militia obeyed the government of Scotland, and if the Welsh militia obeyed the government of Wales? *Suppose an invasion*; would those three governments (if they agreed at all) be able, with all their respective forces, to operate against the enemy so effectually as the single government of Great Britain would?

The Federalist No. 4 (Jay), at 48 (Clinton Rossiter ed., 1961) (emphasis added).

In sum, the Federalist Papers mention “invasion” solely in the context of an organized, hostile military incursion. And even then, Jay, Madison, and Hamilton all emphasize the need for a unified federal response to invasion. No use of “invasion” refers to immigration.

## 2. Other mentions of the State War Clause at the time of the Founding

Beyond the Federalist Papers, other mentions of “invasion” at the time of the Founding do not support Texas’s definition.<sup>39</sup> In the Debates in the Several State Conventions, this Court could not locate a single mention of “invasion” that refers to unlawful immigration. See Debates in the Several State Conventions on the Adoption of the Federal Constitution (Jonathan Elliot ed., 1836). To the contrary, uses of “invasion” refer to the term as a military incursion. See, e.g., 2 Debates in the Several State Conventions on the Adoption of the Federal Constitution (Jonathan Elliot ed., 1836), at 234 (“Those that were attacked called in foreign aid to protect them; and the ambitious Philip [of Macedon], under the mask of an ally to one, invaded the liberties of each, and finally subverted the whole.”) (statement of Alexander Hamilton); id. at 137 (“Do you, sir, suppose that, had a British army invaded us at that time, such supineness would have been discovered?”) (statement of Elias Mason).

Nor does early congressional legislation support Texas’s interpretation. The First, Fifth, and Ninth Congresses all addressed immigration,

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<sup>39</sup> Professor Frank Bowman III highlights several speeches from the Constitutional Convention mentioning “invasion” as a need to repel a foreign enemy. Frank O. Bowman III, Immigration Is Not an “Invasion” under the Constitution, Just Security, (Jan. 29, 2024), <https://www.justsecurity.org/91543/immigration-is-not-an-invasion-under-the-constitution>. As he notes, Massachusetts delegate Rufus King asked, “What are the great objects of the Genl. System? 1. difence agst. foreign invasion.” Id. Hamilton disparaged the loose German confederation by stating it failed to “protect them against foreign invasion.” Id. And Virginia Governor Edmund Randolph encouraged more executive military power to enable protection “against foreign invasion.” Id. Bowman also notes that Rhode Island ratified the convention with the provision that “no person shall be compelled to do military duty otherwise than by voluntary enlistment, except in cases of general invasion.” Id.

but none referred to it as an invasion. See Joshua Treviño, The Meaning of Invasion Under the Compact Clause of the U.S. Constitution, at 6, Tex. Pub. Pol. Foundation (Nov. 2022); First Congress, stat. II, ch. 33, § 5; Fifth Congress, stat. III, ch. 46, § 4; Ninth Congress, stat. II, ch. 46, § 1. Another early law, the Calling Forth Act of 1792 refers to invasion “from any foreign nation or Indian tribe.” Ch. 28, 1 Stat. 264, repealed by the Calling Forth Act of 1795 1 Stat. 424, 3d Cong., Sess. II, Ch. 36 (1795) (repealed in part 1861 and codified at 10 U.S.C. § 12406).<sup>40</sup> The Calling Forth Act authorizes the militia to be deployed against “combinations too powerful to be suppressed by the ordinary course of judicial proceedings . . . .” Id. The notion that “invasions” will overcome judicial proceedings poses a challenge for Texas, which is attempting to regulate the purported immigrant “invasion” through judicial proceedings under SB 4.

In regulating the recently acquired Louisiana Territory, the Eighth Congress stated regional military commanders “shall be specially charged with the employment of the military and militia of his district, in cases of sudden invasion .

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<sup>40</sup> Texas cites this act to suggest that “invasion” can refer to actions by non-state actors. (Dkt. # 25 at 27). The Court does not disagree with that proposition, but it also does not follow that all non-state actors are then “invaders.” Indeed, the Calling Forth Act still speaks of invasion as the sort of hostile military necessity that the President must respond to with armed militias. Calling Forth Act of 1792, 1 Stat. 264, 2d Cong., Sess. I, Ch. 28. (“[W]henver the United States shall be invaded, or be in imminent danger of invasion from any foreign nation or Indian tribe, it shall be lawful for the President of the United States, to call forth such number of the militia of the state or states most convenient to the place of danger or scene of action, as he may judge necessary to repel such invasion, and to issue his orders for that purpose, to such officer or officers of the militia as he shall think proper.”).

. . . and at all times with the duty of ordering a military patrol . . . to arrest unauthorized settlers.” Treviño, *supra*, at 7; Eighth Congress, stat. I, ch. 38, § 12. In other words, Congress specifically referred to unauthorized immigration as something separate from an invasion. *Id.*

Just over a decade after ratification, Madison categorically rejected the notion of removing noncitizens as an act of war in his Report of 1800:

It is said, that the right of removing [noncitizens] is an incident to the power of war, vested in Congress by the constitution.

This is a former argument in a new shape only; and is answered by repeating, that the removal of [noncitizen] enemies is an incident to the power of war; that the removal of [noncitizen] friends, is not an incident to the power of war.

It is said, that Congress, are, by the constitution, to protect each state against invasion; and that the means of preventing invasion, are included in the power of protection against it.

The power of war in general, having been before granted by the constitution; this clause must either be a mere specification for greater caution and certainty, of which there are other examples in the instrument; or be the injunction of a duty, superadded to a grant of the power.

Under either explanation, it cannot enlarge the powers of Congress on the subject. The power and the duty to protect each state against an invading enemy, would be the same under the general power, if this regard to greater caution had been omitted. *Invasion is an operation of war. To protect against invasion is an exercise of the power of war.*

James Madison, The Report of 1800, (Jan. 7, 1800),  
founders.archives.gov/documents/Madison/01-17-02-0202 (emphasis added).

Madison’s report explicitly contradicts Texas’s position. If the removal of noncitizens is not an operation of war, then unlawful immigration cannot constitute an “invasion” under the State War Clause.

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Overall, neither the text of the Constitution nor the contemporary usage of “actually invaded” supports Texas’s argument that an influx of unauthorized immigrants constitutes an invasion. From the text of the Constitution to the Federalist Papers to early congressional acts, “invasion” does not refer to unauthorized immigration.

### **III. SB 4 is not a wartime measure.**

The State War Clause is not an unlimited grant of power in times of invasion. Rather, it grants states only the power to “engage in War[.]” U.S. Const. art. 1, § 10, cl. 3. Setting aside that immigration is not an invasion, SB 4 would still not be constitutional because it does not authorize or relate to any “engage[ment] in war.” Id.

Again, SB 4 generally has three operating provisions. Officers may arrest noncitizens for unauthorized entry into the state, Tex. Penal Code § 51.02(a), noncitizens may be arrested for entering or attempting to enter after previous

removals, *id.* § 51.03, and noncitizens may be removed if they agree to removal or are convicted of an offense under SB 4. Tex. Code of Crim. Proc. Art. 5(B).002.

None of these provisions are operations of war. Rather, they are standard operations of criminal enforcement by state civil authorities. SB 4 is a “war” inasmuch as the “War on Drugs” is a war—a metaphorical invocation of the term “war” to denote a serious effort. Nothing more. SB 4 does not require use of a military, nor will the State send the National Guard into Mexico to wage war on cartels, call upon NATO allies for aid, or hold unauthorized immigrants as prisoners of war as a result of SB 4. In the most basic sense, SB 4 is not an act of war.

Texas instead argues that “the greater power includes the lesser.” (Dkt. # 25 at 29) (quoting *Moyer v. Peabody*, 212 U.S. 78, 84–85 (1909)). In other words, if Texas may engage in war to repel immigrants, Texas posits that it may engage in less militaristic activities that accomplish the same objective. That argument is without merit. Texas is not engaging in war—through SB 4 or otherwise—so it cannot claim that SB 4 is a necessary domestic component of the war effort. And even if it did, the power to “engage in war” does not grant unlimited legislative or immigration authority. *See, e.g., Youngstown Sheet &*



Tube Co. v. Sawyer, 343 U.S. 579, 642–45 (1952) (Jackson, J., concurring).<sup>41</sup> If this is true for the federal government, then it is most certainly the case for the temporary and narrow exception given to states under the State War Clause. Engaging in war is one function of government; controlling immigration is another. Again, Madison’s Report of 1800 specifically rejected the idea that control of immigration is incident to the power of war. James Madison, The Report of 1800, (Jan. 7, 1800), [founders.archives.gov/documents/Madison/01-17-02-0202](https://founders.archives.gov/documents/Madison/01-17-02-0202).

The state’s limited and temporary authority to engage in war to repel invasions of organized hostile forces does not amount to a wider authority to regulate in fields preempted by the federal government. The State War Clause itself makes this clear. Even when under invasion, the Clause forbids states from, *inter alia*, entering into treaties, granting letters of marque, laying duties, or keeping troops. The State War Clause authorizes a state only to “engage in war [if] actually invaded,” it does not suspend any other restrictions contained in Section 10. U.S. Const. art. 1 § 10 cl. 3. The “actually invaded” clause affects only the power to engage in war and delegates no other powers to the state. Just as Texas

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<sup>41</sup> See also *id.* at 649–50. (“[The Forefathers] knew what emergencies were, knew the pressures they engender for authoritative action, knew, too, how they afford a ready pretext for usurpation. We may also suspect that they suspected that emergency powers would tend to kindle emergencies. Aside from suspension of the privilege of the writ of habeas corpus in time of rebellion or invasion, when the public safety may require it, they made no express provision for exercise of extraordinary authority because of a crisis.”).

cannot unilaterally enter treaties or lay duties in wartime, the State War Clause does not grant it the power to violate the Supremacy Clause.

Texas defends SB4 because “[m]illions of [noncitizens] have entered the State of Texas illegally under the Biden Administration . . . and the State has the constitutional power to repel that invasion.” (Dkt. # 25 at 28–29). But SB 4 is not limited to times of invasions. The law does not require the Governor’s declaration of an invasion or war. Nor does SB 4 halt when immigration flows are reduced or when a new administration takes power or when the federal government increases border security measures. Even accepting for argument that SB 4 is a wartime response to an invasion, that would not make SB 4 constitutional. The law would remain preempted and unenforceable after the end of any “invasion” because the State War Clause affirmatively forbids enforcement of wartime acts once the invasion has ended. See U.S. Const. art. 1, § 10, cl. 3. If the state, by arresting removable noncitizens, is “engaging in war,” then the state cannot continue to pursue a wartime measure once the invasion has ended.<sup>42</sup> The result, then, is that SB 4 must expire when immigration flows ebb to levels below those at the time of the governor’s declaration. SB 4 contains no such clause.

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<sup>42</sup> The absurd result of determining that routine criminal prosecutions are “engaging in war” is that the State War Clause would then forbid all state criminal enforcement except in times of invasion.

SB 4 does not begin when an invasion begins or end when an invasion ends. It has no characteristics of a wartime measure, nor does it support other operations of war. Under any rational sense of the phrase, Texas is not “engaging in war” by enforcing SB 4.

#### **IV. States may not derogate the federal government’s war powers.**

*A. States cannot engage in perpetual war against the federal government’s directives.*

Accepting, again for the purposes of argument, that SB 4 would qualify as a wartime measure, it would be preempted by the federal government’s wartime powers.<sup>43</sup> The federal government’s control over war powers is uncontested in caselaw. See, e.g., Holmes v. Jennison, 39 U.S. 540, 551 (1840) (“The powers of war and peace, and of making treaties, are conferred upon the general government; and at the same time, expressly prohibited to the states. Every incident, therefore, which follows the grant, is equally included in the prohibition[.]”); United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 318 (1936) (“The powers to declare and wage war, to conclude peace, . . . if they had never been mentioned in the Constitution, would have vested in the federal

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<sup>43</sup> If it is difficult to imagine why SB 4 as a military action would be preempted by the federal government’s military control, that is because it is not a wartime measure. But if the Court were to accept that Texas *could* take military actions to repel immigrants, then the State could also take other actions to repel immigrant “invaders,” including launching airstrikes against cartels in Mexico and deploying the state’s National Guard into Mexican border cities. That obviously untenable prospect highlights why a state may not, on its own directive and against the federal government’s wishes, engage in an indefinite war.

government as necessary concomitants of nationality.”); Torres, 597 U.S. at 590 (“[T]he Constitution’s text, across several Articles, strongly suggests a complete delegation of authority to the Federal Government to provide for the common defense. . . . [T]he Constitution spells out the war powers not in a single, simple phrase, but in many broad, interrelated provisions.”). As Torres notes, “The Constitution also divests the States of like power” and “[t]he States ultimately ratified the Constitution knowing that their sovereignty would give way to national military policy.” 597 U.S. at 590–92.

Article I, Section 8 grants Congress the ultimate power to “declare war” and “repel invasions.” U.S. Const. art. 1, § 8, cl. 11, 15. The Constitution vests the President—not a governor—as the “Commander in Chief of the Army . . . and of the Militia of the several States.” Id. art. 2, § 2, cl. 1. It cannot be that the President and Congress retain power to repel invasions, but the governor may also supplant the federal government’s authority when actually invaded. To the contrary, even when the federal government lacks resources to respond, federal law allows the President to direct state resources to repel the invasion.<sup>44</sup> The

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<sup>44</sup> See 10 U.S.C. § 12406 (“Whenever— (1) the United States . . . is invaded or is in danger of invasion by a foreign nation; (2) there is a rebellion or danger of a rebellion against the authority of the Government of the United States; or (3) the President is unable with the regular forces to execute the laws of the United States; the President may call into Federal service members and units of the National Guard of any State in such numbers as he considers necessary to repel the invasion, suppress the rebellion, or execute those laws. Orders for these purposes shall be issued through the governors of the States . . .”).

Constitution makes clear that the power to conduct war and repel invasions is entrusted to the federal government. The State War Clause, read consistently with other provisions of the Constitution, authorizes states to respond to invasion only as an emergency interim measure before the federal government may respond.

Put simply, if Texas is engaging in war by enacting SB 4, it must cede authority to the federal government to conduct that war once the federal government has had time to respond to the purported invasion. Here, the United States has had time to respond, and it has directed Texas to halt enforcement of SB 4. (Dkt. # 1-1). If the United States is truly at war, Texas may not direct its officers to disobey that command.

*B. Sovereignty arguments do not allow Texas to ignore the Supremacy Clause or countermand military directives.*

If SB 4 constitutes engaging in war, the federal government may direct the war.<sup>45</sup> If SB 4 is not engaging in war, then the State War Clause is largely irrelevant to the constitutionality of the state's action. Attempting to get

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<sup>45</sup> Texas suggests that the federal government is “unwilling” to repel its purported invasion, and therefore “the State [can] go it alone.” (Dkt. # 25 at 25) (citing *The Federalist* No. 43 (Madison)). Again, Texas quotes from a passage that does not discuss invasion. Moreover, the federal government is not unwilling or unable to respond. The federal government has responded and continues to respond to surges of immigration as they occur on the border. *See supra*, p. 47–50. Texas may disagree with the scope of that response, but the adequacy of the response is not a question for courts to decide. The determination of when to declare war, as well as satisfaction of the guarantee to repel an invasion, are questions left to the political branches. *See California v. United States*, 104 F.3d at 1091. If the Court cannot declare that the United States is failing the Guarantee Clause, *see Luther v. Borden*, 48 U.S. 1 (1849), then it cannot grant Texas’s “unnecessary or unwilling” argument. (Dkt. # 25 at 25)

around this, Texas suggests that the State War Clause instead provides for the more general notion of sovereignty that allows the state to defend itself. (Dkt. # 25 at 26–27). The states’ police powers, however, are already a part of the preemption analysis. The invocation of the State War Clause may reflect the state’s sovereign powers, but it does not independently change the preemption analysis.

Instead, Texas quotes from Madison and John Marshall at Virginia’s ratification debate to suggest the state’s sovereign power to repel invasions “cannot be said to be repugnant to a concurrence of the [federal] power” to make war.<sup>46</sup> (Dkt. # 25 at 26–27) (quoting 3 Debates in the Several State Conventions on the Adoption of the Federal Constitution 425 (Jonathan Elliot ed., 1836)).

A full view of the Virginia ratification debates shows an argument over whether states may raise militias at all, not whether they may use those militias against the federal government’s wishes. See Jeffrey M. Hirsch, War Powers Abrogation, 89 Geo. Wash. L. Rev 593, 632 (2021). Both Madison and

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<sup>46</sup> Madison’s full quote is more expository:

No state shall, without the consent of Congress, lay any duty on tonnage, keep troops or ships of war in time of peace, enter into any agreement or compact with another state, or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay.” They are restrained from making war, unless invaded, or *in imminent danger*. When in such danger, they are not restrained. I can perceive no competition in these clauses. They cannot be said to be repugnant to a concurrence of the power.

3 Debates in the Several State Conventions on the Adoption of the Federal Constitution 425 (Jonathan Elliot ed., 1836) (emphasis in original).

Marshall emphasize that a state militia may respond to more immediate exigent circumstances, but speak at the convention of the need for the *federal* government to respond to invasion.<sup>47</sup> Madison’s quote about a “concurrence of the power” fits within that context, because the state’s power to raise a militia to engage in a temporary and limited defensive war in pressing emergencies is not repugnant to the federal government’s ultimate authority over war. 3 Debates in the Several State Conventions on the Adoption of the Federal Constitution 425 (Jonathan Elliot ed., 1836).

By relying on partial quotes taken in the context of the power to raise militias, Texas reads far too much into the Virginia debates.<sup>48</sup> The notion that

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<sup>47</sup> Madison begins his speech by arguing that state control of militias in times of invasion would be disastrous. 3 Debates in the Several State Conventions on the Adoption of the Federal Constitution 424 (Jonathan Elliot ed., 1836) (“Is [the war power] to be vested in the state governments? If so, where is the provision for general defence? If ever America should be attacked, the states would fall successively. It will prevent them from giving aid to their sister states; for, as each state will expect to be attacked, and wish to guard against it, each will retain its own militia for its own defence. Where is this power to be deposited, then, unless in the general government, if it be dangerous to the public safety to give it exclusively to the states?”). Similarly, Marshall notes,

What government is able to protect you in time of war? Will any state depend on its own exertions? The consequence of such dependence, and withholding this power from Congress, will be, that state will fall after state, and be a sacrifice to the want of power in the general government. *United we are strong, divided we fall.* Will you prevent the general government from drawing the militia of one state to another, when the consequence would be, that every state must depend on itself?

*Id.* at 420 (emphasis added).

<sup>48</sup> It is worth noting that Madison grew exasperated by hyper-technical arguments on this point, noting, “If we object to the Constitution in this manner, and consume our time in verbal criticism, we shall never put an end to the business.” 3 Debates in the Several State Conventions on the Adoption of the Federal Constitution 425 (Jonathan Elliot ed., 1836).

states may call out the militia (or in modern terms, the National Guard), to respond to genuine exigencies is uncontroversial. The Virginia Debates speak to this uncontroversial power to call militias—not to a unilateral authority to declare and conduct war in contravention of the federal government’s command.<sup>49</sup> See 10 U.S.C. § 12406 (authorizing President to command national guard); Hirsch, War Powers Abrogation, at 618 (“[T]here was no dispute that states were completely subservient to the federal government when it came to war powers.”).<sup>50</sup> Madison’s quote must be read in context. Courts must rely on more than just selective

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<sup>49</sup> Marshall’s entire argument is in support of federal war power. Elsewhere in the debates, he argues that the federal government’s aim is to “protect the United States, and to promote the general welfare. Protection, in time of war, is one of its principal objects.” 3 Debates in the Several State Conventions on the Adoption of the Federal Constitution 226 (Jonathan Elliot ed., 1836)). States “cannot do these things” and the power is vested “[b]y the national government only . . . . It is, then, necessary to give the government that power, in time of peace, which the necessity of war will render indispensable, or else we shall be attacked unprepared.” *Id.* at 226–27.

<sup>50</sup> As Hamilton stated in ratification debates, for example:

The great leading objects of the federal government, in which revenue is concerned, are to maintain domestic peace, and provide for the common defence. In these are comprehended the regulation of commerce,—that is, the whole system of foreign intercourse,—the support of armies and navies, and of the civil administration. . . . This principle assented to, let us inquire what are the objects of the state governments. Have they to provide against foreign invasion? Have they to maintain fleets and armies? Have they any concern in the regulation of commerce, the procuring alliances, or forming treaties of peace? No. Their objects are merely civil and domestic[.]”

2 The Debates in the Several State Conventions on The Adoption Of The Federal Constitution, 350 (Jonathan Elliot ed., 2d ed., 1836).

Hamilton noted that “federal control of military matters was unconstrained, as there was ‘no limitation of that authority . . . to provide for the defence and protection of the community,’ especially ‘any matter essential to the formation, direction, or support of the national forces.’” Hirsch, *supra*, at 632 (quoting The Federalist No. 23, at 148 (Hamilton) (Jacob E. Cooke ed., 1961)).



quotations of extemporaneous remarks at one of many ratifying conventions to inform their understanding of the Constitution. And beyond one selective quote about a “concurrence of power,” it is established constitutional law that “[t]he States ultimately ratified the Constitution knowing that their sovereignty would give way to national military policy.” Torres, 597 U.S. at 592.<sup>51</sup>

In sum, for Texas to invoke the temporary “invasion” defense, the state must be “engaging in war” through SB 4. And if Texas is “engaging in war,” then the federal government retains complete authority to direct that war once it has capacity to respond. “[T]he structure of the Constitution prevents States from frustrating national objectives in this field.” Torres, 597 U.S. at 590. Texas either *is* engaging in war, in which case it must obey federal war directives once the federal military has responded, or it *is not* engaging in war, in which case the State War Clause does not apply.

## **V. Nonjusticiability**

Finally, Texas argues that an “invasion” is a nonjusticiable political question and therefore, this Court must accept its claim of invasion at face value.

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<sup>51</sup> The Constitution guarantees the safety of states in event of invasion. The Guarantee Clause requires the federal government to respond to “provide protection from foreign invasion . . . .” U.S. Const. art. IV, § 4, cl. 1. The states, in forfeiting their individual right to wage war, gained the benefit of an unwaivable federal guarantee that they would be protected. Nor is there some issue regarding states being left unable to defend themselves when Congress is not in session. Almost immediately after ratification, Congress passed the Calling Forth Acts to delegate temporary defensive military authority to the President, which have remained in some form since 1792. 1 Stat. 264, 2d Cong., Sess. I, Ch. 28 (1792).

(Dkt. # 25 at 23). This stretches the political question doctrine beyond recognition. The political question doctrine “excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch.” Japan Whaling Ass’n v. Am. Cetacean Soc., 478 U.S. 221, 230 (1986).

Typically, a defendant contends that a plaintiff’s claim is nonjusticiable and must therefore be dismissed. See, e.g., Rucho v. Common Cause, 139 S. Ct. 2484, 2495–96 (2019) (holding that claims of political gerrymandering are nonjusticiable by federal courts). Here, by contrast, Texas asserts an independent affirmative defense and then argues that its own affirmative defense is nonjusticiable. Put another way, there is a difference between the defense of nonjusticiability and a defense that is nonjusticiable.

Texas’s argument conflates these two propositions. If the defense is nonjusticiable, then it should presumably be rejected in the same way that nonjusticiable claims are rejected.<sup>52</sup> See id. To hold otherwise would give any state the right to ignore the Supremacy Clause so long as it could imagine a

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<sup>52</sup> Texas cites several circuit court cases for the proposition that claims of invasion are nonjusticiable. But those cases cited “invasion” in the context of the Guarantee Clause—not the State War Clause. See Chiles v. United States, 69 F.3d 1094, 1097 (11th Cir. 1995); Padavan v. United States, 82 F.3d 23, 28 (2d Cir. 1996); New Jersey v. United States, 91 F.3d 463, 468 (3d Cir. 1996); California v. United States, 104 F.3d 1086, 1091 (9th Cir. 1997). And the cases dealt with claims for declaratory judgments that the United States was failing its duties under the Invasion Clause. In other words, the claims, not the defenses, were nonjusticiable.

nonfrivolous claim of invasion.<sup>53</sup> That is not how constitutional adjudication works, especially where the incarceration of tens of thousands of individuals may depend on the “nonjusticiable” defense. See Baker v. Carr, 369 U.S. 186, 217 (1962) (“The courts cannot reject as ‘no law suit’ a bona fide controversy as to whether some action denominated ‘political’ exceeds constitutional authority.”).

Indeed, the Supreme Court long ago rejected Texas’s theory:

If this extreme position could be deemed to be well taken, it is manifest that the fiat of a state Governor, and not the Constitution of the United States, would be the supreme law of the land; that the restrictions of the Federal Constitution upon the exercise of state power would be but impotent phrases, the futility of which the state may at any time disclose by the simple process of transferring powers of legislation to the Governor to be exercised by him, beyond control, upon his assertion of necessity. Under our system of government, such a conclusion is obviously untenable.

Sterling v. Constantin, 287 U.S. 378, 397–98 (1932) (Holmes, J.).

Overall, Texas’s invasion defense must fail. The Constitution does not refer to immigration as an “invasion.” Texas is not engaging in war by enacting SB 4. And even if it was, Texas would necessarily cede that war authority to the federal government. At each step of the way, Texas’s radical position falters.

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<sup>53</sup> If, for example, California wished to enact environmental regulations that conflict with the EPA’s, it could claim that pollutants are “invading” the state and that regulations are a necessary response to “engage in war” on pollution. If the United States sued to enjoin the preempted regulations, federal courts would be powerless to decide California’s “nonjusticiable” defense.

## IRREPARABLE HARM

### I. The United States' Harm

The United States will suffer immediate irreparable harm if SB 4 takes effect. First, the United States has shown irreparable harm as a matter of law. “If a statute is expressly preempted, a finding with regard to likelihood of success fulfills the remaining [preliminary injunction] requirements.” Tex. Midstream Gas Servs., LLC v. City of Grand Prairie, 608 F.3d 200, 206 (5th Cir. 2010); see also United States v. Arizona, 641 F.3d 339, 366 (9th Cir. 2011) (noting, in the context of obstacle preemption, that “an alleged constitutional infringement will often alone constitute irreparable harm”), aff’d in part, rev’d on other grounds, 567 U.S. 387 (2012); New Orleans Pub. Serv., Inc. v. Council of New Orleans, 491 U.S. 350, 366–67 (1989) (“NOPSI”) (noting that irreparable injury may be established “by a showing that the challenged state statute is flagrantly and patently violative of” the Supremacy Clause). “Because the United States has established a likelihood that the [state law] violates the Supremacy Clause, irreparable harm is presumed.” United States v. Texas, 557 F. Supp. 3d 810, 821 (W.D. Tex. 2021).

Texas has not addressed per se irreparable harm, which this Court has previously held to effectively concede irreparable harm as a matter of law. See id. (“[F]ailure to enjoin the [state law] causes per se irreparable harm to the federal government. Texas did not respond to this argument in its Opposition brief, and . . .

Texas still did not address the issue at the hearing on this Motion.”). Accordingly, it is uncontested that the federal government will suffer irreparable harm as a matter of law. If SB 4 violates the Supremacy Clause, irreparable harm to the United States follows. See NOPSI, 491 U.S. at 366–67.

The United States would also suffer irreparable harm because its foreign relations will be injured if SB 4 takes effect. A State Department representative expects that “SB 4 would result in significant and ongoing negative consequences for U.S. foreign relations.” (Jacobstein Decl., Dkt. # 14-1 at 2). SB 4 would immediately disrupt sensitive foreign relations agreements, particularly around the destination for the removal of noncitizens. (Id.); *supra*, p. 42–44. These disruptions are costly, because the state’s unconstitutional intrusion into foreign affair distracts from other productive discourse, risks antagonizing American allies, and undermines the country’s ability to promulgate foreign policy with one voice. (Id.); Crosby v. Nat’l Foreign Trade Council, 530 U.S. 363, 383–85 (2000) (“[T]he Executive has consistently represented that the state Act has complicated its dealings with foreign sovereigns and proven an impediment to accomplishing objectives assigned it by Congress.”).

The United States engages in regular talks with Mexico to reduce irregular migration at the southern border. See Exec. Order 14010, 86 Fed. Reg. 8267 (Feb. 2, 2021). These discussions may become irreparably derailed if SB 4

takes effect. Id. Most recently, the two countries had a high-level diplomatic meeting resulting in the issuance of a joint communique to reduce irregular migration and continue diplomatic solutions in the area. The White House, Mexico-U.S. Joint Communique (Dec. 28, 2023), <https://perma.cc/92CW-APKE>. The two countries also lead multilateral negotiations to reduce irregular migration from the Northern Triangle and work to end corruption in the region. (Jacobstein Decl., Dkt. # 14-1 at 3–7). If the United States cannot speak with one voice, then it cannot engage in these talks effectively. The United States cannot, for example, make promises to Mexico about removing noncitizens to their original countries of origin if Texas removes noncitizens under SB 4 into Mexico regardless of their country of origin. It cannot guarantee that asylum applicants will have their claims adjudicated or promise uniform standards for admissibility under SB 4. Although SB 4 purports to deter irregular migration, it threatens to deteriorate diplomatic talks designed to achieve that same goal.

It is no surprise, then, that Mexico has engaged diplomatically with the United States to protest SB 4. (See Jacobstein Decl., Dkt. # 14-1 at 2); Crosby, 530 U.S. at 382 (noting that “a number of this country’s allies and trading partners fili[ing] formal protests” was evidence the state law undermined effective diplomacy). Texas denigrates Mexico as “a failed narco-state,” (Dkt. # 25 at 3), but that “failed narco-state” is also the United States’s largest trading partner,

amounting to \$863 billion in trade per year, or \$2 million of trade each minute.

U.S. International Trade in Goods and Services, U.S. Census Bureau, available at

<https://www.census.gov/foreign-trade/Press->

[Release/current\\_press\\_release/index.html](https://www.census.gov/foreign-trade/Press-Release/current_press_release/index.html). More than 1.6 million U.S. citizens live

in Mexico, and the country is the top international tourist destination for

Americans, with over 33 million traveling to the country in 2022. See U.S.

Relations With Mexico, U.S. Dep't of State, [https://www.state.gov/u-s-relations-](https://www.state.gov/u-s-relations-with-mexico)

[with-mexico](https://www.state.gov/u-s-relations-with-mexico); International Visitation to and from the United States, Int'l Trade

Admin., [https://www.trade.gov/sites/default/files/2023-05/International-Visitation-](https://www.trade.gov/sites/default/files/2023-05/International-Visitation-to-the-United-States.pdf)

[to-the-United-States.pdf](https://www.trade.gov/sites/default/files/2023-05/International-Visitation-to-the-United-States.pdf). The United States has a paramount interest in maintaining

a strong diplomatic relationship with Mexico, and SB 4 would irreparably harm the

federal government by injecting the state's unilateral policymaking into that

diplomacy. See Arizona, 567 U.S. at 395 (“Perceived mistreatment of [noncitizens]

in the United States may lead to harmful reciprocal treatment of American citizens

abroad.”).

SB 4 also harms the United States's nonrefoulement obligations. As

explained *supra*, p. 56–57, SB 4 frustrates the United States' efforts and

obligations to protect individuals fleeing from persecution or torture. The State

Department's representative estimates that it will hamper the country's advocacy

“for the advancement of human rights” and could be seen as a sign that the country

is scaling back its commitment to international protection. (Jacobstein Decl., Dkt. # 14-1 at 6–11). This would risk incentivizing other countries to do the same—including Mexico, which saw the third-largest number of asylum applications globally last year, many of whom would have otherwise entered the United States. (Id. at 8). The United States cannot, on the one hand, ask Latin American allies to host asylum applicants while one of its own states simultaneously declines to do the same. (See id.).

Other forms of irreparable harm will follow from SB 4’s enforcement, too numerous to spell out in detail. Border Patrol will be unable to conduct immediate reviews of apprehended migrants. (BeMiller Decl., Dkt. # 14-2 at 2–4). Even if Texas does share all data related to noncitizen arrests with DHS, the agency will have a diminished ability to detect time-sensitive threats. (Id.). Hindrances to the operations of the federal government, especially as to counterterrorism efforts, constitute irreparable harm. For noncitizens arrested under SB 4, DHS will likely lose the ability to pursue expedited removals, which must be used to remove noncitizens within 14 days of their arrival into the country. (See BeMiller Decl., Dkt. # 14-2 at 2–4); Designating Aliens For Expedited Removal, 69 Fed. Reg. 48877–01, 48880 (Aug. 11, 2004). SB 4 will result in changes to immigration flows at the southern border towards the New Mexico, Arizona, and California borders. (BeMiller Decl., Dkt. # 14-2 at 1–3). These changes will force increased



DHS responses to the region, which will include building new facilities and infrastructure, and may take years to complete. (Id.) (estimating costs of \$20 million for single new facility that may hold 500 noncitizens). Terrain along these borders is also more rugged, resulting in more immigrant deaths. (Id.). By changing immigration patterns to more dangerous terrain, SB 4 will also risk placing DHS officers in more danger as they mount emergency responses to individuals in life-threatening situations. (Id.). In sum, the United States has made a clear showing of irreparable harm.

## **II. The Organizational Plaintiffs' harm**

The United States' harm is more than sufficient on its own to justify enjoining the law. But the Organizational Plaintiffs have also shown they will suffer irreparable harm if the preempted law takes effect.

Both Las Americas and American Gateways currently serve many clients who have entered the United States outside ports of entry and now risk prosecution under SB 4. By advocating for incarcerated clients and expediting asylum applications, the organizations will incur significant costs due to SB 4. These cannot be readily recovered through suits against the state for money damages. Rest. Law Ctr. v. U.S. Dep't of Labor, 66 F.4th 593, 597 (5th Cir. 2023) (noting that “[i]n determining whether costs are irreparable, the key inquiry is not so much the magnitude but the irreparability”) (cleaned up); id. (“Even purely

economic costs may count as irreparable harm “where they cannot be recovered in the ordinary course of litigation.”) (cleaned up). Likewise, the organization will lose the ability to apply for asylum or withholding on behalf of their clients because SB 4 directs state courts to disregard pending federal determinations of removability. *See supra*, p. 56–58.

SB 4 will particularly damage the Organizational Plaintiffs’ programs that encourage victims of abuse or human trafficking to report crimes to the police. Las Americas, (Dkt. # 30 at 18). SB 4 contains no provision abating arrest or removal based on investigations into the abuse or trafficking.<sup>54</sup> Because SB 4 authorizes state police officers to arrest many unauthorized noncitizens, victims of abuse or human trafficking will risk arrest and removal if they report their crimes. This omission is particularly perverse because victims of trafficking will be removed while federal officials will lose key witnesses which may hinder the indictment, conviction, or removal of traffickers themselves. The requirement that state court judges disregard pending U or T visa determinations harms the United States, which uses those visas to help prosecute abuse and trafficking, as well as the Organizational Plaintiffs seeking to help victims to report their crimes and remain in the country.

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<sup>54</sup> SB 4 does prevent officers from arresting individuals at a domestic violence “SAFE-ready facility” so long as they are “on the premises . . . for purposes of obtaining a forensic medical examination and treatment.” Tex. Code of Crim. Proc. art. 5(B).004.

Likewise, Las Americas and American Gateways will likely lose their ability to represent many asylum applicants. Las Americas, (Yang Decl., Dkt. # 30-2 at 3–4). Because state judges may not consider federal asylum applications as a reason to abate state removal proceedings, many of these applications may be mooted prior to adjudication, frustrating the organizations’ missions. The organization will likely have to expedite asylum applications for those detained under SB 4 in hopes to achieve a determination prior to the state’s removal. (Id.). For the same reason, SB 4 may also decrease the organizations’ funding, which is partially based off the number of asylum cases. (Id.).

Finally, El Paso County will also likely suffer irreparable harm. It will have to pay to expand its jail, provide counsel for indigent defendants, and hire more Sheriff deputies and court personnel. Las Americas, (Carillo Decl., Dkt. # 30–3 at 4–5). El Paso County may lose the ability to focus on high risk or violent criminals, harming its jail cost containment efforts. (Id.). Although funds for hosting federal prisoners is the third-largest source of revenue for El Paso County, the County could lose several million dollars if it instead must hold noncitizens arrested under state law—expenses that it cannot readily recover under the state even if SB 4 is eventually declared unconstitutional. And finally, SB 4 will likely frustrate the County’s efforts to integrate its law enforcement office with migrant

support services and will make noncitizen crime victims less likely to report violent crimes.

### EQUITIES AND PUBLIC INTEREST

When the United States is a party to a preliminary injunction motion, the final two factors of the inquiry—balance of the equities and public interest—merge. Nken v. Holder, 556 U.S. 418, 435 (2009). When the federal government sues under the Supremacy Clause, the contest “is not a controversy between equals.” Sanitary Dist. of Chicago, 266 U.S. at 425. “The United States is asserting its sovereign power to regulate” a field dedicated to the federal government. Id. Texas may disagree with the federal government’s policy decisions, but they are the federal government’s to make. See Trump v. Hawaii, 138 S. Ct. 2392, 2421 (2018). (“[W]e cannot substitute our own assessment for the Executive’s predictive judgments on such matters, all of which are delicate, complex, and involve large elements of prophecy.”) (internal quotations omitted).

A state’s “[f]rustration of federal statutes and prerogatives [is] not in the public interest.” United States v. Alabama, 691 F.3d at 1301. That is particularly true as to SB 4, which strips away an asylum applicant’s option to raise credible fears or torture or persecution in a state hearing. See Nken v. Holder, 556 U.S. 418, 436 (2009) (“[T]here is a public interest in preventing [noncitizens] from being wrongfully removed, particularly to countries where they are likely to face

substantial harm.”). And the record makes clear that removing noncitizens into Mexico risks subjecting them to death, torture, and rape. See Las Americas, (Junaid Decl., Dkt # 30-5).

Nor can Texas assert a legitimate interest in enforcing an unconstitutional law. See Trans World Airlines, Inc. v. Mattox, 897 F.2d 773, 784 (5th Cir. 1990) (states faced no injury from injunction of preempted regulation); United States v. Alabama, 691 F.3d at 1301 (“[W]e discern no harm from the state’s nonenforcement of invalid legislation.”).

Finally, despite Texas’s statements that it must prevent against “drug smuggling, human trafficking, and terrorism,” nothing in this Order prevents the state from doing so. (Dkt. # 25 at 56). Texas already criminalizes each of these activities. See, e.g., Tex. Health & Human Safety Code § 481.011; Tex. Penal Code § 20A.02; id. § 76.02. For the past century, Texas has relied on its expansive police powers afforded to it under the Constitution to regulate crime within its borders. Texas may continue to do so, but it cannot regulate the federal field of unlawful entry and removal.

#### SCOPE OF THE INJUNCTION

Next, the Court discusses the scope of the injunction. See Fed. R. Civ. P. 65(d). Texas asks the Court to only enjoin the unconstitutional applications of SB 4 and sever any remaining constitutional sections. (Dkt. # 25 at 60–61).

Although cognizant of the “normal rule” that “partial, rather than facial, invalidation is the required course,” the nature of SB 4 does not lend itself to a partial injunction. Ayotte v. Planned Parenthood of N. New England, 546 U.S. 320, 329 (2006).

The main provisions of SB 4—criminalizing illegal entry, criminalizing illegal re-entry, authorizing removals of noncitizens, and denying the defense of a federal determination—are each preempted under this Court’s analysis. The remaining provisions all depend on the validity of the criminal prohibitions and are therefore nullified by the injunction.<sup>55</sup> Accordingly, the Court will enjoin the law in full and prohibit Defendants and their officers, agents, and employees from enforcing any provision of SB 4. See Fed. R. Civ. P. 65(d)(2).

More fundamentally, SB 4 is not like Arizona’s SB 1070 in one critical aspect: SB 4 operates as an intertwined whole.<sup>56</sup> See Tex. Penal Code §§

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<sup>55</sup> Sections 4, 6, and 7 all deal with supervision or parole of defendants under SB 4, which are necessarily nullified by the underlying injunction on the criminal prohibitions themselves. SB 4 §§ 4, 6, 7. Section 5 requires criminal databases to include offenses under SB 4, which is likewise nullified. Id. § 5. Section 8 is a severability clause, while Section 9 states that the law will take effect on March 5, 2024. Id. §§ 8, 9.

<sup>56</sup> In Arizona, SB 1070 contained largely separate provisions, dealing with (1) authorizing stops for officers to determine immigration status, (2) requiring noncitizen registration, (3) criminalizing employment while being undocumented, and (4) authorizing arrests with probable cause that a person is removable. See Arizona, 567 U.S. at 390. In the underlying litigation, the district court made clear that it intended to address SB 1070 piecemeal, and that procedural posture carried through on appeal. See Lucas Guttentag, Immigration Preemption and the Limits of State Power: Reflections on Arizona v. United States, 9 Stan. J. C.R. & C.L. 1, 12–13 (2013) (recounting procedural history of Arizona). Although each provision generally aimed to deter immigration, see id., SB 1070 sought to accomplish that deterrence through the relatively different fields of registration, employment, immigration status, and police stops.

51.02–03; Tex. Code of Crim. Proc. arts. 5(B).001–5(B).003. Removal orders under SB 4 operate for noncitizens accused of illegal entry (Tex. Penal Code § 51.02) or illegal re-entry (*id.* § 51.03). And the removal order provision (Tex. Code of Crim. Proc. art. 5B.002(c)) serves as a potential alternative to incarceration under SB 4.<sup>57</sup> One provision cannot be enjoined without significantly eliminating or mooted other key remedies under another provision. Despite the law’s severability clause, SB 4 must be enjoined in whole.

#### STAY PENDING APPEAL

At the Court’s hearing on February 15, 2024, the parties debated whether the Court should stay any injunction pending appeal. In light of the parties’ arguments, and to allow the parties increased time to brief the matter before the Fifth Circuit, the Court will concurrently address Texas’s conditional request for a stay. See Fed. R. App. P. 8(a)(2)(A)(ii).

The Fifth Circuit “consider[s] four factors in deciding whether to grant a stay pending appeal: (1) whether [Texas] has made a strong showing that [it] is likely to succeed on the merits; (2) whether [Texas] will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the

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<sup>57</sup> Section 9 of SB 4 contains a severability clause. While federal courts should normally respect severability clauses, it would not be practicable here. The only possibility of severance under the law would be if a court ruled that the removal provisions were preempted but not the underlying criminal offenses (the reverse could not be true because there could be no removal order absent an underlying offense). However, that would raise its own conflict preemption problem, because removal is an option to avoid incarceration under federal immigration law.

other parties interested in the proceeding; and (4) where the public interest lies.” SEC v. Barton, 79 F.4th 573, 581 (5th Cir. 2023) (quoting Nken, 556 U.S. at 434).<sup>58</sup> Applying the Fifth Circuit’s framework, the Court finds that a stay is not warranted.

First, given the discussion herein, Texas is not likely to succeed on the merits. Its arguments rest upon a narrow and untenable reading of Arizona and the many immigration preemption cases that preceded it. SB 4 intrudes onto especially dominant federal interests, such as the removal of noncitizens, and conflicts with federal law by disallowing consideration of pending asylum or withholding determinations. Texas’s “actually invaded” defense, meanwhile, asserts a novel reading of “invasion” never once affirmed by any federal court (and, indeed, unanimously rejected by three circuit courts). Texas is unlikely to succeed on the merits.

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<sup>58</sup> In NAACP v. Tindell, the court of appeals announced that it “evaluate[s] a request for an injunction pending appeal according to the standard for granting or denying a stay pending appeal.” 90 F.4th 419, 422 (5th Cir. 2024) (citing Texas v. DHS, 88 F.4th 1127 (5th Cir. 2023), vacated, No. 23A607, 2024 WL 222180 (U.S. Jan. 22, 2024)); Mock v. Garland, 75 F.4th 563, 577 (5th Cir. 2023) (noting same). An injunction pending appeal is an extraordinarily high burden. “That authority is to be used ‘sparingly and only in the most critical and exigent circumstances.’” Wisconsin Right to Life, Inc. v. Fed. Election Comm’n, 542 U.S. 1305, 1306 (2004) (citing Ohio Citizens for Responsible Energy, Inc. v. NRC, 479 U.S. 1312, 1313, (1986) (Scalia, J., in chambers)). “It is only appropriately exercised where (1) [n]ecessary or appropriate in aid of our jurisdiction . . . and (2) the [issues] are indisputably clear[.]” Id. (cleaned up). The more likely understanding of Tindell and Mock is that the Fifth Circuit meant to lower the standard for an injunction pending appeal—rather than raise the standard for a stay. But because the Court is uncertain, it notes that Texas has not shown the issues are so “indisputably clear” as to warrant a stay under the potentially heightened standard. Id.



Second, Texas will not suffer sufficient irreparable injury to warrant a stay. Although an injunction generally automatically results in a form of irreparable injury to the state, several factors mitigate that injury here. See Vote.Org v. Callanen, 39 F.4th 297, 308 (5th Cir. 2022). Unauthorized immigration is not new to the Texas border, and Texas has relied for decades on the existing federal regime to regulate immigration. See Wireless Agents, L.L.C. v. T-Mobile USA, Inc., 2006 WL 1540587, at \*3 (N.D. Tex. June 6, 2006) (“[D]elay in seeking a remedy is an important factor bearing on the need for a preliminary injunction.”) (cleaned up). Additionally, federal law already provides for state officers to conduct immigration enforcement measures. See 8 U.S.C. § 1357(g). In its responsive briefing, Texas failed to address § 1357(g) at all. Its true harm, then, is not that the state cannot enforce immigration laws, but that it cannot do so free of federal supervision. Finally, the Court does not doubt the risk that cartels and drug trafficking pose to many people in Texas. But as explained, Texas can (and does) already criminalize those activities. Nothing in this Order stops those enforcement efforts. No matter how emphatic Texas’s criticism of the Federal Government’s handling of immigration on the border may be to some, disagreement with the federal government’s immigration policy does not justify a violation of the Supremacy Clause.

The third and fourth Nken factors largely merge as applied to SB 4.

The United States has shown it will suffer diplomatic harms, as it will lose the ability to speak “with one voice” on immigration. It has shown that SB 4 will strain relations with Mexico, which has already protested the law and will likely continue to do so as Texas deports Central and South American immigrants into the country. Texas may remove or incarcerate many noncitizens with valid asylum or withholding claims, in violation of U.S. treaty obligations, which may induce other countries to follow suit. It has shown that federal agencies’ ability to detect security risks will be harmed as Texas police disrupt DHS’s ability to centrally and timely monitor illicit drug trades, human trafficking, and imminent threats.

If SB 4 takes effect, the law would immediately impose criminal liability on thousands of noncitizens who re-entered the state. The removal of noncitizens cannot be undone, even if a stay on this injunction is ultimately lifted. Thousands of individuals should not be arrested, incarcerated, or removed prior to resolution of SB 4’s constitutionality.

Texas’s “invasion” defense would make a stay particularly inappropriate here, as Texas has invoked a clause that would authorize the state to engage in war on Latin American immigrants arriving from Mexico. A summary stay of the injunction would leave open the question of whether Texas is being

“actually invaded” or at war. If Texas is to be granted these extreme powers, the consequences of that radical determination must be laid out in full.

If allowed to proceed, SB 4 could open the door to each state passing its own version of immigration laws. The effect would moot the uniform regulation of immigration throughout the country and force the federal government to navigate a patchwork of inconsistent regulations. SB 4 threatens the fundamental notion that the United States must regulate immigration with one voice.

In the final analysis, it is clear that the Plaintiffs, particularly the United States, will suffer grave irreparable harm were SB 4 to take effect, especially where Texas has other aspects of Operation Lone Star in full force. The balance of equities unequivocally weighs in favor of denying the stay pending appeal.

CONCLUSION

**IT IS ORDERED** that the motions for preliminary injunctions, United States (Dkt. # 14) and Las Americas, (Dkt. # 30) are **GRANTED**.

Defendants are preliminarily **ENJOINED** from enforcing SB 4.

**DATED:** Austin, Texas, February 29, 2024.

  
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David Alan Ezra  
Senior United States District Judge

Appendix B

United States Court of Appeals  
for the Fifth Circuit

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No. 24-50149

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UNITED STATES OF AMERICA,

*Plaintiff—Appellee,*

*versus*

STATE OF TEXAS; GREG ABBOTT, *in his official capacity as Governor of Texas*; TEXAS DEPARTMENT OF PUBLIC SAFETY; STEVEN C. MCCRAW, *in his official capacity as Director of Texas Department of Public Safety,*

*Defendants—Appellants,*

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LAS AMERICAS IMMIGRANT ADVOCACY CENTER; AMERICAN GATEWAYS; COUNTY OF EL PASO, TEXAS,

*Plaintiffs—Appellees,*

*versus*

STEVEN C. MCCRAW, *in his official capacity as Director of the State of Texas Department of Public Safety,*

*Defendant—Appellant.*

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Appeal from the United States District Court  
for the Western District of Texas  
USDC No. 1:24-CV-8  
USDC No. 1:23-CV-1537

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UNPUBLISHED ORDER

Before CLEMENT, ENGELHARDT, and RAMIREZ, *Circuit Judges*.

PER CURIAM: \*

IT IS ORDERED that a temporary administrative stay is GRANTED. The Appellees' request to stay the temporary administrative stay for seven days following the date hereof pending an application to the Supreme Court of the United States is GRANTED.

IT IS FURTHER ORDERED that this appeal is EXPEDITED to the next available Oral Argument Calendar.

IT IS FURTHER ORDERED that Appellants' opposed motion for a stay pending appeal is deferred to the oral argument merits panel that receives this case.

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\* JUDGE RAMIREZ would not grant a temporary administrative stay and would defer the question to the oral argument merits panel that receives this case.

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UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TEXAS  
AUSTIN DIVISION

UNITED STATES OF AMERICA, )  
Plaintiff, )  
vs. ) Case No. ) 1:24-cv-00008-DAE  
THE STATE OF TEXAS; GREG )  
ABBOTT, in his official )  
capacity as Governor of Texas; )  
TEXAS DEPARTMENT OF PUBLIC )  
SAFETY; STEVEN C. MCCRAW, in )  
his official capacity as )  
Director of Texas Department )  
of Public Safety, )  
Defendants. )  
\*\*\*\*\*)

TRANSCRIPT OF PRELIMINARY INJUNCTION HEARING  
BEFORE THE HONORABLE DAVID A. EZRA  
SENIOR UNITED STATES DISTRICT JUDGE

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1 (February 15, 2024, 9:20 a.m.)

2 P R O C E E D I N G S

3 THE CLERK: Austin 24-cv-8, United States of America,  
4 et al., versus the State of Texas, et al.

5 THE COURT: All right, counsel. Can I please have  
6 your appearances and the appearances of anyone who is here on  
7 your behalf who may not be arguing today.

8 MR. BOYNTON: Good morning, your Honor. Brian Boynton  
9 from the Department of Justice for the United States, and with  
10 me at the counsel table is Jean Lin and Sam Shapiro.

11 THE COURT: Sir.

12 MR. BALAKRISHNAN: Good morning, your Honor. Anand  
13 Balakrishnan for the American Civil Liberties Union for the  
14 plaintiffs Las Americas, American Gateways, and the County of  
15 El Paso. With me at counsel table is Cody Wofsy, David  
16 Donatti, and Bernardo Cruz from the County of El Paso.

17 THE COURT: All right. Do you want to introduce the  
18 people -- does somebody want to introduce the people that are  
19 sitting there for the Bar?

20 MS. GOODLETTE: Good morning, your Honor. Tami  
21 Goodlette with Texas Civil Rights Project on behalf of the  
22 plaintiffs. Alongside with me, this is my colleague Erin  
23 Thorn.

24 THE COURT: Okay.

25 MS. KRUGER: Mary Kruger, your Honor. I'll join with

1 Jaime as far as the U.S. Attorney for our district, Margaret  
2 Leachman and Robert Gray.

3 THE COURT: Thank you very much. And, sir.

4 MR. WALTERS: Good morning, your Honor. Ryan Walters  
5 from the Texas Attorney General's office on behalf of the  
6 defendants, other than District Attorney Bill Hicks.

7 Also with me are (background noise) today, Jacob  
8 Przada, Kyle Tebo, and Mr. Francisco Ortega representing  
9 District Attorney Bill Hicks.

10 THE COURT: And I have two gentlemen there that I know  
11 well. We need to have the names.

12 MR. SULLIVAN: Yes, your Honor. Jake Sullivan and  
13 Trevor Ezell from the Governor's office, your Honor.

14 THE COURT: Thank you very much.

15 Ladies and gentlemen, so that you will know what is  
16 going to be transpiring this morning, this is a hearing on a  
17 motion for a preliminary injunction filed by the United States  
18 and by the -- you know, I have a hard time pronouncing your  
19 client.

20 MR. BALAKRISHNAN: There's three plaintiffs in the  
21 other case, your Honor. It's Las Americas, American Gateways,  
22 and the County of El Paso.

23 THE COURT: I don't have trouble with the County of  
24 El Paso.

25 And of course, the defendants, you're aware of.

1           Normally, in a case, the Court will allocate 15  
2 minutes per side for argument.

3           Because of the nature of this case, and the importance  
4 of it, I have discussed this with counsel, and -- by the way,  
5 counsel has been very, very cooperative on both sides, which I  
6 really do appreciate, and very collegial.

7           And I am providing each side with one hour of  
8 argument.

9           Generally speaking, in a motion like this, just like  
10 in a trial, closing argument, the movant has an opportunity to  
11 make the first argument, and then they have an opportunity to  
12 offer a rebuttal after the other side has their opportunity to  
13 make their argument to the Court.

14           In order to be fair to the State of Texas, I have told  
15 the government that they have the -- the government and the  
16 other plaintiff, that they have -- plaintiffs -- that they have  
17 a total of one hour, and that if they wish to reserve time for  
18 rebuttal, that they need to do so on their own.

19           So, to make it clear, let's say they take 45 minutes  
20 for their argument, they would then have 15 minutes to divide  
21 among themselves for rebuttal. I am not going to give them an  
22 hour for argument and then additional time for rebuttal. I  
23 hope I'm making myself clear. So each side will have a total  
24 of one hour.

25           Counsel, are you ready to proceed?

1 MR. BOYNTON: Ready, your Honor.

2 THE COURT: You may proceed. Please do so at the  
3 podium so it's easier. Oh, and after the government finishes  
4 its presentation, we're going to take a short recess.

5 I do that for two reasons, to give counsel an  
6 opportunity to use the restroom if they need to, but most  
7 important, to give my reporter an opportunity to rest her  
8 hands, because it's very arduous and we want to make sure we  
9 have a good transcript. Even though we've got an absolutely  
10 excellent and professional reporter, when you just keep going  
11 like that for two hours straight, it's too much.

12 So we will take a short ten-minute recess or so after  
13 the government finishes its argument.

14 You may proceed, sir.

15 MR. BOYNTON: Thank you, your Honor. Brian Boynton  
16 from the Department of Justice for the United States.

17 The plaintiffs have agreed to allocate our hour as  
18 follows: The United States is taking 40 minutes, the  
19 organizational plaintiffs and El Paso are taking 20. Of our 40  
20 minutes for the United States, I'm going to do 30 minutes on  
21 direct and 10 ten on rebuttal.

22 I believe the organizational plaintiffs in El Paso are  
23 going to split it five direct, 15 rebuttal, but they can let  
24 you know if they've changed their mind about that.

25 THE COURT: All right. Thank you very much, Counsel,

1 and you have responsibility to stay in touch with your own  
2 time, okay.

3 MR. BOYNTON: Thank you, your Honor. We're tracking  
4 that.

5 SB4 is clearly invalid under several precedents and  
6 this Court should enjoin it.

7 I'd like to first touch on field preemption. The  
8 Supreme Court in the Arizona case described the standards for  
9 field preemption. They made clear that a state law can be  
10 field-preempted in one of two ways: If there are dominant  
11 federal interests at stake or if there's a comprehensive  
12 legislative regime.

13 Here we have both in place. The relevant field is the  
14 entry and removal of noncitizens from the United States, and  
15 that field is one where there are very dominant federal  
16 interests. There's the interest in state and foreign affairs  
17 in controlling the border, national security, and regulating  
18 immigration.

19 There's also a comprehensive federal legislative  
20 regime in place. Congress has enacted laws in great detail  
21 specifying who is admissible to this country and when, how  
22 people can be -- noncitizens can be removed from this country,  
23 the procedures for removals, and the protections in place for  
24 noncitizens who fear prosecution or torture if they're removed.  
25 That comprehensive regime occupies the field.

1 Texas largely disregards the standard for field  
2 preemption, the federal interests, and this comprehensive  
3 legislative scheme that is in place. Instead they make a  
4 series of arguments against field preemption, none of which has  
5 merit.

6 First, they try and redefine the field. They argue  
7 that perhaps the field is all of immigration law, or more  
8 narrowly, that it's misconduct by noncitizens after they've  
9 entered the United States.

10 Neither of those is correct. We have a very narrow  
11 field we've identified, and that's the entry and removal of  
12 noncitizens from the United States.

13 Texas has also argued that we don't have any case law  
14 supporting the notion that federal power in that field is  
15 exclusive. But that's not correct. We have cited an abundance  
16 of cases saying that federal power with respect to entry and  
17 removal is exclusive.

18 The Fifth Circuit said that in the docket decision. I  
19 can quote from that. They said, "Policies pertaining to the  
20 entry of aliens and their right to remain here are entrusted  
21 exclusively to Congress." You can't get much clearer than  
22 that. The Supreme Court has said the same thing in the Hines  
23 case, the Truax case, which we cite and which Texas does  
24 acknowledge, the Alabama case we cited makes the same point,  
25 the Takahashi case makes the same point.

1           We've also pointed the Court to four Court of Appeals  
2 decisions that have considered field preemption with respect to  
3 a provision of federal law that is adjacent to the primary  
4 provisions that we're looking at here.

5           Here in U.S.C. Section 1325 and 1326, so the federal  
6 provisions that govern unlawful entry and unlawful reentry of  
7 noncitizens, we've cited four Court of Appeals decisions  
8 dealing with Section 1324, the adjacent provision, which is the  
9 federal transportation in a harbor prohibition.

10           And there, the courts of appeals have been unanimous,  
11 that that provision is still preemptive of state laws that are  
12 roughly parallel to that federal provision.

13           Here we have the same dynamic. We have a state law,  
14 SB4, that is, in some respects, parallel to the federal  
15 provisions.

16           Now, as I'm going to discuss next when we get to  
17 conflict preemption, it's not parallel. In all respects there  
18 are very important conflicts, but it's, in some respects,  
19 parallel.

20           And the courts of appeals have been unanimous that  
21 1324 is still preemptive, and we think your Honor should find  
22 that 1325 and 1326, plus the array of other legislation  
23 governing admissibility and removal, is still preemptive as  
24 well.

25           Texas has argued that the INA somehow contemplates

1 that states would enact legislation governing entry and removal  
2 but they don't cite any provision of the INA in support of that  
3 proposition. Instead they just point to some provisions that  
4 allow state officials, in some circumstances, to cooperate with  
5 DHS in the enforcement of federal law. They don't cite any  
6 provisions saying that a state can enact its own legislation  
7 governing entry and removal.

8 THE COURT: Counsel, it's -- it's my understanding  
9 from carefully reviewing your papers that the United States is  
10 not seeking to enjoin, in this case, the State of Texas'  
11 ability to cooperate with the United States; am I correct?

12 MR. BOYNTON: You're correct, your Honor. We are not  
13 seeking to enjoin efforts by state law enforcement to cooperate  
14 with the federal government in enforcement of federal law.

15 What we're seeking to enjoin is the legislation  
16 they're asking for, is the act by Texas to enact that law that  
17 we're seeking to enjoin.

18 THE COURT: Okay. So the -- as I understand it, it  
19 all boils down to what you call -- how we define supplement,  
20 right?

21 So you would, I assume, define supplement to mean that  
22 if, for instance, a border patrol agent -- not a border patrol  
23 agent, a DPS agent, Department of Public Safety officer, were  
24 driving along somewhere near Del Rio and there was a car that  
25 was weaving back and forth and he pulled that car over, and it



1 appeared to him that there were undocumented individuals in  
2 that car, he could then notify -- first of all, he could arrest  
3 him if he was drunk driving, drunk driving, regardless of  
4 whether they were undocumented or not. But he could also  
5 notify the immigration authorities, federal immigration  
6 authorities, for them to come pick these people up; am I  
7 correct, you wouldn't have a problem with that?

8 MR. BOYNTON: No, your Honor. State law enforcement  
9 can detain someone for violations of state law and then could  
10 provide notice to DHS if they believe that somebody is an  
11 unlawful noncitizen.

12 But this case is not about enforcement efforts at all.  
13 It's just focused on the legislation SB4.

14 THE COURT: Well, the State has put a lot of emphasis  
15 on the fact that they need to enforce the law because the  
16 federal government, allegedly, is not enforcing the law.

17 MR. BOYNTON: Yes, your Honor. They made this  
18 argument that they have a defense to field preemption because  
19 they contend that the federal government has abandoned the  
20 relevant field. That's not correct as a factual matter.  
21 There's been no abandonment here.

22 In just the portion of 2023, after the Title 42 order  
23 lifted in May, that portion from May through November of '23,  
24 DHS removed over 400,000 individuals. If you go through  
25 December, it was 472,000 individuals. That's more individuals

1 removed than in any single year since 2015. So there's no  
2 factual basis.

3 But more fundamentally, this is totally irrelevant to  
4 the field preemption argument. Field preemption looks at what  
5 Congress has done. Has Congress enacted legislation that  
6 occupies the field? Here we've explained that Congress has and  
7 Texas has little response to that.

8 And so their critiques of enforcement efforts are  
9 completely irrelevant to the field preemption argument. They  
10 make one other argument that's irrelevant to field preemption,  
11 which I'll touch on quickly and then I'd like to move to  
12 conflict preemption.

13 They also say that because there are some parallels  
14 between SB4 and Section 1325 and 1326, the federal statutes,  
15 there can be no field preemption. But that's not how field  
16 preemption works.

17 The Supreme Court in Arizona made clear that even  
18 complementary state legislation is displaced if you have field  
19 preemption. It's different in that respect from conflict  
20 preemption.

21 So let me turn now to conflict preemption. That's an  
22 independent reason why SB4 should be held to be preemptive.

23 Now, we've identified six different categories of  
24 conflicts between SB4 and federal law. Texas has very little  
25 response to any of them.

1 First conflict is at a macro level. The INA makes  
2 clear that states do have some role to play in cooperation with  
3 the federal government with respect to enforcing the  
4 immigration laws. But the INA nowhere gives states the right  
5 to pass legislation independently regulating entry and removal  
6 of noncitizens.

7 So that careful scheme laid out in the INA giving  
8 states a limited role but not permitting them to enact  
9 legislation like SB4 preempts SB4. The Supreme Court in  
10 Arizona reasoned just that way with respect to Section 6 of the  
11 law at issue in Arizona.

12 The second conflict accepts for a minute Texas's  
13 argument that SB4 is parallel to 1325 and 26. We think it's  
14 not parallel, but even if it were, there's still a conflict in  
15 this unique field of immigration where the federal interests  
16 are so strong, there are foreign affairs implications of how  
17 federal laws are prosecuted.

18 And in this field, the Supreme Court in Arizona made  
19 clear the federal government needs to have the discretion to  
20 decide how to enforce the law, and states can't enact even a  
21 mirror of state law, and then try to enforce that law in a way  
22 that could conflict with the federal government's exercise of  
23 discretion. So that's the second conflict.

24 In addition to Arizona, we've cited four Court of  
25 Appeals cases that make the same point with respect to state

1 laws mirroring Section 1324.

2           The third conflict has to do with the protections  
3 afforded to noncitizens in federal law. There's an elaborate  
4 scheme under federal law for how a noncitizen who fears  
5 prosecution or torture if they're removed is able to raise  
6 certain defenses. They can claim asylum, they can claim  
7 withholding or removal or protection under the Convention  
8 against Torture. There is no analogue to any of that in SB4.

9           SB4 allows a state judge to order somebody removed  
10 from the country for having unlawfully entered, without  
11 providing them any protection equivalent to asylum, withholding  
12 and CAT. There's even a provision of the law that says that a  
13 prosecution won't be abated because a noncitizen is seeking  
14 protection under federal law.

15           The only portion of SB4 that addresses this is that  
16 Section 5102 says that if a noncitizen has affirmatively been  
17 granted asylum, that's a defense in their case.

18           But what we've posited is the problem here arises that  
19 someone gets arrested by Texas for unlawfully entering, they're  
20 sentenced, and then after their conviction, after their  
21 sentence runs, they then have to be removed from the country by  
22 Texas.

23           At that point, they have not had a chance to claim  
24 asylum from the federal government so they won't have asylum  
25 and they certainly won't have had asylum at the time they were

1 convicted for violating SB4. And so there's nothing in SB4  
2 that affords people the rights they have under federal law.

3 SB4 also disregards the elaborate scheme under federal  
4 law for designating where someone should be removed. SB4 says  
5 everyone who crosses unlawfully, whether they're Mexicans or  
6 non-Mexicans, will be returned to Mexico, the country from  
7 which they entered. That's not how it works under federal law,  
8 and for good reason.

9 Mexico is not willing, except in certain  
10 circumstances, to take back non-Mexicans. It would be like if  
11 Mexico were trying to expel Guatemalans to the United States  
12 who crossed unlawfully into Mexico. You can't just do that  
13 without Mexico's agreement, and federal law makes that clear.

14 SB4 disregards those limits entirely.

15 Fourth conflict, SB4 requires judges to determine  
16 whether a noncitizen prosecuted has lawful presence. It's one  
17 of the defenses to -- in Section 51 --

18 THE COURT: You're talking about immigration judges at  
19 one level and then Article III federal judges at another level.

20 MR. BOYNTON: Yeah, so we're talking about -- here at  
21 SB4 it would be state judges here in --

22 THE COURT: I thought you were talking about the  
23 scheme, the federal scheme.

24 MR. BOYNTON: Right. The federal scheme, correct, you  
25 have immigration judges who are making determinations about

1 asylum, withholding, protection under the Convention against  
2 Torture.

3 THE COURT: And then the B.02, a duly appointed  
4 Article III judge, under the powers of Article III, where they  
5 cannot be removed from office, would be circuit court judges.

6 MR. BOYNTON: Correct, your Honor. The petition for  
7 review is directly and --

8 THE COURT: Particularly in Texas, they're subject to  
9 election.

10 MR. BOYNTON: Regardless of how they're appointed or  
11 removed, the Fifth Circuit has made clear in the Farmers Branch  
12 case that you can't have state judges trying to figure out  
13 whether someone is lawfully present.

14 That's a term that is not actually defined in federal  
15 immigration law, and there's no mechanism under SB4 for state  
16 judges to get some definitive determination of whether someone  
17 is lawfully present. Farmers Branch says that's another  
18 conflict.

19 And then finally, I'd just like to point out a couple  
20 other deviations between SB4 and federal law.

21 The second provision of SB4, 5103, is the unlawful  
22 reentry provision, and it says that someone who is found in  
23 Texas after having previously been removed violates the  
24 unlawful reentry statute on the theory that they must have  
25 unlawfully reentered again because they've been found in the

1 state.

2 But there's no defense for someone who's affirmatively  
3 permitted to enter the United States by the federal government.  
4 If DHS were to parole someone in, Texas would prosecute them  
5 because they found them in the state, and they would prosecute  
6 them even though the person had permission to enter. That's a  
7 stark conflict between SB4 and federal law.

8 So in the face of these conflicts and field  
9 preemption, Texas resorts to a different and novel argument  
10 under the constitutional provision that generally restricts  
11 states from engaging in war.

12 The state war clause says states generally can't  
13 engage in war. But there's an exception if there's an  
14 invasion. This Court has already dealt with that issue in  
15 another case so I know you're familiar with it, but there have  
16 been some developments since then so I'd like to touch on this  
17 argument briefly.

18 We think it's incorrect for five different reasons.

19 First of all, there's no invasion here. We have four  
20 courts of appeals that have -- three courts of appeals, the  
21 Second Circuit, the Third, and one other have considered -- and  
22 the Ninth -- have considered this exact issue. Can the influx  
23 of unlawful migration over the border constitute an invasion  
24 for constitutional purposes?

25 They've all rejected the argument. They said that's

1 not the kind of armed hostility by a political entity that  
2 constitutes an invasion. It seems very clear we're nowhere  
3 near an invasion here. So that's the first reason to reject  
4 this argument right at the threshold.

5 Second, Texas is not engaging in war by enacting SB4.  
6 They've enacted a criminal provision that calls for the removal  
7 of people to Mexico. Under no ordinary understanding is that  
8 engaging in war.

9 Third, Texas has not justified the next step of their  
10 argument, that even if they're allowed to engage in war, that  
11 they're allowed to violate any federal law in the process of  
12 doing that.

13 The state war clause is generally a restriction on states.  
14 It says they can't engage in war. There's an exception that  
15 lifts the restriction in the case of invasion. But it's not an  
16 affirmative authorization to engage in war in disregard and in  
17 conflict with any existing federal law that might govern. So  
18 this argument, even if you were to accept the invasion and war  
19 part, doesn't justify SB4 disregarding federal law.

20 Fourth, and this is a point you touched on in your prior  
21 decision, any authority Texas has under this clause is  
22 time-limited. In theory, they could take some action in the  
23 face of an actual invasion to try to repel it. But that's a  
24 time-limited authorization at best.

25 And then finally, there's the political question doctrine,



1 and that's an issue I know you're familiar with, you touched on  
2 in your prior decision. It's also one that a number of judges  
3 from the Fifth Circuit in a recent order denying mandamus  
4 touched on as well. They focused on this political question  
5 element. They talked about the invasion defense generally.

6 I don't read that decision as saying the invasion argument  
7 generally works. But there was some language in it that  
8 suggests that at least those five judges, not the rest of the  
9 court but those five judges, have questions about the political  
10 question doctrine's applicability.

11 And they said what their -- one strand of political  
12 question doctrine is whether the Constitution commits a  
13 decision to a particular branch of government. And if so,  
14 then maybe courts can't decide that issue if it's textually  
15 committed to a different branch.

16 What the judges in that concurrent dissent notes -- it's a  
17 dissent -- has said was that here it doesn't make sense to say  
18 the question is politically committed to the federal  
19 government, because if a state's been invaded and they have to  
20 defend themselves, they shouldn't have to wait for Congress to  
21 authorize it.

22 Even if you were to accept that argument, and we actually  
23 think that argument's incorrect, but even if you were to accept  
24 it, there's a different political question problem, which is  
25 the lack of judicially manageable standards in determining

1 what's an invasion.

2 This is an easy case. It's very clear that what's  
3 happening here isn't an invasion, but you could imagine tough  
4 cases where it's hard to know whether something is an invasion.

5 But even on the textual commitment point, you have to look  
6 at the different constitutional clauses together. There's the  
7 clause Texas relies on, Article 1, Section 10, Clause 3, but  
8 there's another one, which is Article 4, Section 4, that says  
9 the federal government has responsibility to come to the  
10 assistance of states if there's an invasion.

11 When you think about that clause, it makes a lot of  
12 sense that the federal government is going to make that  
13 determination.

14 Invasions are also relevant to the suspension of habeas  
15 clause as well. And there, no one would think that the  
16 discretion to decide whether there's been an invasion should be  
17 vested in the state government rather than the federal  
18 government.

19 I'm checking my time, your Honor, looks like I'm doing all  
20 right.

21 I'd like to turn, then, to our foreign commerce clause  
22 argument. The Fifth Circuit in the Piazza Seafood case makes  
23 clear what the governing standard is, and if you have a law  
24 that discriminates against foreign commerce, that's  
25 unconstitutional.

1           Additionally, if you have a law that regulates foreign  
2 commerce, even in a nondiscriminatory way, it raises  
3 constitutional concerns if it impedes the federal government's  
4 ability to conduct foreign affairs.

5           Generally, we have both of those things. We have  
6 nondiscrimination and an intrusion into the federal  
7 government's conduct of federal affairs.

8           SB4 regulates noncitizens in Mexico coming into the United  
9 States. It doesn't regulate U.S. citizens. So it's, on its  
10 face, discriminatory.

11           It also burdens the federal government's conduct of foreign  
12 affairs for all the reasons we've set forth in our briefing,  
13 including the declaration from the Department of State, which  
14 runs through the interference.

15           Mexico objects to SB4. This is impeding our ability to  
16 negotiate with Mexico and other partners in the hemisphere to  
17 deal with immigration issues.

18           And there's a real concern as well about reciprocal  
19 treatment of Americans. If a state can treat noncitizens in  
20 ways that Mexico finds objectionable, it opens up American  
21 citizens abroad to mistreatment as well.

22           Texas doesn't really respond to either of these.

23           Instead of disputing that there's discrimination against  
24 foreign commerce, they argue, well, there's actually just no  
25 commerce at all, because they say this is just a movement of

1 people.

2 We've cited numerous cases, however, that the movement of  
3 people is commerce and affects commerce. That's very  
4 well-established and Texas doesn't have any case law going the  
5 other way, that I'm aware of.

6 They also don't really dispute that this is comparing our  
7 foreign affairs. All they say is that it doesn't matter if  
8 Mexico objects to this law because Mexico should be doing more,  
9 in their view, to stop unlawful migration.

10 But that's not the relevant test here. The test is whether  
11 there's a burden on the United States' ability to conduct  
12 foreign affairs.

13 So then stepping past our affirmative arguments under  
14 preemption in the commerce clause, Texas has raised a couple of  
15 additional defenses that I want to briefly touch on.

16 They've argued that the United States doesn't have a cause  
17 of action to sue at all. They don't cite any cases, though,  
18 saying that the United States lacks the cause of action to sue  
19 to enjoin a preemptive state law.

20 The United States does this quite frequently when  
21 necessary. The Arizona decision, the Supreme Court decided --  
22 was a lawsuit by the United States against Arizona in exactly  
23 the same circumstances we're facing here. No one there  
24 questioned whether the United States had a cause of action.

25 We similarly brought actions against Alabama and

1 South Carolina, and some of the cases the parties have cited  
2 here, no question that there was a cause of action.

3 Texas relies primarily on the Armstrong decision from the  
4 Supreme Court, and that decision discusses whether the  
5 supremacy clause itself gives rise to a cause of action in a  
6 suit by private parties.

7 That was a case where some providers, healthcare providers,  
8 were trying to sue to get greater reimbursement under Medicaid.

9 And what the Supreme Court said is they can't challenge the  
10 state reimbursement levels as a violation of the supremacy  
11 clause under the supremacy clause. The supremacy clause  
12 doesn't provide the cause of action.

13 Now, they could have a cause of action in equity. And the  
14 Supreme Court reaffirmed that generally equity does provide a  
15 cause of action.

16 THE COURT: That case didn't involve the United  
17 States.

18 MR. BOYNTON: Correct.

19 THE COURT: The United States was not a plaintiff in  
20 the case.

21 MR. BOYNTON: Correct, your Honor.

22 And what was critical is that Congress had displaced  
23 the cause of action in the Medicaid statute itself by providing  
24 a limited cause of action.

25 Here we have nothing in the INA that displaces the

1 United States' ability to bring a cause of action in equity to  
2 enjoin this preemptive law.

3           Then additionally, Texas has raised an abstention  
4 argument urging this Court to abstain from hearing the case.  
5 We think that argument fails for at least three reasons.

6           First, we cite case law that abstention principles  
7 don't generally apply when the United States is bringing a  
8 lawsuit.

9           Second, Pullman abstention, which is the variety of  
10 abstention they've invoked, that applies when there is a  
11 constitutional challenge to a law and there's a question about  
12 whether the law could be interpreted in a way to avoid the  
13 constitutional challenge.

14           There's case law saying that that doesn't apply when  
15 you have a preemption challenge, like we're bringing here, as  
16 opposed to a straight constitutional challenge.

17           But then finally and most fundamentally, there's  
18 nothing about SB4 that is ambiguous in a way that affects our  
19 challenges here.

20           Our field preemption challenge is -- looks at SB4 as a  
21 whole. It says that a state cannot be involved in regulating  
22 the entry and removal of noncitizens. And nothing about the  
23 particular ways in which SB4 is interpreted or applied is going  
24 to have any relevance to that argument.

25           The same is true about at least some of our conflict

1 preemption arguments. It doesn't matter what the circumstances  
2 are or how SB4 is interpreted. There's still a conflict with  
3 federal law. So we don't see any basis to abstain.

4 For all those reasons, we think we've shown the  
5 likelihood of success on the merits. We also think that we've  
6 satisfied the remaining preliminary injunction factors. We've  
7 shown irreparable injury to the United States.

8 The fact that SB4 is preemptive by itself is per se  
9 injury to the United States. We've explained that in our  
10 briefing. Texas is not opposed to that in their opposition.  
11 Additionally, as we've discussed a little bit, SB4 interferes  
12 with foreign affairs. It also interferes with DHS operations.

13 On the other side of the ledger, we think any injury  
14 to Texas could be addressed through other means. There are  
15 mechanisms in the INA for Texas to cooperate with DHS if Texas  
16 wants to do more to contribute to enforcement of the federal  
17 immigration laws. And nothing prevents Texas from taking the  
18 step that 26 different counties have done in entering into  
19 agreements under 1357G to aid the federal government in  
20 immigration enforcement.

21 And then finally, the public interest tips sharply in  
22 our favor. There's very little interest in enforcing a  
23 preemptive law. There's a significant impact that this law  
24 will have against noncitizens, and the harms to Texas are ones  
25 that we think, in the balance, are outweighed by the harms from

1 enforcement of SB4.

2           So for all of these reasons, your Honor, we urge you  
3 to enjoin SB4 and to do so obviously before the law takes  
4 effect on March 5th.

5           THE COURT: Thank you very much, Counsel.  
6 Counsel.

7           Please watch your time so that you don't intrude on  
8 the time you have for rebuttal.

9           MR. BALAKRISHNAN: Of course, your Honor.

10           Anand Balakrishnan from the ACLU on behalf of  
11 Las Americas, American Gateways, and the County of El Paso.

12           My clients, your Honor, are clearly not the federal  
13 government and not the state, but SB4 is going to place them in  
14 an impossible situation of being stuck between competing  
15 regulations of immigration in the state of Texas.

16           I just want to speak very briefly and raise three  
17 points. I don't want to repeat arguments that Mr. Boynton has  
18 made. But I want to sort of address three points here from the  
19 perspective of our clients who are coming in affected by SB4 in  
20 a different way than the federal government.

21           The first point I wanted to make is the huge impact  
22 that SB4's removal provision is going to make to noncitizens in  
23 the State of Texas.

24           Once -- you know, before SB4, the only way noncitizens  
25 could be removed from the United States was through the system



1 the federal government has created which, of course, starts a  
2 balance between enforcement and forms of relief. Some of those  
3 forms of relief, which have existed for decades in the United  
4 States, are humanitarian protections to protect people from  
5 being deported, to persecution, torture or even death in other  
6 countries. SB4 provides for no such forms of relief, and, in  
7 fact, directly interferes with the system the federal  
8 government has created.

9 THE COURT: The odd thing about this, from your  
10 client's perspective, is that frequently your clients, the  
11 ACLU, have been quite critical of the federal government for  
12 being too harsh in and too quick to remove people from the  
13 United States.

14 MR. BALAKRISHNAN: Absolutely, your Honor. But you  
15 know, our positions on the federal government policies are very  
16 different than what the state is doing here, which is  
17 completely -- and I agree with the federal government in this  
18 instance -- the state has no authority to legislate or operate  
19 in the entire field of removal or, you know, governance of  
20 entry into the country.

21 But I do think -- I just want to make one very quick  
22 point so it's clear about the way that SB4 operates. Take, for  
23 example, a noncitizen who is arrested and placed under SB4 the  
24 state has created. At the end of that proceeding, they will  
25 have a conviction for state illegal entry, they'll have a state

1 removal order.

2           If they refuse to cooperate with that removal order  
3 and don't leave the United States, they're subject to up to 20  
4 years of incarceration in the state prison system.

5           THE COURT: Well, they can't refuse. They get taken  
6 to the border and good-bye. It's the same thing the border  
7 patrol does.

8           MR. BALAKRISHNAN: Exactly, and that puts them --

9           THE COURT: The border patrol doesn't cross into  
10 Mexico and take them to their house.

11           MR. BALAKRISHNAN: Right. They could be forced out.  
12 They could be told, either you leave or we put you in prison  
13 for 20 years. In either case what that means is that they're  
14 unable to access the relief that the federal government has  
15 provided to them or they're punished for doing so. This is the  
16 first very quick point I wanted to make.

17           I just wanted to make one other brief point before  
18 sitting down and saving my time for rebuttal. I do think that  
19 an important issue here as well is that this doesn't just have  
20 to do with people who are arrested and detained. It also has  
21 to do with people -- noncitizens and their citizen families  
22 living in the community in places like the County of El Paso.

23           So the federal government, for example, has created --  
24 the federal government knew that there was a problem there.  
25 Victims of crime who are noncitizens were not reporting the

1 crimes, were not cooperating with law enforcement because they  
2 were afraid of being deported.

3 So it created specific visas for victims of domestic  
4 abuse and for victims of human trafficking. And it said if you  
5 go to a state, local, or federal law enforcement officer and  
6 you report the crime and you cooperate in the investigation and  
7 prosecution of the crime, we will -- you are eligible for a  
8 specific visa. Make sure that these crimes are investigated  
9 and prosecuted. And, you know, the organizations who are  
10 clients here regularly assist people through that process.

11 But the problem with SB4 is they've -- you know, the  
12 organizations in the county have already heard this. People  
13 don't think that if they go to a local law enforcement officer  
14 or a state officer, they're going to be arrested, deported, and  
15 if they're not deported by the state, incarcerated for 20  
16 years.

17 That's a huge issue for public safety for citizens and  
18 noncitizens, and, of course, important to all of the clients,  
19 including the County of El Paso itself.

20 With that, I'll stop, unless your Honor has any  
21 questions, and otherwise, I'll save my time for rebuttal.

22 Thank you.

23 THE COURT: Thank you, sir.

24 All right. So we have now heard from -- I don't  
25 believe there's anybody else who's going to argue for the

1 movant.

2 MR. BOYNTON: Correct, your Honor.

3 THE COURT: All right. We're going to take a  
4 10-minute recess to give my reporter an opportunity to rest her  
5 hands and to use the restroom, if necessary, and get a drink of  
6 water so we get a good transcript for the State of Texas.

7 Thank you very much. We will stand in brief recess.

8 (Recess was taken.)

9 THE COURT: I forgot to mention this at the beginning.  
10 I know that you see me over here with something to drink. I  
11 can assure you that I'm not trying to somehow be a prima donna  
12 up here on the bench. Many years ago I had a small vocal cord  
13 cancer which fortunately they caught in time, but the  
14 requirement is that you have radiation therapy.

15 Once you have radiation therapy, it does a job on your  
16 vocal cords, and so I have to keep my vocal cords hydrated with  
17 warm liquid or else I lose my voice. So that's the reason I  
18 have this up here. I'm not just sitting up here sipping away  
19 on coffee, I can assure you.

20 Counsel -- counsel, before we start, I do want you to  
21 please take me there -- yeah, go ahead. I want to say that  
22 this Court is not unsympathetic with the concerns which have  
23 been raised by Governor Abbott and other officials in the state  
24 of Texas or the Texas legislature. I personally have sat as a  
25 United States District Judge on the border for decades, long

1 before even I came here.

2 I sat at the United States District Court for the  
3 Southern District of California in San Diego. You can step  
4 outside of the courthouse, get on a trolley, in three minutes  
5 you're in Tijuana, Mexico.

6 I sat in Arizona for 20 years by designation, on and  
7 off, in Tucson and Phoenix. Those are hot spots for  
8 undocumented immigration.

9 I also, here in the Western District of Texas, sat for  
10 two years in Del Rio, Texas, which is precisely what we're  
11 talking about here, as a United States District Judge. I sat  
12 down there with now Chief Judge Alia Moses.

13 So I am very familiar with the concerns that have been  
14 raised and to some substantial degree agree with those  
15 concerns. And so I don't want it to be suggested that somehow  
16 I am not in any way, shape or form unaware of the issues that  
17 Texas raises. I have seen them for myself.

18 So are you ready to proceed, sir?

19 MR. TEBO: I am, your Honor. Thank you.

20 THE COURT: Are you going to be making the entire  
21 argument yourself, or are you going to be splitting it with one  
22 of your colleagues?

23 MR. TEBO: I'm just going to be doing it myself,  
24 your Honor.

25 THE COURT: The ladies and gentlemen don't know this,

1 but with the exception of some of the government's counsels,  
2 these folks from Texas and other places and I are well aware of  
3 each other and are friends. They've been in my court many  
4 times and Texas has won some big cases in front of me, so we're  
5 not unfamiliar with each other.

6 Go ahead, Counsel.

7 MR. TEBO: Thank you, your Honor. It's great to be  
8 here in your courtroom again.

9 I wanted to -- so I think this -- the key thing to  
10 understand in this case as it's been litigated so far is that  
11 this is a preenforcement facial challenge. This law has not  
12 gone into effect, and that has lots of problems and we've seen  
13 that in the way this has been litigated so far.

14 There have been a lot of assumptions, including today,  
15 even after some of the briefing that we've submitted that  
16 somehow aliens under SB4, if they're being detained or  
17 incarcerated by the State, that they will not be able to access  
18 federal immigration protections like asylum or consent by the  
19 Secretary of Homeland Security and the like.

20 Now, the way that that's done is that they said, well,  
21 SB4 itself does not -- at least some of those provisions have  
22 an explicit provision that says those are available, but that's  
23 not how we interpret laws.

24 There's lots of things -- SB4 doesn't say that people  
25 get a jury trial, either. Those are from other sources of law.

1 We look at the entire Corpus Juris, the body of law, and that  
2 includes federal law.

3 In Texas, the state courts, there's a canon  
4 construction in the state code that says, "Penal Code  
5 provisions are to be construed by the courts to be consistent  
6 with both the state and the federal constitution, and that  
7 includes preemption."

8 Defendants can raise preemption as a defense in state  
9 courts as applied for facial. That happens in state criminal  
10 cases. And to the extent there's any ambiguity, the State  
11 applies the rule of lenity in interpreting criminal provisions  
12 in favor of the defendant.

13 So if, for example, there's uncertainty about what is  
14 meant by lawful presence as a defense, because there are --  
15 that definition exists in several different categories of  
16 federal law for different purposes. For benefits -- for  
17 benefits and for provisions of the -- criminal provisions of  
18 the INA.

19 But to the extent there is any ambiguity, that is  
20 always going to be interpreted in favor of the criminal  
21 defendant.

22 We have a declaration from the Texas Department of  
23 Criminal Justice, the Chief of Staff, Jason Clark, that talks  
24 about how -- I mean, right now, this is -- it's not unusual --  
25 SB4 is not the first time that the State of Texas is going to

1 have illegal aliens in its custody and its prisons. Texas has  
2 a lot of illegal aliens in its prisons.

3 It does not in any way forbid them from accessing  
4 federal immigration hearings or officials. It provides forums  
5 for them. It allows nonprofit lawyers to come and access them.

6 THE COURT: Well, if someone, an undocumented alien,  
7 crosses the border -- and by the way, I am not buying into this  
8 argument that all undocumented aliens are criminals. In fact,  
9 the vast, huge majority of undocumented aliens are law-abiding  
10 individuals, except for the fact that they crossed the border  
11 illegally, which, of course, is a violation of the law, federal  
12 law.

13 But let's assume we have somebody that has violated --  
14 go to drunk driving. They go drunk driving. They get caught  
15 drunk driving. Well, they're subject to state prosecution for  
16 being a drunk driver and they can go to state prison.

17 And when they get out of state prison, what happens  
18 generally, in fact a hundred percent of the time under current  
19 law, is that the State of Texas, the county or wherever it  
20 happens to be, will turn them over to the federal government  
21 who will either prosecute them for being an undocumented alien  
22 or deport them. That's what happens now.

23 So obviously, if somebody were an undocumented alien  
24 who committed a burglary, which is a, you know, a serious  
25 felony, they could end up in state prison somewhere for several



1 years. And at the end of that term of imprisonment, the State  
2 would notify the immigration authorities, the immigration  
3 authorities would put a detainer on that individual, and then  
4 that individual would be subject to, again, prosecution by the  
5 federal government for -- not for the burglary, because that's  
6 a state crime, but for being an undocumented alien and/or they  
7 would be deported to whatever country they came from. If they  
8 came from Guatemala, they would go back to Guatemala.

9 So I think you would agree with me there; would you  
10 not?

11 MR. TEBO: I would, with one caveat, your Honor. And  
12 this is in the declaration of Jason Clark from TDCJ. It's  
13 actually very early in the process where we cooperated with the  
14 federal government. So as soon as someone comes into custody  
15 of the Texas Department of Criminal Justice and they're  
16 suspected to be an alien and not a U.S. citizen, they -- then  
17 there's like an interview inside the TDCJ with the person in  
18 custody.

19 Then they reach out to ICE, they run checks through  
20 their system, they notify ICE, and typically ICE will place a  
21 detainer early in the process, even before they're about to be  
22 released, just to say, okay, when these -- before releasing  
23 this person out after he's served his sentence, we'll take him  
24 into custody.

25 THE COURT: But the federal -- excuse me, I didn't

1 mean to interrupt you.

2 MR. TEBO: No, go ahead.

3 THE COURT: I didn't mean to talk over you. The  
4 federal government would not have, in my view, the authority --  
5 he comes in, commits a burglary in Texas -- to just say, well,  
6 I'm sorry, Texas, you can't prosecute that burglary. That's a  
7 state crime, and the State of Texas has the right to prosecute  
8 that individual.

9 And once they do, they choose to do so, and it's been  
10 done, regardless of when the detainer is put on -- and you may  
11 be absolutely right. I've had it both ways, to be honest with  
12 you. I just sentenced some guy to -- for having committed --  
13 he had committed a crime in Texas. He had been in jail in  
14 Texas, he got indicted by the feds for being an undocumented  
15 person, second time coming back, came to my Court, I sentenced  
16 him, and then he will be deported when he finishes his federal  
17 term of imprisonment.

18 So the State of Texas has not lost its sovereignty  
19 here in terms of being able to prosecute these individuals.

20 Nobody -- if the federal government in this case is  
21 suggesting that somehow undocumented aliens are immune from  
22 prosecution in Texas, that's an argument they're going to lose  
23 in this court. But I don't think that's their argument.

24 MR. TEBO: Your Honor, I would say that their argument  
25 about field preemption comes pretty close to that. Because,

1 for example, as your Honor is aware, the State of Texas has  
2 been prosecuting over the last few years under Operation Lone  
3 Star for public criminal trespass when aliens cross and they  
4 come onto state or private land and they're trespassing.

5 So under their theory about field preemption, anything  
6 about entering -- so when these people enter and they enter  
7 into Texas and they're on either state or private land and  
8 they're trespassing and we are prosecuting them, I don't know  
9 what difference it would be to the government of Mexico, if  
10 it's a Mexican national, for us to proceed under that provision  
11 of Texas law as opposed to SB4. It seems like it's the same  
12 effect.

13 THE COURT: Well, yes, but there's -- Counsel, you  
14 made a very good point. But there is a -- there is a  
15 difference in the sense that under SB4 -- what you're talking  
16 about here is somebody crossing over, they're found in Texas  
17 and Texas then charges them for being in trespass, okay.

18 That isn't the issue that's in front of me today,  
19 okay. I don't know who has that issue. We have so many  
20 federal judges around here. Judge Moses has got one case,  
21 Judge Pitman, something else. There's all kinds of cases  
22 floating around involving these issues. And that is -- believe  
23 me, I'm trying to cabin my case as narrowly as I possibly can.

24 I think -- I'll wait to hear from the Government. I  
25 don't know whether they're going to take issue with that, but

1 SB4 goes far beyond that. Otherwise, the state legislature  
2 wouldn't need to pass SB4 in their own -- I mean, why pass a  
3 law? So the law that they passed gives the State the right to  
4 not only arrest these people and put them in jail -- currently,  
5 what they do is they turn them over to the federal government  
6 and the federal government deports them.

7 It would give them the right to take them and put them  
8 before -- I don't know what you would call the state judges,  
9 state immigration judge, I don't know. A state judge could  
10 then order them to be deported and sent across the border, and  
11 that is very different than what now exists.

12 Because if it was what Natalie says, there would be no  
13 SB4.

14 MR. TEBO: Your Honor, I would say, you know, this  
15 is -- it is not the same as removal, the orders to return.  
16 What the Court does is it does order the alien, upon completion  
17 of a sentence, to be returned to the country he entered from,  
18 which would be Mexico in any case, your Honor.

19 But we have a declaration from Victor Escalon from  
20 DPS, from the Department of Public Safety, which is the agency  
21 that would be responsible for monitoring compliance with this  
22 order when it is to be executed, and he has said that the way  
23 that this is done is they cooperate, they contact the  
24 authorities in Mexico, which they have a working relationship  
25 already with the Mexican national government and the states

1 that are adjacent to Texas, Mexican states, and with CBP,  
2 Customs and Border Protection.

3 They will escort the aliens to the port of entry, and  
4 they will -- if it's -- if Mexico says they will not take this  
5 person, there is no attempt to forcibly push that -- put that  
6 person into Mexico.

7 The compliance -- according to Mr. Escalon's  
8 declaration, the monitoring for compliance is complete when  
9 that person is escorted toward the Mexican side of the port of  
10 entry, and if Mexico does not agree to let that person in, that  
11 is the end of the matter and that is the end of compliance and  
12 that person would not be prosecuted.

13 THE COURT: They would be prosecuted; wouldn't they?

14 MR. TEBO: No, your Honor.

15 THE COURT: What if they walk away? They say, well,  
16 Mexico doesn't want me. I'm from Honduras, they don't want me.  
17 We get a lot from Honduras. We get a lot from Guatemala. They  
18 don't want me. They just get to go back into Del Rio and enjoy  
19 a good life?

20 MR. TEBO: Your Honor, they would go to CBP, Customs  
21 and Border Protection officers there at the American side of  
22 the port of entry. But because it was not -- we have -- there  
23 are mens rea requirements throughout the criminal law.

24 THE COURT: See, one of the big problems here is  
25 that -- or one of the issues here is that a little more care --

1 and by the way, this happens with federal laws also. In fact,  
2 maybe a lot more here. It could have gone into drafting this  
3 statute.

4 Basically, you are left with attempting to defend the  
5 law, not of what the law says, but what somebody else says they  
6 intend or hope to do about it. We don't know. This person  
7 could be there. He could retire tomorrow. We don't know.

8 And it makes it very difficult for courts under those  
9 circumstances. I have to rule on what the law says, not what  
10 maybe somebody thinks they're going to do or not do. And  
11 that's -- it's a very -- it's a difficult problem for the  
12 Attorney General of Texas now to be put into the position of  
13 attempting to defend the law, not on what it says will happen  
14 or should happen or must happen, but, you know, yeah, well, we  
15 understand that this is what the law says, but actually, we're  
16 going to do something a little different.

17 MR. TEBO: Well, your Honor, I would say, I think two  
18 points on that. One is federal law is part of state law, and  
19 this is a norm in the way that Texas courts interpret state  
20 laws to be consistent with federal law. That's why people can  
21 raise preemption as a defense.

22 So this is not saying we should ignore SB4.

23 THE COURT: Does SB4 say anything about preemption as  
24 a defense?

25 MR. TEBO: It does not, but it doesn't have to. It

1 also doesn't say they have a right to a jury trial, either.  
2 These are from other sources of law in the state.

3           The other point I would make is that in Arizona versus  
4 U.S., the case that is probably the most talked about by all  
5 sides in these cases, it ruled on something similar to this  
6 where it refused to rule on the preemption of a provision in  
7 the Arizona law allowing officers to make efforts to verify  
8 immigration status with the federal government.

9           And it said the federal government has brought suit  
10 against a statute -- or against a sovereign state to challenge  
11 the provision even before the law has gone into effect. There  
12 is a basic uncertainty about what the law means and how it  
13 would be enforced.

14           At this stage, without the benefit of a definitive  
15 interpretation from the state courts, it would be inappropriate  
16 to assume it is preemptive.

17           And that's going into what we're talking about here,  
18 and that's with these declaration -- there's been a lot of  
19 assumptions made that somehow this law is just read in  
20 isolation and there is no other law outside of it that applies  
21 to the circumstances when it's going to be enforced.

22           THE COURT: I don't know if that's the -- I don't know  
23 whether that's the position that the federal government is  
24 taking, but it certainly is the position that I'm taking. I  
25 mean, I'm looking at this in a more practical way.

1           One of the issues that even in -- you know, my late  
2 friend, and he was a good friend, he and I sat on panels  
3 together and I knew him well, Justice Scalia -- boy, do I miss  
4 him. He was a wonderful man and a great justice. Even in his  
5 dissent in U.S. versus Arizona, he said explicitly that  
6 immigration and deportation are exclusively federal confines.  
7 They are not for the states. I don't have his exact language  
8 here. I'm not a Professor Chemerinsky who has the kind of a  
9 memory that can recite --

10           MR. TEBO: Well, your Honor, I would say that the  
11 orders to return are not removals. They are not expelling  
12 people from the country.

13           So there are two different provisions of removals.  
14 One is early in the process where the defendant has to agree to  
15 it. Now, this is, I would say, definitely the least  
16 objectionable, because the -- an alien can always leave on  
17 their own, right. They can leave. There's no federal law that  
18 says you have to stay here.

19           So if they agree to it, in exchange for not being  
20 prosecuted, they can leave, and the state court will issue an  
21 order with their consent to go.

22           The other provision, which is the more objectionable  
23 one that I think your Honor is talking about, is after they are  
24 sentenced, they have to enter an order that when they complete  
25 their sentence, they have to return to the country that they



1 entered from.

2 THE COURT: The point is that they get sentenced.

3 Now we have, and I don't think counsel would disagree  
4 with me here, we have an extremely elaborate system of federal  
5 law covering immigration. There are hundreds, maybe hundreds  
6 of hundreds, I don't know, of immigration judges whose sole job  
7 it is to do exactly what the State of Texas now proposes to do.

8 Then if people don't feel that they have been properly  
9 adjudicated there, they have the right to appeal to an  
10 Article III court, which is a court where the judges have  
11 lifetime tenure and are therefore not subject to the whims of  
12 the world.

13 The concern here is -- and I'm not -- I do not, under  
14 any circumstances, mean to impugn the integrity of any state  
15 judge. We're not talking about that. I have classmates that  
16 went to law school with me here in Texas who are wonderful  
17 state judges.

18 But Article III is one thing, and it is pretty  
19 independent, and the judges that would be hearing these cases  
20 are not Article III judges. They are state judges who are  
21 appointed by the governor and/or elected, sometimes both, under  
22 state law, and they don't have Article III tenure, lifetime  
23 tenure. There's no judge in the State of Texas under the Texas  
24 constitution that has lifetime tenure, to my knowledge.

25 MR. TEBO: Your Honor, well, first, I would say the

1 Supreme Court has said repeatedly that --

2 THE COURT: You're talking about the U.S. Supreme  
3 Court?

4 MR. TEBO: The U.S. Supreme Court.

5 There's a presumption that state courts follow the  
6 law. So there is that presumption. I don't think that because  
7 of the way they're -- most state judges in the country are  
8 elected, and originally, almost all federal litigation went  
9 through state courts and then to the Supreme Court.

10 It was very small, but there used to be, even on the  
11 federal question jurisdiction, a minimum amount of controversy.  
12 So most cases -- most federal cases went through state court  
13 systems, and then, obviously, the U.S. Supreme Court can hear  
14 those cases on certiorari coming out of the state court system.  
15 So there's always that --

16 THE COURT: Well, you're right, but I think that we  
17 would presume that United States magistrate judges, many of  
18 whom, like the ones we have here -- we have one here, I know,  
19 that was a distinguished state judge, Judge Howell, are  
20 clearly, unequivocally, in my view, going to follow the law and  
21 are presumed that they will follow the law.

22 But the Supreme Court has said, also, in that  
23 instance, and statute also says it, that U.S. magistrate judges  
24 may not preside over a trial of a felony defendant, period, end  
25 of story, because they are not Article III judges.

1           Now, in civil cases -- civil cases, not criminal -- a  
2 magistrate judge, with consent of the parties, but not without  
3 consent of the parties, may preside over a jury trial.

4           You're talking about a possible 20-year sentence under  
5 SB4. That's a felony, and those people would not have the  
6 benefit of an Article III judge, which the federal law would  
7 require and does require for federal crimes. So there we are.  
8 It isn't required for state crimes obviously, obviously, but  
9 that's where we are.

10           I mean -- and so that's an issue that has to kind of  
11 be melded in here. I mean, it's an issue of some concern.

12           MR. TEBO: Well, I think -- one thing, your Honor, is  
13 that I would say that even when you go through the state court  
14 systems, there's always Supreme Court review. That's just the  
15 way our system is set up.

16           THE COURT: Well, there's Supreme Court review --  
17 would be Supreme Court review of any criminal case tried by  
18 a -- by a federal magistrate judge if they were allowed to try  
19 felonies, but they're not, because they're not Article III  
20 judges.

21           MR. TEBO: Right. But I think that's -- that's  
22 because of the power -- the U.S. Constitution that sets out the  
23 judicial branch and says how they are to be selected when  
24 they're exercising federal judicial power.

25           THE COURT: The U.S. Constitution applies to the State

1 of Texas.

2 MR. TEBO: It does, and that's why Texas State judges  
3 comply with the U.S. Constitution all the time. Most  
4 litigation in this country is through the state court system  
5 and they address federal all the time. Federal law is part of  
6 Texas law. State courts in Texas apply federal law all the  
7 time. In fact, they're required by the Constitution to apply  
8 federal law.

9 THE COURT: I don't want to appear to be arguing with  
10 you, Counsel, because I'm not. This is the problem with being  
11 a law professor for 38 years. I ask tough questions  
12 sometimes -- I'm not going to take any time away from you for  
13 drinking some water, believe me. Take as much time as you  
14 need.

15 MR. TEBO: I appreciate it. So I'd like to talk  
16 about --

17 THE COURT: You only have a limited amount of time.

18 MR. TEBO: I'd like to talk about field preemption.

19 So the federal government has cited out-of-circuit  
20 cases on harboring and transportation of aliens under 1324 of  
21 federal law as creating a field preemption over contract sales.

22 Now, that's not what we have here. They -- there is  
23 no -- they don't cite any cases specifically about field  
24 preemption relating to entry, reentry, or removal. So these  
25 cases are not on point with this. And there's also several

1 provisions of federal law that we cite. If it's field  
2 preemptive, that means that the states cannot have any, even  
3 complimentary, laws, or any role at all in enforcement of this  
4 field.

5 But several provisions of federal law do grant states  
6 the ability to enforce laws involving entering the country,  
7 including -- and we cite these in our response to the PI  
8 motions.

9 THE COURT: Yes, I read that.

10 MR. TEBO: Yes. So there are several provisions, so  
11 that itself takes it out of field preemption. So I think  
12 that -- and the Fifth Circuit has said, in the El Cenizo case  
13 from 2018, that you are to read the fields very narrow.

14 You are not to broadly -- now, the Fifth Circuit -- so  
15 in Arizona versus U.S., the only field they said was  
16 field-preempted was alien registration. That's because it  
17 operates internally throughout the country, so you have to have  
18 one system.

19 SB4 is not like that. SB4 involves things happening  
20 at the border. It does not happen -- this just involves entry  
21 into Texas, and it's complimentary to the federal provisions  
22 that it adopts, and it does not have more severe penalties for  
23 compliance with them. In fact, they are less severe on the  
24 entry and reentry, and therefore, they do not conflict with  
25 federal law.

1           THE COURT: Can I ask you a question that's been kind  
2 of -- it woke me up at 2:30 in the morning, which is what used  
3 to happen to me when I was a trial lawyer. I had my best  
4 thoughts at 2:30 in the morning.

5           Let's say, just for purposes of argument, that I agree  
6 with you and I rule that SB4 is perfectly fine. Perfectly  
7 constitutional, if I were to rule that way. And the State of  
8 California then says, oh wow, this SB4 is great. Let's enact  
9 California's version of SB4. And then Maine does the same  
10 thing, and let's say Louisiana does it, and then let's say that  
11 New Mexico does it, and Arizona does it. And each one of those  
12 states is not going to have your man, the DPS man, there.  
13 They're going to have somebody else.

14           So we then have all of these states who have their own  
15 immigration law that they're interpreting differently. There's  
16 no national interpretation. Everybody has their own  
17 interpretation of immigration law.

18           It sounds to me that that then turns us from the  
19 United States of America to a confederation of states where  
20 each state has its own kind of laws and its own sovereignty in  
21 this area, and that's precisely the same thing that the civil  
22 war said you can't do.

23           So how do you have a -- what if California says, well,  
24 you know, as far as we're concerned, let 'em in. We'll let  
25 everybody in. We're not -- we've got our own little version of

1 SB4, and we're just going to -- we're just going to enforce it  
2 in an incredibly lenient way.

3 Or Maine takes that position. And then Texas takes a  
4 really hard line and New Mexico takes a hard line and Arizona  
5 takes a hard line, and somebody else interprets it a different  
6 way -- Louisiana, I don't know.

7 I mean, it just -- it seems incredible to me that we  
8 could have a situation where each state had its own immigration  
9 law and then attempted to interpret it in its own way.

10 But because, you know, these appeals would go -- they  
11 would go to federal court, and appeal for one of these district  
12 courts would go to a Fourth Court of Appeals or a state Fourth  
13 Court of Appeals or the second, whatever, and then go to the  
14 state supreme court. And then maybe, ultimately, to the U.S.  
15 Supreme Court, maybe years down the road.

16 What a nightmare.

17 MR. TEBO: Your Honor, if I could -- I think I have  
18 two points on that. One is you'd have to address whether these  
19 laws are actually in conflict with -- once you move beyond the  
20 whole field branch, if we agree that the whole field has not  
21 been preempted by Congress --

22 THE COURT: I haven't agreed to that.

23 MR. TEBO: I know. But if we move beyond to the  
24 conflict preemption, that is the test for each state. Does  
25 their statute actually conflict with federal law.

1           The other thing I would say is the situation that you  
2 talk about was really the norm before the late 1800s, when the  
3 federal government really started to pass more comprehensive  
4 federal immigration laws. The states did have --

5           THE COURT: I'm sorry, Counsel. Please go ahead.

6           MR. TEBO: I'm sorry, your Honor.

7           THE COURT: No, I'm the one that interrupted you. I  
8 apologize.

9           MR. TEBO: I appreciate it, your Honor.

10          So the states were the primary actors in regulating  
11 the flow of people into their states, into the country up until  
12 the late 1800s, when the federal government took a more  
13 aggressive approach.

14          So this was not unheard of. The federal government  
15 had a more subsidiary role where it assisted the states in  
16 doing that. So the states actually did deport people.

17          There's a lot of articles cited in Justice Scalia's  
18 dissent in Arizona versus U.S. I think it's called the lost  
19 hundred years of immigration law and it talks about this. The  
20 federal government really was not the primary actor for the  
21 first 100 hundred years of this country in the immigration  
22 space. It was the states.

23          THE COURT: Yes, but I would -- you know, one of the  
24 reasons I enjoy having you here in argument is because you do  
25 such a good job. You're very bright and a very capable lawyer.



1           The problem is that -- exactly what you pointed out.  
2 The states were doing their own thing, to a degree, and the  
3 federal government saw, Congress saw, that this ain't working,  
4 that they needed to have a uniform federal law throughout the  
5 country that would regulate clearly and unambiguously the issue  
6 of who can come into the United States, who cannot come into  
7 the United States and who is deportable and/or parolable.

8           And that's why we have this. Now, is it a great law?  
9 I don't think anybody in their right mind would say that the  
10 federal immigration law doesn't need some reform. I mean,  
11 Republicans believe that, the Democrats believe that. We were  
12 almost there, but it blew up at the last minute for whatever  
13 reason, and it's not my purview.

14           But, yeah -- but that doesn't mean that the law we  
15 have isn't enforceable. We have all these immigration judges  
16 whose sole job is to do this. And then we have an appeal  
17 process that used to come to the district courts. Thank  
18 goodness, it doesn't anymore. It goes to the poor court of  
19 appeals judges, but they are Article III judges for sure, and  
20 they hear those appeals. And when I sit on the Ninth Circuit,  
21 as I do regularly, I hear those appeals. It's a tough  
22 question.

23           Now, I'd like to have you address something that I  
24 think is important to address, and that's this whole issue of  
25 invasion. And I don't want you to miss that because of my

1 questions, because that's a big issue for you in this case. So  
2 why don't you go ahead and address that.

3 MR. TEBO: Yes, your Honor.

4 THE COURT: Maybe you don't want to address it.  
5 You've addressed it very carefully in your --

6 MR. TEBO: No. Well, your Honor -- just going by the  
7 points that the United States made on this issue.

8 So whether an influx of migration would constitute an  
9 invasion in itself, I don't think this Court has to address  
10 that full scope of this. This is a facial challenge so the  
11 plaintiffs have to show that every application is unlawful.

12 And I think at minimum, the presence of the cartels,  
13 who are at least a quasi state, a paramilitary organization who  
14 are very active on the border -- like you said, your Honor,  
15 most people coming across the border are not, you know,  
16 hardened criminals. We agree with that. But there is a lot of  
17 criminal activity with the cartels who exercise, you know,  
18 sadly, in Mexico, a lot of quasi sovereign authority.

19 THE COURT: You know, I couldn't agree with you more,  
20 Counsel. I'm going to give you a few extra minutes for  
21 arguments, because I have taken up some of your time with my  
22 questions, and I think it's only fair to give you some time.

23 MR. TEBO: Thank you, your Honor. I appreciate your  
24 questions and I'm happy to answer --

25 THE COURT: I'm going to give you an extra ten minutes

1 because I have taken up some of your time and that's just not  
2 fair.

3 I couldn't agree with you more, Counsel, that the  
4 problem we have here is the cartels. Look, I've said it many  
5 times. As someone who was a military officer, I've seen bad  
6 things in my life, but I will tell you that the stuff that  
7 these cartels do to human beings is like a training manual for  
8 ISIS. I mean, these are vicious, bad people. There's no  
9 question about it. I sentenced a guy who worked for the  
10 cartels who admitted to over 40 murders, but the FBI said that  
11 was a fraction of what he actually did. Bad people.

12 But the question here is, is the United States being  
13 invaded in the sense that the United States Constitution gives  
14 the state the authority to come in and essentially act in a way  
15 that it has acted, or wants to act under SB4, to thwart that  
16 invasion. I'm not sure that -- what SB4 does actually does  
17 much in that regard.

18 Now, we know that the governor controls the National  
19 Guard, but the governor only controls the National Guard to the  
20 extent that the president of the United States allows that to  
21 happen under circumstances of provision. Because what normally  
22 happens in times of stress or a problem is that the federal  
23 government, the president, federalizes the National Guard.

24 We've seen this happen. We've seen it happen even in  
25 situations where President Eisenhower federalized the National

1 Guard in order to prevent riots when children were -- children  
2 of color were being allowed into the schools. Federalized the  
3 National Guard over the objection of the governor, in that  
4 case.

5 In Vietnam, the Hawaii National Guard was federalized  
6 and sent to Vietnam. During World War II the National Guards  
7 of many states, including Texas, I believe, were federalized  
8 and sent overseas to fight the war.

9 I haven't seen, and the State of Texas can't point me  
10 to, any type of military invasion of Texas.

11 Now, an influx of people, yes, for sure, there has  
12 been, although that has gone down recently because of some  
13 actions by Mexico. But it's still problematic, for sure. So  
14 how do we deal with this? How does this statute deal with  
15 this?

16 Because that's one of your arguments, is there's been  
17 this invasion. That was Judge Ho's argument, invasion. But I  
18 know what an invasion looks like. I mean, Governor Abbott  
19 hasn't had the National Guard bring tanks out or 105 millimeter  
20 howitzers or the Texas Air Guard patrolling the Rio Grande with  
21 jets or helicopters. None of this has ever happened.

22 MR. TEBO: Well, your Honor, I would say that the  
23 Texas Military Department does have a very active role down at  
24 the border. They have laid concertina wire, which is -- you  
25 know, in the military, as you know, they have combat engineers

1 who do that sort of work, putting up barriers. That is a  
2 military function.

3 THE COURT: I agree with that. I think that that's  
4 true. There have been calls for President Biden to federalize  
5 the Texas Guard but he hasn't done so.

6 So that's right. I think that the Texas Guard has  
7 played -- and so has the Department of Public Safety, by the  
8 way. Let's not cut them out. They've played a significant  
9 role here.

10 And this Court is not, N-O-T, by whatever action I  
11 take, going to go outside the purview of SB4. There are other  
12 cases going on involving the barbed wire. I mean, that's  
13 Judge -- Chief Judge Moses' case, and, you know, the Supreme  
14 Court recently, as you know, gave the border protection the  
15 right to cut the wire to get to the --

16 MR. TEBO: I would say, your Honor -- I would be more  
17 careful in my language. I would say they vacated an injunction  
18 pending appeal against -- that ordered them not to.

19 THE COURT: But they could cut the wire.

20 MR. TEBO: Yeah, although, I would say, your Honor,  
21 they have not since that time. My understanding is they have  
22 not cut the wire.

23 THE COURT: Maybe they're being judicious.

24 MR. TEBO: That is probably true, your Honor.

25 THE COURT: I don't think that the Supreme Court

1 issues orders for nothing. The point is that Texas fought that  
2 and they didn't win.

3 MR. TEBO: I would say we're back in the lower courts.  
4 We're not down on that yet, your Honor.

5 THE COURT: I understand. Let's not argue that case,  
6 all right. I am not going to issue a ruling that has anything  
7 to do with barbed wire or anything else. That's not what I'm  
8 here to do. I'm here to rule on whether SB4 is constitutional  
9 or unconstitutional. That's it.

10 MR. TEBO: Understood, your Honor.

11 One thing I would like to say, you know, you brought  
12 up the point about how is SB4, you know, a response to an  
13 invasion. I would say Justice Holmes, a civil war veteran, in  
14 Moyer versus Peabody --

15 THE COURT: Decorated civil war veteran.

16 MR. TEBO: That's right, your Honor. He said the, you  
17 know, the greater includes the lesser. We cited this. And  
18 this -- in Blackstone's commentaries, he advocated that enemies  
19 of the human race, like pirates, smugglers, who were proper  
20 targets of military force, should be -- instead of being  
21 treated as prisoners of war, they should be treated as common  
22 criminals.

23 So criminal law is a way that -- you know, it is an  
24 option for a state, for a nation to compliment its war powers.

25 It doesn't -- the civilian criminal law is not

1 precluded from being applied in service of a defensive war,  
2 your Honor.

3           And the fact that Texas is not using cannons or  
4 fighter jets to respond to this crisis at the border is a  
5 prudent, you know -- and Texas is bound by the laws of war,  
6 just like the United States is, even when it's using its  
7 defensive war powers granted by the Constitution. And it would  
8 be obviously wrong and immoral -- unlawful under the laws of  
9 war for it to take those sorts of actions against, you know,  
10 unarmed people coming across the border.

11           THE COURT: I could not agree with you more. I think  
12 the real question is some people have suggested that an  
13 invasion requires -- and the Constitution speaks of invasion as  
14 a war-like invasion, and I don't think that there's -- I really  
15 do not see any evidence that Texas is at war.

16           A little -- that rhetoric has been used by, in some  
17 cases, politicians, that Texas is at war. Well, I don't think  
18 Texas is at war.

19           But I think that Texas is definitely under pressure, no  
20 question about that, that there have been a lot of illegal  
21 immigration that's come into Texas and Texas has had to deal  
22 with it. And that includes -- even the plaintiffs in this  
23 case, the County of El Paso, they have had plenty of illegal  
24 immigration there. But I don't think we have a war going on  
25 here in the sense, in the sense that we would talk about war.

1 But here's one other thing I want to address with you. One  
2 of the big arguments that has been made is that because Texas  
3 is under invasion, that it is necessary for the statute, okay.  
4 And that is premised on the present circumstances, which  
5 fluctuated.

6 Unfortunately, there is no sunset provision in this  
7 statute, which is something that should have happened. I'm  
8 just -- I'm not a Texas legislator and I'm just offering my own  
9 personal opinion.

10 I'm not going to rule on that necessarily, but I do think  
11 that -- what happens if, regardless of who our new president  
12 will be, whether it'll be President Biden or President Trump,  
13 okay, they make a deal with Mexico and Mexico literally shuts  
14 down the border.

15 There's no -- virtually no illegal immigration coming  
16 through. Illegal immigration has gone down dramatically  
17 recently, but let's assume -- because Mexico has taken some  
18 very proactive steps -- but let's assume either President  
19 Trump, as he has said he would do, or President Biden, as he  
20 has said he would do, actually get with Mexico and this --  
21 SB4 -- just carries on.

22 MR. TEBO: Well, your Honor, I would say first, the  
23 invasion clause argument is not the sole basis for, you know,  
24 supporting SB4.

25 THE COURT: You need to tell that to a few certain



1 judges. They've spent a lot of time on it in their dissent.

2 MR. TEBO: Yes, your Honor. Our contention,  
3 obviously, is this is not preempted, even under -- you know,  
4 not even extended information clause argument. That this is  
5 not in conflict. This is complimentary to federal provisions.  
6 It does not conflict with anything there.

7 It makes it illegal, the same conduct that the federal  
8 government has made illegal, and it does not have any more  
9 severe penalties as to that conduct.

10 I would say there are a couple different ways the  
11 invasion clause is relevant here in addition to that.

12 One is the avoidance canon argument, that you should  
13 not -- because of constitutional doubts with federal law  
14 potentially conflicting with the state's reserve powers under  
15 the Constitution, you should not interpret federal law in a  
16 broad manner that would potentially clash with state powers  
17 under that clause.

18 Obviously, if there's a conflict between the statute  
19 and the Constitution, the Constitution wins.

20 THE COURT: Always, yes.

21 MR. TEBO: So you don't have to reach the  
22 constitutional question in order to find that you should avoid  
23 an overly broad reading of state field preemption, which is  
24 consistent with what the Fifth Circuit has said in general.  
25 Field preemption should not be likely assumed, and the field

1 should be defined as narrowly as possible.

2 And we should not, you know, assume that there's going  
3 to be a conflict between state and federal law. We should try  
4 to harmonize state and federal law to the extent possible.

5 And then, of course, the other way that the invasion  
6 clause is if -- if there is a true conflict and if the federal  
7 government has not been performing its duties under the  
8 invasion clause of Article 4, where it's supposed to protect  
9 the states from an invasion, then the state's defensive war  
10 powers would be justifiably called into being, and that would  
11 be the strongest version of the invasion clause argument.

12 But we don't have to go there, because obviously, from  
13 our perspective, this is not in conflict, it's not  
14 field-preempted. There's no direct case law saying that these  
15 categories, these fields, are preempted in that way, and we  
16 don't believe that there's any -- no federal immigration  
17 statute has been pointed to where we are actually in conflict  
18 with what the federal government is doing.

19 It is complimentary legislation. So we don't think  
20 you have to get there, but the invasion clause has, you know,  
21 several -- there's several different layers of it going outward  
22 from that argument, your Honor, from that straightforward  
23 argument.

24 THE COURT: Okay. Anything else that you would like  
25 to cover?

1 MR. TEBO: Do I have time, your Honor?

2 THE COURT: I'll give you -- yeah, we kind of used  
3 that extra ten minutes. You've got 15 minutes, my friend.  
4 I'll give you the extra ten minutes because I was barraging you  
5 with questions that I didn't -- because, you know, this is the  
6 issue. You passed the law.

7 MR. TEBO: I appreciate it.

8 THE COURT: Well, you didn't.

9 MR. TEBO: Your Honor, now, one thing, the federal  
10 government pointed to the Fifth Circuit's DACA ruling from  
11 October of 2022 that talked about removal and -- well, entry  
12 into the country being an exclusive federal function.

13 Now, that is true. However, you have to look at the  
14 context of that and what exactly happened there. So DACA held  
15 that alien classifications, a system of how you classify  
16 aliens, whether they are involved here or not, that that was an  
17 exclusive federal function.

18 But in that case, the harm to Texas, the -- from the  
19 earlier DACA ruling, that -- one of the bases for standing was  
20 Texas' driver's license law adopted the federal definition of  
21 people being lawfully present. And that made them eligible for  
22 subsidized driver's licenses. That was the basis for the  
23 State's injury.

24 And that was upheld by the Fifth Circuit in the DACA  
25 ruling of November 2015, which was the precursor to the DACA

1 ruling.

2 So they did not find that Texas was somehow wrong in  
3 adopting the federal definition of lawful presence for issuing  
4 its driver's license. In fact, it said it was required. It  
5 could not adopt its own classification of who was lawfully  
6 present or not.

7 So that is different from what Texas is doing here  
8 where it also adopts the federal definitions of unlawful entry  
9 and reentry for purposes of the provisions in SB4.

10 There's also the -- when the law expressly  
11 contemplates concurrent regulation with states and localities,  
12 that ends the matter and there's no field prevention. That was  
13 the Fifth Circuit last year in National Press Photographers  
14 versus McCraw.

15 And so the examples that we listed of Texas being able  
16 to enforce pursuant to the federal provisions, enforce federal  
17 prohibitions of aliens entering the country, smuggling,  
18 et cetera, those show that this is not field-preempted. There  
19 is a role for states and that takes it out of field preemption  
20 and that's why we have to look at whether there's an actual  
21 conflict with what SB4 does.

22 THE COURT: You're making me dizzy, moving that thing  
23 around.

24 MR. TEBO: Sorry, it's an old habit.

25 So in the Kansas versus Garcia case from the Supreme

1 Court in 2020, they said that the conflict must be with the  
2 federal statute, not with federal enforcement priorities or  
3 discretion. So a lot of what the federal government has argued  
4 is -- now, this would apply in the, in the field -- their  
5 arguments are more appropriate to the field preemption  
6 argument, that somehow something should be field-preempted  
7 if -- you know, it just can't be anything outside of the  
8 federal purview of discretion and enforcement.

9 But when you get to conflict preemption, that is not  
10 the case. And it is not relevant what the executives  
11 enforcement priorities or discretion is, whether the State of  
12 Texas may have it different. Because preemption is, by the  
13 Congress's statutes, the supremacy clause does not apply to the  
14 president's desires or the enforcement priorities. It applies  
15 to treaties, statutes, and the Constitution.

16 And as I said, your Honor, there's no conflict here  
17 with all the provisions of -- the protective provisions for  
18 aliens. You know, they can raise preemption as a defense in  
19 state court.

20 The declarations we have in this case show that we in  
21 no way stiff arm any federal immigration authorities. If  
22 someone has to have a criminal fear interview, federal  
23 immigration authorities have an open door to come into Texas  
24 Department of Criminal Justice facilities at any time.

25 If they need to go somewhere for a hearing, the

1 incarcerated person, we will take them there. If there was --  
2 if they have a video call that they need to be on for those  
3 purposes, if they need a form, we help them. If they need  
4 lawyers to access them, they're allowed to do it.

5           There's no evidence that SB4 is going to operate any  
6 differently from all the other cases where illegal aliens are  
7 in Texas custody and are available to avail themselves of all  
8 the protections of federal immigration law.

9           The U.S. also says that state courts are, under SB4,  
10 are violating the Fifth Circuit, the en banc pluralities  
11 opinion in the Farmers Branch case, which was from 2013, and  
12 said that state courts that involved a city ordinance that said  
13 that state courts would make their own determinations about  
14 whether someone was lawfully present, and it did give a  
15 presumption to the federal determinations, but it was not  
16 required to adopt it.

17           But in this case that does not apply to SB4. There is  
18 nothing in SB4 that says that state courts make an independent  
19 determination of any federal determination as to -- if someone  
20 has, say, asylum or any other sort of lawful status or lawful  
21 presence, I should say, under any sort of provision, whether it  
22 be the Secretary of Homeland Security's consent to them not  
23 being subject to removal and the like. And so that does not  
24 apply here.

25           The federal government also says that the -- it makes

1 the point that if Texas removes people under the orders to  
2 return, that that cuts short any asylum claims.

3 Now, there is a provision in SB4 that says a  
4 prosecution under SB4 shall not be abated because of a pending  
5 asylum claim. We saw the status determination by the --

6 THE COURT: That was something I found very  
7 troublesome and very problematic.

8 MR. TEBO: But what I would say, your Honor, is --

9 THE COURT: I'll give you an opportunity, Counsel.  
10 I'm sorry. On the -- I want you to know where my concern is.

11 On the one hand you've said, well, you know, the DPS  
12 says I'm going to do this and some other people who said  
13 they're going to do that, and we would expect Texas to abide by  
14 all of the general rules of law that Texas normally abides by.  
15 And that's all well and good.

16 But then you have this provision in the statute itself  
17 which says that the law shall not -- prosecution shall not be  
18 abated. You know what the word abated means, of course, by  
19 federal considerations, and it just slaps the federal  
20 immigration law right in the face.

21 MR. TEBO: This is what I would say, your Honor.

22 THE COURT: It's a hard provision to defend, Counsel.

23 MR. TEBO: This is what I -- but that does not have  
24 any relevance to the return orders, the orders to return,  
25 because the prosecution has already ended.

1           So when this says the prosecution shall not be abated,  
2 the prosecution ends upon conviction, sentencing.

3           THE COURT: Well, let's assume here that you have --  
4 someone who is arrested under SB4, they're brought before a  
5 state judge and they say, well, Judge, I have a credible fear  
6 of torture and/or whatever for whatever reason and here's my  
7 evidence, and the judge says, well, I -- and their lawyer says  
8 this prosecution needs to be abated so that this stopped so  
9 that this individual can present their claim to the federal  
10 government. And the state judge says, I'm sorry, I'd like to  
11 do that, but I can't because the law says it shall not be  
12 abated. You're going to trial.

13           MR. TEBO: Your Honor, but I think that's how  
14 prosecutions for state crimes already occur with illegal  
15 aliens. So just because someone has an asylum claim does not  
16 mean they get out of, you know, being convicted for a state  
17 crime.

18           THE COURT: Yes, but we're not talking here about  
19 somebody being charged with an independent state offense such  
20 as burglary or drunk driving. We're talking about somebody  
21 who's been picked up for the sole reason that they are in the  
22 United States illegally.

23           And Texas has caught them, some DPS official has  
24 caught them crossing the border, grabs them, brings them in,  
25 finds out this is the second time. He gets indicted under SB4,



1 and they get caught; trial.

2 Now, there may be other reasons, but let's just assume  
3 that's it. And the judge is going to have to say, well, you're  
4 either going to have to ignore that abated clause, or the judge  
5 is going to have to push forward and say, sorry, you're going  
6 to get prosecuted, and they get prosecuted.

7 I mean, there's just no way to get around it. It just  
8 says what it says.

9 MR. TEBO: Your Honor, it does say that, that the  
10 prosecution shall not be abated, but it does not in any way  
11 prevent people from applying for any of these sort of  
12 discretionary reliefs.

13 THE COURT: Why would they do it? Why would the state  
14 legislature put that language there if they didn't mean it?

15 MR. TEBO: I'm not saying that they didn't mean it,  
16 your Honor. I'm saying that the effect of it --

17 THE COURT: What's the purpose of it?

18 MR. TEBO: The effect of it is that, you know -- well,  
19 for example, asylum claims are really backed up and they take  
20 years.

21 So, you know, if it was permitted -- like, well, if  
22 we're not going to prosecute you for the independent state  
23 crime of entering Texas, right, it's a state law crime, we're  
24 not going to prosecute that because you have a pending asylum  
25 application with the federal government that's going to take

1 years. So you're just free to go and we're not going to  
2 prosecute you.

3 Now, they're not being sent back to the country that  
4 they're claiming that they are being persecuted in. They're in  
5 a Texas prison. So there is, I guess, no safer place from, you  
6 know, your home country persecuting you if you're in the walls  
7 of a Texas prison.

8 THE COURT: But the problem here is that the Texas  
9 crime is being here in the United States.

10 MR. TEBO: It's entering Texas.

11 THE COURT: Okay. All right. The Texas crime is  
12 entering the United States, which federal law says they have a  
13 right to do if they are -- if they meet certain federal  
14 criteria, limited though it may be, certain federal criteria.

15 For instance, if we have somebody who is -- been  
16 tortured, verifiably tortured because of their political views,  
17 they're threatened with imminent execution, and they come and  
18 they're literally buzzing into the United States, to avoid that  
19 happening, they get arrested because they are unlawfully in  
20 Texas, they get brought before the state judge.

21 The state judge -- they say, wait a minute, I have an  
22 asylum claim here. And your explanation is, well, they can't  
23 abate it because there's a big backup on these asylum claims.  
24 So they go to jail.

25 MR. TEBO: Well, I would say they don't abate the

1 prosecution for the process, if there was a determination that  
2 someone is entitled to asylum or some other sort of relief.  
3 They would have a preemption defense even if that is not in  
4 SB4.

5 THE COURT: It's not in SB4.

6 MR. TEBO: It doesn't have to be in SB4, your Honor.

7 Preemption is a defense. Preemption by federal law is  
8 a defense to prosecution, and the Texas courts construe state  
9 law to be consistent federal law.

10 THE COURT: No, that's exactly what you're arguing.  
11 You're saying this law is preempted.

12 MR. TEBO: Right. But I'm saying that Texas courts  
13 interpret state law to be consistent with federal law, and  
14 that's why, for example, we don't prevent anyone in our custody  
15 from accessing the federal immigration relief.

16 THE COURT: But the prosecution can't be abated.

17 MR. TEBO: Right. You can be prosecuted, but that  
18 doesn't mean that you are going to be removed from the country,  
19 which is beyond the prosecution.

20 THE COURT: So you say --

21 MR. TEBO: That's right, your Honor.

22 But if you have a defense, if you have a defense -- if  
23 you have a defense based on -- so if what the federal -- if the  
24 relief that the federal government has given you would make it  
25 so that you would not -- that you did not illegally enter the

1 United States, if there was some sort of relief granted by the  
2 Secretary of Homeland Security, for example, which has been  
3 brought up by the United States, that would be a defense. You  
4 could raise that as a defense because it is piggy-backed on the  
5 federal law, and that is part of federal law.

6 THE COURT: Okay. I think you have made the best  
7 argument that you could possibly make.

8 MR. TEBO: Your Honor, one other point I would like to  
9 make on this is --

10 THE COURT: I wish you had been in the state  
11 legislature and drafted the statute.

12 MR. TEBO: Your Honor, there is a severability clause.  
13 So if your Honor would find some of these provisions to be  
14 preemptive, that would -- you know, the severability clause  
15 should be honored, and -- including any applications. You  
16 know, it's a very broad severability clause; not just  
17 provisions of the law, but applications of the law. And so I  
18 would ask that your Honor consider that.

19 THE COURT: I'm aware of the severability -- believe  
20 me, I've read this statute, I can't tell you how many times,  
21 and I have read all of your papers. I want to make that clear.  
22 Because some circuit judges seem to think that I don't read the  
23 papers, but anyone who's been before me knows better than that,  
24 including yourself, Counsel. Thank you for nodding yes.

25 And I mean, you did a thorough job. There's no

1 question about it.

2 MR. TEBO: Could I talk a little bit more?

3 THE COURT: Yeah.

4 MR. TEBO: Okay. So the foreign -- the dormant  
5 foreign commerce clause claim that the United States brings --

6 THE COURT: I know it's over, but I'm going to give  
7 them a few more minutes.

8 MR. TEBO: It's a novel argument. Besides its  
9 novelty, I think the biggest problem with it is -- you know,  
10 the dormant commerce clause does not apply if Congress has  
11 affirmatively spoken on the issue, right.

12 And the federal government has said that there is no  
13 market, there is no commerce in -- these are illegal  
14 transactions, so illegal aliens. The federal government can  
15 prohibit commerce under its commerce clause power. If this is  
16 commerce, if the flow of people is commerce, then the federal  
17 government has prohibited it.

18 We are not prohibiting anything that the federal  
19 government has not already prohibited. We are piggy-backing on  
20 the definitions of when someone's making an unlawful entry into  
21 the United States, that the federal government has  
22 affirmatively acted with, according to its commerce power,  
23 assuming that that's the basis of what they're talking about.  
24 Therefore, the dormant foreign commerce clause would not apply.

25 It does not apply to an unlawful black market. It's

1 something that the federal government itself has made unlawful.  
2 It said there is no market in the traffic of human beings  
3 across the border of the United States and Mexico.

4 Even under the Piazza Seafood Test of the Fifth  
5 Circuit, it said that even if the Court were to find that there  
6 was a discrimination against foreign commerce, it would be  
7 upheld if it serves a legitimate local purpose that could not  
8 be served adequately by responsible nondiscriminatory  
9 alternatives.

10 This is as direct as possible. If the unlawful -- if  
11 the legitimate local purpose is preventing people from  
12 unlawfully coming into Texas, the most direct way is to  
13 prevent -- is to make it unlawful for that conduct to occur.

14 THE COURT: This is basically Governor Abbott's  
15 argument, and he's been joined by several other governors and  
16 many congressmen. We've had an amicus brief from some  
17 Republican Congress members in this case. It's not enjoined by  
18 many others, but it's enjoined by some, that the federal  
19 government isn't doing its job in immigration. That's  
20 basically what you're arguing.

21 MR. TEBO: Your Honor, I believe a majority of the  
22 nation's governors has endorsed Texas' position. A majority of  
23 governors, a majority of the attorneys general in the country,  
24 and --

25 THE COURT: In this case?

1 MR. TEBO: Not in this case, your Honor. I'm talking  
2 about there's a letter of support and --

3 THE COURT: I don't know -- where is that at?

4 MR. TEBO: It's cited in the brief.

5 THE COURT: I know it's cited, but I didn't get a copy  
6 of it. Look, I'm not going to decide this case based on --

7 MR. TEBO: That's right, your Honor.

8 THE COURT: -- predicated on what a particular  
9 attorney general in some state says is good or isn't good.  
10 That's just not the way we decide cases in the federal court  
11 system at any level.

12 You're kind of over, even in my overgenerous -- is  
13 there anything else?

14 MR. TEBO: Your Honor, I would also say that the  
15 organizational plaintiffs, they do not have Article III  
16 standing for the reasons that we explained.

17 THE COURT: Yes, I'm familiar with that argument.  
18 I've looked at it very carefully.

19 MR. TEBO: And they also do not have a cause of  
20 action. Judge Cardone in El Paso had an on-point ruling. This  
21 was a challenge to a Texas immigration policy where Judge  
22 Cardone found that the immigration advocacy groups did not  
23 have -- they were making a preemption claim, supremacy clause  
24 claim, just like here, and she found that they did not have  
25 Article III standing because it was a preenforcement facial

1 challenge to a law that had not gone into effect.

2           So therefore, it was under the test of Susan B.  
3 Anthony List versus Driehaus where the plaintiffs had to show  
4 that they had a constitutional -- a constitutionally protected  
5 interest, that they were possibly subject to being prosecuted,  
6 and that their conduct was arguably covered by the law.

7           THE COURT: I'm sorry, I'm going to look at that very  
8 carefully, but there is no question -- I will tell you right  
9 now there's no question in my mind that the United States has  
10 standing there.

11           MR. TEBO: We're not challenging the United States'  
12 standing.

13           THE COURT: I know that. So one way or the other  
14 we're going to get to the merits.

15           MR. TEBO: Yes. Although, your Honor, I would say on  
16 the issue of the cause of action, the United States has said  
17 that --

18           THE COURT: You're getting notes here.

19           MR. TEBO: Your Honor, I do want to say the letter of  
20 support that I mentioned is at footnote 15 of our brief.

21           THE COURT: Yes, I remember that. It's stuck in the  
22 footnote.

23           MR. TEBO: But I would say that on the cause of  
24 action, United States has said that, well, the -- we bring  
25 these cases and no one challenges -- you know, it's not



1 rejected on the basis of cause of action.

2 But if it's not litigated, if it's not an issue,  
3 that's not a jurisdictional element. So like, you know, it's  
4 forfeitable, it's waivable. Just because it was not brought up  
5 does not mean that that case stands for the proposition that  
6 the United States did have a cause of action.

7 So, for example, they said in Arizona versus United  
8 States that was not at issue in the case. But they can't bring  
9 an action under Ex parte Young. The federal government says,  
10 well, that's just not true.

11 We cite the Supreme Court cases that say it's a -- Ex  
12 parte Young is a very limited exception that creates a cause of  
13 action in favor of private individuals to sue state actors for  
14 violating federal law.

15 But they say -- they do cite the Virginia Office for  
16 Protection and Advocacy versus Stewart. That's a 2011 Supreme  
17 Court case. That's where one state agency was suing another.

18 But that case -- so Ex parte Young has two aspects to  
19 it, and this particular law, it's the Fifth Circuit case law.

20 There is one, the exception to sovereign immunity, the  
21 Ex parte Young gives. The other is whether there's an  
22 equitable cause of action created. Those are two separate  
23 issues.

24 And the Virginia Office for Protection and Advocacy  
25 case that they cite on behalf of having a cause of action under

1 Ex parte Young did not address cause of action at all. It was  
2 only about the exception to sovereign immunity, whether a  
3 state -- a state needs to be suing another state agency under  
4 Ex parte Young was somehow -- it violated the sovereign  
5 immunity of the State of Virginia, and they said that it did  
6 not.

7 THE COURT: Well, the federal government has sued  
8 states in numerous cases and there's never been a suggestion  
9 that they lack standing with the authority to do so.

10 Now, let me say this. If they were seeking monetary  
11 damages from the state, which they are not; what they're doing  
12 is they're seeking injunctive relief. That's why we're here.  
13 It's a preliminary injunction.

14 Anything else, Counsel? You covered this in your  
15 papers very carefully.

16 MR. TEBO: I did, your Honor.

17 THE COURT: That board you've got, you're moving  
18 around. I wish the Court of Appeals could see this board  
19 spinning around in front of me.

20 MR. TEBO: Yes. Your Honor, I think we've covered  
21 pretty much everything.

22 THE COURT: I think so, too. As usual, Counsel, you  
23 do a great job, and you've done a thorough and careful job of  
24 arguing this case, and I do understand your arguments.

25 I have reviewed the papers here, and so this Court is

1 not going to be making any flippant decisions predicated on  
2 some minute area that you may have covered in your papers but  
3 not covered in oral argument. I can assure you that.

4 MR. TEBO: Your Honor, I would just ask that if the  
5 Court does enter a preliminary injunction, that it stay any  
6 grant, pending appeal. I'm just making that request.

7 THE COURT: The Attorney General of Texas has no  
8 problem at all finding its way from wherever you're located  
9 here in Austin over to the federal court. You know, the one  
10 thing that is always -- that is always -- in fact, there's an  
11 article about it, about the so-called administrative stays that  
12 courts of appeals issue.

13 Theoretically, a stay is supposed to maintain the  
14 status quo until the merits of the case can be heard by the  
15 Court of Appeals.

16 It's always -- it's somewhat paradoxical that you can  
17 have an administrative stay entered where a law has not gone  
18 into effect, which there's no -- before there was no law,  
19 right.

20 So that's -- status quo is the law that's not in  
21 effect. They entered the administrative stay which then allows  
22 the law to go into effect, which is kind of not maintaining the  
23 status quo. And this is exactly what happened in, not just  
24 buoy cases, put that aside, but Judge Albright ruled on the  
25 case -- I think it's still under review.

1 MR. TEBO: The Book People case.

2 THE COURT: The Book People case or whatever it is.

3 Anyway, that law wasn't in effect. The Fifth Circuit  
4 issued an administrative stay, which then allowed the law to go  
5 into effect.

6 A three-judge panel then decided the law was  
7 unconstitutional. I think Judge Willett might have written  
8 that opinion. Am I right?

9 MR. TEBO: That's right, your Honor.

10 THE COURT: And so the law -- for a period of time an  
11 unconstitutional law was in effect because of the  
12 administrative stay. So it changed the -- and people are  
13 rushing around trying to comply with the law.

14 So I don't know, where is that case now? Is it --

15 MR. TEBO: I believe that the -- I'm not personally  
16 involved in that case, but I'm aware of it.

17 The mandate has been held by someone on the --

18 THE COURT: So it may be going en banc. So we don't  
19 know.

20 MR. TEBO: It may be going en banc. I know that the  
21 State of Texas did not file a petition for en banc review.

22 THE COURT: They can do it themselves. The judges of  
23 the Court appeals --

24 MR. TEBO: My understanding is that sometimes they  
25 just -- you know, they want more time to review it and have a

1 negotiation.

2 THE COURT: Sure. As counsel knows, because I know  
3 counsel, I hold the record for the most designated sittings on  
4 the Ninth Circuit since it began in history. I believe in the  
5 appellate process. And I believe in the Fifth Circuit Court of  
6 Appeals.

7 And then some judges may not believe in me, but I've  
8 been affirmed by every judge that wrote an opinion in the --  
9 that was not all that kind, in the buoy case where they  
10 received a mandamus, which the Court denied.

11 But I respect those judges and I respect Judge Ho. I  
12 respect all of those judges. I don't have a problem with those  
13 judges at all. It's not my task here, and I don't rule  
14 predicated on it.

15 The reason I mention Judge Ho is because he addressed  
16 in his dissent, in a totally different case, the issue of  
17 invasion, to some degree was citing Madison and going into  
18 great detail.

19 So I wanted to give the parties an opportunity to  
20 address it, because unless Judge Ho is going to change his  
21 views all of a sudden, that may be something that gets  
22 addressed on appeal. That's why I wanted you to have the  
23 opportunity to address it. Not because I don't like Judge Ho.  
24 He may not like me. I don't know.

25 MR. TEBO: I'm sure that's not the case, your Honor.

1 THE COURT: I really don't have a problem with him.

2 MR. TEBO: I would advocate that the Court closely  
3 read Judge Ho's opinion on the invasion clause.

4 THE COURT: Don't worry, I've read it. And so have a  
5 lot of judges around the country. I've heard from a lot of  
6 court of appeals judges and other judges about that whole  
7 situation, but that's neither here nor there.

8 All right. We're going to take a very short recess,  
9 because we -- I gave you a lot more time than I would have  
10 normally, because I did ask you questions, and in fairness, I  
11 wanted you to have a full opportunity. Do you feel like --

12 MR. TEBO: I appreciate it, your Honor, yes. I  
13 appreciate your questions. I don't want you to feel like your  
14 questions were a distraction from anything, and obviously, I  
15 want to answer your questions. That's the most important thing  
16 I can do up here.

17 THE COURT: Well, thank you so much, and I appreciate  
18 that. So we're going to take a five-minute recess. There's a  
19 lot of people who are jiggling around in the audience, I think  
20 might need to use the restroom. So we're going to take a  
21 five-minute recess so people can use the restroom, and give my  
22 court reporter a break. We've been going for quite awhile.

23 And then we'll come back and I'll hear from the  
24 government.

25 (Recess was taken.)

1 THE COURT: All right, Counsel.

2 MR. BOYNTON: Thank you, your Honor. My friends have  
3 told me they're going to give me five minutes of their rebuttal  
4 time to add to my own. I'm not sure I'm going to need it. But  
5 I think that gives me at least 15 minutes.

6 THE COURT: You do.

7 MR. BOYNTON: Okay. Thank you.

8 So to start off, Texas has suggested that this case  
9 shouldn't proceed because in individual prosecutions under SB4  
10 the defendant can raise a preemption defense, and therefore,  
11 try to avoid their conviction. If they lose in Texas courts,  
12 they can take it all the way to the Supreme Court, eventually.

13 That's true all the time, federal law is supreme.  
14 That was true of the statute in Arizona that was being  
15 challenged.

16 THE COURT: Now, I want to make it very clear that I  
17 was not in any way -- and I don't think counsel took this to be  
18 the case -- denigrating Texas' position when counsel -- your  
19 opposing counsel and I were talking about the issue of  
20 abatement of the prosecution, and I said, you know, yikes.  
21 Because yikes, not -- I was not referring to the merits.

22 I was referring to the question of how do we  
23 determine, you know, which judge abates what. And that's an  
24 issue. It's an issue.

25 Go ahead.

1 MR. BOYNTON: Yes, your Honor. And one of the related  
2 arguments that Texas seems to be suggesting is that even though  
3 SB4 doesn't say anything about having a process to allow people  
4 to raise the kinds of asylum and withholding claims that they  
5 could under federal law, that maybe there's a way for them to  
6 do that under SB4 that should be read in or could be read into  
7 the statute.

8 Federal law is very clear that there cannot be a  
9 parallel state removal system. And there's a provision we cite  
10 in our brief that I wanted to just point out here because it's  
11 so directly on point, and that's 8 U.S.C. 1229a, a3.

12 It says, "Unless otherwise specified in this chapter,  
13 a proceeding under this section shall be the sole and exclusive  
14 procedure for determining whether the alien may be admitted to  
15 the United States, or if the alien has been so admitted,  
16 removed from the United States."

17 So that provision completely forecloses the idea that  
18 there could be some parallel state procedure regarding whether  
19 someone entered properly and about removal of individuals.

20 The other argument Texas seems to make is that perhaps  
21 if someone was successful in obtaining asylum after they've  
22 been convicted, that that might be a defense under SB4. They  
23 seem to concede that people aren't going to be able to obtain  
24 asylum before they're convicted. Counsel noted the very long  
25 backlog for adjudicating asylum claims in the federal system.



1           But they suggest that perhaps if someone applies for  
2 asylum from state jail, obtains asylum, that that might be a  
3 defense.

4           THE COURT: Well, that was my -- that was the basis of  
5 my comment. I wasn't -- I mean, I'm trying to figure out how  
6 this would work, because if someone -- let's assume someone, as  
7 we were discussing, as I was discussing with your able opposing  
8 counsel, someone has a real credible fear of continued torture,  
9 someone has been -- is running away from, you know, some  
10 situation where -- let's say the immigration courts of the  
11 United States would clearly find them to be eligible for  
12 asylum, and they find themselves in the state system.

13           The state system says there shall be no abatement of  
14 the prosecution. The person says, well, I have this credible  
15 fear, but then the state, as state counsel pointed out, there's  
16 this huge backlog, which is the reason why they put this no  
17 abatement in here. So what is the state judge supposed to do  
18 under those circumstances?

19           They're faced with two conflicting problems. They've  
20 got a federal situation which says that a person has the right  
21 under federal law to raise, as a defense, deportation, a  
22 credible fear of torture and other things, that we allow them  
23 asylum, and yet the state law provides that there should be no  
24 abatement of the prosecution.

25           And that -- my comment was how do you work this out?

1 I mean, I can't imagine some state judge sitting there going,  
2 yikes, what do I do? What do I do? Do I follow the federal  
3 law or I do follow the state law? If I follow the state law,  
4 then I'm going to be violating federal law. If I violate the  
5 federal law, then I may be violating the state law. What in  
6 the world do I do?

7 It is a quandary of some proportion, and that was my  
8 comment. And counsel's -- I mean, the state counsel, able  
9 counsel, said, well, the problem -- the reason that's there is  
10 because there's this huge backup of asylum.

11 Well, you're right, there is a backup, but in the  
12 meantime the guy gets convicted for just being in Texas  
13 illegally, which you say they can't do and -- under this law,  
14 and goes to jail.

15 And they might have an asylum claim that would give  
16 them the right to not be convicted, because they wouldn't be in  
17 the United States illegally if they were entitled to asylum,  
18 right.

19 MR. BOYNTON: So it's correct --

20 THE COURT: That's the problem. You get -- you go  
21 around in a circle here.

22 MR. BOYNTON: We agree, your Honor, that there is an  
23 intractable conflict between federal law and SB4 on this issue.

24 And to take it even a step further, after the person  
25 completes their sentence, they're then facing the Texas SB4

1 removal order. And if they don't comply with that order when  
2 they are delivered to the port of entry, they somehow run off,  
3 they can be convicted under SB4 for violating the removal order  
4 and they face up to 20 years of further imprisonment for  
5 violating that removal order.

6 Now, there was a back-and-forth about what's going to  
7 happen at the port of entry when a Texas State law enforcement  
8 official brings the person to the port of entry, and counsel  
9 talked about the Escalon declaration. The key paragraph is  
10 paragraph 15 of the Escalon declaration. There are two things  
11 that are quite notable about that paragraph.

12 First, it says that the -- Texas is not going to  
13 regard the removal order as having been effectuated unless the  
14 person actually crosses over the border to the Mexican side.  
15 There's no suggestion that they can just go to the port of  
16 entry and then decide not to cross and have discharged the  
17 removal order.

18 It further says that that's the case even if Mexico  
19 refuses to accept the person. The Escalon declaration says,  
20 "If Mexican authorities do not accept the entrance of an alien  
21 subject to an order of return, the officer is then going to  
22 escort them to the POE."

23 And then it says, "Upon witnessing the alien cross to  
24 the Mexican side of the international bridge, the officer will  
25 consider the alien to have complied with the return order and

1 will cease monitoring the alien."

2           So as I read that, it's crystal clear that Texas is  
3 going to make people return to Mexico under these orders or  
4 face further prosecution, and that's the case even though they  
5 might have valid protections under federal law that would  
6 prevent their removal from the United States.

7           There was some discussion of Texas' prosecution of  
8 noncitizens for trespass under state law. We have -- the  
9 United States has not brought an action challenging Texas'  
10 abuse of state trespass law.

11           There are distinctions there with SB4 that are  
12 important. That's not a criminalization of the actual act of  
13 crossing the border. It's a criminalization of conduct that  
14 occurs in Texas in the United States. It's obviously quite  
15 close in time but it's analytically distinct.

16           Additionally, when Texas convicts someone for a state  
17 trespass law violation, they don't then issue a removal order  
18 forcing the person to leave the country and go back to Mexico.

19           So that scenario is quite different from the scenario  
20 that we're facing here.

21           We had some discussion about field preemption with  
22 opposing counsel where he argued that the INA expressly gives  
23 state law enforcement authority in some situations to assist  
24 the federal government.

25           Now, the argument from Texas is that because there are

1 these provisions, there necessarily can't be field preemption.  
2 But there's no basis for that contention.

3 We would agree that if the INA said states can  
4 legislate in an area, then there wouldn't be field preemption.  
5 But simply saying that state law enforcement officials can help  
6 with enforcement is not giving states free reign to enact  
7 legislation like they've done in SB4.

8 There's also some discussion of the Kansas versus  
9 Garcia case, and that's the case that was dealing, in relevant  
10 part, with conflict preemption. Texas relies on it for the  
11 proposition that a parallel state law is not conflict  
12 preemptive because it's parallel to the federal law.

13 That is what the Court concluded in Kansas in the  
14 situation of that case. But that was a very different case  
15 from Arizona. That was a case where the laws at issue were  
16 laws of general applicability. Kansas was prosecuting under a  
17 general identity theft law and a fraud law. The analogous  
18 federal law was a law about misstatements in employee  
19 withholding forms.

20 These were not immigration law violations that were  
21 being prosecuted, and that makes a critical difference.

22 It was the fact that immigration law was at issue that  
23 caused the Supreme Court in Arizona to say that the parallel  
24 Arizona alien registration law not only was field-preempted but  
25 also actually conflicted with the federal statute because it

1 interfered with the federal discretion to enforce immigration  
2 law.

3           The Court explained that because of the foreign  
4 affairs implications, that state enforcement of even a parallel  
5 immigration law causes a conflict. So the situation here is  
6 like that in Arizona and not like the situation in Kansas.

7           I'm not going to reopen the invasion clause issue as I  
8 think we've discussed that sufficiently, but there was one  
9 adjacent point that I wanted to touch on.

10           Counsel argued that even if you're not willing to go so far  
11 as to say that the invasion clause applies here, the  
12 Constitutional Avoidance Doctrine ought to kick in and cause  
13 the Court to interpret the INA in a way that avoids the alleged  
14 constitutional violation.

15           There are at least two problems with that argument. One is  
16 that the Avoidance Canon applies only when there's ambiguity in  
17 a law, and here there's no ambiguity in federal law.

18           The provision I started off this rebuttal reading to you  
19 could not be more clear, that the State cannot have their own  
20 parallel system for removing noncitizens from the country.

21           Additionally, even under Texas's telling, there's not a  
22 violation if the INA displaces SB4. There's not a  
23 constitutional violation. And that's because the provision of  
24 the Constitution we're talking about is a general restriction  
25 on states engaging in war.

1           Now, there's an exception to that restriction in the case  
2 of an invasion, but the clause itself is taking away the power  
3 from the states. So it's not in violation of the clause if  
4 there is some federal legislation that still governs when a  
5 state is engaging in war for the purposes of that clause. And  
6 that's the argument we've been making in the invasion clause  
7 context, that it wouldn't displace federal law that is  
8 otherwise applicable.

9           All the invasion does, if you had an actual invasion, is  
10 remove the constitutional restriction on states engaging in  
11 war.

12           We had some discussion about the foreign commerce clause,  
13 and counsel made one point that I just wanted to address. He  
14 argued that if you have a state law that is parallel to the  
15 federal law, then that doesn't violate the foreign commerce  
16 clause.

17           We don't think that's correct. The Piazza seafood case  
18 that we've been talking about addresses this exact issue and  
19 says that just because the state law is in harmony with the  
20 federal law, if it is a discriminatory law and it's regulating  
21 foreign commerce, then it violates the foreign commerce laws.

22           THE COURT: Well, they take -- the State takes issue  
23 with the question of whether individuals crossing the border  
24 illegally are foreign commerce.

25           MR. BOYNTON: Correct, your Honor, and we think that

1 that argument is misplaced.

2 We think that there is sufficient authority saying  
3 that the movement of people is itself commerce or affects  
4 commerce. And the fact that it's unlawful movements of people  
5 doesn't negate the fact that it's commerce.

6 There's all sorts of unlawful commerce that the  
7 federal government regulates, right. All the drug laws and gun  
8 laws are based on the commerce clause authority, and that's all  
9 conduct that is unlawful as a matter of federal law.

10 And so if you had a state law that is discriminatorily  
11 regulating and it's something that violates federal law, it's  
12 still a foreign commerce clause or dormant commerce clause  
13 problem.

14 THE COURT: Of course there are individuals who do  
15 cross the border not through a port of entry -- or even through  
16 a port of entry, actually, but let's assume not through a port  
17 of entry, who are entitled to asylum. And while they may have  
18 crossed in an inappropriate way, they are entitled to asylum,  
19 so they haven't committed a crime.

20 MR. BOYNTON: You are correct, your Honor, that  
21 they're still entitled to --

22 THE COURT: Committed a state crime, that's the issue.

23 MR. BOYNTON: Yeah, they've actually committed a  
24 federal crime to -- the unlawful crossing between ports of  
25 entry is still a violation even for someone who's entitled to



1 asylum, but the asylum prohibits their removal.

2 THE COURT: That's right. So they committed a crime  
3 but they don't get removed.

4 MR. BOYNTON: Correct, your Honor.

5 THE COURT: And usually the prosecution then gets  
6 abated, which, you know, they don't get prosecuted.

7 MR. BOYNTON: So the final point I'd like to make is  
8 we are facing a March 5 date when this law -- unless the Court  
9 acts -- this law would come into effect. We would urge you to  
10 rule on this case as soon as you can. It seems evident that  
11 there will be further appellate proceedings regardless of how  
12 you come out on this issue.

13 THE COURT: You know, I got blasted for doing that by  
14 the Court of Appeals, some judges on the Court of Appeals, for  
15 rushing a ruling.

16 MR. BOYNTON: I would urge you to work carefully and  
17 thoughtfully, but after you have fully considered the issues,  
18 to issue an opinion as quickly as reasonably possible.

19 THE COURT: Counsel, we don't start with the  
20 arguments, oral arguments. The Court prepares for oral  
21 argument, looks at the papers, carefully reviews the law before  
22 oral argument.

23 It isn't like I come in here and then I'm going to go  
24 run back and say, Gee whiz, what did they say in their papers?  
25 No. The Court has clearly and unequivocally, I can assure you,

1 it's had a running start on this.

2           And, you know, look, every ruling that any federal  
3 judge makes in an area like this is going to be appealed,  
4 regardless of who the judge is. I am no Oliver Wendell Holmes,  
5 okay, but if Oliver Wendell Holmes was sitting here and made a  
6 decision in this case, Oliver Wendell Holmes would be appealed  
7 in the Fifth Circuit, okay, guaranteed.

8           So I only say that because my good friend over here  
9 raised Oliver Wendell Holmes, and I do not equate myself with  
10 Oliver Wendell Holmes; please. I don't want somebody to  
11 suggest that. But it doesn't make any difference.

12           It could be Benjamin Cardozo making this ruling and it  
13 would go to the Fifth Circuit, regardless of how he ruled.

14           And that's the way it should be, okay. That's why we  
15 have public courts. That's why we have levels of appeal. So  
16 in important cases like this, we have more than one judge  
17 making the ultimate decision.

18           It has to start some place. I am the finder of fact,  
19 but much of this is law. And so the Court of Appeals will have  
20 a broad brush opportunity to look at this, and should -- and  
21 should. And it would not surprise me at all that this case  
22 would find its way to the United States Supreme Court.

23           I currently have two cases that I decided, one in  
24 which I was affirmed by a three-judge panel, and then the  
25 three-judge panel was reversed or vacated by a en banc panel.

1           And another one because -- a case in which there was a  
2 strong dissent. It was an unpublished decision.

3           Both of these cases are currently, this term, before  
4 the Supreme Court.

5           This case is much more important than either of those  
6 two cases so this will go to the Supreme Court, I am pretty  
7 sure.

8           MR. BOYNTON: We agree this is a very important case,  
9 your Honor, and we appreciate your attention to it.

10           The final point I'll make. This, no doubt, goes  
11 without saying, but we would oppose any motion for a stay  
12 pending appeal in the event you were to grant the preliminary  
13 injunction.

14           Texas has asked for a stay pending appeal, if there  
15 were a preliminary injunction granted. We would oppose that.  
16 For all the same reasons, we think a preliminary injunction  
17 should be entered in the first place.

18           THE COURT: Well, I -- yeah, okay, I understand your  
19 position. Thank you very much.

20           MR. BOYNTON: Thank you, your Honor.

21           MR. BALAKRISHNAN: Your Honor, I will be mercifully  
22 brief. I know that it's been a long morning and I thank you  
23 for your attention as do our clients.

24           I just want to make three very quick points.

25           First, there was some discussion by the State, you

1 know, both in argument and its briefs, about the projected  
2 operation of the statute in practice. I think -- you know, we  
3 agreed with your Honor that what's important here is the actual  
4 text and what the statute says that it does. I just wanted to  
5 point you to two sort of textual clues that show that --

6 THE COURT: Well, if you know my late friend, Justice  
7 Scalia, I was sitting on a panel with him and somebody said,  
8 well, how the hell do you interpret it, and this and that, and  
9 different people interpreted it differently. And Justice  
10 Scalia stopped him. I mean, he literally put his hand up and  
11 said, wait a minute. You look at the text of the statute.  
12 That's what you look at.

13 MR. BALAKRISHNAN: I agree. I think that's important  
14 in this case, particularly in a preemption case. I just wanted  
15 to point you to just two textual clues that I think help  
16 support a broader reading of the statute than maybe the State  
17 is suggesting.

18 The first is the fact that the statute excludes  
19 certain sensitive locations from enforcement of illegal  
20 reentry.

21 THE COURT: Yes, I'm sure --

22 MR. BALAKRISHNAN: Right, which clearly shows that  
23 it's meant to extend beyond the sort of limited -- very limited  
24 border enforcement that the State declarants refer to.

25 The second thing I'd point you to is, of course, the

1 fact that it authorizes all peace officers to be enforcing the  
2 law, and, of course, that extends beyond simply the Department  
3 of Public Safety.

4 THE COURT: Why don't you address something that I  
5 think is important here, and that is your standing to bring  
6 this for yourself and for your co-plaintiffs.

7 MR. BALAKRISHNAN: Sure, of course.

8 THE COURT: He raised Judge Cardone, a very good  
9 friend of mine and excellent judge, by the way.

10 MR. BALAKRISHNAN: I understand. I mean, of course,  
11 we disagree with that opinion. And I think that the State's  
12 position here is, I guess, wrong and inconsistent with  
13 governing law at a number of levels.

14 I'll just sort of walk through them very quickly for  
15 your Honor because they are also in our briefs. I think as an  
16 initial matter, this argument that you don't -- a private party  
17 doesn't have sort of an equitable cause of action via Ex parte  
18 Young raises the suspension clause claim is flatly incorrect.

19 You know, there is clear, on-point Fifth Circuit law  
20 fairly recently, which we cite in our briefs, which has private  
21 parties doing this exact thing.

22 I think second, the idea that you can't raise a  
23 preenforcement suspension clause -- sorry, preenforcement  
24 supremacy clause claim is belied by the number of cases that  
25 have, in fact, done just that; also cited in our brief.

1 I think that, you know, at bottom, it seems that what  
2 the State's argument is is that the only way you can do --  
3 bring a preenforcement suit is if you meet the Susan B. Anthony  
4 test. But the Susan B. Anthony test is clearly designed for  
5 instances where somebody could be a defendant in a civil or  
6 criminal enforcement. And it's designed around that, so it's  
7 looking at whether you'll actually be prosecuted.

8 But of course, Havens standing, which is what the  
9 nonprofit organizations here are moving under, falls completely  
10 outside the Susan B. Anthony line of cases.

11 And again, you know, Havens itself, you know, the  
12 Fifth Circuit, multiple district courts have analyzed  
13 preenforcement claims brought by individuals and organizations  
14 who are not themselves the directly -- that regulated parties  
15 under -- outside of the Susan B. Anthony test.

16 I think all the cases are in our reply brief. So I think  
17 those threshold claim -- those threshold challenges that the  
18 State's making are flatly incorrect and contrary to precedent.

19 I think, you know, if your Honor wants me to, I can go  
20 ahead and also, sort of, explain why we meet the governing  
21 Havens test for organizational standing.

22 THE COURT: It's in your papers, I believe.

23 MR. BALAKRISHNAN: Yes, it is, and I just wanted to --

24 THE COURT: I read it.

25 MR. BALAKRISHNAN: Okay. I wanted to just --

1 THE COURT: I can read it again.

2 MR. BALAKRISHNAN: If your Honor has any other  
3 questions, I'd be happy to run through those for you.

4 THE COURT: I don't, no. Your opposing -- I'm sorry,  
5 co-counsel, I should say, the government, answered the question  
6 that I was going to be asking.

7 MR. BALAKRISHNAN: Okay. Great. I will just, very  
8 quickly just -- again, the scope of like the Statute SB4 is  
9 clearly broader than the State would make it appear to be, you  
10 know, as evidenced by the use of the term "peace officers,"  
11 which means it's not just DPS who's going to be enforcing it.  
12 It's potentially any of the people who are identified as peace  
13 officers under the Texas code, and their declarant is only  
14 speaking for one such enforcement agency.

15 So clearly, that's insufficient limited --

16 THE COURT: I read the law. I mean, you could have a  
17 constable somewhere, you could have a police officer, you could  
18 have a state chair, you could have any peace officer -- any law  
19 enforcement officer in the state of Texas, I believe, is  
20 encompassed in this group.

21 MR. BALAKRISHNAN: Yeah, absolutely. You know,  
22 there's been some discussion about how you interpret the  
23 operation of a state removal order in the criminal statute.  
24 We've addressed that specifically at pages 2 and 4 of our reply  
25 briefly, so I point you to that.

1           And I think just the final point I'd like to make,  
2 unless your Honor has any other questions for us?

3           THE COURT: I don't think I do.

4           MR. BALAKRISHNAN: There was a quick discussion of  
5 sort of the history of immigration regulation in the United  
6 States.

7           I just wanted to point out, you know, in our opening  
8 brief at page 6, we've laid out the line of cases that  
9 established for 150 years, essentially since the start of  
10 comprehensive federal immigration regulation, the Supreme Court  
11 has time and time again stated that control of entry into the  
12 United States, removal from the United States is the sole and  
13 exclusive providence of the federal government.

14           And that is a line of cases that is not only old, 150  
15 years old, but also continuous. It's never been broken since  
16 that time and has been constantly reiterated by the Supreme  
17 Court, and we think that that principle controls the result in  
18 this case.

19           And with that, I thank you for your time, unless you  
20 have any other questions.

21           THE COURT: All right, thank you.

22           First of all, before we go any further, I want to  
23 sincerely thank counsel for their preparation. I was a trial  
24 lawyer. It's not easy to get up and argue a case like this,  
25 either side. And it's clear to me that counsel were carefully



1 and thoroughly prepared for today's argument, and I do  
2 sincerely appreciate that from both sides.

3 I will never apologize or step away from asking  
4 counsel questions where I have a question or a comment to be  
5 made. I recognize that when I do so, everything I say is on  
6 the record here, and for the first time in my career, recently,  
7 a couple of judges who were writing dissenting opinions from  
8 the denial of a bond chose to pick out some things and they  
9 quoted my comments at length, which is their right, and I have  
10 no problem with that. And I'm sure that there are things that  
11 I may have said here today that can be picked out and  
12 criticized.

13 My job is not to try to second guess what the judge on  
14 the Court of Appeals may find appealing or unappealing in terms  
15 of argument.

16 My job is to try to ferret out and ask questions. And  
17 I think counsel for the State put it best and the way I would  
18 have put it as a trial lawyer. I would rather have the judge  
19 ask a question and have the opportunity to answer it than have  
20 the judge sit there mute and not say anything and then try to  
21 figure out what they might be thinking or not thinking.

22 And quite frankly, oftentimes I will ask a question on  
23 something where I think I might understand what the State or  
24 the Government is arguing and then get an answer which will  
25 help redirect me. And there were a couple of instances here

1 where the State did just that, and I appreciate it, and the  
2 Federal Government did it on one instance.

3           May I also say that I have personally attended and  
4 have read transcripts of Fifth Circuit argument, and I can  
5 assure you the Fifth Circuit Court of Appeals judges are not in  
6 any way, shape or form shy about aggressive questioning of  
7 lawyers who argue before them.

8           And so I think that is part of our process. It's why  
9 we call it oral argument. And I appreciate very much the fact  
10 that we have good lawyers in this case, and you were extremely  
11 responsive.

12           I also want to thank very much the ladies and  
13 gentlemen in the audience here who have very strong opinions,  
14 I'm sure, many of you, on the issues that we had here today,  
15 but you comported yourself in a very professional way and did  
16 not, in any way shape or form, cause any issues for this Court  
17 or any of the court officers.

18           And I know how difficult it is sometimes to listen to  
19 people say things that you don't agree with and you just want  
20 to jump up and say something. But you didn't do that, and I  
21 thank you very much for respecting the dignity of this Court  
22 and the right of various parties here to argue their positions  
23 and not be troubled by any difficult problems you might have  
24 otherwise.

25           I wish that was always the case. I've never really

1 had big problems, but we had a problem in San Antonio when I  
2 first got there where somebody jumped up apparently and started  
3 misbehaving in the courtroom, and I'm very happy we didn't have  
4 that here. And I thank you very much for that.

5 I will try to get my decision out as quickly as I  
6 possibly can, consistent with, as counsel put it, a thorough  
7 and careful analysis of the arguments raised by each side, and  
8 I will do that as quickly as I can.

9 I will try to do it in enough time, and I'm trying to  
10 look at the State's counsel here, but I've got -- I will try to  
11 do it quickly enough so that a stay wouldn't be necessary, so  
12 that you'll have plenty of time before the law goes into effect  
13 if you wish to go to the Court of Appeals so that we don't have  
14 to worry about stays.

15 It doesn't go into effect until March the 5th, and so  
16 I'm going to work really hard with my law clerks in trying to  
17 get this out in sufficient time so that you have an opportunity  
18 before the law goes into effect to get to the Court of Appeals,  
19 either of you, whoever it is wanting to get there.

20 Thank you so very much.

21 And by the way, I hope your bosses know, from both the  
22 United States Attorney General and the State of Texas Attorney  
23 General, that you most certainly earned your income today.

24 The Court stands in recess.

25 \* \* \* \* \*

1 UNITED STATES DISTRICT COURT

2 WESTERN DISTRICT OF TEXAS

3

4 I certify that the foregoing is a correct transcript from  
5 the record of proceedings in the above-entitled matter. I  
6 further certify that the transcript fees and format comply with  
7 those prescribed by the Court and the Judicial Conference of  
8 the United States.

9

10 Date signed: February 21, 2024

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12 /S/ Lisa A. Blanks

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