No. 23A815

In the

Supreme Court of the United States

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

Applicants,

v.

STEVEN MCCRAW, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF TEXAS DEPARTMENT OF PUBLIC SAFETY; AND BILL HICKS, IN HIS OFFICIAL CAPACITY AS DISTRICT ATTORNEY FOR THE 34TH DISTRICT,

Respondents.

REPLY IN SUPPORT OF APPLICATION TO VACATE STAY OF PRELIMINARY INJUNCTION ENTERED BY THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

David A. Donatti
Adriana C. Piñon
AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF TEXAS, INC.
P.O. Box 8306
Houston, TX 77288
T: (713) 942-8146

Tamara F. Goodlette*
Daniel Hatoum*
Erin D. Thorn*
TEXAS CIVIL RIGHTS PROJECT
1017 W. Hackberry Ave.
Alamo, TX 78516
T: (512) 474-5073, ext. 207

Cody Wofsy
Counsel of Record
Spencer Amdur
Cecillia D. Wang
Hannah Schoen
Morgan Russell
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
425 California Street, Suite 700
San Francisco, CA 94104
T: (415) 343-0770
cwofsy@aclu.org

ADDITIONAL COUNSEL AND REPRESENTATION INFORMATION ON NEXT PAGE

Jo Anne Bernal**
El Paso County Attorney
320 S. Campbell St., Suite 200
El Paso, Texas 79901
T: (915) 273-3247

Bernardo Rafael Cruz**
Assistant County Attorney
320 S. Campbell St., Suite 200
El Paso, Texas 79901
T: (915) 273-3247

* *Attorneys for Applicants Las Americas Immigrant Advocacy Center and American Gateways*

** *Attorneys for Applicant County of El Paso*

Anand Balakrishnan
Omar Jadwat
Lee Gelernt
Wafa Junaid
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street
New York, NY 10004
212-549-2660

David D. Cole
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
915 15th Street, NW
Washington, D.C. 20005

Attorneys for Applicants
Las Americas Immigrant Advocacy Center, American Gateways, and County of El Paso

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

STATUTES & REGULATIONS

OTHER AUTHORITIES

INTRODUCTION

Texas asks this Court to permit it to implement its own immigration system. In support of that startling request, the State emphasizes its concerns regarding immigration enforcement, citing the number of recent migrants, along with vague and tenuous attempts to tie asylum seekers to danger, crime, and drugs.

None of this is new. When large numbers of people from Asia traveled to California following the 1848 gold rush, that State warned that "their immigration was in numbers approaching the character of an Oriental invasion, and was a menace to our civilization." *Chae Chan Ping v. United States*, 130 U.S. 581, 595 (1889). When millions of immigrants from eastern and southern Europe arrived in subsequent decades, states highlighted fears of crime and grave danger lurking in those populations. *See* Br. for Appellant 15, *Hines v. Davidowitz*, 312 U.S. 52 (1941) (Pennsylvania warning during World War II that an immigrant "might possibly be a blackhander [i.e. a gangster], a spy or a member of a Fifth Column").[1] In later generations, the focus shifted to immigration from Mexico and elsewhere in Latin America: In 2012, the State of Arizona sought to tie a "flood of unlawful cross-border traffic" to an "influx of drugs, dangerous criminals," and "members of Mexican drug cartels." Br. for Petitioners 3, *Arizona v. United States*, 567 U.S. 387 (2012).

People can disagree about immigration. They always have. And Texas may be deeply concerned about recent immigration. But the same was true of California in the 1870s,

[1] *See also* Libby Garland, AFTER THEY CLOSED THE GATES: JEWISH ILLEGAL IMMIGRATION TO THE UNITED STATES, 1921-1965, 156 (University of Chicago Press 2014) (explaining that proponents of laws like the statute struck down in *Arrowsmith v. Voorhies*, 55 F.2d 310 (E.D. Mich. 1931), feared "a new class of illegal immigrants who were disappearing into the enormous population of the foreign born" and that "Michigan's law represented a state government taking the matter into its own hands" to address what it perceived to be "the federal government's enforcement failures").

Pennsylvania and Michigan in the 1930s, and Arizona in 2012. Nevertheless, for 150 years this Court has made clear that states are not allowed to regulate the core immigration field of entry and removal. *See, e.g.*, *Chy Lung v. Freeman*, 92 U.S. 275, 280 (1875); *Arizona*, 567 U.S. at 408-09; *Hines*, 312 U.S. at 62 & n.10; *see also Arrowsmith*, 55 F.2d at 312 (approvingly cited in *Hines*, 312 U.S. at 61 n.8). Entry and removal laws are a federal question to be decided by Congress—which has engaged in robust debate on immigration this year—not in the 50 statehouses.

That basic and well-established principle resolves this case. Texas tries to sidestep it by badly misreading its own statute and ignoring well over a century of this Court's precedents. It then asserts—in the teeth of constitutional structure, history, and common sense—that it has unreviewable and uncontrollable power to supersede federal law whenever it declares that it is being invaded. In short, the State offers no plausible reason to permit it to implement this blatantly preempted law. Certainly the expedited schedule in the court of appeals does not provide one; Texas concedes a decision is weeks (if not months) away, and in the meantime S.B. 4 is poised to generate hundreds and possibly thousands of unlawful state deportations.

The stay entered by the court of appeals, if allowed to go into effect, will upend a remarkably longstanding status quo. It should be vacated.

ARGUMENT

I. TEXAS HAS NO LIKELIHOOD OF SUCCESS IN DEFENDING S.B. 4.

This is a clear case of both field and conflict preemption, and Texas's contrary arguments lack merit. While the State attempts to change the subject by emphasizing threshold defenses against the *Las Americas* plaintiffs, those arguments contravene this Court's precedents and are ultimately beside the point because at a minimum the United States can doubtless sue to enjoin a preempted

state law. Thus, Texas cannot demonstrate a likelihood of success on the merits, and that alone is reason enough to grant this application.[2]

A. S.B. 4 is Preempted and None of Texas's Contrary Arguments Is Likely to Succeed.

As the plaintiffs demonstrated, S.B. 4 is straightforwardly preempted under settled law. Vacatur App. 13-18. The "federal interest" in entry and removal is "so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." *Arizona*, 567 U.S. at 399 (cleaned up). That authority is *exclusive*, as this Court has repeatedly made clear for 150 years. Moreover, Congress's regulation of entry and removal in general, and entry between ports in particular, is "so pervasive that Congress left no room for the States to supplement it." *Arizona*, 567 U.S. at 399 (cleaned up); *see* Vacatur App. 18-21.

S.B. 4 also conflicts with numerous aspects of Congress's system, including the "careful balance" Congress struck among various policy goals, such as discouraging irregular entry while preserving access to asylum and other relief; its choice to vest federal Executive officers with "broad discretion" at numerous stages; its recognition of the need to speak "with one voice" in the realm of foreign affairs; and its specific policy judgments enshrined in federal law. *Arizona*, 567 U.S. at 396, 400-01, 409; *see* Vacatur App. 22-26. These many conflicts doom S.B. 4 in their own right, and they "underscore the reason[s] for field preemption" here. *Arizona*, 567 U.S. at 403.

None of Texas' responses to these fundamental flaws has merit.

---

[2] This Court routinely grants review over immigration cases of national importance. *See, e.g.*, *Arizona v. Mayorkas*, 143 S. Ct. 478 (2022); *United States v. Texas*, 143 S. Ct. 51 (2022); *Biden v. Texas*, 142 S. Ct. 1098 (2022); *Wolf v. Innovation Law Lab*, 141 S. Ct. 617 (2020); *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 139 S. Ct. 2779 (2019). Texas asserts this Court is "highly unlikely" to grant review *and* reverse if the court of appeals blesses S.B. 4. Opp. 9. But it does not appear to contest that a grant of *certiorari* itself would be likely; after all, such a decision would violate 150 years of this Court's precedents, and represent an extraordinary rejection of federal control over entry and removal.

1. Texas runs away from S.B. 4's plain and obvious meaning. Texas repeatedly claims that, under S.B. 4, "[a] return order merely requires that an alien be transported to a port of entry," where federal officials can decide how to handle them. Opp. 21; *see id.* at 5-6, 16, 17, 21 n.5. But S.B. 4 could not be clearer: its removal orders "require the person to return *to the foreign nation* from which the person entered." Tex. Code of Crim. Proc. art. 5B.002(c), (d) (emphasis added); Tex. Penal Code § 51.04(a)(2) (same). Texas agents are "required to monitor compliance with the order" to return to Mexico. Tex. Code of Crim. Proc. art. 5B.002(g), (e)(2). And if the person does not leave the United States, they commit a "felony of the second degree," Tex. Penal Code § 51.04(b) (titled "Refusal to comply with order to return to foreign nation"), which carries up to 20 years in jail, *id.* § 12.33(a).

The Texas legislature and executive have elsewhere been forthright that S.B. 4 operates by "expelling" thousands of noncitizens to Mexico. Vacatur App. 10, 17; App. 42-43. Indeed, that was the point: The law's sponsor explained that the "primary focus" of S.B. 4 "would be to return those folks to the country from which they came." Vacatur App. 8. And even the declaration Texas attached to its opposition makes clear that an individual will only be "consider[ed] to have complied with [a] return order" when they "cross to the Mexican side of the international bridge" or are turned over to Mexican authorities. App. 36.

Texas makes no attempt to square its description of S.B. 4 as merely "facilitating aliens finding their way to ports of entry," Opp. 18, with the statute's actual text. Nor does it deny that noncitizens with Texas removal orders will face 20-year prison terms if they do not leave the country and enter Mexico. Indeed, if all Texas sought to do was "transfer [a noncitizen] to the federal government" and let "[t]he federal government then decide whether to remove" that person, Opp. 5-6, S.B. 4's removal provisions would make no sense. Texas cannot escape the clear

language of its own statute. But by refusing to defend it as written, the State underscores how egregiously unlawful S.B. 4 is.

2. Texas's analysis of precedent fares no better.[3] It claims that *Arizona*'s field preemption analysis is limited to registration schemes only. Opp. 18-19. But the field preemption analysis in *Arizona* and *Hines* applies with even greater force here. Vacatur App. 21-22. The State suggests—with *no* explanation—that registration is more subject to preemption because it is "domestic." Opp. 18. As the plaintiffs have explained, that gets things backward: If state registration schemes are preempted, state entry and removal schemes must be as well, since the latter strike at the very heart of the sovereign federal immigration power. Vacatur App. 21. Texas has no response.

The preemption of S.B. 4 follows inexorably from *Arizona*; perhaps that is why Texas finds it necessary to ask this Court to overrule that decision. Opp. 24 n.6. But even that would not allow Texas to prevail. *Arizona* applied and built on over a century of clear precedent in reaffirming that a state cannot "achieve its own immigration policy." 567 U.S. at 408; *id.* at 409 ("[T]he removal process is entrusted to the discretion of the Federal Government."); *see* Vacatur App. 13-14 (citing 150 years of precedent to this effect). Texas tellingly does not even try to address this unbroken line of precedent. It brushes aside *Truax v. Raich*, *see* Opp. 17, but fails to mention this Court's rejection of any state power even "*tantamount* to the assertion of the right to deny [noncitizens] entrance and abode," 239 U.S. 33, 42 (1915) (emphasis added); *see* Vacatur App. 18. Nor, in contesting preemption, does Texas address *Chy Lung*—even though that case initiated 150 years of this Court's jurisprudence barring state entry and removal laws.

[3] Texas invokes the presumption against preemption, Opp. 16, but fails to respond to the plaintiffs' explanation that it does not apply in this quintessentially federal arena, *see* Vacatur App. 27.

Arizona's analysis of the other provisions in that case further undercuts Texas's defense. Texas claims that the plaintiffs "do not attempt to equate" S.B. 4 with "the conflict preempted provisions in *Arizona*," Opp. 22, but in fact the plaintiffs explained why that analysis applies with even greater force here, Vacatur App. 24 & n.11. Section 6 was invalid because it permitted "the unilateral decision of state officers to arrest an alien for being removable absent any request, approval, or other instruction from the Federal Government." *Arizona*, 567 U.S. at 410. S.B. 4 does exactly that because it allows state officers to unilaterally arrest people for immigration violations. But it also does much more, because it allows state officers to unilaterally prosecute and remove people, without any federal involvement whatsoever. Vacatur App. 24. That is impossible to square with *Arizona*'s Section 6 analysis.

S.B. 4 is also impossible to square with *Arizona*'s Section 2(B) analysis. While the Court did not enjoin Section 2(B), that was only because the provision "could be read" to merely authorize state officers to "communicate with ICE." *Arizona*, 567 U.S. at 412-13; Vacatur App. 24 n.11. Nothing similar is true here, because S.B. 4 goes far beyond mere communication. Texas suggests that, like Section 2(B), there might be some way in which S.B. 4 could "be construed" to not conflict with federal law, Opp. 20, but (for obvious reasons) offers no actual suggestion for how this could be accomplished. The statute's terms speak for themselves, setting up unilateral arrests, prosecutions, and removals, and specifically forbidding state officers from accommodating federal procedures. Vacatur App. 23-24.

Instead of addressing these problems, Texas attempts to rewrite the *Arizona* opinion. For example, the State denies that *Arizona* "requires federal supervision," Opp. 23, but this Court was clear: "[I]t would disrupt the federal framework to put state officers in the position of holding aliens in custody for possible unlawful presence *without federal direction and supervision*."

567 U.S. at 413 (addressing Section 2(B)) (emphasis added); *see id*. at 409-10 (unilateral arrest authority in Section 6 "violates the principle that the removal process is entrusted to the *discretion of the Federal Government*") (emphasis added). The need for federal direction and supervision precludes the idea that states can enact their *own* immigration schemes.

3. Texas asserts that Congress has invited the states to enact "concurrent regulation" and set up alternative schemes to govern entry and removal. Opp. 16-17 (internal quotation marks omitted). That is baseless. Vacatur App. 27. None of the statutes Texas cites remotely suggest a congressional intent to yield this domain to the states. Opp. 17 n.4.[4] Rather, most of the statutes involve domestic conduct that intersects with immigration only tangentially, if at all. For example, states obviously can create speed limits applicable near immigration checkpoints—which are generally well within the United States. *See United States v. Martinez-Fuerte*, 428 U.S. 543, 552 (1976) (addressing checkpoints). Federal law acknowledges that states can enforce those speed limits, *see* 18 U.S.C. § 758; *United States v. Clemente E.*, 392 F.3d 1164, 1165 (10th Cir. 2004), but that is not evidence that Congress invited alternative state immigration schemes.[5]

[4] By contrast, in *National Press Photographers Association v. McCraw*, 90 F.4th 770, 797 (5th Cir. 2024), the federal agency specifically invited state regulation.

[5] Likewise, Congress's acknowledgement of state trafficking crimes does not show any invitation for states to set up their own immigration systems. *See* Opp. 17 n.4. Congress understood that those laws generally involve criminal conduct like "kidnapping, rape, slavery, or other forced labor offenses" which occurs in the United States and need not pertain to noncitizens. 22 U.S.C. § 7105(b)(1)(E)(iv); *see id.* § 7105(b)(1)(F) (acknowledging U.S. citizen victims); *see, e.g.*, *United States v. L.*, 990 F.3d 1058, 1060, 1064-65 (7th Cir. 2021) (affirming trafficking conviction based on domestic conduct where noncitizens were coerced into sex work through immigration, financial, and other threats). States' ability to prosecute these crimes does not undermine their exclusion from the field of entry and removal. Texas's reliance on special visas for crime and trafficking victims is ironic, however, given that S.B. 4 wipes away those and all other forms of potential federal relief from removal. *See* Vacatur App. 20, 22-23, 31; *see also infra* Section II.

The state fails to acknowledge that Congress made the federal laws "the sole and exclusive procedure" for determining entry and removal questions. 8 U.S.C. § 1229a(a)(3); *see* Vacatur App. 27. Nor does Texas contest that Congress has exhaustively and pervasively regulated both entry and removal. Vacatur App. 19-21; Opp. 17. And the INA's limited opportunities for states to help federal officials do not extend or imply any invitation for states to set up their own schemes. Opp. 17-18 & n.4 (citing 8 U.S.C. § 1357(g)). Just the opposite: As this Court held, those same statutes show that Congress only wanted state assistance "in specific, limited circumstances," and any further involvement is preempted. *Arizona*, 567 U.S. at 410; *see* Vacatur App. 27; *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 212 & n.25 (1983) (field of nuclear safety preempted even though statute "specifically authorized" a limited role for states). That is particularly true given the longstanding dominant federal interest in this field. If Congress had wanted to invite states to take control of the core sovereign activities of regulating entry and removal, one would expect a far clearer statement than the tangential citations Texas can muster. *See Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001) (Congress does not "hide elephants in mouseholes").[6]

Nor does anything in *Kansas v. Garcia*, 140 S. Ct. 791 (2020), undermine preemption here. *See* Vacatur App. 28. S.B. 4 does far more than "overlap to some degree" with the federal system. Opp. 20 (quoting *Kansas*, 140 S. Ct. at 806). It displaces and interferes with a comprehensive federal system, in which Congress "made a considered decision" to balance enforcement, humanitarian relief, and foreign affairs, by placing discretion in the hands of federal officials; "[n]othing similar" was present in *Kansas*. 140 S. Ct. at 806.

[6] Texas's separate "enforcement of its state criminal trespass law" at the border, Opp. 23, is not before the Court. Moreover, that operation differs from S.B. 4 in many respects including that it lacks any reentry or removal provisions. And in any event, its legality is contested.

4. Texas suggests that even if S.B. 4 is almost entirely preempted, the Court should *still* permit the State to enforce it, across the board, because there are a few situations in which (the State claims) it could be valid. Vacatur Opp. 8, 29, 31 (citing *United States v. Salerno*, 481 U.S. 739 (1987)). Everything about that argument is wrong.

For starters, S.B. 4 has no valid applications, because it is field preempted in every single instance. Each time it is enforced, it would contravene Congress's decision "to foreclose *any* state regulation in the area" of entry and removal. *Murphy v. NCAA*, 584 U.S. 453, 479 (2018) (emphasis added) (quoting *Arizona*, 567 U.S. at 401). S.B. 4 also conflicts with federal law in every application. Every time the State orders someone removed—which is mandatory after every conviction—it defies Congress's mandate that people can only be removed after following the procedures laid out in the INA. *See* Vacatur App. 23. And every time the State enforces S.B. 4, it denies federal officials the discretion that Congress gave them as a cornerstone of the federal system. *Id.* at 23-25. Notably, Texas offers *no* response to most of these conflicts. Rather, in grasping for a way to show harmony between S.B. 4 and federal law, Texas mentions a few situations where S.B. 4 would *not* apply. Opp. 16 (people already granted asylum, but only as to the entry crime), 23 (people who enter at ports, again limited to the entry crime). But situations like these in which the statute is "irrelevant" cannot "prevent facial relief." *City of Los Angeles v. Patel*, 576 U.S. 409, 418-19 (2015).

Even if Texas could come up with a valid application or two, that is not enough to avoid an injunction. "It is always possible to imagine" some outlier scenario where a preempted state law might not conflict with federal law (absent field preemption). *League of Women Voters of Ind., Inc. v. Sullivan*, 5 F.4th 714, 728-29 (7th Cir. 2021). If that were enough, most preempted state laws could *never* be enjoined, and instead, the United States and other injured parties would

have to challenge them application by application, in countless separate cases, even when in reality the state law is preempted in all or nearly all cases. "Such an approach would inflict enormous costs on both courts and litigants," and would "insulate [preempted] statutes from most facial review." *Whole Woman's Health v. Hellerstedt*, 579 U.S. 582, 624-26 (2016) (addressing Texas's severability argument), *abrogated on other grounds by Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022). This Court has never followed such a counterintuitive approach. *See* Vacatur App. 29-30. Texas offers no response.

5. Texas suggests that even if the Court halts the removal provisions of S.B. 4, it should let the criminal entry and reentry provisions take effect. Opp. 32. Texas never requested this division from either the district court or the court of appeals, so this Court should decline to entertain its argument in the first instance. *See City of Austin v. Reagan Nat'l Advert. of Austin, LLC*, 596 U.S. 61, 76 (2022) (this Court is one "of final review and not first view") (internal quotation marks omitted).

In any event, that argument is flawed for multiple reasons. For one thing, that outcome would contravene the intent of the Texas Legislature, which made abundantly clear that it did not want a prosecution-only system without removals. *See* Vacatur App. 7-8 & nn.2-3. Texas does not contest that history. Instead, it invokes S.B. 4's general severability clause, but "a severability clause is an aid merely; not an inexorable command." *Whole Woman's Health*, 579 U.S. at 624-26 (quoting *Reno v. ACLU*, 521 U.S. 844, 884-885 & n. 49 (1997)). Under Texas law, there is no severability where the valid and invalid "provisions are connected in subject-matter, dependent on each other, [and] operat[e] together for the same purpose." *Rose v. Doctors Hospital,* 801 S.W.2d 841, 844 (Tex. 1990) (internal quotation marks omitted); *see Builder Recovery Servs., LLC v. Town of Westlake*, 650 S.W.3d 499, 507 (Tex. 2022) (continuing to apply the *Rose* standard). S.B. 4

plainly fits that description, because its prosecution and removal provisions operate together at every step, beginning at a person's first appearance and ending when a person has been removed. Vacatur App. 7-8. The Court should not "use its remedial powers to circumvent the intent of the legislature" and enact the system that Texas rejected. *United States v. Booker*, 543 U.S. 220, 247 (2005) (cleaned up); *see Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2209 (2020) (no severability, despite clause, where "there is strong evidence that [the legislature] intended otherwise") (internal quotation marks omitted).

But even if the legislature had enacted a narrower bill containing entry and re-entry crimes, it would be still preempted. "Policies pertaining to the entry of aliens and their right to remain here are entrusted exclusively to Congress." *Arizona*, 567 U.S. at 409 (quoting *Galvan v. Press,* 347 U.S. 522, 531 (1954)) (cleaned up); *see also e.g.*, *Plyler v. Doe*, 457 U.S. 202, 229 n.23 (1982) (cited by Texas) (explaining that "the State has no direct interest in controlling entry into this country, that interest being one reserved by the Constitution to the Federal Government" and noting "the exclusive federal control of this Nation's borders"); *Chy Lung*, 92 U.S. at 280. Regulation of entry is no less a core aspect of federal sovereignty than regulation of removal. *See* Vacatur App. 14; *Nishimura Ekiu v. United States*, 142 U.S. 651, 659 (1892). If such a law "were valid, every State could give itself independent authority to prosecute federal [entry] violations, diminishing the Federal Government's control over enforcement[,] detracting from the integrated scheme of regulation created by Congress," and allowing prosecution "even in circumstances where federal officials in charge of the comprehensive scheme determine that prosecution would frustrate federal policies." *Arizona*, 567 U.S. at 402 (cleaned up).

Moreover, contrary to Texas's repeated protestations that S.B. 4 "mirrors" federal law, Opp. 1, 6, 10, 18, 23, 32, 33, 34, there are serious "inconsistenc[ies] between [S.B. 4] and federal

law" that both conflict with federal law and "underscore the reason for field preemption," *Arizona*, 567 U.S. at 402-03. Most glaringly, the state re-entry crime fails to track its federal counterpart, criminalizing people whom the federal government has permitted to return to this country. Vacatur App. 25-26. Texas entirely fails to acknowledge that blatant mismatch. *See* Opp. 16 (incorrectly suggesting there is an affirmative defense to the state re-entry crime).

6. Finally, Texas doubles and triples down on its breathtaking claim to state supremacy. Texas confirms that, indeed, it believes it may unilaterally declare a "war"—never mind on whom exactly—as a justification for displacing federal immigration law, and neither Congress, nor the President, nor even this Court gets to "second guess[]" the State's "exclusive authority to decide." Opp. 29-30. As the district court explained, such a claim to "nullification" authority "is antithetical to the Constitution and has been unequivocally rejected by federal courts since the Civil War." App. 3. The district court ably dismantled Texas's incredible and unsupported attempt to wring "supreme and unchallengeable" state power, *Sterling v. Constantin*, 287 U.S. 378, 397-98, 402 (1932), from an "isolated clause[] . . . torn from context." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring); *see* App. 65-98 (considering and refuting all of Texas's arguments).

And, of course, much the same rhetoric was expressed by opponents of immigration in years past. *See supra*. Pennsylvania warned of the threat of spies and enemies among immigrant communities at the height of World War II. *See* Br. for Appellant at 15, *Hines v. Davidowitz*, 312 U.S. 52 (1941). At that time of war, fear of sabotage was not idle. *See Ex parte Quirin*, 317 U.S. 1 (1942). The State of Arizona likewise warned against the same threats Texas highlights. *See* Br. for Petitioners 3, *Arizona v. United States*, 567 U.S. 387 (2012) ("drugs," "criminals," and "cartels"). The notion that this Court just forgot to check the Constitution in reaffirming federal

control over immigration in those cases strains credulity. The Court should reject this doctrine of disunion out of hand.

B. Texas's Threshold Arguments Could Not Justify a Stay and in Any Event Lack Merit.

Texas raises various threshold issues, arguing that the plaintiffs lack standing and a cause of action. But for present purposes, Texas's arguments about the *Las Americas* plaintiffs are irrelevant. The *Las Americas* case is consolidated with the United States' case; a single preliminary injunction was entered in the two cases, and the court of appeals stayed that injunction in the unified appeal from that order. Texas does not appear to contest the federal government's standing, and—notwithstanding Texas's extraordinary arguments to the contrary, Opp. 12-15—there can be no real doubt that the United States may sue in its own courts to block individual states from usurping federal authority, App. 26, 27. That is enough to vacate the stay. *See Bowsher v. Synar*, 478 U.S. 714, 721 (1986) (only addressing one plaintiff's standing in consolidated case, and noting the Court "need not consider the standing issue" for others).

In any event, the State's threshold arguments are meritless. The *Las Americas* plaintiffs have standing. The district court applied this Court's longstanding precedent that an organizational plaintiff "may establish injury in fact by showing that it had diverted significant resources to counteract the defendant's conduct." *NAACP v. City of Kyle, Tex.*, 626 F.3d 233, 238 (5th Cir. 2010) (citing *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982)); *see* App. 12-13. The district court found that the organizational plaintiffs made that showing—unsurprisingly, given that the plaintiffs' mission and work are dedicated to helping individuals secure relief from deportation. Defendant McCraw projected 80,000 additional arrests each year under the new law, upending the plaintiffs' operations and forcing them to dramatically alter their provision of legal services. *See* App. 13-16. Texas has not contested that factual showing.

Texas would write *Havens* out of existence, relying on one out-of-context quote from *Susan B. Anthony List v. Driehaus*, 573 U.S. 149 (2014). But that case addressed a particular situation, where "an individual is subject to . . . a threat" of "arrest, prosecution, or other enforcement action." *Id.* at 158. In the context of *other* injuries, like the organizational injury recognized in *Havens*, it makes no sense to require a threat of prosecution for a plaintiff who is injured by a policy but not subject to prosecution. *See* App. 11-13. Contrary to Texas's theory, courts routinely adjudicate claims by plaintiffs who are injured but not directly regulated by a policy. *See, e.g.*, *Shelby County v. Holder*, 570 U.S. 529, 537 (2013) (describing cases brought "to block voting laws from going into effect"); *Sierra Club v. Morton*, 405 U.S. 727, 734 (1972) (environmental litigation); *Biden v. Nebraska*, 143 S. Ct. 2355, 2366 (2023) (Administrative Procedure Act litigation by states harmed by third-party regulation).[7]

Texas also argues that the plaintiffs lack appellate standing. Opp. 11. But the court of appeals' administrative stay "purports to bring [S.B. 4] back into legal effect." *W. Virginia v. Env't Prot. Agency*, 597 U.S. 697, 718-19 (2022). Thus, the stay "inflicts . . . the same injury" as S.B. 4 itself, and appellate standing is proper for the same reasons as standing in district court. *Id*.

Texas invokes sovereign immunity and argues that *Ex parte Young*, 209 U.S. 123 (1908), does not apply because "no Texas official will enforce any part of this law *against these plaintiffs*." Opp. 11 (emphasis added). But it does not contest the defendants will enforce S.B. 4. And this Court has squarely rejected such a rule: "[T]here is no warrant in our cases for making the validity of an *Ex parte Young* action turn on the identity of the plaintiff." *Virginia Office for Prot. &*

[7] With regard to El Paso County, Texas argues only that "political subdivisions generally lack standing to sue their parent States." Opp. 10. But this Court "has repeatedly entertained suits against a state by a subdivision of the state, including cases under the Supremacy Clause." *Tweed-New Haven Airport Auth. v. Tong*, 930 F.3d 65, 73 (2d Cir. 2019) (collecting six examples); *see Lassen v. Arizona*, 385 U.S. 458, 459 n.1 (1967); App. 18-20.

Advocacy v. Stewart, 563 U.S. 247, 256 (2011); *see id*. at 252, 256 (permitting suit by government agency which sought access to records).

Texas also claims the plaintiffs lack a cause of action. Opp. 12. But this Court has recognized that "'relief may be given in a court of equity'" to enjoin preempted state laws, which "reflects a long history of judicial review of illegal executive action, tracing back to England." *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 327 (2015) (quoting *Carroll v. Safford*, 3 How. 441, 463 (1845)); *see also Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96 n.14 (1983) (collecting cases); *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 20 (2013). When a plaintiff sues under this equitable cause of action, there is no need for any statutory "rights-creating language," Opp. 12 (internal quotation marks omitted); rather, plaintiffs can sue unless Congress acts affirmatively to "preclude the availability of equitable relief," *Armstrong*, 575 U.S. at 328, and Texas makes no argument that Congress has done so here. *See also id*. at 331-32 (assessing the availability of an implied statutory cause of action separately from the equitable cause of action).

Texas's threshold arguments about the *Las Americas* plaintiffs thus run afoul of this Court's clear holdings. But there is no need to resolve any of them now; the involvement of the United States renders these issues little more than a distraction.

II. THE EQUITIES SUPPORT VACATUR.

The court of appeals' order, if it stands, will upend a status quo that this Court has steadfastly maintained for well over a century. Few principles in law have been so stable as the exclusive federal power and responsibility over entry and removal. Over many decades, this Court has repeatedly barred state efforts to take control of immigration, even in the face of concerns similar to those Texas expresses now. This durable and longstanding status quo is itself a powerful reason to vacate the court of appeals' stay.

Texas contends that the court of appeals' rapid briefing schedule means that S.B. 4 should be allowed to take effect. But the plaintiffs previously explained that S.B. 4 is poised to immediately begin generating illegal state deportation orders. Vacatur App. 1-2, 7, 10, 31. Hundreds or thousands of people could be illegally removed to Mexico in the weeks or months it will take to get a decision from the court of appeals. *See id.* at 10, 31 (state projecting 80,000 arrests per year). Nor does the expedited schedule provide any assurance about when the court of appeals will rule on the deferred motion for a stay pending appeal. *See id*. at 11 n.5 (example of "administrative" stay in place for three months).

None of the equities favor Texas. It suggests that it needs S.B. 4 to address certain criminal activity occurring within the State. Opp. 2-3. But Texas law already criminalizes all of the activities it mentions. *See, e.g.*, Tex. Health & Safety Code § 481.112-141; Tex. Penal Code §§ 20A.02, 76.02; App. 108 (criminal penalties for drug trafficking, human trafficking, terrorism). Texas thus has ample tools to address this conduct, without creating its own immigration system.

Nor does S.B. 4 meaningfully address the primary criminal activity that Texas emphasizes: the smuggling of fentanyl into the United States. Opp. 2, 3, 28. Texas stresses noncitizens who enter *between* ports of entry. *Id*. at 2, 18. But it is well-established that fentanyl overwhelmingly enters the country *at* ports, not between them, and is smuggled by *U.S. citizens*, not migrants. David Bier, *Fentanyl Is Smuggled for U.S. Citizens by U.S. Citizens, Not Asylum Seekers*, Cato Inst. (Sept. 14, 2022) ("[F]entanyl is smuggled through official crossing points specifically because it is easier to conceal it on a legal traveler or in legal goods than it is to conceal a person crossing the border illegally."), https://perma.cc/8RTW-MENH; *see* U.S. Sentencing Comm'n, Quick Facts: Fentanyl Trafficking Offenses (2022), https://perma.cc/XDY9-S49M; Statement of Brian Sulc, Executive Director, Transnational Organized Crime Mission Center, Office of Intelligence

and Analysis, Department of Homeland Security (May 18, 2022), https://perma.cc/76WQ-4YTU. S.B. 4 will therefore do little to address fentanyl smuggling. Texas does not contest or even acknowledge this, even though the plaintiffs have pointed it out at every stage of the case.

To the contrary, allowing S.B. 4 to take effect would, among other things, undermine federal efforts to address human trafficking and other crimes. App. 15, 105-07. Federal law encourages people to help law enforcement by offering visas to victims and witnesses who come forward and support an investigation or prosecution. *See* 8 U.S.C. § 1101(a)(15)(U), (T); 8 C.F.R. §§ 214.11, 214.14. And federal officials have numerous other tools—like deferred action and prosecutorial discretion—that they can use to encourage people to help with criminal enforcement. S.B. 4 erases these tools, because it requires state judges to order people removed even if they are seeking visas and other federal protections for crime victims and witnesses. *See* Tex. Code of Crim. Proc. art. 5B.003. And by cutting federal officials out of enforcement decisions, S.B. 4 takes away their ability to encourage cooperation by sparing victims and witnesses from prosecution or removal. Despite the concern Texas expresses for victims of crime, S.B. 4 would deny them the explicit protections that federal law provides. And it would similarly undermine the law enforcement operations of El Paso County, along with countless other local governments in Texas. Vacatur App. 31.

Texas downplays the chaos that S.B. 4 will inflict on the plaintiffs and the general public. Opp. 33. But it ultimately cannot contest that S.B. 4 would upend the immigration system in Texas and the lives of thousands of individuals and families. Migrants seeking safety in this country will be met with a state-law system that eliminates all relief and intense pressure to accept removal and depart the country to avoid a prison term. *See Nken v. Holder*, 556 U.S. 418, 436 (2009) ("[T]here is a public interest in preventing [people] from being wrongfully removed, particularly to countries

where they are likely to face substantial harm."). Non-Mexicans will be forced to seek entry into Mexico against that country's will, creating stand-offs and confusion at ports of entry that rank among the busiest border crossings in the world.[8] People issued state removal orders but who are eligible for relief in the federal system will be subject to conflicting pronouncements from competing immigration regimes. Advocates and local governments will be forced to scramble to provide services to vulnerable people caught up in this new system. And communities throughout Texas will be forced to live in fear as state, not federal, officials will now decide who should be arrested, prosecuted, and deported without the protections and procedures enshrined in federal law.

[8] *Cf., e.g.*, Shelly Hagan, *Texas Governor's Border Slowdown Cost $4 Billion, Research Shows* (Bloomberg Ap. 20, 2022), https://perma.cc/223L-V7LJ (describing chaos resulting from Governor Abbott's prior interference with the operation of ports of entry).

CONCLUSION

The Court should vacate the stay entered by the court of appeals.

Respectfully submitted,

/s/ Cody Wofsy
Cody Wofsy
Counsel of Record
Spencer Amdur
Cecillia D. Wang
Hannah Schoen
Morgan Russell
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
425 California Street, Suite 700
San Francisco, CA 94104
T: (415) 343-0770
cwofsy@aclu.org

Anand Balakrishnan
Omar Jadwat
Lee Gelernt
Wafa Junaid
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street
New York, NY 10004
212-549-2660

David D. Cole
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
915 15th Street, NW
Washington, D.C. 20005

Attorneys for Applicants
Las Americas Immigrant Advocacy Center, American Gateways, and County of El Paso

Dated: March 12, 2024

David A. Donatti
Adriana C. Piñon
AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF TEXAS, INC.
P.O. Box 8306
Houston, TX 77288
T: (713) 942-8146

Tamara F. Goodlette*
Daniel Hatoum*
Erin D. Thorn*
TEXAS CIVIL RIGHTS PROJECT
1017 W. Hackberry Ave.
Alamo, TX 78516
T: (512) 474-5073, ext. 207

Jo Anne Bernal**
El Paso County Attorney
320 S. Campbell St., Suite 200
El Paso, Texas 79901
T: (915) 273-3247

Bernardo Rafael Cruz**
Assistant County Attorney
320 S. Campbell St., Suite 200
El Paso, Texas 79901
T: (915) 273-3247

** Attorneys for Applicants Las Americas Immigrant Advocacy Center and American Gateways*

*** Attorneys for Applicant County of El Paso*