

SB4: POLITICS, POLICY, LEGALITY

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I. INTRODUCTION

Imagine a student who attends Texas A&M University. Let’s call her Marisol. Marisol is a senior, a first-generation college student, a Latina, and a student with undocumented status. She is a mere three months away from graduation and on the verge of becoming a teacher at an underserved school in Houston. It is 10:00 p.m. on Sunday night, and she gets a call—her grandmother just had a heart attack, so paramedics are rushing her to the emergency room. Marisol wants to get in her car and rush to the hospital in Houston, but she remembers that one of her taillights is broken. She planned to fix it next week on her off day from work. Marisol is torn—she desperately wants to visit her grandmother, yet she also knows that an officer can stop her for a broken taillight and potentially ask her about her citizenship status. She knows that because of Texas Senate Bill 4 (SB4), this trip to visit her grandmother might mean being deported back to El

Salvador.

Imagine an employer whose company makes parts for Houston's biggest oil companies. The business owner, let's call him Gus, has a workforce of 500 employees. Of these 500 employees, 400 are undocumented. Gus desperately tries to hire American citizens, but he cannot find any who are willing to work at the prevailing wage. Gus' business is booming, so he cannot afford for a portion of his workforce not to show up. However, several of his undocumented employees tell Gus that they are afraid to drive to work for fear of being stopped by police. Gus asks his employees why they are suddenly worried about this. They all say "SB4." His employees explain that in a purely partisan vote, the Texas Legislature passed a "show me your papers law."¹ Gus, who has traditionally voted Republican, thinks this law is silly and knows that he will now have to hire several buses to pick up his workers so that they can get to work. As Gus calculates the cost of renting buses, he realizes he is going to lose money and perhaps business to other companies not based in Texas.

While these two scenarios are both fictional, they are based on real stories from students like Marisol and business owners like Gus. In 2017, the Texas Legislature passed and Texas Governor, Greg Abbott, signed SB4, which did three things: (1) required all Texas jails to fulfill Immigration and Customs Enforcement ("ICE") detainer requests; (2) prevented any municipality, sheriff, or constable from adopting a policy preventing officers from asking about a person's immigration status while being detained or arrested; and (3) required the Attorney General to file a petition to remove any elected official from office if he or she violated SB4.²

When one considers SB4, three key questions emerge: (1) what are the politics of SB4 and how did it become law; (2) what are the specific policies embedded in SB4 and how will they affect real people; and (3) what are the legal challenges to SB4 and how have the challenges played out? This paper addresses these three questions. Section II focuses on the politics of SB4. Next, Section III highlights the policy changes included in SB4. Section IV identifies the legal challenges and the current status of the policy changes. Finally, Section V offers a conclusion and examines SB4 through the experiences of students and families living in Texas.

¹ Mikaela Cannizzo and Claire Allbright, *Senate Bill 4 Passed by House*, DAILY TEXAN (Apr. 27, 2017), <http://www.dailytexanonline.com/2017/04/27/senate-bill-4-passed-by-house>.

² S. 4, 2017 Leg., 85th Sess., (Tex. 2017).

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II. HISTORY OF IMMIGRATION POLICY IN TEXAS

A. 2011-2015

The Texas Legislature passed SB4 in 2017; however, in previous sessions, Texas Legislators introduced similar bills.³ While the previous bills were unsuccessful, they are nonetheless important when considering the current SB4. For example, in the 2011 Regular Legislative Session,⁴ the Texas House passed HB12, which is similar to SB4; however, HB12 died when the Texas Senate did not secure the two-thirds majority needed to pass the bill.⁵ During the 2011 Special Legislative Session, the Texas Senate passed SB9⁶ (also very similar to SB4), but the Texas House blocked that bill.⁷

In the 2015 Regular Legislative Session, a minority group of Texas lawmakers tried to repeal the Texas Dream Act,⁸ which provides in-state college tuition for undocumented Texans.⁹ However, both HB209¹⁰ and HB360¹¹ failed to proceed out of committee in the Texas House. Nevertheless, in 2015, Texas approved \$800 million for enhanced border security.¹² That same year, the Texas Senate changed its rules to require an affirmative vote by three-fifths, rather than two-thirds, of its members to pass a bill.¹³ Functionally, this meant that for any future bill, the majority only

³ See, e.g., *Controversial Immigration Bills Die in Texas Senate*, AMARILLO GLOBE-NEWS (May 26, 2015), <https://www.amarillo.com/news/latest-news/2015-05-26/controversial-immigration-bills-die-texas-senate>.

⁴ Because the Texas Legislature only meets every other year for four months, the Governor of Texas can call a special session if needed. As such, the scheduled four-month session from January to May in odd-numbered years is called the “Regular Session” and any other sessions the Governor calls are called “Special Sessions.” See John Savage, *Everything you need to know about Texas’ special legislative session*, DALLAS NEWS (July 2017), <https://www.dallasnews.com/news/texas-legislature/2017/07/17/everything-need-know-about-texas-special-legislative-session>.

⁵ H.R. 12, 2011 Leg., 82nd Sess. (Tex. 2011); see also Julian Aguilar, *Senate Blocks Sanctuary Cities Bill*, TEX. TRIB. (May 25, 2011), <https://www.texastribune.org/2011/05/25/texas-senate-blocks-sanctuary-cities-bill/>.

⁶ Julian Aguilar, *Sanctuary Cities Bill Clears Texas Senate*, TEX. TRIB. (June 15, 2011), <https://www.texastribune.org/2011/06/15/sanctuary-cities-bill-clears-texas-senate/>.

⁷ S. 9, 2011 Leg., 82nd Sess. (Tex. 2011).

⁸ Bobby Cervantes, *Senate Panel Approves Texas Dream Act Repeal*, HOUSTON CHRON. (Apr. 7, 2015), <https://www.houstonchronicle.com/politics/texas-take/article/Senate-panel-approves-Texas-Dream-Act-repeal-6183842.php>.

⁹ S. 1528, 2005 Leg., 79th Sess., (Tex. 2005).

¹⁰ H.R. 209, 2015 Leg., 84th Sess., (Tex. 2015).

¹¹ H.R. 360, 2015 Leg., 84th Sess., (Tex. 2015).

¹² Paul Weber, *Texas Approves \$800 Million for Border Security*, PBS NEWS HOUR (June 16, 2015, 3:30 PM), <https://www.pbs.org/newshour/nation/texas-approves-800-million-border-security>.

¹³ Christopher Hooks, *Dan Patrick Kills the Two-Thirds Rule*, TEX. OBSERVER (Jan. 21,

needed nineteen out of thirty-one Senators as opposed to twenty-one Senators.¹⁴

B. 2016

While there was no legislative session in 2016, several other factors enhanced the atmosphere leading to SB4. First, in 2016, Donald Trump was elected President. He ran on a staunchly, anti-immigrant platform, and repeatedly insulted Latinos, particularly Mexicans.¹⁵ Second, once he took office in January 2017, President Trump immediately began issuing anti-immigrant Executive Orders.¹⁶ Third, both before and after taking office, President Trump used incendiary language against sanctuary cities.¹⁷ Taken together, the campaign and ultimate election of President Trump created an anti-immigrant atmosphere at the national level, which permeated into Texas.

Building off of this national mood, two incidents in late 2016 and early 2017 further precipitated SB4. First, several public universities, including the University of Texas at Austin and Texas State University, discussed becoming sanctuary campuses, meaning they would not report undocumented students to the federal government nor would they cooperate with ICE agents who wanted to come to the campuses.¹⁸ Governor Abbott responded to this by tweeting: “Texas will not tolerate sanctuary campuses or cities. I will cut funding for any state campus if it establishes sanctuary status.”¹⁹ Second, in 2016, Sally Hernandez was elected Sheriff in Travis County, which includes the City of Austin.²⁰ When Sherriff Hernandez took

2015), <https://www.texasobserver.org/dan-patrick-kills-two-thirds-rule/>.

¹⁴ *Id.*

¹⁵ *The Next Commander in Chief*, THE COUNCIL ON FOREIGN RELATIONS, <https://www.cfr.org/interactives/campaign2016/> (last visited Dec. 18, 2018); Katie Reilly, *Here Are All the Times Donald Trump Insulted Mexico*, TIME (Aug. 31, 2016), <http://time.com/4473972/donald-trump-mexico-meeting-insult/>.

¹⁶ *President Trump’s Executive Orders On Immigration and Refugees*, CENTER FOR THE STUDY OF MIGRATION OF NEW YORK, <http://cmsny.org/trumps-executive-orders-immigration-refugees/> (last visited Dec. 18, 2018).

¹⁷ Fred Barbash, *Trump’s Campaign Words Stalk Him in Court on Sanctuary Cities, Just As in Travel Ban Cases*, WASH. POST (Mar. 30, 2017), https://www.washingtonpost.com/news/morning-mix/wp/2017/03/30/trumpss-campaign-words-stalk-him-in-court-on-sanctuary-cities-just-as-in-travel-ban-cases/?utm_term=.38b162f3fd21.

¹⁸ *Id.*

¹⁹ Greg Abbott (@GreggAbbott_TX), TWITTER (December 1, 2016, 11:27 AM), https://twitter.com/GregAbbott_TX/status/804406542602747904?ref_src=twsrc%5Etfw&ref_url=https%3A%2F%2Fwww.texasmonthly.com%2Fthe-daily-post%2Fheres-need-know-sanctuary-campuses%2F&tfw_creator=leifreigstad&tfw_site=TexasMonthly.

²⁰ Brittany Glas, *Sally Hernandez Wins Travis County Sheriff’s Race*, KXAN (Nov. 8, 2016, 4:06 PM), <http://www.kxan.com/news/local/austin/sally-hernandez-wins-travis-county-sheriffs-race/994905618>.

office, she immediately reversed her predecessor's policy of joining the Secure Communities program²¹ and enforcing ICE detainers.²² Specifically, Sheriff Hernandez posted a video detailing her policy of only complying with detainers if the immigrant had been convicted of murder, sexual assault, or smuggling of persons.²³ Several State Legislators and staffers said that this policy angered Governor Abbott, who responded by cutting grant funding for Travis County.²⁴

Given the national mood set by President Trump, the local actions on college campuses, and Sheriff Hernandez's public statements regarding detainer requests, Governor Abbott listed "punishing cities that provide sanctuary to undocumented immigrants" as an emergency item. The Governor's action ensured that the Legislature would push SB4 through the House and the Senate.²⁵

III. POLITICS OF SB4

With the stage set for SB4, this section describes how SB4 went from an item on Governor Abbott's list of emergency items to a state statute. This section will review SB4's passage through the Texas Senate and the Texas House. It is important to identify some important facts about the 2017 Texas Legislature: (1) the Texas Senate has thirty-one members,²⁶ twenty of whom are Republican as of this writing, meaning they have a three-fifths majority and can pass any bill without Democratic support;²⁷ (2) Dan Patrick, a Republican, is Lieutenant Governor of Texas, and he controls the agenda of the Senate and determines which bills come to the floor for debate;²⁸ (3) the

²¹ Tony Cantú, *Cold as ICE*, AUSTIN CHRON. (July 4, 2014), <https://www.austinchronicle.com/news/2014-07-04/cold-as-ice/>.

²² *Travis County Sheriff Announces ICE 'Detainer' Policy*, KVUE (Jan. 23, 2017, 10:21 AM), <http://www.kvue.com/article/news/local/travis-county-sheriff-announces-ice-detainer-policy/269-389291351>.

²³ *Id.*

²⁴ Patrick Svitek, *In "Sanctuary" Fight, Abbott Cuts Off Funding to Travis County*, TEX. TRIB. (Feb. 1, 2017), <https://www.texastribune.org/2017/02/01/sanctuary-fight-abbott-cuts-funding-travis-county/>.

²⁵ Brandi Grissom, *Gov. Greg Abbott Announces Four Emergency Items, Including CPS Reform and Sanctuary City Ban*, DALLAS NEWS (Jan. 2017), <https://www.dallasnews.com/news/texas-legislature/2017/01/31/gov-greg-abbott-announces-four-emergency-items-including-cps-reform-sanctuary-city-ban>.

²⁶ *Texas Senators of the 85th Legislature*, THE TEXAS SENATE, <http://www.senate.state.tx.us/members.php> (last visited Dec. 18, 2018).

²⁷ Ed Mayberry, *What Does Three-Fifths Rule Mean For Texas Legislature?*, HOUSTON PUB. MEDIA (Jan. 22, 2015, 4:56 PM), <https://www.houstonpublicmedia.org/articles/news/2015/01/22/55458/what-does-three-fifths-rule-mean-for-texas-legislature/>.

²⁸ Jeremy Wallace, *High Property Taxes Are the Epicenter of Texas Lt. Gov. Dan Patrick's Re-Election Campaign*, HOUSTON CHRON. (Oct. 19, 2018), <https://www.houstonchronicle.com/news/politics/texas/article/High-property-taxes-are-the-epicenter-of->

Texas House has 150 members,²⁹ and in 2017, ninety-five were Republican, meaning they too can pass any bill without Democratic support,³⁰ and (4) Joe Straus, a moderate Republican, is the Speaker of the Texas House.³¹

A. *The Texas Senate*

Senator Charles Perry filed SB4 on November 16, 2016.³² While it is common to file bills before the session actually begins (the session started on January 10, 2017), filing the bill on the second earliest day and securing a low bill number suggests the item was critical for Republicans. In fact, one observer noted this was the “first bill out of the gate.”³³ Once Senator Perry filed the bill, the bill was referred to the State Affairs Committee.³⁴ The bill proceeded to committee within two weeks of the session starting, further illustrating the emergent nature of the bill.³⁵ Once the bill reached the State Affairs Committee, the Committee set a date for testimony.³⁶ During the testimony, 97.6% of witnesses testified against the bill.³⁷ Moreover, while Senator Perry’s team argued that this bill protected public safety, only one member of the law enforcement community testified in support of the bill.³⁸ Finally, during the testimony, the State Affairs Committee Chair did not allow extra chairs for Democratic State Senators who were not on the State Affairs Committee.³⁹ As such, Democratic State Senators who wanted to attend were forced to continuously shuttle between the two seats for Democrats.⁴⁰ Once the testimony concluded, the State Affairs Committee

Texas-13330954.php.

²⁹ *Texas House of Representatives*, TEXAS STATE DIRECTORY, <https://capitol.texas.gov/Members/Members.aspx?Chamber=H> (last visited Dec. 18, 2018).

³⁰ *85th Leg. House Members*, TEXAS LEG. ONLINE, <https://capitol.texas.gov/Members/Members.aspx?Chamber=H> (last visited Oct. 26, 2018).

³¹ Patrick Svitek, *In Special Session Rubble, Spotlight Shines Bright on Straus*, TEX. TRIB. (Aug. 16, 2017), <https://www.texastribune.org/2017/08/16/special-session-rubble-spotlight-shines-bright-straus/>.

³² S. 4, 2017 Leg., 85th Sess., (Tex. 2017).

³³ *Texas Legislative Sessions and Years*, LEGIS. REFERENCE LIBR. OF TEX., <https://lrl.texas.gov/sessions/sessionYears.cfm> (last visited Oct. 26, 2018) (referencing data under 85th Legislature rows); telephone Interview with Matthew Simpson, Deputy Political Dir., ACLU of Tex. (Feb. 14, 2018).

³⁴ S. 4, 2017 Leg., 85th Sess., (Tex. 2017).

³⁵ Texas Legislature History, S. 4, 2017 Leg., 85th Sess., (Tex. 2017), <https://capitol.texas.gov/BillLookup/History.aspx?LegSess=85R&Bill=SB4>.

³⁶ *Id.*

³⁷ Brief of the Texas Senate Hispanic Caucus and Mexican American Legislative Caucus at 17–18, as *Amici Curiae* Supporting Plaintiff-Appellees, *City of El Cenizo v. Texas*, 890 F.3d 164 (5th Cir. 2018) (No. 17-50762).

³⁸ Telephone Interview with Robert Papierez, Legislative Dir. for Senator Charles Perry, Texas Senate (Feb. 14, 2018); Amicus Brief, *supra* note 37.

³⁹ Amicus Brief, *supra* note 37, at 32.

⁴⁰ *Id.* at 33.

voted on party lines to pass the bill.⁴¹

While bills often take several days, if not months, to reach the Senate floor, SB4 advanced from the State Affairs Committee to the Senate floor within three days.⁴² Senator Perry suspended the normal Senate rules to bring the bill to the floor quickly.⁴³ Once the bill reached the floor, Senate Democrats knew they were powerless because Republicans controlled twenty seats in the Texas Senate, and they only needed nineteen votes to pass a bill. While two Republicans opposed legislation similar to SB4 in 2015, one of those members had since retired and the other privately made it clear he would not oppose the bill alone.⁴⁴ Therefore, Senate Democrats formed a strategy to use the floor debate to generate material for the inevitable future lawsuit about SB4's constitutionality.⁴⁵ To further this strategy, Senate Democrats introduced amendments and built the record during discussion.⁴⁶ Republicans voted as a bloc and opposed over ninety percent of Democrat amendments.⁴⁷ With the votes in hand, Republicans passed the bill on February 8, 2018, not even one month after the session started.⁴⁸

The story of the Texas Senate and SB4 is that Republicans had a supermajority and wanted this bill to pass, and Democrats and Texans who opposed this bill were powerless. While Republican legislators and staffers purportedly cooperated with Democrats in the Senate as evidenced by accepting Democrat amendments, the overwhelming evidence is to the contrary. The Republicans rejected over ninety percent of Democrat amendments.⁴⁹ They disregarded ninety-eight percent of testimony opposed to the bill, and also added the especially harsh “show-me-your-papers” provision to the bill.⁵⁰ Republicans did not let Democrat State Senators

⁴¹ S. 4, 2017 Leg., 85th Sess., (Tex. 2017).

⁴² *Id.* Even the budget, which is the only bill the Legislature is required to pass, took more time to go from committee to the Senate floor. *See* S. 1, 2017 Leg., 85th Sess., (Tex. 2017).

⁴³ S. 4, 2017 Leg., 85th Sess., (Tex. 2017).

⁴⁴ Telephone Interview with Celina Moreno, Interim Southwest Regional Counsel, MALDEF (Mar. 6, 2018).

⁴⁵ Interview with John Gorczynski, Chief of Staff to Senator Sylvia R. Garcia, Texas Senate (Feb. 22, 2018).

⁴⁶ S. 4, 2017 Leg., 85th Sess., (Tex. 2017).

⁴⁷ Texas Legislature Amendments, S. 4, 2017 Leg., 85th Sess., (Tex. 2017), <http://www.legis.state.tx.us/BillLookup/Amendments.aspx?LegSess=85R&Bill=SB4>.

⁴⁸ Texas Legislature History, S. 4, 2017 Leg., 85th Sess., (Tex. 2017), <https://capitol.texas.gov/BillLookup/History.aspx?LegSess=85R&Bill=SB4>.

⁴⁹ Texas Legislature History, S. 4, 2017 Leg., 85th Sess., (Tex. 2017), <https://capitol.texas.gov/BillLookup/History.aspx?LegSess=85R&Bill=SB4> (reviewed each Amendment).

⁵⁰ Amicus Brief, *supra* note 37, at 26; S. 4 Amendment 9, 2017 Leg., 85th Sess. (Tex. 2017).

attend the committee hearing.⁵¹

B. Texas House

Once the Texas Senate passed SB4, the bill proceeded to the Texas House where Representatives Geren and Workman served as Sponsors of the bill.⁵² For opponents of SB4, the Texas House was always the more important battle because: (1) Speaker Straus was considered more moderate than Lieutenant Governor Patrick and thus more likely to scale back the bill; and (2) Representative Geren, also considered a reasonable and moderate member, seemed amenable to removing some hardline aspects of the bill.⁵³

The opponent's hope was reasonable; unlike in the Senate, where the bill raced through committee, in the House, the bill remained in the State Affairs Committee for over a month.⁵⁴ During this time, Representative Geren met with advocates on both sides of the issue.⁵⁵ In fact, he met with the members of the TRUST Coalition, including the Mexican American Legal Defense and Education Fund (MALDEF) and the American Civil Liberties Union (ACLU).⁵⁶ Beyond the TRUST Coalition, the faith and law enforcement communities lobbied against SB4, and Representative Geren met with both groups.⁵⁷ Moreover, just like the Texas Senate, ninety-seven percent of the witnesses who testified in the House State Affairs Committee opposed SB4.⁵⁸ This advocacy seemed effective because on April 20, 2017, the House State Affairs Committee passed a version of the bill without several of the most controversial provisions from the Texas Senate version, including the "show-me-your-papers" provision.⁵⁹

Once the bill passed committee, Republican leadership placed it on the emergency calendar and, on April 26, 2017, brought the bill to the House

⁵¹ Telephone Interview with Luis Figueroa, Legislative and Policy Dir., Ctr. for Pub. Policy Priorities (Feb. 9, 2018).

⁵² S. 4, 2017 Leg., 85th Sess., (Tex. 2017).

⁵³ Christopher Hooks, *Burning Down the House: Joe Straus and the End of the Moderate Texas Republican*, TEX. OBSERVER (October 25, 2017), <https://www.texasobserver.org/burning-house-joe-straus-end-moderate-texas-republican/>; *No Straus for House. What Now?*, STAR-TELEGRAM (October 26, 2017), <https://www.star-telegram.com/opinion/editorials/article181129181.html>.

⁵⁴ Texas Legislature History, S. 4, 2017 Leg., 85th Sess., (Tex. 2017), <https://capitol.texas.gov/BillLookup/History.aspx?LegSess=85R&Bill=SB4>.

⁵⁵ Telephone Interview with Luis Figueroa, Legislative and Policy Dir., Ctr. for Pub. Policy Priorities (Feb. 9, 2018).

⁵⁶ Telephone Interview with Matthew Simpson, Deputy Political Dir., ACLU of Tex. (Feb. 14, 2018).

⁵⁷ *Id.*

⁵⁸ Amicus Brief, *supra* note 37, at 26.

⁵⁹ S. 4, 2017 Leg., 85th Sess., (Tex. 2017).

floor.⁶⁰ During this marathon session that lasted into the early morning hours of April 27, 2017, the bill changed in fundamental ways.⁶¹ Once SB4 reached the Senate floor, House Democrats shifted their strategy by offering amendments to try to narrow the bill.⁶² Remember, the version in the House was already weaker than the Senate version, as it did not contain the “show-me-your-papers provision.” Democrats also knew that if the bill that passed the House was sufficiently different from the version that passed the Senate, there would be a conference committee where Democrats could further weaken the bill.⁶³ Once the floor debate began, it became clear there would be an amendment frenzy as Republicans and Democrats offered over 100 amendments.⁶⁴ The process proceeded as expected—Democrats offered amendments to weaken the bill and Republicans voted as bloc to defeat them; however, the Ninth Amendment, also known as the “Schaefer Amendment,” changed everything.

Representative Matt Schaefer is a member of the Freedom Caucus representing the most conservative wing of the Republican party.⁶⁵ His amendment added the “show-me-your-papers” provision, which prevents municipalities from prohibiting their officers from asking about an individual’s immigration status during a detention.⁶⁶ Representative Rinaldi then offered, and Representative Schaefer accepted, an amendment to the amendment that would also allow the Attorney General to begin removal proceedings against any elected official who violated SB4.⁶⁷ Democrats were livid and tried to offer amendments to weaken these provisions. For example, Representative Bernal offered an amendment, which was rejected, that would limit the “show-me-your-papers” provision to adults.⁶⁸ Representative Bernal called this rejection the saddest moment in his entire

⁶⁰ *Id.*

⁶¹ Julián Aguilar, *After Emotional Debate, Texas House Tentatively Passes “Sanctuary” Legislation*, TEX. TRIB. (Apr. 27, 2017), <https://www.texastribune.org/2017/04/27/tensions-flaring-house-members-will-debate-anti-sanctuary-city-bill/>.

⁶² Telephone Interview with Diego Bernal, Dist. 123 Representative, Tex. House of Representatives (Mar. 6, 2018).

⁶³ *Id.*; Telephone Interview with Jaclyn Uresti, Exec. Dir., Mexican Am. Legislative Caucus (Mar. 2, 2018).

⁶⁴ S. 4 Amendments, 2017 Leg., 85th Sess. (Tex. 2017); Telephone Interview with Payton Spreen, Chief of Staff to Representative Charlie Geren, Tex. House of Representatives (Feb. 24, 2018) (while a House member made a motion to require all amendments to be pre-filed, that motion failed, so Representatives could offer amendments to SB4 during the floor debate).

⁶⁵ TEXAS FREEDOM CAUCUS, <https://www.freedomfortexas.com/members/> (last visited Dec. 18, 2018).

⁶⁶ S. 4 Amendment 9, 2017 Leg., 85th Sess. (Tex. 2017).

⁶⁷ S. 4 Amendment 10, 2017 Leg., 85th Sess. (Tex. 2017).

⁶⁸ S. 4 Amendment 17, 2017 Leg., 85th Sess. (Tex. 2017).

professional career.⁶⁹ Representative Geren, SB4's sponsor, rejected this amendment and had specifically removed the "show-me-your-papers" aspect of the bill in committee.⁷⁰ As such, Democrats and moderate Republicans may have been able to block the "show-me-your-papers" amendment. In this frenzy, Republicans offered Democrats a deal—end debate now and do not offer any more amendments, and Republicans would pull the Schaefer amendment.⁷¹ Democrats asked for and received a recess to discuss the deal.⁷² Off the record, Legislative staffers said that the Democratic Caucus could not agree on whether or not to accept. Off the record, staffers said that moderate Democrats believed they should accept this deal and try to further weaken the bill in the Conference Committee, while other Democrats were more strident and argued that they should never negotiate over this bill. While only the Democratic legislators themselves know what happened, Democrats ultimately rejected the deal. Once this deal fell through, the entire tenor of the debate changed. Republicans passed every amendment they sought and virtually all Democrat amendments failed.⁷³ After more than twelve hours of negotiation, Republicans (and some moderate Democrats) voted to end debate and the bill passed on party lines.⁷⁴ It was not clear why they voted to end debate, as they could have prolonged debate and perhaps forced Republicans to make concessions.

Because the Texas House passed a different version of the bill than the Texas Senate, the Texas Senate could either concur with the House version or force a conference committee to work out the differences. Because the Texas Senate was worried a conference committee may derail the bill,⁷⁵ the Texas Senate decided to concur with the House version,⁷⁶ and Governor Abbott signed the bill into law via a Facebook Live event.⁷⁷

⁶⁹ Telephone Interview with Diego Bernal, Dist. 123 Representative, Tex. House of Representatives (Mar. 6, 2018).

⁷⁰ Telephone Interview with Payton Spreen, Chief of Staff to Representative Charlie Geren, Tex. House of Representatives (Feb. 24, 2018).

⁷¹ Telephone Interview with Matt Rinaldi, Dist. 115 Representative, Tex. House of Representatives (Feb. 20, 2018).

⁷² H.R. Journal, 2017 Legis., 85th Sess., at 1973 (Tex. 2017).

⁷³ See S. 4 Amendments, 2017 Leg., 85th Sess. (Tex. 2017); Julián Aguilar, *After Emotional Debate, Texas House Tentatively Passes "Sanctuary" Legislation*, TEX. TRIB. (Apr. 27, 2017), <https://www.texastribune.org/2017/04/27/tensions-flaring-house-members-will-debate-anti-sanctuary-city-bill/>.

⁷⁴ H.R. Journal, 2017 Leg., 85th Sess., at 1951 (Tex. 2017).

⁷⁵ Telephone Interview with Luis Figueroa, Legislative and Policy Dir., Ctr. for Pub. Policy Priorities (Feb. 9, 2018).

⁷⁶ See S. 4 Amendments, 2017 Leg., 85th Sess. (Tex. 2017).

⁷⁷ Peggy Fikac et al., *Abbott Signs 'Sanctuary Cities' Bill on Facebook Live*, MY SA (May 7, 2017), <https://www.mysanantonio.com/news/local/article/Gov-Greg-Abbott-signed-Sanctuary-Cities-11128205.php>.

C. Other Political Issues

Before discussing the actual policies within SB4, there are a few other political issues to highlight. First, Governor Abbott was very involved in SB4, and one source said that House Republicans were clearing amendments with the Governor's office before offering them.⁷⁸ Moreover, Governor Abbott threatened moderate Republicans with primary challenges if they did not go along with him.⁷⁹

Second, House Democrats raised several Points of Order during the floor debate, but Speaker Straus overruled every single one.⁸⁰ While Points of Order are rarely successful ("they are about as successful as half-court three-pointers taken by people not named Steph Curry"), overruling all ten suggests that Speaker Straus was not trying to derail SB4.⁸¹ Some have suggested that Speaker Straus and Governor Abbott made a deal to allow SB4 to advance in exchange for not bringing up the bathroom bill that the Senate passed.⁸²

Third, because SB4 limited the academic freedom of community college professors by preventing them from publicly lobbying against SB4, advocates expected community colleges to lobby against the bill.⁸³ However, the leadership of institutions of higher education did not strongly advocate against SB4 perhaps because they were facing their own budget cuts and did not want to threaten their funding by opposing SB4, the passage of which was a priority of the Texas Governor and Lieutenant Governor.⁸⁴

IV. SB4 POLICY

While many people focus on the "show-me-your-papers" aspect of SB4, in reality, the bill has several different features, which this section will review.

⁷⁸ Telephone Interview with Luis Figueroa, Legislative and Policy Dir., Ctr. for Pub. Policy Priorities (Feb. 9, 2018).

⁷⁹ Telephone Interview with Matthew Simpson, Deputy Political Dir., ACLU of Tex. (Feb. 14, 2018)

(he did support primary challengers to three moderate Republicans, though it is not clear the motivation was SB4); Patrick Svitek, *Abbott Plunges Deeper into House Primary Challenges*, TEX. TRIB. (Feb. 20, 2018), <https://www.texastribune.org/2018/02/20/abbott-plunges-deeper-house-primary-challenges/>.

⁸⁰ Telephone Interview with Jaelyn Uresti, Exec. Dir., Mexican Am. Legislative Caucus (Mar. 2, 2018).

⁸¹ Telephone Interview with Diego Bernal, Dist. 123 Representative, Tex. House of Representatives (Mar. 6, 2018).

⁸² Telephone Interview with Jaelyn Uresti, Exec. Dir., Mexican Am. Legislative Caucus (Mar. 2, 2018).

⁸³ Telephone Interview with Celina Moreno, Interim Southwest Regional Counsel, MALDEF (Mar. 6, 2018).

⁸⁴ *Id.*

SB4 bars a municipality, county, sheriff's office, police department, or college

campus police department (together "local entity") from prohibiting its officers from "assisting or cooperating with a federal immigration officer as reasonable or necessary, including providing enforcement assistance."⁸⁵ Specifically, SB4 bars local entities from prohibiting their officers from asking about a person's immigration status when that person is under lawful detention or arrest.⁸⁶ This is the "show-me-your-papers" provision that most frustrated immigration advocates.⁸⁷ While Republicans in the Legislature argued that this legislation did not create any new power for police, it limited the authority of local entities.⁸⁸

SB4 prohibits a local entity from adopting or endorsing a policy that materially limits the

enforcement of immigration laws (i.e. runs counter to SB4).⁸⁹ Immigration advocates argued that this policy censored local officials and employees.⁹⁰

If a local entity violates either of the aforementioned policies, SB4 authorizes the

Attorney General to sue the entity and enforce compliance.⁹¹ Civil penalties accrue at a rate of \$25,000 per day that the entity is in violation.⁹² Finally, if an elected or appointed official of a city or county violates SB4, he or she is removable from office, and the Attorney General *must* initiate removal proceedings.⁹³

Immigration and Customs Enforcement (ICE) often requests a local police department or

sheriff's office to hold detainees for up to an additional forty-eight hours so that ICE can determine whether or not to arrest the person for violating the nation's immigration laws.⁹⁴ These requests are known as

⁸⁵ TEX. GOV'T CODE ANN. § 752.053(b)(3) (LexisNexis 2017).

⁸⁶ *Id.* § 752.053(b)(1).

⁸⁷ Telephone Interview with Matthew Simpson, Deputy Political Dir., ACLU of Tex. (Feb. 14, 2018).

⁸⁸ Telephone Interview with Payton Spreen, Chief of Staff to Representative Charlie Geren, Tex. House of Representatives (Feb. 24, 2018); *see* S. 4, 2017 Leg., 85th Sess., (Tex. 2017) (removing the right of local law enforcement to prohibit law enforcement from asking about immigration status).

⁸⁹ TEX. GOV'T CODE ANN. § 752.053(a)(1).

⁹⁰ Telephone Interview with Celina Moreno, Interim Southwest Regional Counsel, MALDEF (Feb. 27, 2018).

⁹¹ TEX. GOV'T CODE ANN. § 752.055(b).

⁹² *Id.* § 752.056(a)–(b).

⁹³ *Id.* § 752.0565(a)–(b).

⁹⁴ *Immigration Detainers*, ACLU, <https://www.aclu.org/issues/immigrants-rights/ice-and-border-patrol-abuses/immigration-detainers> (last visited Dec. 18, 2017).

detainers, and localities have traditionally chosen whether or not to honor them.⁹⁵ Texas honored more than ninety-nine percent of detainers before SB4; however, because Sheriff Hernandez of Travis County threatened not to honor them, SB4 mandates that all local entities comply with ICE detainers unless the individual proves that he or she is a U.S. citizen.⁹⁶

Some of those detained have sued local entities arguing that honoring detainers violates

the Fourth Amendment's prohibition against illegal seizure.⁹⁷ Therefore, sometimes local entities are forced to pay settlements or damages in these cases.⁹⁸ SB4 recognizes this possibility and both indemnifies local entities from such lawsuits and mandates that the state pay all costs associated with such suits.⁹⁹

SB4 also creates a Class A Misdemeanor for any peace officer who does not follow an

ICE detainer request.¹⁰⁰

None of the aforementioned policies apply to hospitals, schools, or peace officers

that work for religious organizations.¹⁰¹ One staffer explained that this exemption was important because preventing immigrants from visiting a hospital or church or attending school was not the bill drafter's intent.¹⁰²

V. LEGAL CHALLENGES TO SB4

Unsurprisingly, immediately after Governor Abbott signed SB4, the legal challenges began. This section provides both a timeline of the legal processes and a summary of the major legal arguments both for and against

⁹⁵ *Immigration Detainers: An Overview*, AM. IMMIGRATION COUNCIL, <https://www.americanimmigrationcouncil.org/research/immigration-detainers-overview> (last visited Dec. 18, 2018).

⁹⁶ Complaint at 14, *City of El Cenizo v. Texas*, 264 F. Supp. 3d 744 (W.D. Tex. 2017) (No. 5:17-cv-00459); Tony Plohetski, *Sheriff's Stand on ICE Detainers Could Cost Travis County \$1.8 Million*, AUSTIN AM.-STATESMAN (Jan. 18, 2017), <https://www.statesman.com/news/20170118/sheriffs-stand-on-ice-detainers-could-cost-travis-county-18-million>; TEX. CODE CRIM. PROC. ANN. art. 2.251 (LexisNexis 2017).

⁹⁷ *Miranda-Olivares v. Clackamas County*, No. 3:12-cv-02317-ST, 2014 U.S. Dist. LEXIS 50340, at *1 (D. Or. Apr. 11, 2014).

⁹⁸ *What ICE Isn't Telling You About Detainers*, ACLU: IMMIGRANTS' RIGHTS PROJECT 1, 2 (2012), https://www.aclu.org/files/assets/issue_brief_-_what_ice_isnt_telling_you_about_detainers.pdf.

⁹⁹ TEX. GOV'T CODE ANN. § 402.0241(b)-(c) (LexisNexis 2017).

¹⁰⁰ TEX. PENAL CODE ANN. § 39.07 (LexisNexis 2017).

¹⁰¹ TEX. GOV'T CODE ANN. § 752.052(a)-(d) (LexisNexis 2017).

¹⁰² Telephone Interview with Robert Papierez, Legislative Director for Senator Charles Perry, Texas Senate (Feb. 14, 2018).

various sections of SB4.¹⁰³ Currently, the plaintiffs have asked the Fifth Circuit to reconsider its decision, which allowed the vast majority of the law to remain in effect (only the prohibition against local officials “endorsing” policies was enjoined).¹⁰⁴

A. Timeline of Legal Processes

May 7, 2017: Governor Abbott signed SB4 into law.¹⁰⁵ Texas Attorney General Ken Paxton filed a declaratory judgment seeking to declare SB4 constitutional.¹⁰⁶

May 8, 2018: The City of El Cenizo sued Texas arguing that SB4 did not define “sanctuary city.”¹⁰⁷

June 1, 2017: MALDEF, representing the City of San Antonio, filed a suit against the State of Texas arguing that SB4 is unconstitutional and seeking a preliminary injunction.¹⁰⁸

June 2, 2017: The City of Austin voted to join the City of San Antonio’s lawsuit against the State of Texas.¹⁰⁹

June 7, 2017: The City of Dallas voted to join the City of San Antonio’s lawsuit against the State of Texas.¹¹⁰

June 20, 2017: The City of Houston voted to join the City of San Antonio’s lawsuit against the State of Texas.¹¹¹

¹⁰³ Importantly, the case against SB4 is still pending, so this analysis is current as of April 30, 2018.

¹⁰⁴ Julián Aguilar, *Critics of Texas’ “Sanctuary Cities” Law Ask Federal Appeals Court to Reconsider Case*, TEX. TRIB. (Mar. 28, 2018), <https://www.texastribune.org/2018/03/28/critics-texas-sanctuary-cities-law-ask-federal-appeals-court-reconsider/>.

¹⁰⁵ Patrick Svitek, *Texas Gov. Greg Abbott Signs “Sanctuary Cities” Bill Into Law*, TEX. TRIB. (May 7, 2017), <https://www.texastribune.org/2017/05/07/abbott-signs-sanctuary-cities-bill/>.

¹⁰⁶ Patrick Svitek, *Paxton Looks to Get Ahead of Legal Challenges to “Sanctuary Cities” Ban*, TEX. TRIB. (May 8, 2017) <https://www.texastribune.org/2017/05/08/paxton-looks-get-ahead-legal-challenges-sb4/>.

¹⁰⁷ Jackie Wang, *Border City, County Sue Texas Over “Sanctuary” Law*, TEX. TRIB. (May 9, 2017), <https://www.texastribune.org/2017/05/09/border-city-county-sue-texas-over-sanctuary-cities-law-constitutionali/>.

¹⁰⁸ *Maldef Sues On Behalf Of San Antonio, Non-Profit Organizations To Stop Texas SB 4*, MALDEF (June 1, 2017), http://www.maldef.org/news/releases/2017_6_1_MALDEF_Sues_on_Behalf_of_San_Antonio_NonProfit_Organizations_to_Stop_TX_SB4/.

¹⁰⁹ Stephanie Federico, *City of Austin Joins San Antonio in Lawsuit Against ‘Sanctuary Cities’ Law*, AUSTIN MONITOR (June 2, 2017), <https://www.austinmonitor.com/stories/2017/06/city-austin-join-san-antonio-lawsuit-sanctuary-cities-law/>.

¹¹⁰ Elva Limón & Robert Wilonsky, *Dallas Joins Fight Against Sanctuary Cities Bill*, DALL. NEWS (June 7, 2017), <https://www.dallasnews.com/news/dallas/2017/06/07/protesters-takesanctuary-cities-law-fight-dallas-city-hall>.

¹¹¹ Megan Flynn, *Houston City Council Votes to Join Lawsuit Against SB 4*, HOUSE PRESS (June 22, 2017), <http://www.houstonpress.com/news/houston-joins-the-legal-fight-against-sb-4-9544569>.

June 23, 2017: The United States Department of Justice filed a Statement of Interest supporting the State of Texas.¹¹²

June 27, 2017: The City of El Paso voted to join the City of San Antonio's lawsuit against the State of Texas.¹¹³

June 29, 2017: MALDEF and the ACLU, representing the plaintiffs, and the State of Texas, the defendant, argued about the proper venue for this case.¹¹⁴ The plaintiffs argued that San Antonio was appropriate; whereas, the government wanted the case transferred to Austin because the Governor and Attorney General live there.¹¹⁵

July 18, 2017: Governor Abbott called a Special Session for the Texas Legislature, and State Representative Anchia called for repealing SB4.¹¹⁶

August 9, 2017: In Austin, Judge Sparks dismissed Attorney General Paxton's preemptive suit because the law had not gone into effect; thus, he would not consider "hypothetical legal questions."¹¹⁷ Moreover, Judge Sparks argued that allowing this preemptive suit would "open a Pandora's box and invite every local government to seek a court's judicial blessing on a law prior to it taking effect."¹¹⁸ This ruling was a small victory for the plaintiffs and ensured that the preliminary-injunction suit would be heard in San Antonio.¹¹⁹

August 30, 2017: District Court Judge Garcia granted a preliminary injunction for several provisions of SB4.¹²⁰ In particular, Judge Garcia blocked the provision prohibiting local officials from endorsing any

¹¹² Press Release, Dep't of Justice, Department of Justice Files Statement of Interest Siding with Texas in SB4 Litigation (June 23, 2017), <https://www.justice.gov/opa/pr/department-justice-files-statement-interest-siding-texas-sb4-litigation>.

¹¹³ Julián Aguilar, *City of El Paso Joins Plaintiffs in Suit Against Texas Immigration Law*, TEX. TRIB. (June 27, 2017), <https://www.texastribune.org/2017/06/27/el-paso-joins-suit-texas-immigration-law/>.

¹¹⁴ Julián Aguilar, *Attorneys Argue Over Proper Venue for Sanctuary City Lawsuit*, TEX. TRIB. (June 29, 2017), <https://www.texastribune.org/2017/06/29/attorneys-argue-over-where-sb4-court-venue/>.

¹¹⁵ *Id.*

¹¹⁶ Andrea Zelinski, *Some Lawmakers Push for SB 4 Repeal During Special Session*, HOUSE CHRON. (July 18, 2017), <https://www.chron.com/news/politics/texas/article/Some-lawmakers-push-for-SB-4-repeal-during-11296999.php>.

¹¹⁷ Andrea Zelinski, *Federal Judge Tosses Paxton's Preemptive SB4 Lawsuit*, HOUSE CHRON. (Aug. 9, 2017), <https://www.chron.com/news/politics/texas/article/Federal-judge-tosses-Paxton-s-preemptive-SB4-11746384.php#photo-13211804>.

¹¹⁸ *Id.*

¹¹⁹ Cassandra Pollock, *The Brief: Paxton's "Sanctuary Cities" Suit Dismissed — But the Fight's Not Over*, TEX. TRIB. (Aug. 10, 2017), <https://www.texastribune.org/2017/08/10/brief-aug-10/>.

¹²⁰ Julián Aguilar, *Judge Temporarily Blocks Immigration Enforcement Law*, TEX. TRIB. (Aug. 30, 2017), <https://www.texastribune.org/2017/08/30/judge-temporarily-blocks-sanctuary-cities-law/>.

provision counter to SB4, the requirement that local entities comply with every detainer request, and the disciplinary, retaliatory, and punitive action provisions.¹²¹ However, because the “show-me-your-papers” provision does not mandate that police officers ask for immigration status, Judge Garcia allowed this provision to take effect.¹²²

August 31, 2017: Attorney General Paxton filed a motion to stay Judge Garcia’s decision while he appealed to the Fifth Circuit.¹²³ He also appealed the preliminary injunction to the Fifth Circuit.¹²⁴

September 5, 2017: Attorney General Paxton appealed the denial of the stay to the Fifth Circuit.¹²⁵

September 22, 2017: The Fifth Circuit heard arguments on the motion for a stay of Judge Garcia’s decision.¹²⁶

September 25, 2017: The Fifth Circuit vacated part of Judge Garcia’s decision.¹²⁷ Specifically, the Fifth Circuit allowed the portion of the law prohibiting local entities from materially limiting cooperation with federal immigration authorities to go into effect.¹²⁸ The Fifth Circuit also permitted the policy of honoring detainers to go into effect.¹²⁹ Importantly, these provisions only went into effect while the Appeals Court considered the merits of the preliminary injunction.¹³⁰ However, the portion of the law preventing local entities from endorsing policies contrary to SB4 remained blocked.¹³¹

November 7, 2017: The Fifth Circuit heard arguments about the merits of the preliminary injunction.¹³²

March 13, 2018: The Fifth Circuit vacated the entire preliminary

¹²¹ City of El Cenizo v. Texas, 264 F. Supp. 3d 744, 813 (W.D. Tex. 2017).

¹²² *Id.* at 813 n. 102.

¹²³ See, e.g., Motion for Stay Pending Appeal, City of El Cenizo v. Texas, 264 F. Supp. 3d 744 (W.D. Tex. 2017) (No. 5:17-cv-404-OG).

¹²⁴ *Id.*

¹²⁵ Brief for Appellant at 11, City of El Cenizo v. Texas, 890 F.3d 163 (5th Cir. 2018) (No. 17-50762).

¹²⁶ Chase Karacostas, *Court to Hear SB 4 Arguments on Sept. 22*, DAILY TEXAN (Sept. 10, 2017), <http://www.dailytexanonline.com/2017/09/07/court-to-hear-sb-4-arguments-on-sept-22>.

¹²⁷ Julián Aguilar, *Appeals Court Allows More of Texas “Sanctuary Cities” Law to Go Into Effect*, TEX. TRIB. (Sept. 25, 2017), <https://www.texastribune.org/2017/09/25/appeals-court-allows-more-texas-sanctuary-cities-law-go-effect/>.

¹²⁸ City of El Cenizo v. Texas, No. 17-50762, 2017 WL 4250186, at *2 (5th Cir. Sept. 25, 2017).

¹²⁹ *Id.*

¹³⁰ *Id.* at *1.

¹³¹ *Id.* at *2.

¹³² Julián Aguilar, *“Sanctuary Cities” Law Hearing Draws Debate on Free Speech, ICE Detainers*, TEX. TRIB. (Nov. 7, 2017), <https://www.texastribune.org/2017/11/07/texas-sanctuary-cities-law-hearing-draws-debate-free-speech-ice-detain/>.

injunction, except for the portion enjoining the provision about local officials endorsing policies contrary to SB4.¹³³

March 28, 2018: The plaintiffs asked the Fifth Circuit to reconsider its decision regarding the preliminary injunction and to rehear the case en banc.¹³⁴

Thus far, the Fifth Circuit has not decided on hearing the case en banc nor has the district court scheduled arguments to hear the case on the merits.

B. Legal Arguments

The plaintiff cities in the *City of El Cenizo* case argued that SB4 was unconstitutional because it violated preemption, the First Amendment, and the Fourth Amendment.¹³⁵ This section will analyze the plaintiffs' and defense's arguments along with the constitutional claim.

1. Preemption

In instances where federal law and state law conflicts, the U.S. Constitution is clear that federal law shall be "the Supreme Law of the Land."¹³⁶ Preemption is either express or implied, and implied preemption encompasses both field preemption and conflict preemption.¹³⁷ Express preemption exists when federal legislation states that it preempts any state legislation.¹³⁸ The plaintiffs did not argue express preemption because nothing in the federal legislation states that it preempts state law.¹³⁹

2. Field Preemption

Field preemption occurs when "Congress, acting within its proper authority, has determined [that a field] must be regulated by its exclusive governance."¹⁴⁰ The plaintiffs argued that the provision mandating that local entities assist federal immigration enforcement is field preempted.¹⁴¹ The plaintiffs argued that Congress created a web of detailed statutory provisions regulat[ing] local involvement in immigration enforcement and has

¹³³ Julián Aguilar, *Federal Appeals Court's Ruling Upholds Most of Texas' "Sanctuary Cities" Law*, TEX. TRIB. (Mar. 13, 2018), <https://www.texastribune.org/2018/03/13/texas-immigration-sanctuary-cities-law-court/>.

¹³⁴ Aguilar, *supra* note 104.

¹³⁵ Brief of Appellees/Cross-Appellants at 7–9, *City of El Cenizo v. Texas*, 890 F.3d 164 (5th Cir. 2018) (No. 17-50762).

¹³⁶ U.S. CONST. art. VI, cl. 2.

¹³⁷ *Arizona v. United States*, 567 U.S. 387, 399 (2012).

¹³⁸ *Id.*

¹³⁹ See, e.g., Brief of Appellees/Cross-Appellants, *supra* note 135.

¹⁴⁰ *Arizona*, 567 U.S. 387 at 401.

¹⁴¹ See Brief of Appellees/Cross-Appellants, *supra* note 135, at 39.

comprehensively regulated immigration.¹⁴² Specifically, the plaintiffs believed that Congress has created specific processes for state and federal cooperation on immigration enforcement thereby leaving no room for state regulation.¹⁴³ On the other hand, the defendants argued that Congress has merely explained how local entities can cooperate with the federal government, whether with or without a formal agreement.¹⁴⁴ In particular, the Immigration and Nationality Act (“INA”) states that state officers can “cooperate with the Attorney General in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States”¹⁴⁵ without an agreement.¹⁴⁶ In other words, according to the State of Texas, Congress has merely regulated the manner of cooperation, not whether cooperation can occur. In fact, the savings clause explicitly allows for cooperation, meaning SB4 is permissive.¹⁴⁷ The Fifth Circuit agreed with Texas that federal law has not preempted the enforcement-assistance section because “federal law regulates *how* local entities” cooperate with the federal government. Whereas, SB4 focuses on “*whether* local entities” must cooperate with the federal government.¹⁴⁸

3. Conflict Preemption

Conflict preemption occurs when “compliance with both federal and state regulations is a physical impossibility,”¹⁴⁹ or if a state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”¹⁵⁰ The plaintiffs alleged both conflict and field preemption. The plaintiffs argued that federal law, which requires that only immigration officers inquire about someone’s immigration status, preempts the “show-me-your-papers” provision because it requires local entities to allow officers to inquire about an individual’s immigration status.¹⁵¹ Texas

¹⁴² Brief of Appellees/Cross-Appellants City of San Antonio, Texas, City of El Paso, Texas, Bexar County, Rey A. Saldaña, Texas Association of Chicanos in Higher Education, La Union Del Pueblo Entero, Workers Defense Project, Texas Association of Hispanic County Judges and County Commissioners, El Paso County, Richard Wiles, Jo Anne Bernal, and the Texas Organizing Project Education Fund at 10, *City of El Cenizo v. Texas*, 890 F.3d 164 (5th Cir. 2018) (No. 17-50762).

¹⁴³ Brief of Appellees/Cross-Appellants, *supra* note 142, at 23.

¹⁴⁴ 8 U.S.C. § 1357(g) (2006); Brief for Appellants, *supra* note 125, at 31.

¹⁴⁵ 8 U.S.C. § 1357(g)(10)(B).

¹⁴⁶ *Arizona v. United States*, 567 U.S. 387, 410 (2012).

¹⁴⁷ Brief for Appellants, *supra* note 125, at 34 (relying heavily on *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178 (1903) for the proposition that localities are creatures of the state and thus the state has “complete discretion” over them).

¹⁴⁸ *City of El Cenizo v. Texas*, 890 F.3d 164, 177 (5th Cir. 2018) (emphasis in original).

¹⁴⁹ *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142–43 (1963).

¹⁵⁰ *Hines v. Davidowitz*, 312 U.S. 52, 67–68 (1941).

¹⁵¹ *City of El Cenizo*, 890 F.3d at 180–88.

argued that in *United States v. Arizona*, the U.S. Supreme Court ruled that “promoting local-federal cooperation is not conflict or field preempted.”¹⁵² Texas went on to note that SB4 does not permit local officers to determine “whether a person is removable;” instead, it merely allows officers to ask about a person’s immigration status and “federal officials are the ones who ultimately determine what steps to take.”¹⁵³ The Fifth Circuit agreed with Texas, holding that *Arizona* upheld Section 2B of Arizona’s S.B. 1070 law, which “required local officers to make a “reasonable attempt . . . to determine the immigration status.”¹⁵⁴ The Fifth Circuit went on to note that “the statute in Arizona seems more problematic [than SB4] because it mandates status inquiries where SB4 merely forbids preventing those inquiries.”¹⁵⁵ Therefore, although the plaintiffs presented strong field and conflict preemption arguments, the Fifth Circuit ruled against them.

C. First Amendment

The First Amendment protects the freedom of speech, and this protection extends to public officials just like private citizens.¹⁵⁶ Because we expect public officials to debate issues of public interest, such as immigration, laws cannot censure or restrict public officials’ right to free speech.¹⁵⁷ If a statute restricts speech, plaintiffs can allege the statute violates the overbreadth doctrine and impermissibly restricts protected speech.¹⁵⁸ In this case, the plaintiffs argued that the provision preventing local officials from “adopting, enforcing, or endorsing a policy” that materially limits the enforcement of immigration laws, violated the First Amendment.¹⁵⁹

The plaintiffs advanced three violations of the First Amendment. First, because SB4 does not define the word “endorse,” it could mean “a recommendation, suggestion, comment,”¹⁶⁰ an editorial by a local sheriff,¹⁶¹ a comment during a meeting or private session of government, or a statement during a political campaign or an interview. Second, SB4 constitutes viewpoint discrimination because it only prohibits endorsing a policy

¹⁵² Brief for Appellants, *supra* note 125, at 30.

¹⁵³ *Id.* at 31.

¹⁵⁴ *Arizona v. United States*, 567 U.S. 387, 411 (2012).

¹⁵⁵ *City of El Cenizo*, 890 F.3d at 181.

¹⁵⁶ *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968).

¹⁵⁷ *City of El Cenizo v. Texas*, 264 F. Supp. 3d 744, 775–76 (W.D. Tex. 2017).

¹⁵⁸ *Village of Hoffman Estates v. Flipside Hoffman Estates, Inc.*, 455 U.S. 489, 494 (1982).

¹⁵⁹ TEX. GOV’T CODE ANN. § 752.053(a)(1) (LexisNexis 2017); Brief of Appellees/Cross-Appellants, *supra* note 135, at 61–62.

¹⁶⁰ *City of El Cenizo*, 264 F. Supp. 3d at 780.

¹⁶¹ *Id.* at 791.

limiting immigration laws, not promoting immigration laws.¹⁶² Third, because SB4 extends this prohibition to a long list of stakeholders it is likely overbroad.¹⁶³

The court notes that any statute that regulates content is “presumptively invalid and the Government bears the burden to rebut that presumption.”¹⁶⁴ Texas argued that the court should construe “endorse” narrowly to avoid the constitutional concern.¹⁶⁵ In particular, Texas wanted “endorse” to mean “to sanction” or ratify by official action as opposed to interpreting “endorse” to include political speech.¹⁶⁶ Texas believed the narrow construction was warranted because (1) it would further the aims of the statute, which is to ensure local entities cooperate with federal immigration officials, and (2) the words “adopt” and “enforce” (which are the two words next to endorse) are more similar to “sanction” than to “support.”¹⁶⁷

The Fifth Circuit rejected Texas’ arguments and concluded the “endorse” provision impermissibly violated the First Amendment.¹⁶⁸ The Fifth Circuit held that narrowing “endorse” to simply mean “sanction” would render the word superfluous next to “adopt” and “enforce.”¹⁶⁹ Because courts assume each word in a statute has its own meaning, the Fifth Circuit gave “endorse” a more expansive meaning including “to support,” and thus concluded that the endorsement provision violated the First Amendment.¹⁷⁰

D. Fourth Amendment

The Fourth Amendment protects individuals “against unreasonable searches and seizures.”¹⁷¹ For a seizure to be legal under the Fourth Amendment, generally there must be probable cause that the person

¹⁶² *Id.* at 782 (“[T]he First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.” (quoting *Erznoznick v. City of Jacksonville*, 422 U.S. 205, 215 (1975))).

¹⁶³ TEX. GOV’T CODE ANN. § 751.051(5)(b) (LexisNexis 2017) (stating that the law includes any “officer or employee of or a division, department, or other body that is part of a municipality, county, or special district or authority, including a sheriff, municipal police department, municipal attorney, or county attorney.”); *City of El Cenizo*, 264 F. Supp. 3d at 782.

¹⁶⁴ *United States v. Stevens*, 559 U.S. 460, 468 (2010) (quoting *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 817 (2000)).

¹⁶⁵ Brief for Appellants, *supra* note 125, at 43 (citing *Virginia v. Am. Booksellers Ass’n*, 484 U.S. 383, 397 (1988)).

¹⁶⁶ *Id.* at 43–44.

¹⁶⁷ *Id.* at 44–45 (citing *United States v. Golding*, 332 F.3d 838, 844 (5th Cir. 2003) (discussing “the canon of *noscitur a sociis*)).

¹⁶⁸ *City of El Cenizo v. Texas*, 890 F.3d 164, 184 (5th Cir. 2018).

¹⁶⁹ *Id.* at 183–84.

¹⁷⁰ *Id.* at 184.

¹⁷¹ U.S. CONST. amend. IV.

committed a crime.¹⁷² The plaintiffs believed that SB4 violated the Fourth Amendment because it mandated law enforcement agencies to “comply with and honor all detainer requests.”¹⁷³ The plaintiffs argued that because unlawful presence in the United States is a civil violation, *not* a criminal violation, local officials cannot detain a person based solely on probable cause that they are undocumented.¹⁷⁴

In response, Texas asserted that ICE agents can detain individuals for unlawful presence.¹⁷⁵ Because ICE agents have probable cause and conveyed that to local officials via the detainer request form, Texas argued that, via the collective-knowledge doctrine, local officials also have probable cause for honoring a detainer request.¹⁷⁶ Simply put, even though local officials do not know the “facts amounting to probable cause,” the detainer form represents communication between the local official and federal ICE agent and this provides probable cause.¹⁷⁷

The Fifth Circuit ruled that federal agents have the authority to detain undocumented immigrants.¹⁷⁸ The Fifth Circuit also found the collective-knowledge doctrine to be applicable, as the new detainer request form provides, “the required ‘communication between the arresting officer and an officer who has knowledge of all the necessary facts.’”¹⁷⁹ While the Fifth Circuit agreed that ICE policy could change and thus detainer requests may not always convey probable cause, the court explained those challenges should be brought on an as-applied basis as opposed to facially.¹⁸⁰

VI. CONCLUSION

Immigration policy has always been a divisive topic. But, the 2016 Presidential election certainly took the division to a new level. President Trump’s heightened rhetoric about immigration both before and after he was elected certainly had an effect in Texas. On the one hand, it inspired immigration hardliners to embolden their policy prescriptions. On the other hand, immigration advocates felt a greater sense of urgency to speak out. In

¹⁷² *City of El Cenizo*, 890 F.3d at 186–87.

¹⁷³ Brief of Appellees/Cross Appellants, *supra* note 135, at 43.

¹⁷⁴ *Id.* at 45–46 (citing *Padilla v. Kentucky*, 559 U.S. 356, 365 (2010); *Santos v. Frederick Cty. Bd. of Comm’rs*, 725 F. 3d 451, 464–65 (4th Cir. 2013); *Melendres v. Arpaio*, 695 F. 3d 990, 1001 (9th Cir. 2012)).

¹⁷⁵ Brief for Appellants, *supra* note 125, at 14.

¹⁷⁶ *Id.* at 116, 21–22. In particular, Texas argued that ICE’s new detainer request form contains either Form I-200 stating a federal official has determined there is probable cause to believe the alien is removable or I-205 stating the alien is subject to removal.

¹⁷⁷ *Id.*

¹⁷⁸ *City of El Cenizo v. Texas*, 890 F.3d 164, 187–90 (5th Cir. 2018).

¹⁷⁹ *Id.* at 187–88 (quoting *United States v. Ibarra*, 493 F.3d 526, 530 (5th Cir. 2007)).

¹⁸⁰ *Id.* at 190.

Texas, Austin became ground zero for both sides—Sheriff Sally Hernandez proclaimed that she would not follow ICE detainer requests, save for select circumstances, and State Senator Perry introduced SB4.

SB4 has several prongs: (1) mandating that local jails follow ICE detainer requests; (2) prohibiting any local entity from limiting immigration enforcement, specifically prohibiting its employees from asking any detained or arrested individual about their immigration status; and (3) requiring the Texas Attorney General to remove any elected or appointed officials who violate SB4.¹⁸¹

SB4 started in the Texas Senate where the Republicans have a filibuster-proof majority and therefore can pass any law they want.¹⁸² As expected, on a completely partisan vote, SB4 passed the Texas Senate. However, the Texas House has a different composition. While the Republicans hold a majority, there are some moderate Republicans; therefore, the House State Affairs Committee weakened the bill by both eliminating the provisions for removing elected officials from office and requiring local entities to allow their officers to inquire about a person's immigration status during a detention or arrest.¹⁸³ But once the bill reached the floor, the House Freedom Caucus proposed adding those two provisions back into the law.¹⁸⁴ House Democrats seemed to have an opportunity to block those provisions in exchange for ending debate. Yet, the Democratic caucus could not agree on a compromise. Therefore, the version of SB4 that passed the House was virtually identical to the Senate version.¹⁸⁵ On May 7, 2017, Governor Abbott signed SB4 into law.¹⁸⁶

Unsurprisingly, the legal challenges began immediately—Attorney General Paxton filed a declaratory judgment seeking to declare the law constitutional, and cities filed suit against Texas, claiming that SB4 is unconstitutional.¹⁸⁷ These court proceedings are still on-going; although, after the District Court enjoined much of the law, the Fifth Circuit removed

¹⁸¹ S. 4, 2017 Leg., 85th Sess., (Tex. 2017).

¹⁸² Ed Mayberry, *What Does Three-Fifths Rule Mean For Texas Legislature?*, HOUSTON PUBLIC MEDIA (Jan. 22, 2015, 4:56 PM), <https://www.houstonpublicmedia.org/articles/news/2015/01/22/55458/what-does-three-fifths-rule-mean-for-texas-legislature/>.

¹⁸³ S. 4, 2017 Leg., 85th Sess., (Tex. 2017).

¹⁸⁴ S. 4 Amendment 9, 2017 Leg., 85th Sess. (Tex. 2017).

¹⁸⁵ S. 4, 2017 Leg., 85th Sess., (Tex. 2017).

¹⁸⁶ Svitek, *supra* note 105.

¹⁸⁷ Patrick Svitek, *Paxton Looks to Get Ahead of Legal Challenges to "Sanctuary Cities" Ban*, TEX. TRIB. (May 8, 2017) <https://www.texastribune.org/2017/05/08/paxton-looks-get-ahead-legal-challenges-sb4/>; Jackie Wang, *Border City, County Sue Texas Over "Sanctuary" Law*, TEX. TRIB. (May 9, 2017), <https://www.texastribune.org/2017/05/09/border-city-county-sue-texas-over-sanctuary-cities-law-constitutional/>.

most of the injunction.¹⁸⁸

Beyond all the legal, policy, and political analysis, SB4 ultimately affects real people. Consider Marisol, the college student who cannot visit her grandmother because her broken taillight could ultimately lead to police attention and questions about her immigration status. Think about Gus, the business owner who must charter his own bus so that his employees can get to work because they are too afraid to drive. Consider children with undocumented parents who must face the constant fear of knowing that their parents could be stopped, arrested, and then possibly deported when dropping them off at school.

Perhaps the final question is, what happens next? The Texas Legislature returns to Austin in 2019 with two options. One option leads to greater immigration restriction and harsher laws. For example, the Texas Senate could return and repeal the Texas Dream Act, which provides in-state tuition to undocumented students attending public colleges in Texas.¹⁸⁹ The Texas House, with a new conservative speaker, could do the same. Governor Abbott could then sign this law into effect, thereby depriving thousands of children from reaching their college dreams.

However, there is another more hopeful, empathetic, and welcoming pathway. In this scenario, the Texas Senate does not introduce a bill to repeal the Texas Dream Act.¹⁹⁰ Instead, the Texas House, comprised of a coalition of moderate Republicans and Democrats, would ratify a bill to repeal SB4. business, faith, and law-enforcement communities would lobby the Texas Senate to repeal SB4 and then Governor Abbott would sign this repeal. Texans can come together, make that dream a reality, and ensure that Texans like Marisol and Gus can live without fear and interruption.

¹⁸⁸ Aguilar, *supra* note 127.

¹⁸⁹ Chloe Sikes and Angela Valenzuela, *Texas Dream Act [House Bill 1403]*, TEX. STATE HISTORICAL ASS'N (Aug. 23, 2016), <https://tshaonline.org/handbook/online/articles/mlt03>.

¹⁹⁰ *Id.*