

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION**

City of El Cenizo, Texas, <i>et al.</i>	§	
	§	
Plaintiffs,	§	
	§	
Travis County, Travis County Judge Sarah Eckhardt, and Travis County Sheriff Sally Hernandez	§	Civil Case No. 5:17-cv-404-OG
	§	
	§	
Plaintiff-Intervenors,	§	
v.	§	
	§	
State of Texas, <i>et al.</i>	§	
	§	
Defendants.	§	

**COMPLAINT IN INTERVENTION OF TRAVIS COUNTY,
TRAVIS COUNTY JUDGE SARAH ECKHARDT, AND TRAVIS COUNTY
SHERIFF SALLY HERNANDEZ**

COMES NOW TRAVIS COUNTY, JUDGE SARAH ECKHARDT, in her official capacity as Travis County Judge, and SHERIFF SALLY HERNANDEZ, in her official capacity as Travis County Sheriff (“Intervenors”) and file this Complaint in Intervention against the STATE OF TEXAS (“State”), GREG ABBOTT in his official capacity as Governor of Texas, and KEN PAXTON in his official capacity as Attorney General of Texas, pursuant to Federal Rules of Civil Procedure, Rule 24(a)(2), or, in the alternative, Rule 24(b).

I. INTRODUCTION

1. The State of Texas has enacted, and Governor Greg Abbott has signed, Senate Bill 4 (“SB 4”), an unprecedented and punitive law that, among other things, mandates compliance with voluntary detainer requests from United States Immigration and Customs

Enforcement (“ICE”), and provides severe penalties for law enforcement officials who fail to comply, including criminal penalties, large civil fines, and removal from office.

2. The law does not stop at punishing law enforcement officials for declining to honor ICE detainers; it also punishes local government entities and their elected and appointed officials and employees for adopting, enforcing, or endorsing any policy that “materially limits the enforcement of immigration laws” (Act of May 7, 2017, 85th Leg., R. S., S.B. 4, § 1.01 (to be codified in Chapter 752, Government Code, as § 752.053 (a)), subjecting them to civil penalties and removal from office.

3. Law enforcement groups and officials from around the State opposed the SB 4 because its mandate requiring local law enforcement to engage in federal immigration activities harms public safety by discouraging the cooperation of victims and witnesses with law enforcement investigation of crimes.

4. SB 4 will subject Texans—both non-citizens and citizens—to racial and ethnic profiling, unlawful stops, and unlawful detentions. This is because SB 4 requires that local law enforcement officers enforce federal immigration laws without the direction and supervision of federal officials. Additionally, SB 4 undermines the discretion and judgment of local law enforcement officials regarding detention, instead requiring an inflexible “one size fits all” standard. This will lead to stops and detentions that are unnecessary in the eyes of local law enforcement officials who are infinitely more familiar with the facts on the ground. Under SB 4, both citizens and non-citizens will be at risk of constant prolonged stops due to unwarranted and burdensome inquiries into their immigration status.

5. SB 4's prohibition of endorsement of any policy that limits immigration enforcement is a clear content and viewpoint-based regulation of free speech that violates the First Amendment.

6. SB 4's prohibition on any activity that "materially limits" immigration enforcement is void for vagueness.

7. SB 4 mandates that law enforcement officials hold inmates beyond the completion of their criminal sentences, thereby potentially requiring those officials to violate the Fourth Amendment rights of such individuals.

8. SB 4's enforcement provisions are preempted by federal law because they duplicate and expand provisions of federal immigration law and establish state enforcement procedures that inject themselves into the comprehensive federal enforcement scheme in ways that are neither contemplated nor authorized by federal law.

9. SB 4 compels local law enforcement officials to become an arm of the federal government for purposes of enforcing immigration laws, putting them in a position that the federal government does not—and indeed could not—require of them, further upsetting the careful federal immigration enforcement scheme.

10. Intervenors seek a declaration that SB 4 is unconstitutional, and an injunction against its implementation by the State, because it violates the First Amendment; Fourth Amendment; Tenth Amendment; Due Process Clause; and Equal Protection Clause of the U.S. Constitution, and is preempted by federal law.

II. JURISDICTION AND VENUE

11. Intervenors raise federal questions under the United States Constitution. The Court has jurisdiction over these constitutional claims pursuant to 42 U.S.C. § 1331, Federal

Question. Additionally, the Court has remedial authority under 28 U.S.C. §§ 2201-02, Declaratory Judgment Act. Venue lies in this district pursuant to 28 U.S.C. § 1931 because a substantial part of the events or omissions giving rise to the claim occurred in this district.

III. ADDITIONAL PARTIES

12. Intervenor Travis County is a county located in Texas, and is recognized as a legal subdivision of the State. Travis County has constitutional and statutory authority to set policies and adopt regulations, as well as administer programs for its residents. It administers the county judicial system, and provides health and social services to county residents regardless of their immigration status or national origin.

13. Travis County is the seat of government for its duly elected and appointed public officials, who face injury in fact from SB 4 in the form of mandamus, injunction, crippling civil penalties, and removal from office if they are determined to be non-compliant with this law. The law also creates budget uncertainty for Travis County by requiring Travis County to assume the costs of training its staff and law enforcement officials to enforce federal immigration rules and laws, and the costs of housing inmates subject to immigration detainers without bond during the pendency of their state criminal cases, as well as beyond release dates mandated by state law.

14. Intervenor Sarah Eckhardt is the duly elected County Judge of Travis County, who faces the injury of civil penalties and/or removal from office for endorsing a policy that “materially limits” enforcement of immigration laws. “Materially limits” is not defined by the statute, is vague, and appears to subject Judge Eckhardt to removal from office for any kind of speech critical of the statute, or of State or Federal immigration enforcement policies or practices. Judge Eckhardt was elected by the voters of Travis County, and as their duly elected County Judge, is expected to advocate for the issues important to those voters, including this

issue. Judge Eckhardt faces actual and imminent harm from SB 4. Judge Eckhardt appears in her official capacity.

15. Intervenor Sally Hernandez is the duly elected Sheriff of Travis County. She is a judicial officer with discretion derived from the Texas Constitution. Tex. Const. Art. V, § 23. Sheriff Hernandez faces civil penalties and/or removal from office for various acts that may be deemed to violate SB 4, including adopting, enforcing, or endorsing a written or verbal policy that is determined to “materially limit” the enforcement of immigration laws. As a law enforcement officer, under SB 4 she is also subject to criminal sanctions for declining to honor a detainer request from ICE, as well as automatic removal from office if she is convicted of this new criminal offense. Sheriff Hernandez appears in her official capacity.

16. Sheriff Hernandez’s authority and discretion to administer the law and to ensure the public safety of the residents of Travis County is greatly diminished by SB 4. Sheriff Hernandez faces actual and imminent harm as a result of SB 4’s unconstitutional mandates.

17. The threat of punitive enforcement of the provisions of this bill is real, as demonstrated by the State’s improperly filed lawsuit (Civil Action No. 1:17-cv-00425-SS) alleging that Sheriff Hernandez intends to violate the law [Dkt. 23, ¶¶17, 40], although her public statements have contradicted this assertion, and asking the Court to issue an advisory opinion declaring the law to be constitutional. [Dkt. 23, PRAYER, p. 41] The State further alleges in its lawsuit that Travis County and its elected officials intend to violate the law. [Dkt. 23, ¶35] Travis County, Judge Eckhardt, and Sheriff Hernandez have pre-enforcement standing to bring this action, and are currently injured by Senate Bill 4’s mandates.

IV. ORIGINAL LAWSUIT

18. Plaintiffs City of El Cenizo, *et al.*, filed suit against Defendants State of Texas, Governor Greg Abbott, and Attorney General Ken Paxton, seeking declaratory and injunctive relief to prevent implementation of SB 4. Plaintiffs allege that SB 4 violates the First Amendment, the Due Process Clause, the Fourth Amendment, the Ninth and Tenth Amendments, and the Equal Protection Clause of U.S. Constitution, and that it is preempted by the Supremacy Clause of the U.S. Constitution because it intrudes into immigration enforcement, a field that is occupied by the federal government's comprehensive enforcement scheme. Plaintiffs allege that SB 4 imperils the liberty and livelihood of the City of El Cenizo and its officials, Maverick County and its officials, along with their basic ability to serve their own constituents. Plaintiffs further allege that LULAC is an organization that serves Latinos throughout Texas, and its members are threatened by the SB 4's dramatic expansion of the State's role in immigration enforcement.

V. INTERVENORS' FACTUAL ALLEGATIONS

19. The following factual allegations are in addition to those presented in the Plaintiffs' complaint. In an abundance of caution, Intervenors present these arguments prior to the effective date of SB 4, because under SB 4, repercussions for making such statements could include civil penalties and removal from office.

A. Compliance with ICE detainer requests is voluntary under federal law and Department of Homeland Security guidance.

20. ICE routinely sends detainer requests to the Travis County Sheriff. A detainer request notifies the Sheriff that the Department of Homeland Security ("DHS") has identified a person who is being held in the Travis County Jail whom DHS believes to be an alien subject to removal, and requests that the Sheriff maintain custody of the individual for a period of up to 48

hours (excluding Saturdays, Sundays, and holidays, 8 C.F.R. §287.7 (d)) beyond the time when the individual would otherwise be released from custody.

21. The detainer is a request by ICE that the Sheriff hold an individual beyond the release date authorized by the criminal courts at sentencing to afford ICE extra time to investigate whether the individual subject to the detainer may be deported. Such detainers, issued by ICE on Form I-247A, are civil in nature. These detainers are easily distinguishable from criminal warrants issued by a judge, which the Travis County Sheriff honors. ICE civil detainer requests are neither reviewed, nor issued, by a judge.

22. ICE detainers are merely requests that law enforcement agencies are not required to follow. 8 C.F.R. § 287.7(a). Indeed, numerous federal courts have held that the federal government cannot mandate local law enforcement officials to comply with such detainers without running afoul of the anti-commandeering provision of the Tenth Amendment.

23. Because ICE detainers are requests, not mandatory orders, federal law imposes no consequences upon law enforcement agencies that disregard the detainer request.

B. Sheriff Hernandez's policy on ICE detainer requests is compliant with both federal law and Department of Homeland Security guidance.

24. Sheriff Hernandez's campaign made clear her belief that Travis County is safer when everyone, regardless of immigration status, feels safe interacting with law enforcement.

25. Sheriff Hernandez was elected by a nearly thirty-point margin, and assumed office on January 1, 2017.

26. Shortly after her election, Sheriff Hernandez issued a written policy, effective on February 1, 2017, setting forth the procedures by which the Travis County Sheriff's Office ("TCSO") would cooperate with ICE concerning ICE detainer requests. This policy was adopted before the legislature even considered SB4. A copy of this policy is attached hereto as Exhibit 1.

27. The purpose of this policy is to promote public safety, to protect and serve all residents of Travis County, and to ensure continued participation of victims and witnesses regardless of their immigration status. Under this policy, TCSO will only comply with civil detainer requests from ICE if those requests are supported by judicial warrant or court order, or if those requests concern individuals alleged to have committed certain serious crimes. Even if neither condition is met, Sheriff Hernandez has reserved the right to exercise discretion in any individual case to ensure that justice is served.

28. This policy, while it limits the participation of her office in immigration activities, does not restrict participation where it is mandated by 28 U.S.C. § 1373 and other federal laws. By this policy, Sheriff Hernandez has chosen to manage her resources in a manner that she believes makes the entire community safer.

29. Compliance with ICE detainer requests consumes limited resources. TCSO personnel must track and respond to requests. Further, inmates whom the courts have ruled to be eligible for release must be held in Travis County Jail cells, cells that are often in short supply, and these inmates must be supervised and fed for additional time beyond the termination of the sentences imposed by the criminal courts that convicted them.

30. Sheriff Hernandez's policy does not protect criminals or prevent people from being prosecuted for criminal acts.

31. Sheriff Hernandez's policy is fully compliant with federal law and DHS guidance. Sheriff Hernandez intends to fully comply with SB4 unless ordered otherwise by the courts.

C. Governor Abbott responds to Hernandez's policy by taking money from Travis County's most vulnerable populations.

32. Immediately after Sheriff Hernandez announced her policy concerning ICE detainees, Governor Greg Abbott announced that he would withhold grant funding for Travis

County in retaliation for Sheriff Hernandez's public statements. Ultimately, Texas denied Travis County \$1.5 million in previously awarded funds that would have supported programs for victims of family violence, veterans, and other at-risk communities.

33. Defunding ongoing programs for Travis County's veterans and battered women was not enough. Governor Abbott directed his office to refuse all future Travis County grant applications—even those unrelated to immigration. Travis County's new grant applications for the 2017-2018 grant cycle were rejected by the Criminal Justice Division of the Governor's Office.

34. On February 2, 2017, Governor Abbott announced via social media that "Texas will hammer Travis County" because of its perceived "sanctuary" policies.

35. On or about February 6, 2017, Governor Abbott again announced that he would "hammer" Travis County. During an appearance on a radio talk show, Governor Abbott stated:

I'm putting the hammer down. This is offensive what is going on in Austin, Texas. It's actually the county, which is Travis County, which is the county seat of Austin, Texas. Travis County has declared what I call "sanctuary city policies." They are no longer going to hold for ICE detainees, certain criminals—who are, in fact, criminals—they've been arrested before for very serious crimes.

36. As part of his comments, Governor Abbott threatened to send public officials to jail if they fail to comply with civil detainer requests.

D. The Legislature disregards constitutional rights and enacts SB4.

37. On January 31, 2017, at the beginning of the Texas legislative session, Governor Abbott made the punishment of "sanctuary" jurisdictions one of his top priorities. He complained that the federal government was not preventing undocumented immigrants from crossing the border, and claimed that some law enforcement officials "are openly refusing to

enforce existing law.” He then announced that “this is the session we will ban sanctuary cities.”

38. Governor Abbott achieved his goal by signing SB 4 into law, effective September 1, 2017.

39. The State of Texas, by its enactment of SB 4, seeks to coerce Sheriff Hernandez to abandon her policy on ICE detainers by threat of criminal sanctions and removal from office.

40. SB 4 requires Sheriff Hernandez to comply without question with any request by federal immigration authorities, eliminating any opportunity for meaningful local review or consideration of allocation of local resources or public safety.

41. Travis County Judge Sarah Eckhardt has been a vocal opponent of SB 4, and is specifically targeted and harmed by SB 4’s vague and undefined restriction on endorsement of policies that “materially limit the enforcement of immigration laws.”

42. SB 4 further requires Travis County and all its elected and appointed officials, including Sheriff Hernandez and Judge Eckhardt, to unquestioningly agree with, and comply with, any requests by immigration authorities or face fines up to \$25,500 per day and removal from office. Indeed, SB 4 goes so far as to punish elected and appointed officials who attempt to comply with its edicts, but refuse to remain silent while doing so.

43. SB 4’s requirement that local governments and officials enforce federal immigration laws eliminates the trust that has been carefully cultivated to keep the community safe, and is an unwarranted intrusion into the rights of Travis County and its elected officials to serve their constituents.

44. Although SB 4's provisions do not take effect until September 1, 2017, the consequences threatened on that effective date are severe and punitive, and require immediate action to avoid their unavoidable constitutional violations.

VI. CAUSES OF ACTION

COUNT ONE: FIRST AMENDMENT

45. Intervenors repeat and incorporate by reference each allegation of the prior paragraphs as if fully set forth herein.

46. SB 4 prohibits county officials and employees from endorsing a policy that "materially limits the enforcement of immigration law." The term "endorse" is not defined by SB 4, but is commonly understood to involve speech; that is, to publicly or officially express support or approval of someone or something.

47. SB 4's endorsement prohibition regulates expression based on its content—immigration enforcement—and therefore requires strict scrutiny. It also regulates expression-based viewpoint, because it only prohibits speech that criticizes SB 4 and immigration enforcement, not speech that supports the bill, its purpose, or its restrictions. SB 4 sets out procedures for removal from office of local officials who take a position in opposition to the bill or its provisions for enforcing immigration laws. The provision is not narrowly tailored to serve a compelling state interest, and therefore violates the First Amendment.

COUNT TWO: VAGUENESS

48. Intervenors repeat and incorporate by reference each allegation of the prior paragraphs as if fully set forth herein.

49. SB 4 is unduly vague, in violation of the Procedural Due Process Clause of the Fourteenth Amendment, because it does not give a person of ordinary intelligence a reasonable

opportunity to know what is prohibited, nor does it establish definite guidelines for law enforcement.

50. SB 4 fails to give local entities, elected and appointed officials, and employees fair notice of what conduct will subject them to substantial civil penalties and removal from office. Among other things, the statute prohibits any policies, including “informal” and “unwritten” policies, that “materially limit” immigration enforcement.

51. SB 4 does not provide any notice of what the enforcing authority, the Texas Attorney General, might consider endorsement, nor does it provide notice of what might constitute material limitation of immigration activities.

COUNT THREE: FOURTH AMENDMENT

52. Intervenors repeat and incorporate by reference each allegation of the prior paragraphs as if fully set forth herein.

53. SB 4 requires law enforcement officials, including Travis County Sheriff Sally Hernandez, to honor all detainer requests from ICE or face criminal charges and removal from office, eliminating their discretion to address Fourth Amendment concerns raised by detention of inmates without criminal warrants.

54. By forcing local law enforcement officers to detain individuals without discretion, SB 4 places them in the position of having to choose whether to violate the Fourth Amendment rights of individuals in their custody or themselves face criminal penalties and removal from office.

COUNT FOUR: PREEMPTION

55. Intervenors repeat and incorporate by reference each allegation of the prior paragraphs as if fully set forth herein.

56. SB 4 is preempted by federal law, which occupies the field in immigration, with comprehensive enforcement procedures that do not request nor envision the kind of state involvement required by SB 4.

57. SB 4 both duplicates and expands provisions of federal immigration law, and it establishes state enforcement procedures that in effect make local law enforcement officials in Texas an arm of the federal government, a position not contemplated by federal law. Federal law permits individual local law enforcement officials to enter into agreements to assist federal immigration officials, with training and supervision by ICE, but does not authorize local authorities to enforce immigration laws on their own.

58. SB 4 amends Chapter 2 of the Texas Code of Criminal Procedure by adding article 2.251, which provides:

DUTIES RELATED TO IMMIGRATION DETAINER REQUESTS.

(a) A law enforcement agency that has custody of a person subject to an immigration detainer request issued by United States Immigration and Customs Enforcement shall:

- (1) comply with, honor, and fulfill any request made in the detainer request provided by the federal government; and
- (2) inform the person that the person is being held pursuant to an immigration detainer request issued by United States Immigration and Customs Enforcement.

(b) A law enforcement agency is not required to perform a duty imposed by Subsection (a) with respect to a person who has provided proof that the person is a citizen of the United States or that the person has lawful immigration status in the United States, such as a Texas driver's license or similar government-issued identification.

59. SB4 also adds Section 39.07 to Chapter 39 of the Texas Penal Code, providing:

FAILURE TO COMPLY WITH IMMIGRATION DETAINER REQUEST

(a) A person who is a sheriff, chief of police, or constable or a person who otherwise has primary authority for administering a jail commits an offense if the person:

(1) has custody of a person subject to an immigration detainer request issued by United States Immigration and Customs Enforcement; and

(2) knowingly fails to comply with the detainer request.

(b) An offense under this section is a Class A misdemeanor.

(c) It is an exception to the application of this section that the person who was subject to an immigration detainer request described by Subsection (a)(1) had provided proof that the person is a citizen of the United States or that the person has lawful immigration status in the United States, such as a Texas driver's license or similar government-issued identification.

60. These provisions of SB 4 are preempted because they attempt to regulate a field that Congress has left no room for the states to regulate, and they conflict with federal law.

61. The newly enacted article 2.251 (Act of May 7, 2017, 85th Leg., R.S., S.B. 4 (to be codified as an amendment to Chapter 2, Tex. Code Crim. Pro. art. 2.251)) attempts to mandate that local law enforcement officials, such as Sheriff Hernandez, detain persons who are subject of an ICE detainer, when, under federal law, ICE detainers are non-mandatory requests for detainer that law enforcement agencies are not required to follow. 8 C.F.R. § 287.7(a). Because ICE detainers are requests, not mandatory orders, federal law imposes no consequences upon law enforcement agencies that disregard the detainer request. However, SB 4, by creating article 39.07 of the Texas Penal Code imposes a state criminal prohibition where no federal counterpart exists. Thus, article 2.251 is preempted by federal law and is invalid. As such, the reference to article 2.251 in the newly enacted Section 752.053 of the Texas Government Code is also invalid.

COUNT FIVE: EQUAL PROTECTION

62. Intervenors repeat and incorporate by reference each allegation of the prior paragraphs as if fully set forth herein.

63. The Fourteenth Amendment to the U.S. Constitution provides that no state shall deny to any person within its jurisdiction “the equal protection of the laws.”

64. SB 4 was enacted with the intent to harm Texas residents based on their race, ethnicity, and national origin. In application, it will coerce law enforcement officers to engage in racial profiling in violation of the Fourteenth Amendment’s Equal Protection Clause.

65. State enforcement of federal immigration laws is not a compelling interest that justifies race-based discrimination. SB 4 is not narrowly tailored, and is not the least restrictive means of achieving the stated government interest; nor is there a rational basis for separating local law enforcement officials, who serve and protect the public within their jurisdictions, from decision-making authority within those same jurisdictions and their own facilities in the name of immigration enforcement.

COUNT SIX: TENTH AMENDMENT

66. Intervenors repeat and incorporate by reference each allegation of the prior paragraphs as if fully set forth herein.

67. 8 C.F.R. § 287.7(a) authorizes ICE to issue detainers, providing, in pertinent part:

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

68. This statute makes clear that ICE detainers are requests, not mandatory orders. SB 4, by adding article 2.251 to the Texas Code of Criminal Procedure, transforms these requests into mandatory orders, demanding that law enforcement agencies imprison, at their expense, suspected aliens subject to removal. As such, this statute violates the Tenth Amendment.

VI. COMMON QUESTIONS OF LAW AND FACT

69. Intervenors' claims, enumerated above, arise from common questions of fact and law asserted by Plaintiffs in their suit seeking to invalidate SB 4 on constitutional grounds. Common questions of law include the extent to which SB 4 intrudes on federal authority to regulate the status of foreign nationals within the United States' borders; the extent to which SB 4 is vague; and the extent to which SB 4 impedes the protected First Amendment conduct of local officials. Common questions of fact include the manner in which SB 4 will impact local law enforcement activities and how SB 4 will negatively impact local communities.

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PRAYER FOR RELIEF

WHEREFORE, Intervenors pray that the Court grant the following relief:

- A. Declare that SB 4 is unconstitutional and invalid on its face;
- B. Declare that SB 4 is preempted by federal law;
- C. Grant preliminary and permanent injunctions barring Defendants from enforcing Senate Bill 4.
- D. Award Plaintiff-Intervenors court costs and reasonable attorney's fees; and
- E. Grant any further relief that the Court deems proper.

DATED: June 8, 2017

Respectfully Submitted,

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