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

CITY OF EL CENIZO, et al., *Plaintiffs*, v. STATE OF TEXAS, et al., *Defendants*.	NO. 5:17-cv-404-OG [Lead Case]
EL PASO COUNTY, et al., *Plaintiffs*, v. STATE OF TEXAS, et al., *Defendants*.	No. 5:17-cv-459-OG [Consolidated Case]
CITY OF SAN ANTONIO, et al. *Plaintiffs*, v. STATE OF TEXAS, et al., *Defendants*.	No. 5:17-cv-489-OG [Consolidate Case]
	SUPPLEMENTAL BRIEF OF TRAVIS COUNTY PLAINTIFF-INTERVENORS

SUPPLEMENTAL BRIEF OF PLAINTIFF-INTERVENORS TRAVIS COUNTY, TRAVIS COUNTY JUDGE SARAH ECKHARDT, AND TRAVIS COUNTY SHERIFF SALLY HERNANDEZ

TO THE HONORABLE JUDGE ORLANDO L. GARCIA:

Plaintiff-Intervenors Travis County, Travis County Judge Sarah Eckhardt, in her official capacity, and Travis County Sheriff Sally Hernandez, in her official capacity ("Travis County"), file this Supplemental Brief pursuant to this Court's Order authorizing supplemental briefing [Dkt. 140].

I. INTRODUCTION

The State argues Senate Bill 4 ("SB 4") sets simple requirements for law enforcement officials to follow. However, the interplay between terms that are undefined or poorly defined and oddly phrased mandates and prohibitions fails to provide the necessary clarity and will subject individuals to the severe penalties articulated in SB4 for even the slightest misstep. These requirements, at best, are unclear as to the actual meaning and to whom they apply. In reality, the statute requires officials to ignore their subjective knowledge of a potential constitutional violation or suffer criminal penalties, removal from office, or civil penalties. In light of the open threats and subsequent consequences suffered by Travis County, it is imperative the statute is not vague so that individuals are not subject to the whims of a temperamental state official.

Travis County Plaintiff-Intervenors submit the following briefing and adopt by reference the arguments, authorities, evidence and exhibits filed prior to or offered at the hearing in support of all plaintiffs' applications for preliminary injunction as additional support, or as alternative theories to those set forth previously and herein.

II. SB 4 MANDATES IMMIGRATION ACTIVITIES BY LOCAL OFFICERS AND EMPLOYEES

a. SB 4 mandates compliance by all employees.

SB 4 enacts Chapter 752 of the Texas Government Code, which mandates certain acts by "local entities" as follows:

> Sec. 752.053. POLICIES AND ACTIONS REGARDING IMMIGRATION ENFORCEMENT. (a) A local entity or campus police department may not:
>
> (1) adopt, enforce, or endorse a policy under which the entity or department prohibits or materially limits the enforcement of immigration laws;
>
> (2) as demonstrated by pattern or practice, prohibit or materially limit the enforcement of immigration laws; or
>
> (3) for an entity that is a law enforcement agency or for a department, as demonstrated by pattern or practice, intentionally violate Article 2.251, Code of Criminal Procedure.
>
> (b) In compliance with Subsection (a), a local entity or campus police department may not prohibit or materially limit a person who is a *commissioned peace officer described by Article 2.12, Code of Criminal Procedure, a corrections officer*, a booking clerk, a magistrate, or a *district attorney,* criminal district attorney, or *other prosecuting attorney* and who is employed by or otherwise under the direction or control of the entity or department from doing any of the following:
>
> (1) inquiring into the immigration status of a person under a lawful detention or under arrest;
>
> (2) with respect to information relating to the immigration status, lawful or unlawful, of any person under a lawful detention or under arrest, including information regarding the person's place of birth:
>
> (A) sending the information to or requesting or receiving the information from United States Citizenship and Immigration Services, United States Immigration and Customs Enforcement, or another relevant federal agency;
>
> (B) maintaining the information; or
>
> (C) exchanging the information with another local entity or campus police department or a federal or state governmental entity;

> (3) assisting or cooperating with a federal immigration officer as reasonable or necessary, including providing enforcement assistance; or
> (4) permitting a federal immigration officer to enter and conduct enforcement activities at a jail to enforce federal immigration laws.[1]
> (emphasis added)

The State argues that while this new section prohibits local political subdivisions from adopting or enforcing policies that "materially limit" immigration enforcement, it only authorizes, and does not mandate, line officers or employees to "inquire into the immigration status of a person under a lawful detention or under arrest."[2] The State further argues that each line officer or employee is allowed to make the decision about whether to inquire about immigration status or not. The State insists that SB 4 only says that if a line officer or employee decides he will engage in immigration activities, he cannot be prevented from doing so.[3]

This reading ignores SB 4's definition of "local entity" in new §752.051(5), which reads in pertinent part as follows::

> (5) "Local entity" means: …
> (B) ***an 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; and
> (C) a district attorney or criminal district attorney.[4]
> (emphasis added)

Line officers and employees are included in this definition of "local entity," and a "local entity" is prohibited from adopting, enforcing, or endorsing policies that materially limit immigration enforcement. Consequently, line officers and employees are restricted from adopting, enforcing, or even endorsing their own practices that "materially limit" immigration

[1] Act of May 7, 2017, 85th Leg., R.S., S.B. 4, to be codified as an amendment to Tex. Gov't Code at § 752.053.
[2] PI Hr'g Tr. 105:15-19, Jun. 26, 2017.
[3] Dkt. 91, Def.'s Resp. to Mot. for PI. 58; PI Hr'g Tr. 117:21-24.
[4] S.B. 4, to be codified at Tex. Gov't Code § 752.051 (5).

enforcement, a restriction which applies to all immigration enforcement activities, not merely inquiries about immigration status.

b. State's interpretation of SB 4 would have an illogical result.

Even if the State's argument were true, allowing each officer or employee to make his own independent decision about whether to inquire into the immigration status of persons he has detained will create a crazy patchwork within a local political subdivision where in certain areas, officers will make inquiries, and in others, they may not. This is contrary to the State's expressed goal of consistent enforcement across the State.[5]

Supervisors will have no control over the everyday activities of their officers, lacking the ability to provide guidance in this area for fear such guidance will be construed as an informal, unwritten policy that will subject them to the statute's severe penalties. For example, if a Sheriff prohibits overtime or specific assignments, it may materially limit a line officer's cooperation with federal immigration authorities in violation of the statute, and consequently subject the Sheriff to penalties. In fact, even disciplining employees for actions or decisions that in some manner touch on immigration may fall within the prohibited activity. Arguably, this lack of control would extend to attempts to discipline officers who deliberately abuse the inquiry process in order to assist immigration agents.

Even murkier under SB 4 is what a line officer is expected to do with the immigration status information he collects. Texas asserts that the line officer or employee doesn't have to do anything with it,[6] but they clearly expect that he will, or there would be no reason to require him to collect the information.

[5] Dkt. 91, Def.'s Resp. 16, 56, 73; PI Hr'g Tr. 103:13-15 & 23-25.
[6] PI Hr'g Tr. 115:3 – 116:1.

Clearly, the plain language of SB 4 imposes statutory obligations upon "local entit[ies]" such as the Sheriff, Constables, County Attorney, and District Attorney of Travis County and their employees. The statutory obligations include requirements to: exchange immigration information with "relevant federal agenc[ies]"[7]; maintain immigration information[8]; exchange immigration information with local, state, and federal entities[9]; assist or cooperate with federal immigration officers, "including providing enforcement assistance"[10]; and permit ICE to "enter and conduct enforcement activities at a jail to enforce federal immigration laws."[11] The duties imposed by SB 4 on local entities in this regard involve far more than just facilitating an individual peace officer's ability to make immigration inquiries if he/she chooses to do so. Such statutory obligations blur, if not completely obliterate, the lines between federal immigration law and local law enforcement.

Moreover, SB 4 provides no guidance to officers in carrying out the statutory duties the Act imposes with respect to "immigration information." In argument offered during the Preliminary Injunction hearing, the State suggested that an officer might call the federal government's Law Enforcement Services, open 24 hours a day, 7 days a week, every day of the year.[12] However, making this call is not a resolution to the problem of having a person detained by the side of the road. Even if federal agencies can inform the officer that the person is not documented, the officer is still left standing by the side of the road detaining a person, with no way to move forward short of arresting the person without probable cause or a warrant, or at

[7] S.B. 4, to be codified at Tex. Gov't Code § 752.053(b)(2)(A).
[8] S.B. 4, to be codified at Tex. Gov't Code § 752.053(b)(2)(B).
[9] S.B. 4, to be codified at Tex. Gov't Code § 752.053(b)(2)(C).
[10] S.B. 4, to be codified at Tex. Gov't Code § 752.053(b)(3).
[11] S.B. 4, to be codified at Tex. Gov't Code § 752.053(b)(4).
[12] PI Hr'g Tr. 110:11-16.

least continuing to detain him for intervention by ICE, both of which risk violating the person's Fourth Amendment rights.

III. TRAVIS COUNTY PLAINTIFFS HAVE STANDING TO ASSERT FOURTH AMENDMENT CLAIM

The State has argued that Plaintiffs lack standing to assert a Fourth Amendment claim because such claims must be asserted by individuals suffering the deprivation.[13] Contrary to this assertion, Travis County Plaintiffs, specifically Sheriff Hernandez, has standing to assert the claims asserted pursuant to the Fourth Amendment.

a. Sheriff Hernandez has standing.[14]

SB 4 mandates that local entities honor any immigration detainer request, which is defined by the law itself as any "federal government request" to maintain custody, whether verbal or written, "including a United States Department of Homeland Security Form I-247 document."[15] By requiring the Sheriff (and her employees) to honor all ICE detainers, and by also imposing the threat of enormous civil penalties, removal from office, and criminal sanctions for not honoring ICE detainers, SB 4 places them in the untenable position of having to choose between violating the Fourth Amendment rights of persons in their custody and their own oaths to support the U.S. Constitution or facing serious personal consequences that could even include jail time. As the sheriff whose policy on ICE detainers drew the ire of the Governor and the Legislature and hardened their resolve to enact SB 4,[16] Sheriff Hernandez has clearly established her "personal stake" in the outcome of this litigation such that her involvement assures a concrete adverseness which sharpens the presentation of issues. *Bd. Of Education v. Allen*, 392 US.

[13] PI Hr'g Tr. 122:2-8.
[14] The State sued Travis County and Sheriff Hernandez in Travis County within hours after SB4 was signed by the Governor seeking a declaratory judgment regarding the constitutionality of SB4. Dkt. 14-1, Def.'s Memo. in Supp. of Opp. Mot. to Dism. or Transf. 1.
[15] S.B. 4, to be codified at Tex. Gov't Code § 772.0073(a)(2).
[16] Dkt. 91, Def.'s Resp. 73; PI Hr'g Tr. 134:17-21.

236, 241 n.5 (1968). *See also*, *Baker v. Carr*, 369 U.S. 186, 204 (1962); U.S. Const. art VI; Tex. Const. art. 16, §1 (a). As noted by the Supreme Court in *Bd. of Education*, "having to choose between violating their oath" or "refusal to comply" with a statute believed to be unconstitutional when such refusal would likely result in expulsion from office is sufficient to establish standing (citing *Baker*). Although the Fifth Circuit has declined to extend standing to those officials whose only injury is violating an oath, the Fifth Circuit has recognized that the danger of expulsion and other injuries would satisfy an injury sufficient for standing. *See, Finch v. Mississippi State Med. Ass'n, Inc.*, 585 F.2d 765, 774 (5th Cir. 1978), *modified*, 594 F.2d 163 (5th Cir. 1979) (plaintiff was "in no danger of expulsion from office"); *Donelon v. Louisiana Div. of Admin. Law ex rel. Wise*, 522 F.3d 564, 568 (5th Cir. 2008) (similar). In this instance, Sheriff Hernandez's standing is further supported by the fact that failure to comply with SB4 may result in criminal charges and civil penalties. In light of the State's well documented history of actions and statements regarding "hammering" Travis County, the risk of losing further funding also strengthens her standing, as well as that of Travis County. The Attorney General's assurances that they do not read the statute a particular way and that they would not proceed that way does not negate the Sheriff's standing.

b. Travis County and Sheriff Hernandez also assert the rights of their officers and employees because they are intertwined.

SB 4's definition of "local entities" includes their individual employees and may subject those employees to SB 4's crushing civil penalties of not more than $1,500 for the first violation and not more than $25,000 for each subsequent violation. The law further fails to articulate whether the entity or the individual would be responsible for the fine. As such, Travis County establishes a personal stake in the outcome of this litigation. Plaintiffs' standing on the Fourth Amendment issue arises from the SB 4's requirement that Plaintiffs completely disregard the

Fourth Amendment rights of individuals in their custody, potentially violating their oaths, and suffering civil penalties and/or criminal charges.

IV. SB4 DOES NOT MITIGATE RISKS TO COUNTY FOR VIOLATION OF THE CONSTITUTION

The State essentially asks this Court to ignore the constitutional deficiencies of the statute because the statute provides mitigation strategies to assist the Plaintiffs. A cursory review of SB4 reveals the inadequacies of the statute to mitigate the Plaintiffs concerns. Neither the statute nor the State's representations provide adequate mitigation for the constitutional concerns that have been raised.

a. The State claims grant money will be a cost savings to counties.

When some witnesses expressed concerns about the additional costs of complying with SB 4's mandates, the State made a great show of asking the witnesses whether they had made application for grant funds authorized by the bill. Not surprisingly, none of the witnesses was aware that grant funds were currently available. Why? Although SB 4 provides for establishment of a grant program, the bill does not go into effect until September 1, so of course this program does not yet exist. There is currently no evidence that the grant program has been established or funded.[17] Although SB 4 provides that the Governor's Criminal Justice Division ("CJD") must establish and administer a competitive grant fund to provide assistance to local entities to offset costs related to enforcing immigration laws or honoring ICE detainer requests, Travis County has particular reason to doubt the availability of such funds to them, as the Governor terminated all of Travis County's 2016-2017 CJD grants mid-term on March 1, 2017, and subsequently denied Travis County's applications for CJD grants for the upcoming 2017-2018 grant cycle. The Governor threatened to "hammer" Travis County, and he did. The awarding of grants is at the

[17] *See* CJD's List of Grant Programs at https://egrants.gov.texas.gov/fundopp.aspx

discretion of the Governor's Office. No reason is required for not awarding a grant to a particular applicant, and the Governor's Office has clearly demonstrated that it regards and will use grants as a tool to control and express the Governor's displeasure with local entities, especially Travis County.

b. Attorney General will defend local entities if sued.

Obviously anticipating Fourth Amendment challenges to SB 4, the Legislature included a section that allows the Attorney General ("AG") to represent a local entity that is sued for a Fourth Amendment violation. Although the State would like to proceed with the premise that this provision is couched in mandatory terms, "[t]he attorney general shall defend…," the statute actually provides a great deal of latitude to the Attorney General because it requires an application from the local entity, and it requires representation only "if the attorney general determines the cause of action arises out of a claim involving the local entity's good-faith compliance with an immigration detainer request required by Article 2.251, Code of Criminal Procedure."[18] It does not provide a mechanism to challenge the AG's decision. Further, it does not provide representation for any other claims arising out of the compliance with required policies and for the enforcement of immigration inquiries by line officers or employees. Further, it requires the local entity or individual to release all control of the matter to the AG, allowing a settlement with a finding of liability against the local entity. In Travis County's case, the State's position of wanting to "hammer" Travis County could result in various situations resulting in criminal charges, removal, or civil penalties as a result of the AG's complete control of the civil matter, or a decision to leave Travis County to fend for itself when faced with litigation related to SB 4 and its consequences, intended or incidental.

[18] S.B. 4, to be codified at Tex. Gov't Code § 402.0241 (b).

c. The federal government will take custody of inmates the last seven days of their state sentences.

Texas touted SB 4's provision for sending inmates with ICE detainers to serve the final seven days of their state sentences in federal custody as a huge money-saver for local entities. However, Texas failed to mention that "[t]his subsection applies *only* if appropriate officers of the federal government consent to the transfer of the defendant into federal custody…."[19] (emphasis added) The Texas Legislature cannot mandate the federal government to take these inmates, and there is no evidence that the federal government will take them, that they have the capacity to house them, or that they have authority to supervise inmates serving State sentences. This "solution" appears to be nothing more than wishful thinking or smoke and mirrors, and is just too speculative for a reasonable person to rely on.

d. The Attorney General "would never…"

The Attorney General made repeated statements to the effect that, "We would never prosecute anyone for that," and "Nothing would ever happen to someone who did that." In making such statements, the AG used egregious examples of conduct under the statute, but there are a multitude of less egregious examples of conduct that a representative of the State may or may not find to violate the law. A different representative of the State might find even those very egregious examples of conduct to violate the law. Even assuming the representations of the AG are genuine, these statements are subject to change and interpretation and cannot bind future attorneys general.

The statute is vague. Local entities, their officials, officers, and employees cannot operate effectively in a situation where they are afraid to take actions because they are unsure whether those actions might violate this law. They are effectively constrained to a very mandatory and

[19] S.B. 4, to be codified at Tex. Code Crim. Pro. art. 42.039.

very broad reading of the law that severely limits even activities that they would normally be expected to perform in the positions they occupy (training, oversight, supervision, even answering questions). The consequences they face should someone decide that something they have done violated the law are dire, and affect their livelihoods, their careers, and their freedom.

V. CONCLUSION

As set forth in the El Cenizo Plaintiffs' Memorandum in Support of Application for Preliminary Injunction, [Dkt. 24-1] and in Plaintiff-Intervenor Travis County, *et al.*'s Application for Preliminary Injunction [Dkt. 70], Plaintiffs and Travis County Plaintiff-Intervenors have established that they are likely to succeed on the merits of their claims that SB 4 violates the Constitution; that Plaintiffs and Travis County Plaintiff-Intervenors will suffer irreparable harm if the Court does not enjoin SB 4; that the Defendants will suffer no harm if the Court preserves the status quo pending adjudication of this matter on the merits; that the balance of hardships tips strongly in favor of Plaintiffs and Travis County Plaintiff-Intervenors, and that a preliminary injunction in this case advances the public interest.

For these reasons, Travis County Plaintiff-Intervenors respectfully request that the Court grant the Plaintiff Intervenors Travis County, Travis County Judge Sarah Eckhardt and Travis County Sheriff Hernandez's Application for Preliminary Injunction.

Dated: July 10, 2017.

Respectfully Submitted,

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ATTORNEYS FOR TRAVIS COUNTY PLAINTIFF-INTERVENORS

CERTIFICATE OF SERVICE

I hereby certify that on July 10, 2017, I served a copy of the foregoing document on all counsel registered to receive NEFs through this Court's CM/ECF system. All attorneys who are not registered to receive NEFs have been served via email.

/s/ Sherine E. Thomas
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