

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

CITY OF EL CENIZO, et al,	§	
Plaintiffs,	§	
	§	
CITY OF AUSTIN,	§	
Consolidated Plaintiff-Intervenor,	§	
	§	
v.	§	CIVIL ACTION NO. 5:17-cv-404
	§	
STATE OF TEXAS, et al.,	§	
Defendants.	§	

CITY OF AUSTIN’S FIRST AMENDED COMPLAINT IN INTERVENTION

The City of Austin (“Austin” or the “City”) files this Amended Complaint in Intervention against the State of Texas (“Texas”), Governor Greg Abbott, and Texas Attorney General Ken Paxton.

I. SUMMARY

1. The 2017 Texas Legislature enacted Senate Bill No. 4 (SB 4) to punish cities, counties and college campuses that provide “sanctuary” to undocumented immigrants. SB 4 has been codified as Texas Government Code § 752.051, *et seq.* The City challenges unconstitutional aspects of SB 4, seeking declaratory and injunctive relief under the First Amendment of the United States Constitution.

2. SB 4 violates the U.S. Constitution’s right to free speech by penalizing the conduct of local officials who “endorse” a policy that would contradict SB 4’s mandates.

II. PROCEDURAL HISTORY

3. Plaintiffs City of San Antonio, *et al.*, filed suit against defendants Texas, Governor Greg Abbott, and Attorney General Ken Paxton, seeking declaratory and injunctive relief to prevent

implementation of SB 4. See Dkt. 1 in 5:17-cv-489-OLG (W.D. Tex.).¹ Plaintiffs allege that SB 4 violates the United States Constitution and other federal constitutional and statutory provisions by invading the field of civil immigration enforcement, encouraging racial profiling, threatening local municipalities with fines and threatening local officials with removal from office for perceived non-compliance with state and federal immigration law. *Id.* at ¶¶ 104-143. Plaintiffs allege that the City of San Antonio, its officials, and its residents—along with organizational plaintiffs Texas Association of Chicanos in Higher Education (TACHE), La Union del Pueblo Entero (LUPE), and Workers Defense Project—will suffer substantial harms if the State is permitted to implement SB 4. *Id.* at ¶¶ 83-103.

4. The City of Austin intervened in that action, which was then consolidated into this current action. Dkt. 27. Currently, the plaintiffs in this action are the City of Austin; El Paso County; Richard Wiles, Sheriff of El Paso County in his Official Capacity; Jo Anne Bernal, County Attorney of El Paso County, in her Official Capacity; Texas Organizing Project Education Fund; City of San Antonio; Rey Saldaña; Texas Association of Chicanos in Higher Education; La Union del Pueblo Entero, Inc; Workers Defense Project; City of El Paso; MOVE Texas; Bexar County; and the Texas Association of Hispanic County Judges and County Commissioners.

III. PARTIES

5. Consolidated Plaintiff-Intervenor Austin is a home-rule city in the State of Texas. The City adopted its original Charter in 1909. In exercise of the City's constitutional authority, the Charter describes the manner in which local officials, including a Mayor and Council, may be elected and removed from office. The Charter also reserves to the City all constitutional home-rule authority including the discretion to allocate resources and determine priorities in furtherance of the welfare,

¹ The Court consolidated that case with the present case on June 6, 2017. Dkt. 27.

health, morals, comfort, safety, and convenience of the City and its inhabitants. The Charter establishes the City's governance structure: members of the governing body, the City Council, are elected from ten districts and a Mayor is elected at-large. The City Council appoints a City Manager who is the Chief Administrative Officer of the City. The City Manager nominates, and the City Council confirms, the Chief of Police. The City of Austin employs over 16,000 people.

6. Defendant State of Texas is a constituent political entity of the United States of America and subject to the laws and Constitution of the United States.

7. Defendant Greg Abbott ("Governor Abbott") is the elected Governor of the State of Texas. Governor Abbott, who is sued in his official capacity, is the chief executive officer of the State of Texas and is responsible for the conduct of Texas agencies, officials, and personnel. Governor Abbott signed SB 4 into law on May 7, 2017.

8. Defendant Ken Paxton ("Attorney General Paxton" or "Paxton") is the elected Attorney General for the State of Texas. The Attorney General is authorized "to institute proper court proceedings to enforce or protect any right of the public that is violated." *Agey v. Am. Liberty Pipe Line Co.*, 172 S.W.2d 972, 974 (Tex. 1943). The Texas Constitution designates the Attorney General as the representative of the State in all suits and pleas to which the State may be a party. TEX. CONST. ART. IV, § 22. Attorney General Paxton is sued in his official capacity.

IV. JURISDICTION AND VENUE

9. The Court has jurisdiction under 28 U.S.C. § 1331 to decide the City's claims under the United States Constitution. The Declaratory Judgment Act, 28 U.S.C. §§ 2201, *et seq.*, provides the Court with further remedial authority.

10. Venue properly lies within the Western District of Texas under 28 U.S.C. § 1391(b).

V. FACTUAL ALLEGATIONS

11. The Texas Legislature has attempted on multiple occasions to pass laws that would punish “sanctuary” jurisdictions, including failed bills in 2011 and 2015.

12. At the beginning of the 2017 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.”

13. On or about February 6, 2017, Governor Abbott again announced that he would “hammer” the City of Austin. At 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.” As part of his comments, Governor Abbott threatened to send public officials to jail—including sheriffs and mayors—if they fail to comply with civil detainer requests.

14. Between February 9 and February 12, 2017, U.S. Immigration and Customs Enforcement (“ICE”) began a series of raids that sent waves of terror through immigrant communities in Austin and across Central Texas. In the Austin and San Antonio areas, ICE conducted several dozen arrests, the majority of which concerned individuals who had committed no criminal offense.

15. On or about March 20, 2017, during a hearing in the United States District Court for the Western District of Texas, in the matter of *U.S. v. Coronilla-Guerrero*, Case No. 1:17-CR-132-LY, U.S. Magistrate Judge Andrew W. Austin stated in open court to an ICE official:

There’s been questions about whether Austin’s being targeted. We had a briefing that your immediate supervisor, I guess, Agent Shaffer, came and briefed me and the magistrate judge, Judge Lane, at the very end of January that we could expect a big operation, agents coming in from out of town. There was going to be a specific

operation, and it was at least related to us in that meeting that it was a result of the sheriff's new policy that this was going to happen.

A. SB 4 Increases Immigration Enforcement and Threatens to Penalize Municipalities and Policymakers Who Decline to Follow the State's Unconstitutional Demands

16. Governor Abbott signed SB 4 into law on May 7, 2017, and the legislation became effective September 1, 2017.

17. SB 4 applies to the governing body of a municipality, as well as to officers or employees of the municipality. Tex. Gov't Code § 752.051. SB 4 specifically states that its application includes municipal police departments and municipal attorneys.

18. SB 4 prohibits the City, and employees of the City, from endorsing any policy that would prohibit or limit the enforcement of federal immigration law. Gov't Code § 752.053. The statute specifically states that "a local entity...may not... adopt, enforce, or endorse a policy under which the entity or department prohibits or materially limits the enforcement of immigration laws." *Id.*

19. The statute defines "local entity" as "the governing body of a municipality" and "an officer or employee of or a division, department, or other body that is part of a municipality[.]" *Id.* At 752.051.²

20. The law does not define endorsement but prescribes harsh penalties for this vague term.

21. If the City or an employee of the City does not comply with SB 4, he or she may be subject to gratuitous fines up to \$25,500 for each day of noncompliance after the first day. The State may bring an action to impose these fines if any officer or employee of the municipality fails to comply with SB 4. Tex. Gov't Code § 752.056. The 2019 Texas Legislature amended SB 4 to explicitly state that it waives governmental immunity for cities and counties.

² Seemingly, the definition would include any employee of the City.

22. If the State believes a local official holding elective or appointive office refuses to comply with SB 4—for example, by endorsing a policy that would limit the enforcement of federal immigration law—he or she will be subject to a *quo warranto* action seeking to remove the official from office. Tex. Gov’t Code § 752.056.

23. On multiple occasions, the City’s Mayor and City Council have adopted resolutions expressing the City’s intent to be a “Welcoming City” for immigrants and all communities, regardless of race, religion, ethnicity, status, or national origin. The City has also issued other resolutions expressing support for all in Austin and opposing harmful policies of the state and federal government.³ In support of this objective, the City provides social services and other support to local immigrant communities, without regard to perceived immigration status. SB 4’s vague description allows the State to criminalize these resolutions as prohibited “endorsements.”

24. Upon introduction of SB 4, multiple elected officials at the City publicly expressed their opposition to SB 4 and its likely negative impact on the local community. For example, Council Member Greg Casar, whose district includes many residents born outside of the United States, has participated in demonstrations against SB 4 and has given local and national media interviews highlighting the potential harms of this new law. Council Member Pio Renteria gave public testimony describing how the combined effects of SB 4 and recent ICE raids have led to immigrant communities avoiding public settings, including attendance at his church. This speech has been made since SB 4 was enacted. The City Council will continue to speak in support of residents of

³ See City of Austin Resolution 20180510-048 (identifying Austin as a welcoming city that serves and protects residents regardless of immigration status, and offering support of Austin Sanctuary Network and its residents denied asylum protections); Resolutions 20161215-066 and 20170276-018 (allocating funding to local organizations to provide legal services to immigrants); Resolution 20180628-124 (rejecting zero tolerance policy and emphasizing the City’s support for inclusivity); Resolution 20170518-045 (reacting to SB 4 as a deterrent to safety and cooperation with law enforcement, which disparately impacts safety for both the immigrant community and the community at large); Resolution 20170518-045 (directing City Manager to pursue litigation fighting both state and federal anti-immigrant policies); Resolution 20171005-034 (denouncing the 2017 federal administration’s Deferred Action on Childhood Arrivals rescission).

the City of Austin. This includes opposing harmful punitive policies of the federal and state governments.

25. Beyond elected officials, the State could threaten its endorsement penalties against unelected City officials and employees, including the City Manager, Police Chief, and City Attorney for simply answering questions at town halls or in interviews, or carrying out their job duties as required by the City Charter or policy direction through the City Council.

26. As endorsement is not defined, the State can use the sword of enforcement to broadly restrict the speech of City officials and employees based on content and viewpoint.

27. In November 2018, Attorney General Paxton initiated an SB 4 enforcement action against the City of San Antonio, San Antonio's City Manager Cheryl Sculley ("Sculley"), and its Police Chief William McManus ("McManus").⁴ Among other claims (including claims that San Antonio officials limited federal immigration enforcement), Paxton claimed that the City of San Antonio, Sculley, and McManus endorsed a policy in violation of SB 4 by implementing San Antonio Police Department ("SAPD") General Manual Procedure 618.11. Pursuant to the procedure, SAPD assists crime victims and witnesses in obtaining U-visas, officers will not detain and/or arrest individuals based on the fact or suspicion that they are in the United States illegally, and SAPD officers will not refer persons to ICE unless the person has a federal deportation warrant.

28. The City of Austin similarly expects that the State could bring such an action against Austin and its employees based on actions or the Austin Police Department's policies concerning, for example, inquiring into immigration status or assisting people seeking to obtain U-visas. As such, the City faces a credible threat of enforcement of restrictions on speech.

⁴ This action is currently pending as *Paxton v. McManus, et al.*, D-1-GN-18-007133 (345th Jud. Dist. Ct., Travis County).

VI. CAUSE OF ACTION

FIRST AMENDMENT OF THE U.S. CONSTITUTION

29. The City hereby incorporates by reference the preceding paragraphs 1 through 28.

30. SB 4 violates the First Amendment of the United States Constitution by penalizing the protected speech of City of Austin officials, both elected officials and unelected employees, who “endorse” a policy that would contradict SB 4 mandates. Under federal law, any statute restricting protected speech is deemed to be overbroad and invalid.

31. The City of Austin and its officials and employees will suffer irreparable harm if SB 4’s endorsement provisions are not enjoined.

32. Additionally, SB 4 constitutes impermissible content-based, viewpoint discrimination, as it only applies to prohibit certain speech based on the viewpoint and content of the speech.

33. The City of Austin and its officials and employees will suffer irreparable harm if SB 4’s endorsement provisions are not enjoined.

PRAYER

WHEREFORE, the City of Austin seeks the following relief:

- A. A declaration that the endorsement provisions of SB 4 are unconstitutional under the First Amendment of the United States Constitution;
- B. A permanent injunction barring Texas from enforcing the endorsement provisions of SB 4; and
- C. Any further relief that the Court deems fit and proper.

Respectfully submitted,

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**ATTORNEYS FOR CONSOLIDATED
PLAINTIFF INTERVENOR CITY OF AUSTIN**

CERTIFICATE OF SERVICE

This is to certify that I have served a copy of the foregoing on attorneys of record for all parties, via the Court's ECF/CM system, in compliance with the Federal Rules of Civil Procedure, on this 13th day of December, 2019.

/s/ Sameer S. Biring
SAMEER S. BIRRING