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**SENATE BILL 4:  
POLICE OFFICERS’ OPINIONS ON  
TEXAS’S BAN OF SANCTUARY CITIES**

MEGAN E. REED\*

**TABLE OF CONTENTS**

INTRODUCTION .....	68
I. BACKGROUND ON SB4 .....	69
A. <i>History of Sanctuary Cities in the United States</i> .....	69
B. <i>Events Leading to SB4’s Enactment</i> .....	74
C. <i>SB4’s Provisions</i> .....	77
1. <i>ICE-DETAINDER PROVISION</i> .....	78
2. <i>ENFORCEMENT-COOPERATION PROVISION</i> .....	78
D. <i>Similar State Legislation</i> .....	79
II. IN PRACTICE, WHAT WILL SB4 CHANGE? .....	82
A. <i>Racial Profiling v. Probable Cause</i> .....	82
B. <i>Reports to Police by Victims and Witnesses</i> .....	85
1. <i>LOWER CRIME REPORTING AND COOPERATION</i> .....	85
2. <i>U AND TVISAS</i> .....	87
C. <i>Inquiries Into Immigration Status</i> .....	91
1. <i>THE NEED TO IDENTIFY PEOPLE</i> .....	91
2. <i>UNDOCUMENTED IMMIGRANTS CARRYING NON-U.S. IDENTIFICATION</i> .....	93
D. <i>Jails and Detainers</i> .....	96
1. <i>BASIS FOR DETAINERS</i> .....	96
2. <i>SB4’S IMPACT ON HONORED ICE DETAINERS IN TEXAS</i> .....	97
3. <i>FOURTH AMENDMENT CONCERNS</i> .....	99
E. <i>Officers’ Reputations Within Their Communities</i> .....	104
F. <i>Training on Immigration Law</i> .....	107
G. <i>Resource Reallocation and the Tenth Amendment</i> .....	108
III. IS SB4 EFFECTIVE? .....	109
CONCLUSION.....	112

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## INTRODUCTION

The current sanctuary-city debate swept across the United States after a 32-year-old woman died in her father's arms when an undocumented immigrant shot her. The undocumented immigrant was previously in the San Francisco Police Department's custody, but the Department released him based on its sanctuary-city policy, despite federal immigration authorities' objections. Naturally, Americans began asking, "Do sanctuary cities make us safer? Or does law enforcement's compliance with ICE detainers make us safer?" Texas, believing cities should do the latter, enacted Senate Bill 4, banning sanctuary cities and fueling the fire of the already heated sanctuary-city debate. But police officers—whose behavior SB4 affects—are caught in the middle of the politics and legal arguments, making their opinions extremely relevant.

For this Article, the Author interviewed six local law enforcement agencies in Texas regarding SB4.<sup>1</sup> Based on those interviews and other research, this Article concludes that SB4 likely does not uproot and change Texas policing practices and asserts that SB4 may in fact be highly ineffective at improving resident safety, which was Texas lawmakers' stated purpose for SB4. SB4 continues to have far reaching impacts, including concerns of racial profiling, victims and witnesses refusing to come forward due to fears of deportation, and damage to police officers' reputations. Further, while some local law enforcement agencies claim they will not have to reallocate their resources to comply with SB4's requirements, they have had to expend extra resources on community outreach due to the fear SB4 has caused.

The officers interviewed for this Article assert that, since SB4's enactment, officers are not stopping individuals based on their race or ethnicity, and they are not inquiring into peoples' immigration statuses more frequently. Due to SB4's recent enactment and the lack of data, however, the accuracy of those statements likely cannot be confirmed until SB4 is implemented in practice. But the fact that some agencies are not reallocating their resources may provide evidence that officers are making decisions with other facts in mind besides race and documentation status.

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<sup>1</sup> The author reached out to dozens of local law enforcement agencies in Texas. Unfortunately, most agencies either did not respond to the interview requests or declined to comment. Further, the law enforcement officers' names have been changed in this Comment.

Further, most Texas detention facilities were cooperating with Immigration and Customs Enforcement (ICE) long before the current sanctuary-city debate began. Thus, the officers claim that SB4 will not impact their daily operations. Considering that fact, in addition to the lack of resource reallocation, leads to the question of why Texas lawmakers bothered to enact SB4 in the first place. To answer that question, it is important to first understand the history of sanctuary cities, the events leading to SB4's enactment, SB4's requirements, and similar state legislation.

## I. BACKGROUND ON SB4

### A. *History of Sanctuary Cities in the United States*

*Sanctuary* is defined as a “safe place, esp[ecially] where legal process cannot be executed” or as a “holy area of a religious building.”<sup>2</sup> This concept can be traced back to biblical times,<sup>3</sup> when the sanctuary responsibility belonged to churches, “which offered places of refuge for those accused of crimes and were susceptible to revengeful attacks by their victims.”<sup>4</sup>

Throughout history, churches and monasteries provided sanctuary to various groups seeking safety. For example, churches played a large role in the Underground Railroad, providing refuge for people escaping slavery.<sup>5</sup> During World War II, monasteries provided refuge to Jewish people fleeing the holocaust.<sup>6</sup> Churches also gave refuge to civil rights workers seeking to enforce the United States Supreme Court's 1954 ruling in *Brown v. Board of Education* and to draft resisters during the Vietnam War.<sup>7</sup>

<sup>2</sup> *Sanctuary*, *Black's Law Dictionary* (10th ed. 2014).

<sup>3</sup> See, e.g., Sophie H. Pirie, *The Origins of a Political Trial: The Sanctuary Movement and Political Justice*, 2 *YALE J.L. & HUMAN.* 381, 389 (2013) (explaining that “Biblical sanctuaries offered respite, not merely from the procedures of local custom or law, but also from its norms”); Clyde Haberman, *Trump and the Battle over Sanctuary in America*, *N.Y. TIMES* (Mar. 5, 2017), <https://www.nytimes.com/2017/03/05/us/sanctuary-cities-movement-1980s-political-asylum.html> (referring to Deuteronomy and the Book of Joshua as examples of sanctuary); Ann Deslandes, *Sanctuary Cities Are as Old as the Bible*, *JSTOR DAILY* (Mar. 22, 2017), <https://daily.jstor.org/sanctuary-cities-as-old-as-bible/> (“The Bible, at Joshua 20:2, states ‘tell the Israelites to designate the cities of refuge.’”).

<sup>4</sup> Rose Cuison Villazor, *What is a “Sanctuary”?*, 61 *SMU L. REV.* 133, 139 (2008).

<sup>5</sup> See Douglas L. Colbert, *The Motion in Limine: Trial Without Jury—A Government's Weapon Against the Sanctuary Movement*, 15 *HOFSTRA L. REV.* 5, 41–42 (1986).

<sup>6</sup> *Id.* at 42.

<sup>7</sup> *Id.* at 42–43.

People first used the term *sanctuary* in the immigration context during the 1980s Sanctuary Movement.<sup>8</sup> The term referred to churches' and cities' efforts to assist Salvadoran and Guatemalan people applying for asylum in the United States.<sup>9</sup> At first, the federal government took a hands-off approach to the Sanctuary Movement.<sup>10</sup> But by mid-1984, 150 churches nationwide had declared sanctuary and 18 national religious denominations and commissions endorsed the movement.<sup>11</sup> The government, "which had apparently hoped that the movement would be short-lived," then changed its approach and began arresting and prosecuting multiple sanctuary workers for conspiring to violate immigration laws.<sup>12</sup> Instead of deterring sanctuaries—as the government likely planned—the prosecutions inspired more churches and synagogues to join the sanctuary efforts.<sup>13</sup>

In response to the federal government rejecting the Salvadorans' and Guatemalans' asylum claims, states and cities enacted their own laws providing safeguards to immigrants.<sup>14</sup> The most controversial safeguard provided assurance that police officers would not cooperate with federal immigration enforcement.<sup>15</sup> Eventually, however, the Sanctuary Movement died down when Congress amended the Immigration and

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<sup>8</sup> Villazor, *supra* note 4, at 134–35; Deslandes, *supra* note 3.

<sup>9</sup> See Villazor, *supra* note 4, at 139–142; Norma Stoltz Chinchilla, Nora Hamilton & James Loucky, *The Sanctuary Movement and Central American Activism in Los Angeles*, 36 *LATIN AM. PERSP.* 101, 102 (2009).

<sup>10</sup> See, e.g., Colbert, *supra* note 5, at 43 (revealing that the U.S. government initially did not consider the sanctuary movement a threat, and declined to prosecute sanctuary workers despite their openly stated intent to violate immigration law); Pirie, *supra* note 3, at 407 ("It is perhaps not surprising that the government, and the INS in particular, 'poohpoohed sanctuary for two years as an irrelevant gesture . . . that had a marginal impact at most on the INS task of protecting the nation's borders and that would disappear when the novelty wore off.") (quoting Gary MacEoin, *A Brief History of the Sanctuary Movement*, in *SANCTUARY: A RESOURCE GUIDE FOR UNDERSTANDING AND PARTICIPATING IN THE CENTRAL AMERICAN REFUGEES' STRUGGLE* 14, 23 (Gary MacEoin ed., 1985)).

<sup>11</sup> Chinchilla, Hamilton & Loucky, *supra* note 9, at 107.

<sup>12</sup> *Id.*; see also Colbert, *supra* note 5, at 44–45.

<sup>13</sup> Colbert, *supra* note 5, at 47; Chinchilla, Hamilton, & Loucky, *supra* note 9, at 107.

<sup>14</sup> Villazor, *supra* note 4, at 142; Huyen Pham, *The Constitutional Right Not to Cooperate? Local Sovereignty and the Federal Immigration Power*, 74 *U. CIN. L. REV.* 1373, 1383 (2006).

<sup>15</sup> See Villazor, *supra* note 4, at 142–43 (describing the safeguard as "a type of 'don't ask, don't tell' policy"); Pham, *supra* note 14, at 1383–84 (describing a typical sanctuary law in Takoma Park, Maryland, which prohibited its employees from assisting INS with investigations of immigration violations.).

Nationality Act (INA) in 1997, making the Salvadoran and Guatemalan asylum seekers eligible for special refugee status.<sup>16</sup>

Although the executive branch openly criticized the sanctuary laws, it never sued the States to challenge the laws.<sup>17</sup> Instead, Congress sought States' cooperation by enacting INA § 287(g) in 1996.<sup>18</sup> But by the time § 287(g) was actually implemented in 2002 (following the September 11, 2001 terrorist attack),<sup>19</sup> the Sanctuary Movement had already died down.<sup>20</sup>

Section 287(g)—still in effect today—authorizes ICE to delegate immigration enforcement authority to local law enforcement agencies under an agreement that requires training and supervision by ICE officers.<sup>21</sup> Once deputized under the agreement, local law enforcement officers have the same power as immigration officials “to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States.”<sup>22</sup> As of February 2018, ICE has § 287(g) agreements with 78 law enforcement agencies, 26 of which are in Texas.<sup>23</sup> Critics argue that § 287(g) agreements cause racial profiling, community policing problems, and negative local economy impacts.<sup>24</sup>

Before discussing the federal government's second attempt at state cooperation, it is important to understand the concept of an ICE detainer. A detainer is a “notice that ICE issues to federal, state, local, or tribal [law enforcement agencies] to inform the [agencies] that ICE intends to assume custody of a removable alien in the [agencies'] custody.”<sup>25</sup> As of

<sup>16</sup> See Villazor, *supra* note 4, at 142 n.58.

<sup>17</sup> Pham, *supra* note 14, at 1384.

<sup>18</sup> *Id.*

<sup>19</sup> See T. ALEXANDER ALEINIKOFF ET AL., *IMMIGRATION AND CITIZENSHIP* 1215 (8th ed. 2016).

<sup>20</sup> See Villazor, *supra* note 4, at 142 n.58 (“In 1997, Congress passed the Nicaraguan Adjustment and Central American Relief Act, Pub. L. No. 105-100, 111 Stat. 2160, 2193–2201 (1997) . . . , which enabled some immigrants from El Salvador and Guatemala to apply for cancellation of their removal.”); Pham, *supra* note 14, at 1385.

<sup>21</sup> *Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act*, U.S. IMMIGR. AND CUSTOMS ENF'CEMENT (Aug. 10, 2018), <https://www.ice.gov/287g> [hereinafter *Delegation of Immigration Authority*].

<sup>22</sup> 8 U.S.C. § 1357(a)(1) (2000).

<sup>23</sup> *Delegation of Immigration Authority*, *supra* note 21.

<sup>24</sup> Jason G. Idilbi, *Local Enforcement of Federal Immigration Law: Should North Carolina Communities Implement 287(g) Authority*, 86 N.C.L. REV. 1710, 1712–13 (2008).

<sup>25</sup> U.S. IMMIGR. AND CUSTOMS ENF'CEMENT, POLICY NO. 10074.2: ISSUANCE OF IMMIGRATION DETAINERS BY ICE IMMIGRATION OFFICERS § 3.1 (2017). SB4 defines an “immigration detainer request” as “a federal government request to a local entity to maintain temporary custody of an alien, including a United States Department of Homeland Security Form I-247 document or a

2015, detainer requests notify the agency that the Department of Homeland Security (DHS) “has determined that probable cause exists that the [inmate] is a removable alien.”<sup>26</sup> The detainer request also asks the agency to (1) notify DHS as soon as practicable prior to the inmate’s release; and (2) maintain custody of the inmate for up to 48 hours beyond the preexisting release date to allow DHS to assume custody of the inmate.<sup>27</sup>

In 2008, ICE introduced Secure Communities, another cooperation program designed to identify criminal undocumented immigrants in another law enforcement agency’s custody.<sup>28</sup> Traditionally, local law enforcement agencies fingerprint the people in their custody and send that information to the FBI.<sup>29</sup> “Under Secure Communities, the FBI automatically sends the fingerprints to ICE.”<sup>30</sup> If ICE finds a match, it issues a detainer “[i]n most cases,” although it is not automatic.<sup>31</sup>

Secure Communities was heavily criticized for targeting undocumented immigrants that were not dangerous criminals and for reducing immigrants’ trust in local law enforcement.<sup>32</sup> In 2010, states began notifying ICE that they wanted to opt out of Secure Communities, but ICE announced that opting out was not possible.<sup>33</sup> In response, some states found their own way to opt out—decline ICE detainer requests.<sup>34</sup> By June 2011, however, 47 percent of jurisdictions were participating in the program, “and DHS [was] on track to expand the program to all [local

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similar or successor form.” TEX. GOV’T CODE ANN. § 772.0073(a)(2) (West 2017).

<sup>26</sup> U.S. DEP’T OF HOMELAND SEC., IMMIGRATION DETAINER—NOTICE OF ACTION, DHS FORM I-247A I (2017) [hereinafter *Immigration Detainer*]. Prior to 2015, ICE detainer requests did not state the existence of probable cause. *Legal Issues with Immigration Detainers*, IMMIGR. LEGAL RESOURCE CTR. 2 (Nov. 2016), [https://www.ilrc.org/sites/default/files/resources/detainer\\_law\\_memo\\_november\\_2016\\_updated.pdf](https://www.ilrc.org/sites/default/files/resources/detainer_law_memo_november_2016_updated.pdf).

<sup>27</sup> *Immigration Detainer*, *supra* note 26, at 1.

<sup>28</sup> *Secure Communities*, U.S. IMMIGR. AND CUSTOMS ENFORCEMENT (Mar. 20, 2018), <https://www.ice.gov/secure-communities>.

<sup>29</sup> ALEINIKOFF ET AL., *supra* note 19, at 1217; Lindsey J. Gill, *Secure Communities: Burdening Local Law Enforcement and Undermining the U Visa*, 54 WM. & MARY L. REV. 2055, 2059 (2013).

<sup>30</sup> Gill, *supra* note 29, at 2059; *see also* David A. Martin, *Resolute Enforcement is Not Just for Restrictionists: Building a Stable and Efficient Immigration Enforcement System*, 30 J.L. & Pol. 441 (2015).

<sup>31</sup> *Number of ICE Detainers Drops by 19 Percent*, TRAC IMMIGR. (Jan. 2013), <http://trac.syr.edu/immigration/reports/325>.

<sup>32</sup> *See* Gill, *supra* note 29, at 2062–63; Rachel R. Ray, *Insecure Communities: Examining Local Government Participation in US Immigration and Customs Enforcement’s “Secure Communities” Program*, 10 SEATTLE J. SOC. JUST. 327, 337–38 (2011).

<sup>33</sup> Martin, *supra* note 30, at 449–50.

<sup>34</sup> *Id.* at 450.

law enforcement agencies] across the country by 2013.”<sup>35</sup> But beginning in 2013, “the detainer-resistance snowball truly gained momentum.”<sup>36</sup> Realizing the need for substantial changes to Secure Communities for local law enforcement agencies to voluntarily cooperate again, DHS discontinued the program in 2014.<sup>37</sup> But in 2017, the Trump administration revived the program, claiming that “Secure Communities had a long and successful history prior to its [2014] suspension.”<sup>38</sup> Collectively during these two periods, “Secure Communities [has] interoperability led to the removal of over 363,400 criminal aliens from the U.S.”<sup>39</sup>

The Criminal Alien Program (CAP) is another federal-state cooperation program that generally receives less public attention than the other programs.<sup>40</sup> CAP aims to identify “allegedly removable noncitizens who are incarcerated in jails and prisons” and to initiate removal proceedings.<sup>41</sup> In addition to identifying undocumented immigrants, CAP also identifies lawful permanent residents and other lawfully present nonimmigrants.<sup>42</sup> CAP is implemented in all federal and state prisons, along with 300 local jails nationwide.<sup>43</sup> In Fiscal Year 2011, CAP resulted in 221,122 arrests by ICE.<sup>44</sup>

The Department of Justice’s (DOJ) March 2018 lawsuit against California demonstrates the tensions surrounding state and federal cooperation under the Trump Administration. In 2017, California passed three statutes that limited cooperation with federal immigration officials.<sup>45</sup> The DOJ argues that the laws “have the purpose and effect of

<sup>35</sup> Ray, *supra* note 32, at 337.

<sup>36</sup> Martin, *supra* note 30, at 451.

<sup>37</sup> *Id.* at 453.

<sup>38</sup> *Secure Communities*, *supra* note 28.

<sup>39</sup> *Id.*

<sup>40</sup> *The Criminal Alien Program (CAP): Immigration Enforcement in Prisons and Jails*, AM. IMMIGR. COUNCIL (Aug. 1, 2013), <https://www.americanimmigrationcouncil.org/research/criminal-alien-program-cap-immigration-enforcement-prisons-and-jails>.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *See* Complaint at 2, *United States v. California*, No. 18–264 (E.D. Cal. Mar. 6, 2018).

The first statute, the “Immigrant Worker Protection Act,” Assembly Bill 450 . . . , prohibits private employers in California from voluntarily cooperating with federal officials who seek information relevant to immigration enforcement that occurs in places of employment.

The second statute, Assembly Bill 103 . . . , creates an inspection and review scheme that requires the Attorney General of California to investigate the



making it more difficult” to enforce immigration law, making the laws unconstitutional under the U.S. Constitution’s Supremacy Clause.<sup>46</sup> At the time of this writing, the litigation is still pending.

### B. *Events Leading to SB4’s Enactment*

Once again, in 2018, the term *sanctuary*—used in terms of a *sanctuary city*—is at the forefront of immigration debates. *Sanctuary city* does not have one precise definition or any specific legal meaning. But all the various definitions agree on one thing: a *sanctuary city* is a city that limits its cooperation with federal immigration authorities,<sup>47</sup> which often includes declining ICE detainer requests. But unlike during the 1980s, when the term *sanctuary* represented ethical and moral obligations, today the term carries a negative connotation.<sup>48</sup>

The current sanctuary-cities debate started in 2015 when an undocumented immigrant, Jose Ines Garcia Zarate, shot and killed Katie Steinle.<sup>49</sup> Prior to her death, Garcia Zarate was in the San Francis-

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immigration enforcement efforts of federal agents.

The third statute, Senate Bill 54 . . . , which includes the “California Values Act, limits the ability of state and local law enforcement officers to provide the United States with basic information about individuals who are in their custody and are subject to federal immigration custody, or to transfer such individuals to federal immigration custody. *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> See, e.g., Tal Kopan, *What Are Sanctuary Cities, and Can They Be Defunded?*, CNN (last updated Mar. 26, 2018, 3:40 PM), <http://www.cnn.com/2017/01/25/politics/sanctuary-cities-explained/index.html> (“The term ‘sanctuary city’ is a broad term applied to jurisdictions that have policies in place designed to limit cooperation with or involvement in federal immigration enforcement actions.”); Kaitlyn Schallhorn, *Sanctuary Cities: What Are They?*, Fox News (Mar. 22, 2018) <http://www.foxnews.com/politics/2017/10/09/sanctuary-cities-what-are.html>, (“While the exact specifications can vary, sanctuary city policies overall limit just how much local law enforcement officials cooperate with federal immigration authorities.”); Van Le, *Immigration 101: What is a Sanctuary City?*, AMERICA’S VOICE (Apr. 25, 2017), <https://americasvoice.org/blog/what-is-a-sanctuary-city/> (“There’s no single definition of . . . a sanctuary city, but generally speaking, it’s a city (or a county) that limits its cooperation with federal immigration enforcement agents in order to protect low-priority immigrants from deportation.”).

<sup>48</sup> Lansing, *Michigan Rescinds ‘Sanctuary’ Status After Criticism from Businesses*, Fox News (Apr. 13, 2017), <http://www.foxnews.com/us/2017/04/13/lansing-michigan-rescinds-sanctuary-status-after-criticism-from-businesses.html> (According to Councilwoman Judi Brown Clarke, the term *sanctuary city* “has its own negative connotation . . . . The only way to take that away is to take that word away.”); Sophie Quinton, *Controversy over “Sanctuary” Campuses is Misleading, Legal Analysts Say*, PBS (Dec. 17, 2016, 2:22 PM), <https://www.pbs.org/newshour/nation/sanctuary-campus-controversial> (stating that the word *sanctuary* has a “negative connotation” for some people); Villazor, *supra* note 4, at 135 (“Similar to the word ‘amnesty,’ sanctuary has acquired a tainted meaning.”).

<sup>49</sup> See *Katie Steinle Case that led to Debate over US Sanctuary Cities, Trump’s Call for Wall*

co Police Department's custody. ICE sent the department a detainer request, asking the department to hold Garcia Zarate until ICE officials could take him into custody. The department, however, released Garcia Zarate due to its sanctuary-city policy, which prohibited the sheriff from cooperating with ICE detainers.<sup>50</sup> After Garcia Zarate's release and Steinle's death, Texas started focusing on sanctuary cities.<sup>51</sup>

In the following months, Dallas County Sheriff Lupe Valdez announced that she would only honor ICE detainers on a case-by-case basis.<sup>52</sup> Shortly thereafter, in October 2015, Texas Governor Greg Abbott sent Sheriff Valdez a letter stating that sanctuary-city policies would "no longer be tolerated in Texas."<sup>53</sup> Citing the San Francisco Police Department's release of Garcia Zarate, Abbott stated: "It is unacceptable for a Texas Sheriff to take a similarly dangerous path by departing from the strictest ICE standards."<sup>54</sup>

About a year later, Senator Charles Perry filed Senate Bill 4 (SB4) in the Texas Legislature, and it was introduced in the Senate in late January 2017.<sup>55</sup> That same month, Governor Abbott gave his State of the State Address, declaring the sanctuary-cities ban among his list of four emergency items for legislative action.<sup>56</sup> He stated:

It is our burden to deal with the consequences of the federal government not securing the border. Let's be clear: We all support legal immigration; it's what built America. What must

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*is Under Way in Court*, Fox News (Oct. 23, 2017), <http://www.foxnews.com/us/2017/10/23/kate-steinle-case-that-led-to-debate-over-us-sanctuary-cities-trump-s-call-for-wall-is-underway-in-court.html>; Brief for Appellants at 2, *City of El Cenizo v. Texas*, (No. 17–50762) (5th Cir. Sept. 28, 2017).

<sup>50</sup> See Daniel Arkin, *Kathryn Steinle Killing: San Francisco Defends 'Sanctuary City' Status Amid Criticism*, NBC News (Dec. 2, 2017, 7:53 AM), <https://www.nbcnews.com/news/us-news/kathryn-steinle-killing-san-francisco-defends-sanctuary-city-status-amid-n825836>.

<sup>51</sup> Brief for Appellants, *supra* note 49, at 3.

<sup>52</sup> Jay Root, *Abbott Hits Dallas over "Sanctuary" Policies*, TEX. TRIB. (Oct. 26, 2015, 11:00 AM), <https://www.texastribune.org/2015/10/26/abbott-hits-dallas-over-sanctuary-policies>.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Texas Senate Bill 4*, LEGISCAN (last visited Dec. 5, 2017), <https://legiscan.com/TX/drafts/SB4/2017>.

<sup>56</sup> Press Release, Office of the Texas Governor, Governor Abbott Delivers State of the State Address (Jan. 31, 2017), [https://gov.texas.gov/news/post/governor\\_abbott\\_delivers\\_state\\_of\\_the\\_state\\_address](https://gov.texas.gov/news/post/governor_abbott_delivers_state_of_the_state_address). The other three emergency items included fixing Texas's Child Protective Services agency, reforming ethics laws, and supporting an amendment to the U.S. Constitution to rein in federal power. *Id.*

be stopped is illegal immigration—and worse, the criminals who conspire with cartels to enter the United States illegally.<sup>57</sup>

That same month, Governor Abbott sent a letter to Travis County Sheriff Sally Hernandez regarding her sanctuary-city policy, “strongly urg[ing] [her] to reverse [the] policy before its effective date.”<sup>58</sup> Texas lawmakers were concerned because the Sheriff’s policy “picked the crimes of detention that the Sheriff deemed serious enough to require officers to comply with ICE-detainer requests.”<sup>59</sup> Those crimes, however, did not include rape or child pedophilia.<sup>60</sup> Sheriff Hernandez did not reverse the policy before its February 1, 2017 effective date. Governor Abbott deemed this “offensive”<sup>61</sup> and tweeted, “Texas will hammer Travis County.”<sup>62</sup> Governor Abbott then cut about \$1.5 million of Travis County’s state grant funds.<sup>63</sup>

In February 2017, SB4 passed in the Senate, with 20 yeas and 10 nays.<sup>64</sup> Almost three months later, the House passed SB4, with 94 yeas and 53 nays.<sup>65</sup> On May 7, 2017, Governor Abbott signed SB4, stating:

There are deadly consequences to not enforcing the law, and Texas has now become a state where those practices are not tolerated. With this bill we are doing away with those that seek to promote lawlessness in Texas.<sup>66</sup>

Also, according to Governor Abbott, SB4 promotes public safety—his top priority.<sup>67</sup>

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<sup>57</sup> *Id.*

<sup>58</sup> Letter from Greg Abbott, Governor, Texas, to Sally Hernandez, Sheriff, Travis County (Jan. 23, 2017), [https://gov.texas.gov/uploads/files/press/TravisCountySheriffSanctuaryCity\\_01232017.pdf](https://gov.texas.gov/uploads/files/press/TravisCountySheriffSanctuaryCity_01232017.pdf).

<sup>59</sup> Brief for Appellants, *supra* note 49, at 3.

<sup>60</sup> *Id.*

<sup>61</sup> Andrew Eicher, *Texas Gov. Abbott on Levin: ‘I’m Putting the Hammer Down’ on Sanctuary Cities*, CNSNEWS (Feb. 6, 2017, 2:32 PM), <https://www.cnsnews.com/blog/andrew-eicher/texas-gov-abbot-levin-im-putting-hammer-down-sanctuary-cities>.

<sup>62</sup> Greg Abbott (@GregAbbott\_TX), TWITTER (Feb. 2, 2017, 2:24 PM), [https://twitter.com/gregabbott\\_tx/status/827281587381231616?lang=en](https://twitter.com/gregabbott_tx/status/827281587381231616?lang=en).

<sup>63</sup> Eicher, *supra* note 61.

<sup>64</sup> S. JOURNAL, 85th Legis., Regular Sess. 6 (Feb. 8, 2017), <http://www.journals.senate.state.tx.us/sjrn/85r/pdf/85RSJ02-08-F.PDF>.

<sup>65</sup> H. JOURNAL, 85th Legis., Regular Sess. 7 (Apr. 27, 2017), <http://www.journals.house.state.tx.us/hjrn/85r/pdf/85RDAY58FINAL.PDF>.

<sup>66</sup> *Texas Bans Sanctuary Cities*, OFFICE OF THE TEX. GOVERNOR (May 7, 2017), <https://gov.texas.gov/news/post/Texas-Bans-Sanctuary-Cities>.

<sup>67</sup> *Id.*

Ken Paxton, Texas's attorney general, immediately filed a preemptive lawsuit seeking a declaration that SB4 was constitutional.<sup>68</sup> Dismissing the lawsuit, the federal judge stated that he would not engage in a "hypothetical legal question."<sup>69</sup> But less than a week after Paxton filed his preemptive suit, Texas counties and cities began to sue Texas over SB4's constitutionality.<sup>70</sup> The litigation is still pending at the time of this writing, and the merits of the litigation are beyond this Article's scope.<sup>71</sup>

The jury's verdict in Garcia Zarate's trial then resurged the sanctuary-city debate. The defense argued at trial that "the shooting was accidental and the bullet ricocheted off the ground and traveled about 80 feet before hitting Steinle."<sup>72</sup> The jury found Garcia Zarate not guilty of murder, manslaughter, and assault with a deadly weapon. Instead, he was convicted only of being a felon in possession of a firearm.<sup>73</sup> In response to the verdict, Governor Abbott tweeted: "Kat[ie] Steinle's tragic death shows why the 'sanctuary cities' movement threatens the safety of all Americans. It's also why Texas banned sanctuary city policies."<sup>74</sup>

### C. SB4's Provisions

SB4 has two main provisions: (1) the ICE-detainer provision; and (2) the enforcement-cooperation provision.

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<sup>68</sup> Andrea Zelinski, *Federal Judge Tosses Paxton's Preemptive SB4 Lawsuit*, HOUS. CHRON. (Aug. 9, 2017, 7:52 PM), <http://www.chron.com/news/politics/texas/article/Federal-judge-tosses-Paxton-s-preemptive-SB4-11746384.php>.

<sup>69</sup> *Id.*

<sup>70</sup> Jackie Wang, *Border City, County Sue Texas over "Sanctuary" Law*, TEX. TRIB. (May 9, 2017, 12:00 PM), <https://www.texastribune.org/2017/05/09/border-city-county-sue-texas-over-sanctuary-cities-law-constitutional/>.

<sup>71</sup> As of January 2019, the status of the litigation is as follows: The District Court entered a preliminary injunction enjoining several of SB4's provisions. The Fifth Circuit, however, reversed the preliminary injunction on all provisions except one, finding that the provisions did not violate the Constitution on their face. This ruling allowed SB4's major provisions to go into effect while the litigation proceeds. In other words, Texas can enforce both the ICE-detainer provision and the enforcement-cooperation provision (discussed in the next Part) while the litigation is pending. *El Cenizo v. Texas*, 890 F.3d 164 (5th Cir. 2018).

<sup>72</sup> Holly Yan & Dan Simon, *Undocumented Immigrant Acquitted in Katie Steinle Death*, CNN (Dec. 1, 2017, 2:21 AM), <http://www.cnn.com/2017/11/30/us/kate-steinle-murder-trial-verdict/index.html>.

<sup>73</sup> *Id.*

<sup>74</sup> Greg Abbott (@GregAbbott\_TX), TWITTER (Dec. 3, 2017, 10:21 AM), [https://twitter.com/GregAbbott\\_TX/status/937386267184128000](https://twitter.com/GregAbbott_TX/status/937386267184128000).

### 1. *ICE-DETAINDER PROVISION*

SB4's ICE-detainer provision requires a law enforcement agency to (1) "comply with, honor, and fulfill any request made in [a] detainer request" from the federal government; and (2) "inform the person that the person is being held pursuant to an immigration detainer request issued by [ICE]."<sup>75</sup> Intentional violations of this provision are prohibited.<sup>76</sup>

The ICE-detainer provision has one exception: A law enforcement agency is not required to comply with the two requirements above if the detained person "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."<sup>77</sup>

### 2. *ENFORCEMENT-COOPERATION PROVISION*

SB4's enforcement-cooperation provision prohibits local law enforcement agencies from (1) adopting, enforcing, or endorsing "a policy under which the entity or department prohibits or materially limits the enforcement of immigration laws"; or (2) prohibiting or materially limiting the enforcement of immigration laws "as demonstrated by pattern or practice."<sup>78</sup>

This provision also states that a local law enforcement agency may not prohibit or materially limit a specified official from doing any of the following:

inquiring into the immigration status of a person under a lawful detention or under arrest; 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: sending the information to or requesting or receiving the information from [specified agencies]; maintaining the information; or exchanging the information with another local entity or campus police department or a federal or state governmental entity assisting or cooperating with a federal immigration officer as reasonable or necessary,

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<sup>75</sup> Tex. Code Crim. Proc. Art. 2.251(a).

<sup>76</sup> Tex. Gov't Code § 752.053(a)(3).

<sup>77</sup> Tex. Code Crim. Proc. art. 2.251(b).

<sup>78</sup> Tex. Gov't Code § 752.053(a). As of January 2019, the first provision is subject to a preliminary injunction. *El Cenizo*, 890 F.3d at 173.

including providing enforcement assistance; or permitting a federal immigration officer to enter and conduct enforcement activities at a jail to enforce federal immigration laws.<sup>79</sup>

When an officer is dealing with a victim or witness, however, SB4 prohibits the officer from inquiring into the person's immigration status unless "the officer determines that the inquiry is necessary to: (1) investigate the offense; or (2) provide the victim or witness with information about federal visas designed to protect individuals providing assistance to law enforcement."<sup>80</sup>

#### **D. Similar State Legislation**

In April 2010, Arizona enacted Senate Bill 1070 (SB 1070)—a controversial immigration law that wound up in the United States Supreme Court. SB 1070's origin is very similar to SB4's. Like SB4, which was sparked by Steinle's death, SB 1070 was sparked by the killing of an Arizona rancher, Robert Krentz, on his ranch nineteen miles from the U.S./Mexico border.<sup>81</sup> People claimed that an undocumented immigrant killed Krentz. But unlike Steinle's killer who was an identified undocumented immigrant, Krentz's killer was never identified; instead, it was a mere guess or hunch that the killer was an undocumented immigrant.<sup>82</sup> But Arizona lawmakers still used that rhetoric to launch SB 1070.

SB 1070 quickly became known as the show-me-your-papers law because of its most controversial provision, § 2(b).<sup>83</sup> That provision requires "state officers to make a 'reasonable attempt . . . to determine the immigration status' of any person they stop, detain, or arrest on some other legitimate basis if 'reasonable suspicion exists that the person is an alien and is unlawfully present in the United States.'"<sup>84</sup> Officers, however,

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<sup>79</sup> Tex. Gov't Code § 752.053(b).

<sup>80</sup> Tex. Code Crim. Proc. art. 2.13(d).

<sup>81</sup> William Arrocha, *From Arizona's S.B. 1070 to Georgia's H.B. 87 and Alabama's H.B. 56: Exacerbating the Other and Generating New Discourses and Practices of Segregation*, 48 CAL. W.L. REV. 245, 260 (2012); Dennis Wagner, *Slaying of Ariz. Rancher Is Still a Mystery*, USA TODAY (Nov. 24, 2013, 8:30 PM), <https://www.usatoday.com/story/news/nation/2013/11/24/ariz-rancher-slaying-border-security/3693549>.

<sup>82</sup> Wagner, *supra* note 81.

<sup>83</sup> Kristina M. Campbell, *(Un)Reasonable Suspicion: Racial Profiling in Immigration Enforcement After Arizona v. United States*, 3 WAKE FOREST J.L. & POL'Y 367, 388 (2013); James Barragan, *How Texas' Sanctuary Cities Ban Compares to Arizona's 'Show Me Your Papers' Law*, DALL. NEWS (Jun. 2017), <https://www.dallasnews.com/news/politics/2017/06/26/texas-sanctuary-cities-ban-compares-arizonas-show-papers-law>.

<sup>84</sup> *Arizona v. United States*, 567 U.S. 387, 394 (2012).

“may not consider race, color[,] or national origin” when enforcing this provision, “*except* to the extent permitted by the United States or Arizona Constitution.”<sup>85</sup>

SB 1070’s stated purpose is to “discourage and deter the unlawful entry and presence of aliens and economic activity by persons unlawfully present in the United States.”<sup>86</sup> Critics, however, argue that SB 1070 institutionalizes racial profiling, compromises public safety and health, creates hostile environments for immigrants, and hurts the economy.<sup>87</sup>

The DOJ filed suit against Arizona, challenging SB 1070’s constitutionality.<sup>88</sup> The Supreme Court, while holding that three of the four provisions were preempted, upheld the show-me-your-papers provision, § 2(b).<sup>89</sup> The Court reasoned that “[t]he nature and timing of [the] case counsel caution in evaluating” this provision because the DOJ was challenging the provision before it had gone into effect.<sup>90</sup> Thus, because of the “basic uncertainty about what the law means and how it will be enforced,” the Court found it “inappropriate to assume § 2(B) [would] be construed in a way that creates a conflict with federal law.”<sup>91</sup> In other words, the Court held that § 2(b) was not preempted on its face.<sup>92</sup> The Court did, however, leave open the possibility for preemption and constitutional challenges “to the law as interpreted and applied after it goes into effect.”<sup>93</sup>

<sup>85</sup> ARIZ. REV. STAT. ANN. § 11-1051(B) (emphasis added).

<sup>86</sup> S.B. 1070, 49th Leg., 2d Reg. Sess. (Ariz. 2010).

<sup>87</sup> Alex Lach, *The Top 5 Reasons Why S.B. 1070 Damages America*, CTR. FOR AM. PROGRESS (June 25, 2012, 9:00 AM), <https://www.americanprogress.org/issues/immigration/news/2012/06/25/11785/the-top-5-reasons-why-s-b-1070-damages-america>; Alex Nowrasteh, *Arizona-Style Immigration Laws Hurt the Economy*, FORBES (Oct. 12, 2012, 10:52 AM), <https://www.forbes.com/sites/alexnowrasteh/2012/10/12/arizona-style-immigration-laws-hurt-the-economy/#25b5c1f615b9>; Bill Ong Hing, *Like it or Not, Arizona’s SB 1070 is About Racial Profiling*, HUFFPOST (Apr. 27, 2012), [https://www.huffingtonpost.com/bill-ong-hing/arizona-immigration-law\\_b\\_1457435.html](https://www.huffingtonpost.com/bill-ong-hing/arizona-immigration-law_b_1457435.html).

<sup>88</sup> *Arizona*, 567 U.S. 387; *Citing Conflict with Federal Law, Department of Justice Challenges Arizona Immigration Law*, U.S. DOJ (July 6, 2010), <https://www.justice.gov/opa/pr/citing-conflict-federal-law-department-justice-challenges-arizona-immigration-law>.

<sup>89</sup> *Arizona*, 567 U.S. at 415.

<sup>90</sup> *Arizona*, 567 U.S. at 415.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*; see *Valle Del Sol v. Whiting*, No. CV-10-0101-PHX-SRB, 2015 WL 12030514, at \*1 (D. Ariz. Sept. 4, 2015) (“In Arizona, the Supreme Court held that . . . Section 2(B) was not preempted on its face.”).

<sup>93</sup> *Id.*

On July 17, 2012—not even a month after the Supreme Court’s *Arizona* decision—the American Civil Liberties Union (ACLU), on behalf of several civil rights organizations, sought a preliminary injunction against § 2(b) and submitted evidence to show that it would be implemented unconstitutionally.<sup>94</sup> The court refused to enjoin § 2(b), stating that it would “not ignore the clear direction in the *Arizona* opinion that Subsection 2(B) cannot be challenged further on its face before the law takes effect.”<sup>95</sup> At the summary judgment stage, the court again refused to entertain the plaintiffs’ facial challenge to § 2(B).<sup>96</sup> The parties then settled, ending six years of litigation.<sup>97</sup> Under the settlement agreement, Arizona police officers can check the immigration status of people suspected as being in the country unlawfully.<sup>98</sup> But officers are not allowed to base those suspicions on race or ethnicity, stop people solely for investigating immigration status, or prolong a detention, arrest, or stop solely to verify immigration status.<sup>99</sup> Essentially, the settlement agreement allowed Arizona to preserve § 2(b), while addressing the plaintiffs’ constitutional concerns.

Although Arizona faced significant legal battles and backlash, its passage of SB 1070 nevertheless prompted other states to pass immigration-related legislation.<sup>100</sup> In 2011, five states—Alabama, Georgia, Indiana, South Carolina, and Utah—passed legislation similar to SB 1070. And between 2012 and 2017, state legislatures introduced hundreds of immigration-related bills, some of which were enacted as laws.<sup>101</sup> SB4 was amongst those enacted in 2017.

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<sup>94</sup> Plaintiffs’ Proposed Motion for Preliminary Injunction and Memorandum of Points and Authorities in Support at 1, *Valle del Sol v. Whiting*, No. CV 10-1061-PHX-SRB, 2012 WL 8021265, (D. Ariz. Sept. 5, 2012).

<sup>95</sup> *Valle del Sol v. Whiting*, No. CV 10-1061-PHX-SRB, 2012 WL 8021265, at \*3 (D. Ariz. Sept. 5, 2012).

<sup>96</sup> *Valle del Sol v. Whiting*, No. CV-10-01061-PHX-SRB, 2015 WL 12030514, at \*4 (D. Ariz. Sept. 4, 2015).

<sup>97</sup> Kelly Knaub, *Ariz. Settles ‘Show Me Your Papers’ Suit*, LAW360 (Sept. 16, 2016 1:01 PM), <https://www.law360.com/articles/840781/ariz-settles-show-me-your-papers-suit>.

<sup>98</sup> Knaub, *supra* note 97; STATE OF ARIZONA, OFFICE OF THE ATTORNEY GENERAL, NO. I16-010, INFORMAL ATTORNEY GENERAL OPINION: ADVISORY MODEL POLICY FOR LAW ENFORCEMENT APPLYING SB 1070 (2016).

<sup>99</sup> Knaub, *supra* note 97; STATE OF ARIZONA, *supra* note 97.

<sup>100</sup> *State Omnibus Immigration Legislation and Legal Challenges*, NCSL (Aug. 27, 2012), <http://www.ncsl.org/research/immigration/state-laws-related-to-immigration-and-immigrants.aspx>.

<sup>101</sup> *Id.*



TABLE 1: Relevant Differences between SB4 and SB 1070:<sup>102</sup>

	SB4	SB 1070
<b>Prohibits law enforcement agency policies limiting immigration law enforcement or cooperation with the federal government</b>	Yes	Yes
<b>Requires or permits police officers to inquire into a person's immigration status during an encounter</b>	Permits	Previously required, but the attorney general has instructed officers to ignore this provision
<b>Requires law enforcement agencies to honor all ICE detainers</b>	Yes	No
<b>Permits warrantless arrests of people who have committed a deportable offense</b>	No	Yes
<b>Allows officers to transport undocumented immigrants in custody to federal authorities</b>	No	Yes

## II. IN PRACTICE, WHAT WILL SB4 CHANGE?

### A. Racial Profiling v. Probable Cause

One of the major debates surrounding SB4 is whether SB4 will lead to racial profiling. Specifically, SB4's opponents argue that police officers will use SB4 to racially profile minority groups.<sup>103</sup> In response,

<sup>102</sup> *Comparison: Texas SB 4 vs. Arizona SB 1070*, NAT'L IMMIGR. F. (last visited Jan. 9, 2019), <https://immigrationforum.org/wp-content/uploads/2017/05/Texas-SB-4-AZ-SB-1070-Comparison-Chart.pdf>.

<sup>103</sup> Jim Vertuno, *Texas Lawmakers Pass Bill Allowing Police to Ask About Immigration Status*, USA TODAY (May 3, 2017, 9:19 PM), <https://www.usatoday.com/story/news/nation/2017/05/03/texas-sanctuary-cities-bill-immigration-status-police/101268244>, (“The GOP-led Senate passed the bill Wednesday despite objections from Democrats, who call the bill a “show-me-your-papers” measure that will be used to discriminate against Latinos.”); Brief of *Amicus Curiae* City of San Marcos, Texas at 7, *City of El Cenizo v. Texas*, (No. 15:17-cv-404-OLG) (W.D. Tex. Sept. 7, 2017) (“SB4 will have its greatest impact on Hispanic individuals and others whose physical appearance and attributes lead law enforcement officers to question them about their immigration status after they have been detained.”); First Amended Complaint of City of San Antonio, Texas, Bexar County, City of El Paso, Texas, Rey A. Saldana, Texas Association of Chicanos in Higher Education, La Union Del Pueblo Entero, and Workers Defense Project at 30, *City of El Cenizo v. Texas*, 264 F.Supp.3d 744 (W.D. Tex. 2017) (“San Antonio Police Chief McManus stated that SB[4] would . . . result in racial discrimination.”) [hereinafter *First Amended Complaint of San Antonio*]; City of Austin’s Opposed Motion for

Governor Abbott stated: “If you are not someone who has committed a crime, you have absolutely nothing to worry about . . . . There are laws against racial profiling, and those laws will be strictly enforced.”<sup>104</sup>

Of the police departments interviewed, most of their views seem more in line with Governor Abbott’s statement on racial profiling. The officers understand that someone’s skin color does not give an officer probable cause to stop that person.<sup>105</sup> For example, Officer David Rodriguez with the Fort Worth Police Department believes that SB4 received the racial-profiling backlash because the media and community did not understand the difference between racial profiling and probable cause.<sup>106</sup> In fact, Officer Rodriguez used himself as an example. He stated that when off duty, he looks like any other Hispanic male—he listens to Spanish music and has many Hispanic friends. But an officer must still have a “legal reason to pull [him] over,” besides the fact that he is a Hispanic male.<sup>107</sup>

Officer Rodriguez also stated that the Fort Worth Police Department is committed to ensuring that its officers do not racially profile.<sup>108</sup> In the Fort Worth Police Department’s SB4 brochure (discussed further in Subpart II.E), the department promised to “[e]nforce state and federal laws in a responsible and professional manner without regard to race,

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Preliminary Injunction, Declaration of Jordy Balderas at 3, *City of El Cenizo v. Texas*, 264 F.Supp.3d 744 (W.D. Tex. 2017) (“Even though I am a United States citizen, because I am a darker-skinned Latino man, I am likely to be racially profiled.”); *City of Austin’s Opposed Motion for Preliminary Injunction, Declaration of Delia Garza at 3–4, City of El Cenizo v. Texas*, 264 F.Supp.3d 744 (W.D. Tex. 2017) (“I cannot countenance the idea that I—or anyone in my family or community—will be subject to increased police enforcement based upon our appearance. Such a police regime reminds me of the Gestapo in Nazi Germany, the internment of Japanese-Americans during World War II, and other historical examples of martial law applied against second-class citizens.”).

<sup>104</sup> Alex Samuels, *Gov. Greg Abbott: “Sanctuary” Law Won’t Open the Door for Racial Profiling*, TEX. TRIB. (May 16, 2017, 12:00 PM), <https://www.texastribune.org/2017/05/16/gov-greg-abbott-sanctuary-cities-bill-wont-open-door-racial-profiling>.

<sup>105</sup> Interview with Christopher Martin, Officer, Tarrant County Sheriff’s Office, in Fort Worth, Tex. (Oct. 19, 2017) [hereinafter *Officer Martin Interview*].

<sup>106</sup> Interview with David Rodriguez, Public Affairs, City of Fort Worth Police Department, in Fort Worth, Tex. (Oct. 19, 2017) [hereinafter *Officer Rodriguez Interview*].

<sup>107</sup> *Id.* The Author acknowledges that Officer Rodriguez is known to other police officers and therefore would likely be treated differently. Officer Rodriguez, however, was speaking hypothetically, using an example based on himself. He was not speaking directly to his experience of being racially profiled since SB4 was enacted.

<sup>108</sup> Officer David Rodriguez, Public Affairs, City of Fort Worth Police Department, at the Fort Worth Community Meeting (Oct. 24, 2017) [hereinafter *Officer Rodriguez at Community Meeting*].

ethnicity[,] or national origin.”<sup>109</sup> The brochure also states that “Fort Worth Officers will NOT . . . [e]ngage in racial profiling.”<sup>110</sup>

Deputy Chief Robert Silva, a Hispanic male with a heavy accent, works for the Bexar County Sheriff’s Office. He also used himself as an example when discussing racial profiling: If an officer stopped him for speeding and asked, “were you born in the United States,” his answer would be “no,” because he was born to U.S. citizen parents outside the United States.<sup>111</sup> Could an officer arrest him based solely on his answer? Deputy Chief Silva said, “Absolutely not, because someone can be a U.S. citizen by a plethora of ways.”<sup>112</sup> He also said that Bexar County Sheriff’s Office is not “running IDs just because someone has darker skin and an accent.”<sup>113</sup> If they were, Deputy Chief Silva said he would be stopped every other day. Accordingly, he doesn’t think that SB4 will lead to racial profiling in “any way, shape, or form.”<sup>114</sup>

Commander John Lara with the El Paso County Sheriff’s Office does not think that SB4 will lead to racial profiling in his county, but he emphasized that this is very community specific.<sup>115</sup> For example, in El Paso County, it would be more difficult to racially profile Hispanic individuals because the County’s population is 90 percent Hispanic.<sup>116</sup> Commander Lara noted that it would be easier to racially profile a different ethnic group rather than Hispanic individuals.

Although the officers interviewed said that racial profiling will not occur, and their answers give us insight on their thought processes, we still cannot impute those anecdotal answers to all Texas law enforcement officers. So looking at a similar legislation’s impact on racial profiling would be helpful to determine whether SB4 will lead to racial profiling.

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<sup>109</sup> FORT WORTH POLICE DEP’T, UNDERSTANDING SENATE BILL 4 (2017) [hereinafter UNDERSTANDING SENATE BILL 4].

<sup>110</sup> *Id.*

<sup>111</sup> Telephone Interview with Robert Silva, Deputy Chief, Community Readiness and Intelligence Division of Bexar County Sheriff’s Office (Nov. 17, 2017) [Hereinafter *Deputy Chief Silva Interview*].

<sup>112</sup> *Id.* The Author acknowledges that Deputy Chief Silva is known to other police officers and therefore would likely be treated differently. Deputy Chief Silva, however, was speaking hypothetically, using an example based on himself. He was not speaking directly to his experience of being racially profiled since SB4 was enacted.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> Telephone Interview with John Lara, Commander, El Paso County Sheriff’s Office (Nov. 22, 2017) [hereinafter *Commander Lara Interview*].

<sup>116</sup> *Id.*

But unfortunately, SB 1070, which is often compared to SB4, does not provide much guidance. There does not appear to be any statistical data or studies post-SB 1070 to provide proof that SB 1070 led to racial profiling. Further, SB4's main provisions did not go into effect until March 2018 (because the trial court issued a preliminary injunction), leaving less than a year of implementation with no reliable data available.<sup>117</sup> Therefore, whether SB4 will lead police officers to racially profile individuals will likely depend on whether it is enforced in practice—similar to the Supreme Court's holding on § 2(b) of SB 1070.<sup>118</sup>

## **B. Reports to Police by Victims and Witnesses**

### *1. LOWER CRIME REPORTING AND COOPERATION*

As noted in Subpart II.C.2 of this Article, when an officer is dealing with a victim or witness, SB4 prohibits the officer from inquiring into the person's immigration status unless “the officer determines that the inquiry is necessary to: (1) investigate the offense; or (2) provide the victim or witness with information about federal visas designed to protect individuals providing assistance to law enforcement.”<sup>119</sup> Whether SB4 has impacted the reporting of crimes by victims or witnesses varies by community.

Three of the four largest Texas cities—Houston, Dallas, and Austin—have experienced either lower crime reporting by the immigrant community or reduced cooperation of victims in the immigrant community. Although lower crime reporting sometimes correlates with lower crime rates, in this instance the lower reporting is likely due to immigrant community's fear, which is confirmed by Texas police officers' statements. For example, Officer Taylor Olivarez with the Houston Police Department stated that in Houston, Texas, it is not just rhetoric or rumor—the number of reports are dwindling because people in immigrant communities do not want to speak up if they see a crime.<sup>120</sup> Officer Olivarez's boss, Chief Art Acevedo, stated that in the first three months of 2017, reports by Hispanics of sexual assault dropped nearly 43 percent

<sup>117</sup> *El Cenizo*, 890 F.3d at 173.

<sup>118</sup> *Arizona*, 567 U.S. at 415 (upholding § 2(b) and reasoning that “[t]he nature and timing of [the] case counsel caution in evaluating” this provision because the DOJ was challenging the provision before it had gone into effect.).

<sup>119</sup> Tex. Code Crim. Proc. art. 2.13(d) (emphasis added).

<sup>120</sup> Telephone Interview of Taylor Olivarez, Officer, Houston Police Department (Nov. 21, 2017) [hereinafter *Officer Olivarez Interview*].

percent compared to 2016, and the reports by Hispanics of robberies and assaults dropped 12 percent.<sup>121</sup> In Dallas, Texas, prosecutors have also seen a decrease in cooperation from immigrant communities. “The number of dismissals of domestic violence cases has increased because the complainants fail to appear or respond to prosecutors’ attempt[s] to contact them.”<sup>122</sup> And in Austin Texas, the “Austin Police Department has encountered crime victims, or close relatives of crime victims, who are unwilling to engage in the criminal justice system” due to deportation fears.<sup>123</sup>

Other cities, however, have not experienced lower crime reports or cooperation from the immigrant community. The Bexar County Sheriff’s Office (in San Antonio, Texas) has not seen a lower reporting of crime from immigrant communities since SB4’s announcement.<sup>124</sup> Deputy Chief Silva ran the statistics, and the numbers reflect that immigrants are still coming forward and reporting crime.<sup>125</sup> Likewise, Deputy Chief Jeremy Alaniz with the Arlington Police Department stated that his department has not seen a lower reporting of crime. He monitors the community-participation level to determine the overall trust within the community. If the people are not participating in the department’s programs, he would be concerned. But people in the community are participating, so Deputy Chief Alaniz’s interpretation is that people are still willing to engage with the officers.<sup>126</sup> Similarly, El Paso County Sheriff’s Office has not seen a drop in incidents reported.<sup>127</sup> Commander John Lara believes that El Paso County did not see a drop because it was one of the first Texas counties to speak out against SB4.<sup>128</sup> But he noted that SB4 can have far reaching effects beyond the undocumented

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<sup>121</sup> John Burnett, *New Immigration Crackdowns Creating ‘Chilling Effect’ on Crime Reporting*, NPR (May 25, 2017, 4:54 AM), <https://www.npr.org/2017/05/25/529513771/new-immigration-crackdowns-creating-chilling-effect-on-crime-reporting>.

<sup>122</sup> City of Dallas’s Complaint in Intervention at 13, *City of El Cenizo v. Texas*, 264 F. Supp.3d 744 (W.D. Tex. 2017).

<sup>123</sup> City of Austin’s Complaint in Intervention at 11, *City of San Antonio v. Texas*, 264 F. Supp.3d 744 (W.D. Tex. 2017).

<sup>124</sup> *Deputy Chief Silva Interview*, *supra* note 111.

<sup>125</sup> *Id.*

<sup>126</sup> Telephone Interview of Jeremy Alaniz, Deputy Chief, Arlington Police Department (Nov. 14, 2017) [hereinafter *Deputy Chief Alaniz Interview*].

<sup>127</sup> *Commander Lara Interview*, *supra* note 115.

<sup>128</sup> *Id.*

immigrant—if someone lives in a mixed status family, it can cause the person with legal status not to talk.<sup>129</sup>

It is unclear why the cities experiencing lower crime reporting and lower cooperation from the immigrant community are larger cities. One possible explanation is that more undocumented immigrants live in bigger cities rather than smaller ones. Specifically, according to 2014 estimates, “61% of the 11.1 million undocumented . . . immigrants in the U.S. live[d] in big cities.”<sup>130</sup> And every 6 in 10 undocumented immigrants lived in 1 of 20 specific metro areas.<sup>131</sup> Houston and Dallas (which was combined with Arlington and Fort Worth) were listed in the 2014 estimates as #3 and #4 respectively.<sup>132</sup> Austin was listed as #20. San Antonio and El Paso were not on this list.<sup>133</sup> Thus, a high immigrant population may correlate with lower crime reporting and lower cooperation. Although there are likely many factors at play, a high immigrant population may partly explain why the larger cities are the ones experiencing decreased cooperation and crime reporting.

## 2. *U AND TVISAS*

It is important to note that undocumented immigrants generally are victimized more often than individuals with legal status;<sup>134</sup> so if undocumented immigrants are not reporting crimes, we should all be concerned because the aggressor is free to victimize others. Aggressors will often threaten undocumented immigrants with their unlawful status, telling them that “reaching out for help will result in their removal or separation from their children.”<sup>135</sup> So SB4’s exception to asking victims

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<sup>129</sup> *Id.*

<sup>130</sup> Charlotte Alter, *Majority of America’s Undocumented Immigrants Live in 20 Urban Areas*, TIME (Feb. 9, 2017), <http://time.com/4665544/undocumented-u-s-immigrants-live-in-major-cities>.

<sup>131</sup> See Jeffrey S. Passel & D’vera Cohn, *20 Metro Areas are Home to Six-in-Ten Unauthorized Immigrants in U.S.*, PEW RESEARCH CTR. (Feb. 9, 2017), <http://www.pewresearch.org/fact-tank/2017/02/09/us-metro-areas-unauthorized-immigrants>.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> Frances Bernat, *Immigration and Crime*, OXFORD RES. ENCYCLOPEDIAS (Apr. 2017), <http://oxfordre.com/criminology/view/10.1093/acrefore/9780190264079.001.0001/acrefore-9780190264079-e-93>.

<sup>135</sup> *Id.* See Brief of *Amici Curiae* of Major Cities Chiefs Association, Police Executive Research Forum, and United States Conference of Mayors at 9, *City of El Cenizo v. Texas*, 264 F.Supp.3d 744 (W.D. Tex. 2017) (“A number of studies have shown that abusive partners may utilize the threat of deportation in order to maintain power and control.”) [hereinafter *Major Cities Chiefs Ass’n*]; *Deputy Chief Silva Interview*, *supra* note 111.

or witnesses about their immigration status to inform them about federal visas may be very critical.

Without a lawyer, most undocumented immigrants are not aware of the visas available. For example, U and T visas offer protections to crime victims if the victims meet certain criteria.<sup>136</sup> Generally, both the U and T visas allow the person to work in the United States for four years and create a path to lawful permanent resident status.<sup>137</sup> Both visas require an outside agency—which can be a police department—to certify that the person was a victim of a qualifying crime and helpful to the police.<sup>138</sup>

<sup>136</sup> *U and T Visa Law Enforcement Resource Guide*, DEP'T OF HOMELAND SECURITY 3 (last visited Feb. 12, 2018), [https://www.dhs.gov/sites/default/files/publications/U-and-T-Visa-Law-Enforcement-Resource%20Guide\\_1.4.16.pdf](https://www.dhs.gov/sites/default/files/publications/U-and-T-Visa-Law-Enforcement-Resource%20Guide_1.4.16.pdf) [hereinafter *U and T Visa Resource Guide*].

The requirements for a U Visa are that the victim:

- Is the direct or indirect victim of qualifying criminal activity;
- Has suffered substantial physical or mental abuse as a result of having been a victim of criminal activity;
- Has information about the criminal activity; and
- Was helpful, is being helpful, or is likely to be helpful to law enforcement, prosecutors, judges, or other officials in the detection, investigation, prosecution, conviction, or sentencing of the criminal activity. *Id.* at 4.

The requirements for a T Visa are that the victim:

- Is or was a victim of a severe form of trafficking in persons (which may include sex or labor trafficking), as defined by federal law;
- Is in the United States, American Samoa, the Commonwealth of the Northern Mariana Islands or at a U.S. port of entry due to trafficking;
- Has complied with any reasonable request from a law enforcement agency for assistance in the investigation or prosecution of human trafficking; and
- Would suffer extreme hardship involving unusual and severe harm if removed from the United States. *Id.* at 9.

For both the U and T visa, the victim must also be admissible to the United States. *Id.* at 4, 9.

<sup>137</sup> *Id.* at 4–5, 9–10. “If certain conditions are met, an individual with a U visa may apply for adjustment to lawful permanent resident status . . . after three years.” *Id.* at 5. And “individual with T nonimmigrant status may apply for adjustment to lawful permanent resident status . . . after three years in the United States or upon completion of the investigation or prosecution, whichever occurs earlier.” *Id.* at 10.

It is important to note, however, that a person can still be deported while the U visa application is pending. The person could then potentially return to the United States once the visa is approved. Whether to proceed with the removal proceedings is discretionary. *Questions and Answers for U Visa Applicants*, IMMIGR. LAW CTR. OF MINNESOTA (last visited May 7, 2018), <https://www.ilcm.org/wp-content/uploads/2016/01/U-visa-client-FAQ-English.pdf>.

<sup>138</sup> *U and T Visa Resource Guide*, *supra* note 136, at 5, 11; *U Visas and the Role of Local Police In Preventing and Investigating Crimes Against Immigrants*, SUBJECT TO DEBATE (POLICE EXECUTIVE RESEARCH FORUM) 1, [http://www.policeforum.org/assets/docs/Subject\\_to\\_Debate/Debate2017/debate\\_2017\\_junaug.pdf](http://www.policeforum.org/assets/docs/Subject_to_Debate/Debate2017/debate_2017_junaug.pdf) [hereinafter *Subject to Debate*]. [http://www.policeforum.org/assets/docs/Subject\\_to\\_Debate/Debate2017/debate\\_2017\\_junaug.pdf](http://www.policeforum.org/assets/docs/Subject_to_Debate/Debate2017/debate_2017_junaug.pdf).

Because police departments do not want victims or witnesses to go into hiding because of deportation fears,<sup>139</sup> the departments should consider implementing a proactive visa program where the officers certify victims' and witnesses' visa applications.

Some police departments seem very willing and capable of helping victims and witnesses with federal visa applications. For example, Fort Worth officers and Bexar County officers help the victims and witnesses fill out the necessary paperwork for visas.<sup>140</sup> Arlington Police Department and El Paso County Sheriff's Office send the victims and witnesses to victims' services units within the department, which can connect the victims and witnesses to a variety of resources, such as federal visa applications.<sup>141</sup> Dallas Police Department and Austin Police Department also both help with federal visa applications.<sup>142</sup>

Although the U Visa has not been directly linked to crime reporting through scientific data, "police executives credit U Visa-related certifications with bridging gaps between their agencies and undocumented victims in the community."<sup>143</sup> In 2006, the San Francisco Police Department successfully implemented a proactive U Visa program.<sup>144</sup> Sergeant Antonio Flores with that department stated: "Everyone in policing wants to find innovative ways to build trust, particularly with community members who are historically inclined not to come to us. U visas are just that."<sup>145</sup> Susan Bowyer, Deputy Director of the Immigration Center for Women and Children, surveyed some of their clients who obtained U visas to show the visa's positive impact.<sup>146</sup> Of respondents, 100 per-

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<sup>139</sup> *Commander Lara Interview*, *supra* note 115; *Deputy Chief Silva Interview*, *supra* note 111.

<sup>140</sup> *Officer Rodriguez Interview*, *supra* note 106; *Deputy Chief Silva Interview*, *supra* note 111. In fact, Bexar County Sheriff's Office sponsors their undocumented witnesses for visas. *Deputy Chief Silva Interview*, *supra* note 111.

<sup>141</sup> *Deputy Chief Alaniz Interview*, *supra* note 126; *Commander Lara Interview*, *supra* note 115.

<sup>142</sup> *Dallas Police Department U Visa Nonimmigrant Status Certification Policy*, AILA—TEX. CHAPTER 1 (last visited Feb. 12, 2018), <http://www.ailatexas.org/wp-content/uploads/2017/08/U-Visa-Policy-rev2017.pdf>; *U Visa Nonimmigrant Status Certifications*, AUSTIN POLICE DEP'T I (Dec. 13, 2017), <http://library.niwap.org/wp-content/uploads/Austin-B301b-Nonimmigrant-Status-Certifications-053008.pdf>.

<sup>143</sup> *Subject to Debate*, *supra* note 138, at 4.

<sup>144</sup> *Id.* at 5.

<sup>145</sup> *Id.* at 4.

<sup>146</sup> *Id.* at 6.



cent stated that their life has gotten better and they feel more safe.<sup>147</sup> The data also showed a positive impact on visa recipients' children.<sup>148</sup> The law enforcement agencies that do not already provide these services should consider doing so "as an investigative and community policing tool to improve the delivery of police services to *all* crime victims."<sup>149</sup>

Police departments should not be hesitant to certify visa applications. A crime victim's visa application does not require the police department to "vouch for" the victim's admissibility into the United States.<sup>150</sup> Law enforcement agencies are also not liable if the victim later commits a crime.<sup>151</sup> Instead, the police officers only have to certify that the person was a victim of a qualifying crime and was helpful to police in reporting or prosecuting the crime.<sup>152</sup>

The bottom line is that victims and witnesses need protection regardless of immigration status, and this protection should come in the form of a visa for qualifying individuals. Police officers' active role in certifying U visas has many positive effects with no apparent negative effects. If we want to increase these positive effects, SB4's exceptions to asking victims and witnesses about their immigration status is crucial.

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<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

[C]ertain family members of a U visa recipient may also be eligible to live and work in the United States as "derivative" U visa recipients based on their relationship with the principal recipient. These include:

Unmarried children under the age of 21;

Spouse;

Parents of U visa petitioners under age 21; and

Unmarried siblings under 18 years old of U visa petitioners under age 21.

*U and T Visa Resource Guide*, *supra* note 136, at 5. The "derivative" family members for T visa recipients include:

Unmarried children under the age of 21;

Spouse;

Parents of principal T visa recipients under age 21 at the time of application;

Unmarried siblings under 18 years old of principal T visa applicants under age

21; and Adult or minor children of certain immediate family members of the

T visa recipient. *Id.* at 10.

<sup>149</sup> See *Subject to Debate*, *supra* note 138, at 3 (emphasis in original). For DHS's best practice recommendations for certifying U and T visas, see *U and T Visa Resource Guide*, *supra* note 136.

<sup>150</sup> *Subject to Debate*, *supra* note 138, at 10.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

So before writing off these exceptions as a drawback,<sup>153</sup> we must consider the benefits of an undocumented immigrant receiving a U or T visa.

### C. *Inquiries Into Immigration Status*

#### 1. *THE NEED TO IDENTIFY PEOPLE*

SB4 is unlikely to significantly impact police departments' daily operations because SB4 does not change when officers will inquire into immigration status.<sup>154</sup> Prior to SB4, some departments had policies that prohibited officers from inquiring into a person's immigration status,<sup>155</sup> while some departments did not have any immigration policy because they did not feel it was necessary.<sup>156</sup> But regardless of the departments' policies, there is a consensus among the departments interviewed of when an officer out on patrol would inquire into a person's immigration status—to identify someone—and when an officer would not—to enforce federal immigration law or to decide whether to arrest or ticket someone.<sup>157</sup> Part of an officer's role in the field is to identify people.<sup>158</sup> This is partly based on safety concerns and partly because officers need to ensure that they are arresting or issuing a ticket to the correct person. If a person is not carrying an ID, the officer will have to ask more questions to identify the person.<sup>159</sup>

While Texas police departments cannot set policies that prohibit or materially limit immigration-law enforcement,<sup>160</sup> Fort Worth Police Department's cumbersome policies seem to discourage its officers from

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<sup>153</sup> *Major Cities Chiefs Ass'n*, *supra* note 135, at 9–10.

<sup>154</sup> *Officer Martin Interview*, *supra* note 105 (stating that SB4 does not “change the way that [Tarrant County Sheriff's Office] does business”); *Deputy Chief Alaniz Interview*, *supra* note 126 (stating that he does not believe that SB4 will have an impact on the department's daily operations); *Deputy Chief Silva Interview*, *supra* note 111 (stating that “SB4 won't change [the department's] policies” or impact its daily operations); *Commander Lara Interview*, *supra* note 115 (stating that El Paso County Sheriff's Office's goal is for SB4 to not impact its daily operations).

<sup>155</sup> *Officer Rodriguez Interview*, *supra* note 106; *First Amended Complaint of San Antonio*, *supra* note 103, at 28; *Officer Olivarez Interview*, *supra* note 120; *Commander Lara Interview*, *supra* note 115 (stating that EPCSO officers were not allowed to inquire into immigration status without reasonable *suspicion* to do so because this prevents officers from arbitrarily asking people about their immigration status).

<sup>156</sup> *Deputy Chief Silva Interview*, *supra* note 111.

<sup>157</sup> *Officer Martin Interview*, *supra* note 105; *Deputy Chief Alaniz Interview*, *supra* note 126; *Officer Rodriguez Interview*, *supra* note 106; *Commander Lara Interview*, *supra* note 115.

<sup>158</sup> *Officer Rodriguez Interview*, *supra* note 106.

<sup>159</sup> *Commander Lara Interview*, *supra* note 115.

<sup>160</sup> Tex. Gov't Code § 752.053(a).

inquiring into immigration status. It could be argued, however, that cumbersome policies like Fort Worth Police Department's demonstrate a "pattern or practice" of prohibiting or materially limiting immigration-law enforcement.<sup>161</sup> Fort Worth Police Department's old policy for inquiring into immigration status was about half of a page long; its new policy since SB4's enactment is about four pages long and sets out the procedures officers must follow when inquiring into immigration status.<sup>162</sup> First, the officer must activate his or her body camera when inquiring into immigration status.<sup>163</sup> Second, the officer must fill out a Verification of Immigration Status Report, which must include, but is not limited to: describing what occurred; identifying the supervisor contacted, vulnerable persons with the detained person, and the number of officers required to assist; indicating whether officers contacted ICE and if so, the time of ICE's arrival; indicating whether the vehicle was towed; and specifying the verification's outcome.<sup>164</sup> Between September 1, 2017 and October 24, 2017, Fort Worth Police Department had zero inquiries to the Department of Public Safety to verify a person's immigration status.<sup>165</sup> Officer Rodriguez believes this is proof that officers have more important priorities over federal immigration law.<sup>166</sup>

Officers do not inquire into a person's immigration status out in the field for the purpose of enforcing immigration law.<sup>167</sup> For example, Deputy Chief Silva was previously a special agent with DHS for 14 years. He understands that immigration law is complex and knows that if officers do not have extensive training and the necessary databases to verify immigration status with certainty, they cannot assess citizenship on the

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<sup>161</sup> *Id.*

<sup>162</sup> FORT WORTH POLICE DEP'T, GENERAL ORDERS 128–32, [https://www.fortworthpd.com/docmgmt/Web-10\\_12\\_17.pdf](https://www.fortworthpd.com/docmgmt/Web-10_12_17.pdf), [hereinafter *FWPD General Orders*].

<sup>163</sup> *Id.* at 129.

<sup>164</sup> *Id.* at 129–30.

<sup>165</sup> *Officer Rodriguez at Community Meeting, supra* note 108.

<sup>166</sup> *Id.*

<sup>167</sup> *Officer Martin Interview, supra* note 105 (stating that TCSO is not going to be a strong arm for the federal government); *Deputy Chief Alaniz Interview, supra* note 126 (He stated that whether an officer decides to arrest someone should have nothing to do with immigration; it is based on a criminal act. Officers will not arrest someone because of their immigration status—it is solely based on a criminal violation, "period."); *Deputy Chief Silva Interview, supra* note 111.

street.<sup>168</sup> Accordingly, Bexar County Sheriff's Office is "not going to enforce immigration law."<sup>169</sup>

An officer also would not inquire into a person's immigration status when deciding whether to arrest someone for a crime or give them a ticket instead of a warning. Officers make that decision based on whether the person committed a criminal offense under state and local laws, not whether they are undocumented.<sup>170</sup>

Thus, in practice, SB4 does not appear to change when an officer would inquire into a person's immigration status. Accordingly, most of the departments interviewed were confident that SB4 would not impact their daily operations. They also believe that SB4 does not remove too much discretion from the officers during patrol because it does not *require* officers to inquire into immigration status—it merely *allows* it. An officer's discretion for how to proceed based on criminal activity remains unchanged.<sup>171</sup> Officer Rodriguez put this issue in context: When an officer pulls someone over for running a red light and the department has twenty serious calls pending, the officer must allocate his resources—that is where the officer has discretion. Would the officer really take forty-five minutes to an hour to complete an immigration investigation when more serious crimes also need attention? Officer Rodriguez did not seem to think so.<sup>172</sup>

## 2. UNDOCUMENTED IMMIGRANTS CARRYING NON-U.S. IDENTIFICATION

As stated above, the main reason an officer would inquire into immigration status is when an officer needs to identify a person. This raises the question of whether an undocumented immigrant should carry a non-U.S. ID. Undocumented immigrants or their attorneys must evaluate this question on a case-by-case basis by examining the costs and benefits. All police departments interviewed agreed that, from their perspective, a person is always better off carrying some form of ID,

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<sup>168</sup> Deputy Chief Silva Interview, *supra* note 111.

<sup>169</sup> *Id.*

<sup>170</sup> Officer Rodriguez Interview, *supra* note 106 ("Officers may not take an undocumented person into custody solely upon the suspicion that the individual has entered this country illegally."); Deputy Chief Alaniz Interview, *supra* note 126; Deputy Chief Silva Interview, *supra* note 111.

<sup>171</sup> Officer Martin Interview, *supra* note 105; Officer Rodriguez Interview, *supra* note 106; Deputy Chief Alaniz Interview, *supra* note 126; Deputy Chief Silva Interview, *supra* note 111.

<sup>172</sup> Officer Rodriguez Interview, *supra* note 106.

regardless of where it came from.<sup>173</sup> According to Officer Rodriguez, a person “gain[s] 95% of a police officer’s trust” when the person shows the officer an ID.<sup>174</sup> Failing to present an ID to a police officer will certainly lead to additional questioning.<sup>175</sup>

Immigration attorneys, however, often advise their clients not to carry a foreign ID for various reasons (discussed further below).<sup>176</sup> After all, the person has a right to remain silent when questioned by an officer; so, with a few exceptions, a person does not have to discuss their immigration status.<sup>177</sup> Further, providing a foreign ID or other evidence of foreign birth would also help the ICE meet its burden of proving alienage.<sup>178</sup> ICE has the burden to prove by clear and convincing evidence that a person is an alien and removable.<sup>179</sup> Only after alienage is proven does deportation become an issue. If the undocumented immigrant provides a foreign ID and it ends up in ICE’s hands, a rebuttable

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<sup>173</sup> *Id.*; *Deputy Chief Alaniz Interview*, *supra* note 126; *Officer Olivarez Interview*, *supra* note 120; *Commander Lara Interview*, *supra* note 115.

<sup>174</sup> *Officer Rodriguez Interview*, *supra* note 106.

<sup>175</sup> In El Paso County, if an officer still cannot identify a person, it may lead to that officer contacting Border Patrol to help identify the person. *Commander Lara Interview*, *supra* note 115.

<sup>176</sup> *Immigration Raids: Know Your Rights!*, LA COOPERATIVA (last visited Dec. 6, 2017), <http://www.lacooperativa.org/immigration-raids-know-rights>, (“[I]f you are arrested or detained, . . . [d]o not tell the officer where you were born, your nationality, or what your immigration status is. Do not sign any papers. Do not show the agent any papers or identification documents from your country of origin . . . . If the police or an immigration official stops you on the street . . . [d]o not say anything about your immigration status or where you were born.”); *Know Your Rights: What to Do if You’re Stopped by Police, Immigration Agents or the FBI*, ACLU (last visited Dec. 6, 2017), <https://www.aclu.org/know-your-rights/what-do-if-youre-stopped-police-immigration-agents-or-fbi> [hereinafter *ACLU Know Your Rights*]

<sup>177</sup> U.S. CONST. amend. X (“No person shall be . . . compelled in any criminal case to be a witness against himself . . . .”); *ACLU Know Your Rights*, *supra* note 176 (“If you are questioned about your immigration status . . . [and] you do not have immigration papers, say you want to remain silent.”). Separate rules may apply at airports and international borders. Also, if a person is in the United States on a visa, they must disclose that to federal immigration officers. Lawdgleo, *SB4: What you Need to Know*, DE LA GARZA LAW, PLLC (Aug. 15, 2017), <https://lawdgl.com/sb4-what-you-need-to-know>.

<sup>178</sup> See, e.g., *Murphy v. INS*, 54 F.3d 605, 608–10 (9th Cir. 1995); *Lopez-Chavez v. INS*, 259 F.3d 1176, 1181 (9th Cir. 2001) (noting that once a prima facie case of alienage is established through proof of foreign birth, the alien has the burden of proving time, place and manner of entry).

<sup>179</sup> 8 C.F.R. § 1240.8(a). This standard is higher than a preponderance-of-the-evidence standard but lower than a beyond-a-reasonable-doubt standard. *Removal Proceedings*, CATHOLIC LEGAL IMMIGR. NETWORK, INC. (last visited Feb. 12, 2018), [https://cliniclegal.org/sites/default/files/ch\\_1\\_clinic\\_representing\\_clients\\_in\\_imm\\_court.pdf](https://cliniclegal.org/sites/default/files/ch_1_clinic_representing_clients_in_imm_court.pdf).

presumption of alienage is created.<sup>180</sup> Police officers, however, do not view this in the same way attorneys do—for officers, it is about safety.<sup>181</sup>

Once a person shows a foreign ID, the officer has discretion of whether to inquire into the person's immigration status. Unfortunately, Texas does not provide driver's licenses to undocumented immigrants.<sup>182</sup> Deputy Chief Silva, however, said that the fact that a person shows a consular ID from a different country just confirms that person's identity; but absent a crime, that person has nothing to fear.<sup>183</sup> Commander Lara stated that even if the ID is a Mexican passport, "at least we know who they are."<sup>184</sup>

That outcome, however, can never be guaranteed to an undocumented immigrant, and carrying a foreign ID may be a gamble depending on which officer initiates the traffic stop. For example, Felipe's story, although it occurred outside Texas, represents one scenario that may happen. Felipe, a twenty-nine-year-old Mexican National, lived in the United States since he was four years old.<sup>185</sup> In early 2010, he was pulled over while driving, and he did not have a state driver's license.<sup>186</sup> He presented the officers with a Mexican driver's license and passport, which the officers claimed were "clearly fakes."<sup>187</sup> The officers arrested Felipe for felony possession of fraudulent documents.<sup>188</sup> When his mother called the jail, the officer said he could not disclose Felipe's charges because of

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<sup>180</sup> Robert James McWhirter, *Immigration Law for Criminal Lawyers: Overview*, 16 CRIM. JUST. 18, 24 (2002).

<sup>181</sup> *Officer Rodriguez Interview*, *supra* note 106; Kevin O'Neil, *Consular ID Cards: Mexico and Beyond*, MIGRATION POL'Y INST. (Apr. 1, 2003), <https://www.migrationpolicy.org/article/consular-id-cards-mexico-and-beyond>, ("Local U.S. police and sheriff departments have been among the most enthusiastic backers of the consular IDs.")

<sup>182</sup> *Verifying Lawful Presence*, TEX. DEP'T PUB. SAFETY 1 (July 2013), <https://www.dps.texas.gov/DriverLicense/documents/verifyingLawfulPresence.pdf> ("An applicant for a driver license (DL) or identification card (ID) must present proof of lawful presence in the US."). As of August 2017, 12 states and the District of Columbia provided driver's licenses to undocumented immigrants. *Forms of Identification for Undocumented Immigrants*, CATHOLIC LEGAL IMMIGR. NETWORK, INC. (Aug. 4, 2017, 11:38 AM), <https://cliniclegal.org/resources/forms-identification-undocumented-immigrants>.

<sup>183</sup> *Deputy Chief Silva Interview*, *supra* note 111. It is important to note here, however, that immigration attorneys also caution asylum seekers against obtaining a consular ID or passport because it involves seeking assistance from their government and their claim is based on fear of persecution by their government.

<sup>184</sup> *Commander Lara Interview*, *supra* note 115.

<sup>185</sup> Ray, *supra* note 32, at 343.

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

his ICE hold.<sup>189</sup> Luckily, Felipe’s cousin bailed him out thirty minutes before ICE arrived.<sup>190</sup> Felipe’s story is probably only one of many, leaving vast uncertainty about whether undocumented immigrants should carry foreign identification. Based on that uncertainty, a few days after SB4’s enactment, the American Civil Liberties Union (ACLU) issued a travel advisory (Travel Advisory), “informing anyone planning to travel to Texas in the near future to anticipate the possible violation of their constitutional rights when stopped by law enforcement.”<sup>191</sup>

Officer Olivarez stated that it is better for the person to have some form of ID with the person’s name, picture, and birthdate—even if it is not government issued and just a library card.<sup>192</sup> School IDs, state driver’s licenses, or other IDs that do not show foreign birth or alienage do not help ICE prove their burden.<sup>193</sup> Undocumented immigrants may want to consider obtaining this type of ID, although it may prove difficult depending on their location. Thus, the type of ID an undocumented immigrant should carry must be evaluated on a case-by-case basis. Factors to consider include: looking at the city where the person lives to determine the types of IDs offered; the characteristics of the police department in that city to determine how they handle foreign IDs; the benefits of gaining an officers trust when the person has some form of ID; the cost of risking further questioning and detention if the person has no form of ID; and the risk of assisting ICE with its burden to prove alienage.

#### **D. Jails and Detainers**

##### *1. BASIS FOR DETAINERS*

As noted in Subpart II.A of this Article, a detainer is a notice to law enforcement agencies that “ICE intends to assume custody of a removable alien in the [agencies’] custody.”<sup>194</sup> ICE detainers do not become relevant for local law enforcement agencies until someone has been arrested and charged with a crime—that is, ICE issues detainers only

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<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> *Traveling to Texas May Result in Violation of Constitutional Rights, ACLU Warns*, ACLU (May 9, 2017), <https://www.aclu.org/news/aclu-issues-texas-travel-advisory>.

<sup>192</sup> *Officer Olivarez Interview*, *supra* note 120.

<sup>193</sup> *See McWhirter*, *supra* note 180.

<sup>194</sup> U.S. IMMIGR. AND CUSTOMS ENF’T, *supra* note 21.

within the four walls of a detention facility.<sup>195</sup> Essentially, ICE detainees have “nothing to do with patrol.”<sup>196</sup>

Some officers believe that most people with detainees have committed serious felonies or violent crimes.<sup>197</sup> One officer described people with detainees as those who “aren’t working hard and following the American Dream,” and instead “want to play by their own rules.”<sup>198</sup> But the data does not show that most people with detainees are felons.

As of Fiscal Year 2017, ICE withholds from the public the basis for its detainees,<sup>199</sup> requiring us to rely on the data from Fiscal Year 2003 to Fiscal Year 2016. Looking at that data for detainees issued to Texas law enforcement agencies, 28 percent of detainees were based on offenses considered aggravated felonies under federal immigration law, and about 7 percent were based on nonaggravated felonies.<sup>200</sup> Accordingly, only 35 percent of detainees were based on offenses that constituted felonies under federal immigration law—meaning that 65 percent were based on no conviction at all or an offense considered a misdemeanor under federal immigration law (including petty offenses and minor violations of the law).<sup>201</sup> These numbers also align with the data for detainees issued nationwide during the same time period.<sup>202</sup> So overall, most detainees are not based on felonies.

## 2. SB4’S IMPACT ON HONORED ICE DETAINERS IN TEXAS

The number of issued detainees has increased substantially under the Trump Administration. From January 20, 2017 to September 30, 2017,

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<sup>195</sup> Deputy Chief Alaniz Interview, *supra* note 126; Deputy Chief Silva Interview, *supra* note 95;

<sup>196</sup> Deputy Chief Silva Interview, *supra* note 111. In fact, Deputy Chief Silva believes that the “spirit of [SB4] was to address ICE detainees.” *Id.*

<sup>197</sup> *Id.*; Commander Lara Interview, *supra* note 115.

<sup>198</sup> Deputy Chief Silva Interview, *supra* note 111.

<sup>199</sup> *Latest Data: Immigration and Customs Enforcement Detainers*, TRAC IMMIGR. (July 2017), <http://trac.syr.edu/phptools/immigration/detain> [hereinafter *Latest Detainer Data*].

<sup>200</sup> *Tracking Immigration and Customs Enforcement Detainers*, TRAC IMMIGR. (last visited Feb. 12, 2018), <http://trac.syr.edu/phptools/immigration/detainhistory> [hereinafter *Tracking ICE Detainers*]. The Author calculated these percentages based on the raw numbers from the source.

<sup>201</sup> *Id.* For these offense categories, TRAC “utilize[d] the National Crime Information Center (NCIC) coding system maintained by the Federal Bureau of Investigation. Where there are multiple convictions, ICE identified the most serious offense.” *About the Data—ICE Detainers*, TRAC IMMIGR. (last visited Feb. 12, 2018), [http://trac.syr.edu/phptools/immigration/detain/about\\_data.html](http://trac.syr.edu/phptools/immigration/detain/about_data.html).

<sup>202</sup> *Tracking ICE Detainers*, *supra* note 200.



ICE issued 112,194 detainees.<sup>203</sup> During that same period in 2016, under the Obama administration, ICE issued only 62,102 detainees.<sup>204</sup> The number of declined detainees between January and September jumped from 2,267 in 2016 to 7,232 in 2017.<sup>205</sup>

SB4 is unlikely to drastically change the percentage of *honored* ICE detainees in Texas. It is estimated that in 2014 and 2015, local law enforcement agencies across the United States declined more than 18,000 detainees.<sup>206</sup> Only 146 of the 18,000 came from Texas, totaling less than 1 percent of declined detainees.<sup>207</sup> Between Fiscal Year 2003 and Fiscal Year 2017,<sup>208</sup> ICE issued 371,026 detainees requests to Texas law enforcement agencies.<sup>209</sup> For about half of the issued detainees, it is unknown whether the law enforcement agencies declined to honored them.<sup>210</sup> But for the other half for which we have data, law enforcement agencies refused on honor only about .003 percent.<sup>211</sup> This means that most Texas counties regularly honored ICE detainees long before SB4's enactment.<sup>212</sup>

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<sup>203</sup> *Fiscal Year 2017 ICE Enforcement and Removal Operations Report*, U.S. IMMIGR. AND CUSTOMS ENFORCEMENT (Dec. 13, 2017), <https://www.ice.gov/removal-statistics/2017>.

<sup>204</sup> *Id.*

<sup>205</sup> *Id.*

<sup>206</sup> Morgan Smith & Jay Root, *Jails Refused to Hold Thousands of Immigrants Sought by Feds*, TEX. TRIB. (Jan. 15, 2016, 6:00 AM), <https://www.texastribune.org/2016/01/15/34-texas-counties-declined-hold-deportable-immigra>.

<sup>207</sup> *Id.*

<sup>208</sup> The data for Fiscal Year 2017 extends only through July 2017. *Latest Detainer Data*, *supra* note 199.

<sup>209</sup> *Id.*

<sup>210</sup> *Id.* TRAC recommends exercising caution when relying on this data:

ICE recorded that the law enforcement agency refused to comply with the ICE I-247 request. TRAC notes that the field ICE uses to track law enforcement agency refusals is not a required field in ICE's database. Rather, entry of information is optional. The field is used to record a variety of different reasons why ICE "lifted"—that is withdrew—a custody transfer request. These recorded "lift" reasons often disagree with other information ICE records on whether the individual was actually booked into its custody. For example, ICE sometimes records an agency refused its transfer request even though ICE records it actually assumed custody of the individual. Therefore great caution should be exercised when using this information as it may not be reliably recorded by ICE. *Id.*

<sup>211</sup> *Id.*

<sup>212</sup> *Officer Martin Interview*, *supra* note 105; *Deputy Chief Alaniz Interview*, *supra* note 126; *City of Dallas Complaint in Intervention*, *supra* note 122, at 12; *Deputy Chief Silva Interview*, *supra* note 111; *Commander Lara Interview*, *supra* note 115 (EPCSO has "always cooperated with federal law enforcement."); *First Amended Complaint of San Antonio*, *supra* note 103, at 28.

Looking specifically at the data ICE has released for Fiscal Year 2016—the year leading up to SB4's introduction—reveals that the number of honored detainers in Texas did not drop. ICE released data on about 78 percent of its detainer requests to Texas (specifically, 15,219 detainers).<sup>213</sup> Out of those detainer requests, law enforcement agencies declined to cooperate with less than 1/2 of a percent (or specifically, 59 detainers).<sup>214</sup> And 56 of the 59 declined detainers came from Travis County.<sup>215</sup> This data presents the following question: Why is SB4 so important to Texas lawmakers if SB4 would affect less than 1 percent of detainer requests?

### 3. *FOURTH AMENDMENT CONCERNS*

In the ongoing SB4 litigation, plaintiffs argue that SB4's ICE-detainer provision violates the Fourth Amendment of the United States Constitution,<sup>216</sup> which protects people from unreasonable searches and seizures.<sup>217</sup> The Fourth Amendment argument appears to boil down to two issues: (1) whether it is unlawful for a law enforcement agency to hold a person for 48 hours at ICE's direction with only an administrative warrant; and (2) whether SB4 requires law enforcement officers to comply with *any* detainer request, even those without probable cause.

#### a. *48-Hour Hold & Administrative Warrants*

Without an applicable exception, the Fourth Amendment requires a warrant to be issued by a neutral and detached magistrate based on an adequate showing of probable cause in order to seize a person.<sup>218</sup> Holding someone based on a detainer request constitutes “a new seizure for Fourth Amendment purposes.”<sup>219</sup> Under the INA, an ICE officer may arrest any alien in the United States if he has reason to believe that the alien . . . is in the United States in violation of any . . . law or regulation and is likely to escape before a warrant can be obtained for his arrest.” But ICE must arrest the alien “without unnecessary delay for examination before an [ICE officer] having authority to examine aliens

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<sup>213</sup> *Latest Detainer Data*, *supra* note 199.

<sup>214</sup> *Id.*

<sup>215</sup> *Id.*

<sup>216</sup> Consolidated Plaintiffs El Paso County, et al.'s First Amended Complaint for Declaratory Judgment and Injunctive Relief at 27, (No. 15:17-cv-404-OLG) (W.D. Tex. June 5, 2017).

<sup>217</sup> U.S. CONST. amend. IV.

<sup>218</sup> *Schmerber v. California*, 384 U.S. 757, 770 (1966).

<sup>219</sup> *Morales v. Chadbourne*, 793 F.3d 208, 217 (1st Cir. 2017).

as to their right to enter or remain in the United States.<sup>220</sup> Although federal law does not always require ICE to accompany a detainer with a warrant, ICE’s policy requires it to attach administrative warrants to all detainees.<sup>221</sup> Administrative warrants are forms issued by ICE officers, which are not signed by a judge or neutral magistrate.<sup>222</sup>

Currently, the Supreme Court has not provided specific guidance on whether administrative warrants are constitutional. In *Abel v. United States*, the Supreme Court did not specifically address whether an administrative warrant is constitutional because the plaintiff failed to raise it at trial.<sup>223</sup> But the Court acknowledged that since 1798, “[s]tatutes providing for deportation have ordinarily authorized the arrest of deportable aliens by order of an executive official, . . . [showing an] overwhelming historical legislative recognition of the propriety of administrative arrest for deportable aliens.”<sup>224</sup> In another case, *United States v. Tejada*, the First Circuit decided whether the Federal Rule of Criminal Procedure requiring the arresting law enforcement officer to bring the defendant before a magistrate judge applied to people in immigration detention.<sup>225</sup> The Court held the Rule inapplicable, stating that the INA required only an examination by an INS (now ICE) officer “without unnecessary delay” and not an examination by a magistrate.<sup>226</sup>

In a recent district court case, *Roy v. County of Los Angeles*, the district court decided “whether the Fourth Amendment specifically requires judicial officers to review ICE officers’ probable cause determinations.”<sup>227</sup> The district court considered both *Abel* and *Tejada*.<sup>228</sup> Noting the distinctions between protections afforded in criminal cases versus those in civil immigration proceedings, the district court held “that it is . . . [c]onstitutional under the Fourth Amendment for the Legislature to delegate a probable cause determination to an executive officer, such

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<sup>220</sup> Immigration and Nationality Act, 8 U.S.C. § 1357(a)(2) (2016).

<sup>221</sup> U.S. IMMIGR. AND CUSTOMS ENF’T, *supra* note 21, at § 2.4.

<sup>222</sup> *ICE Warrants and Local Authority*, IMMIGRANT LEGAL RESOURCE CTR. 1 (May 2017), [https://www.ilrc.org/sites/default/files/resources/ice\\_warrants\\_may\\_2017.pdf](https://www.ilrc.org/sites/default/files/resources/ice_warrants_may_2017.pdf).

<sup>223</sup> *Abel v. United States*, 362 U.S. 217, 230–31 (1960).

<sup>224</sup> *Id.* at 233.

<sup>225</sup> 255 F.3d 1, 3 (1st Cir. 2001).

<sup>226</sup> *Id.*

<sup>227</sup> *Roy v. Cty. Of Los Angeles*, No. 12-09012, 2017 WL 2559616, at \*9 (C.D. Cal. June 12, 2017).

<sup>228</sup> *Id.* at \*7.

as an ICE agent, rather than to an immigration, magistrate, or federal district court judge.”<sup>229</sup>

In the absence of a Supreme Court ruling, the ongoing SB4 litigation may provide some guidance. In that case, the district court enjoined SB4’s ICE-Detainer Provision, finding that the plaintiffs were likely to prevail on their Fourth Amendment challenge.<sup>230</sup> The Fifth Circuit, however, reversed that preliminary injunction.<sup>231</sup> The court found that current “ICE-detainer request[s] evidence[] probable cause of removability in every instance” because “[o]n the form, an ICE officer certifies that probable cause of removability exists.”<sup>232</sup> Thus, the court found that “[u]nder the collective-knowledge doctrine, . . . the ICE officer’s knowledge may be imputed to local officials even when those officials are unaware of the specific facts that establish probable cause of removability.”<sup>233</sup>

Under the collective-knowledge doctrine, the collective knowledge of two or more officers can satisfy probable cause even if the arresting officer “was unaware of the specific facts that established probable cause.”<sup>234</sup> But there must be “some degree of communication between the arresting officer and an officer who has knowledge of all the necessary facts.”<sup>235</sup> ICE’s current detainer form notifies the local law enforcement agency that DHS “has determined that probable cause exists that the [inmate] is a removable alien.” The ICE officer also checks one of five boxes to further elaborate on the probable-cause details.<sup>236</sup> The detainer form provides at

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<sup>229</sup> *Id.* at \*10.

<sup>230</sup> *El Cenizo v. Texas*, 885 F.3d 332, 343 (5th Cir. 2018).

<sup>231</sup> *Id.*

<sup>232</sup> *El Cenizo*, 885 F.3d at 355.

<sup>233</sup> *Id.* The collective-knowledge doctrine has also been applied in another ICE-detainer case. *Mendoza v. United States Immigration and Customs Enforcement*, 849 F.3d 408, 419 (2017) (“The County employees were entitled to rely on [the ICE officer’s] probable cause determination.”).

<sup>234</sup> *United States v. Hensley*, 469 U.S. 221, 231 (1985).

<sup>235</sup> *United States v. Ortiz*, 781 F.3d 221, 228 (5th Cir. 2015) (quoting *United States v. Ibarra*, 493 F.3d 526, 530 (5th Cir. 2007)).

<sup>236</sup> *Id.* The options include the following:

“A final order of removal against the alien;”

“The pendency of ongoing removal proceedings against the alien;”

“Biometric confirmation of the alien’s identity and a records check of federal databases that affirmatively indicate, by themselves or in addition to other reliable information, that the alien either lacks immigration status or notwithstanding such status is removable under U.S. immigration law;”

“Statements made by the alien to an immigration officer and/or other reliable evidence that affirmatively indicate the alien either lacks immigration status

least some degree of communication between the arresting officer—the local law enforcement officer—and the officer who knows all the necessary facts—the ICE officer.<sup>237</sup> So under the collective-knowledge doctrine (and assuming that administrative warrants are constitutional), the local law enforcement agency would have probable cause to detain the individual.

The ICE detainer form also directs the law enforcement agency to “maintain custody of the alien for a period *NOT TO EXCEED 48 HOURS*” after the county would release that person under the county charge (essentially, when the county would release the person but for the detainer).<sup>238</sup> Critics, however, argue that the Fourth Amendment has no 48-hour exception.<sup>239</sup> But if ICE’s probable cause determination is imputed onto the local law enforcement agency through the collective-knowledge doctrine, no 48-hour exception is necessary.

*b. Detainer Requests Without Probable Cause*

The second question SB4 raises in the Fourth Amendment context is: Does SB4 require law enforcement officers to comply with *any* detainer request, even those without probable cause? SB4 requires a law enforcement agency to “comply with, honor, and fulfill *any* request made in [a] detainer request” from ICE. Reading the text literally, SB4 would require law enforcement agencies to honor detainer requests lacking probable cause. Honoring a detainer in that situation could violate the Fourth Amendment and thus lead to liability for the law enforcement agency. SB4’s challengers argued that SB4’s ICE-Detainer Provision was facially invalid because “it does not expressly require a probable cause determination[,] [and] ICE policy may change.”<sup>240</sup> The Fifth Circuit, however, rejected the plaintiffs’ argument, reasoning that this argument confirmed that facial relief was inappropriate: “If ICE policy changes or if violations occur, the proper mechanism is an as-applied, not a facial challenge.”<sup>241</sup>

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or notwithstanding such status is removable under U.S. immigration law[:]”  
 “Upon completion of the proceeding or investigation for which the alien was transferred to your custody, DHS intends to resume custody of the alien to complete processing and/or make an admissibility determination.”

<sup>237</sup> *Ortiz*, 781 F.3d at 228.

<sup>238</sup> U.S. DEP’T OF HOMELAND SEC., *supra* note 26 (emphasis in original).

<sup>239</sup> César Cuauhtémoc García Hernández, *ICE’s New Immigration Detainer Policy Remains Legally Flawed* (Mar. 24, 2017, 3:38 PM), <http://crimmigration.com/2017/03/24/ices-new-immigration-detainer-policy-remains-legally-flawed>.

<sup>240</sup> *El Cenizo*, 885 F.3d at 357.

<sup>241</sup> *Id.* at 355.

Also, for some police departments, a warrant accompanying a detainer is very important. For example, since January 2017, Bexar County Sheriff's Office has requested that ICE attach a warrant, whether administrative or judicial, to every detainer request.<sup>242</sup> For Bexar County, a warrant signals that ICE has done its due diligence to ensure that a person is removable. If ICE issues a detainer without an accompanying warrant, Bexar County's policy is that it will not honor it.

Different police departments have different ways of dealing with detainees. For example, in Bexar County, the county immediately notifies ICE when the county plans to release a person with a pending detainer.<sup>243</sup> If ICE fails to take custody of the suspect within 48 hours, local law enforcement officers will release the individual. Deputy Chief Silva, however, indicated that in Bexar County, ICE typically takes custody of the individual within a few hours.<sup>244</sup> In Tarrant County, the sheriff's office is hoping to eventually obtain a judicial warrant approved by a judge with each detainer request, rather than just an administrative warrant.<sup>245</sup> Obtaining a judicial warrant would allow Tarrant County to avoid constitutional challenges to continued detention without a warrant.<sup>246</sup> Also, for the last sixteen years, Tarrant County Sheriff's Office has had two on-duty ICE agents in its jails Monday through Friday from about 7 p.m. to 10 p.m.<sup>247</sup>

Some local police departments remain unconcerned about possibly being sued for honoring a detainer request.<sup>248</sup> Bexar County Sheriff's Office, which was sued in the past over an honored ICE detainer request, is also confident that its current processes will protect against any future litigation.<sup>249</sup> In *Santoyo v. United States*, Bexar County Sheriff's Office

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<sup>242</sup> *Deputy Chief Silva Interview*, *supra* note 111.

<sup>243</sup> *Deputy Chief Silva Interview*, *supra* note 111.

<sup>244</sup> *Id.*

<sup>245</sup> *Officer Martin Interview*, *supra* note 105.

<sup>246</sup> For cases challenging administrative warrants, see *Roy*, 2017 WL 2559616, at \*9;

<sup>247</sup> *Id.*; see Jack Fink, *Tarrant County Jail, 17 Others in Texas Ink Deal with ICE*, CBS DFW (July 31, 2017, at 9:15 PM), <http://dfw.cbslocal.com/2017/07/31/tarrant-county-jail-17-others-texas-ink-deal-with-ice> ("Currently, ICE has agents inside the jails doing the job between Monday and Friday."). This may appear to raise a Tenth Amendment anti-commandeering issue. But because Tarrant County is voluntarily allowing ICE into its jails, the federal government is unlikely commandeering any state recourses.

<sup>248</sup> *Officer Olivarez Interview*, *supra* note 120; *Deputy Chief Silva Interview*, *supra* note 111; *Deputy Chief Alaniz Interview*, *supra* note 126; *Commander Lara Interview*, *supra* note 115.

<sup>249</sup> *Santoyo v. United States*, No. 5:16-CV-855-OLG, 2017 WL 2896021 (W.D. Tex. June 5, 2017); *Deputy Chief Silva Interview*, *supra* note 111.

held a man pursuant to a detainer request for about forty days—well over the 48-hour maximum—after his county case was dismissed, effectively ending the county’s custody.<sup>250</sup> Now, when ICE issues a detainer request for an inmate, Bexar County flags that person and closely tracks their county case to ensure that the county does not hold that person beyond the 48-hour maximum.<sup>251</sup>

### **E. Officers’ Reputations Within Their Communities**

Officers are aware that SB4 has impacted their relationships with local communities,<sup>252</sup> but some believe this is due to misinformation about what SB4 actually permits local law enforcement to do.<sup>253</sup> In Commander Lara’s opinion, to understand this issue, it is important to first understand immigrants’ histories. Law enforcement in the immigrants’ native countries are often ruthless and corrupt, so people come to the United States with fears of law enforcement officers. And most of these people have sacrificed a lot to come to the United States, for example, by using their whole life savings to pay someone to help them cross the border. If someone slightly distrusts law enforcement officers, that person will not risk everything to help the officers solve a crime.<sup>254</sup> So it essentially comes down to trust, which was a reoccurring theme during interviews with Texas law enforcement departments.

In order to effectively engage with immigrant communities, it is imperative that local law enforcement support transparency policies and effectively communicate their role in immigration-law enforcement.<sup>255</sup> One way local law enforcement agencies have accomplished this goal is

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<sup>250</sup> *Santoya*, 2017 WL 2896021, at \*1; *Deputy Chief Silva Interview*, *supra* note 111.

<sup>251</sup> *Deputy Chief Silva Interview*, *supra* note 111.

<sup>252</sup> *Officer Olivarez Interview*, *supra* note 120 (stating that SB4 has definitely had an impact on people in Houston, which has a lot of minority communities); *Officer Martin Interview*, *supra* note 105; *Deputy Chief Alaniz Interview*, *supra* note 126; Dianne Solis, *North Texas Police Officers Try to Ease Fear Among Immigrants over SB4*, DALL. NEWS (Aug. 17, 2017), <https://www.dallasnews.com/news/immigration/2017/08/17/north-texas-police-officers-try-ease-fear-among-immigrants-senate-bill-4> (“[SB4] has already hurt our trust . . . We already have a lot of fear out there because of [SB4]. It has already created damage.”); City of Dallas Complaint in Intervention, *supra* note 122, at 13 (“The fear caused by SB4 will undermine Dallas’s ongoing efforts to promote community policing and to develop trust and cooperation in neighborhoods with large immigrant populations.”).

<sup>253</sup> *Deputy Chief Silva Interview*, *supra* note 111; *Officer Martin Interview*, *supra* note 105; *Deputy Chief Alaniz Interview*, *supra* note 126.

<sup>254</sup> *Commander Lara Interview*, *supra* note 115.

<sup>255</sup> *Officer Rodriguez Interview*, *supra* note 106; *Deputy Chief Alaniz Interview*, *supra* note 126.

through community outreach programs. Each department interviewed administered their own version of a community outreach program, each of which varied in approach.

Deputy Chief Alaniz stated that he has personally participated in community forums in Arlington, Texas to address misinformation and fear surrounding SB4.<sup>256</sup> In a three-week timeframe, about 1,000 people attended Arlington Police Department's community forums.<sup>257</sup> Deputy Chief Alaniz stated that his department has a long track record of engaging immigrant communities and suggests that some trust already existed between the community and the police.

Deputy Chief Silva has personally been in communication with the consulate offices in Mexico and Guatemala and other organizations that support the immigrant community.<sup>258</sup> Bexar County Sheriff's Office wants these consulate offices and other organizations to tell victims and witnesses that there is no reason to be afraid or to hide and that the department can help them with the necessary documents to gain legal status if they are a qualifying victim or witness (discussed in Subpart II.B).<sup>259</sup> Bexar County Sheriff's Office also holds town hall meetings where Deputy Chief Silva gives presentations in Spanish.<sup>260</sup>

Commander Lara, who personally testified at a Texas Senate hearing on SB4, stated that the El Paso County Sheriff's Office must do extensive outreach to ensure that the community understands what SB4 does and does not permit.<sup>261</sup> Because SB4 has received substantial media attention, the sheriff's office was worried that SB4 would inhibit its relationship with the community.<sup>262</sup> But in Commander Lara's opinion, SB4 has not caused fear within his local community yet, likely because the sheriff's office reiterates to the community that it is "not [there] to enforce immigration law."<sup>263</sup>

At a community meeting in Fort Worth, Officer Rodriguez and the neighborhood's community police officer handed out SB4 brochures.<sup>264</sup>

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<sup>256</sup> *Deputy Chief Alaniz Interview, supra* note 126.

<sup>257</sup> *Id.*

<sup>258</sup> *Deputy Chief Silva Interview, supra* note 111.

<sup>259</sup> *Id.*

<sup>260</sup> *Id.*

<sup>261</sup> *Commander Lara Interview, supra* note 115.

<sup>262</sup> *Id.*

<sup>263</sup> *Id.*

<sup>264</sup> UNDERSTANDING SENATE BILL 4, *supra* note 109.



The brochure explains SB4 and its effect on police officers' roles. The brochure explains that SB4 does not require officers assist or cooperate with federal immigration authorities SB4 in places of worship and defines all relevant SB4 terms. Officer Rodriguez also answered any questions about SB4 in both Spanish and English. He reassured the community that "FWPD is here to help" and encouraged people to call the police if an officer mistreated them.<sup>265</sup> He also reiterated that everyone in the community personally pays for Fort Worth Police Department's services through the Crime Control and Prevention District (CCPD) funding.<sup>266</sup>

In Houston, Officer Olivarez's<sup>267</sup> unit spearheaded a program called *Alianza Against Crime*, which takes place in Houston's East End—a predominantly Hispanic area. This initiative has three main parts: (1) a Town Hall Forum, which allows people to ask questions directly to local law enforcement officers and aims to make people more comfortable and open with police; (2) a Resource Fair, where civic organizations set up booths to answer questions and provide information; and (3) a Police Display, which includes interactive demonstrations of police department equipment.<sup>268</sup> After conducting the community events, the department saw an increase in calls to the police from immigrant communities.

In addition to the diverse approaches discussed above, police departments should also consider using social media creatively. For example, Officer Olivarez received a sponsor for Android tablets to conduct surveys at the *Alianza* events.<sup>269</sup> He stated that 50 percent of the Spanish-speaking people who responded to his survey found out about the Houston Police Department's events via social media. In February 2017, Officer Rodriguez posted a nearly six-minute video to his personal Facebook about SB4 to help soothe the fears of Fort Worth's immigrant community.<sup>270</sup> In Spanish,

<sup>265</sup> *Officer Rodriguez at Community Meeting, supra* note 108.

<sup>266</sup> *CCPD, FORT WORTH POLICE DEP'T*, <http://www.fortworthpd.com/CCPD>. CCPD funding gives 1/2 of a cent of the sales tax from every purchase in Fort Worth to the police department. *Id.* During the community meeting, Officer Rodriguez stated: "The next time you see a police car, look at the back bumper. It says CCPD funded, meaning that you pay for that car . . . with your sales taxes." *Officer Rodriguez at Community Meeting, supra* note 108.

<sup>267</sup> Officer Olivarez stated that he loves his job and building relationships with people in the community. He just completed his masters and is looking at a PhD program in community policing.

<sup>268</sup> *Officer Olivarez Interview, supra* note 120; *Law Enforcement Spotlight: Houston Alianza Against Crime*, COPS, U.S. DOJ (July 2017), [https://cops.usdoj.gov/html/dispatch/07-2017/le\\_spotlight\\_july.html](https://cops.usdoj.gov/html/dispatch/07-2017/le_spotlight_july.html).

<sup>269</sup> *Officer Olivarez Interview, supra* note 120.

<sup>270</sup> Daniel Segura, *Calma Amigos!*, FACEBOOK (Feb. 1, 2017), <https://www.facebook.com/>

he reinforced that Fort Worth officers are not federal officials that enforce immigration law. With 1.7 million views of the video, Officer Rodriguez has received both praise and criticism.<sup>271</sup> Officer Rodriguez believes that officers need to market both their badges and themselves; the media will not report on the officers' good deeds, so the department must take it into their own hands and do it themselves via social media.<sup>272</sup>

### **F. Training on Immigration Law**

Officer training on immigration law is a practice that varies among departments. SB4's opponents argue that "[i]mmigration law is a complex field and requires special training to administer"—something local law enforcement officers do not have.<sup>273</sup> Some departments interviewed for this Article indicated that immigration-law training is unnecessary.<sup>274</sup> But other departments interviewed indicated that they plan to provide immigration-law training.<sup>275</sup>

In the absence of a § 287(g) agreement, police officers (depending on their jurisdiction) may not have required immigration-law training. Under § 287(g) agreements, "ICE provides a four-week basic training program and a one-week refresher training program (completed every two years)" on immigration law.<sup>276</sup> That training makes sense because § 287(g) agreements authorize police officers to enforce immigration law "in relation to the investigation, apprehension, or detention of aliens in the United States."<sup>277</sup> Under SB4—and in the absence of an operational § 287(g) agreement—local law enforcement officers are not authorized to enforce immigration law and are prohibited from making unilateral decisions about a person's immigration status. Therefore, training in immigration-law enforcement

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daniel.segura.9406/videos/1515060968511895.

<sup>271</sup> Diane Smith, *Officer Makes Video to Soothe Immigrants; Mayor, Police Say He's Speaking for Himself*, STAR-TELEGRAM (Feb. 2, 2017, 1:51 PM), <http://www.star-telegram.com/news/local/community/fort-worth/article130355404.html>.

<sup>272</sup> *Officer Rodriguez Interview*, *supra* note 106.

<sup>273</sup> Application for Preliminary Injunction, Declaration of Vanita Gupta at 2, *City of El Cenizo v. Texas*, (W.D. Tex. June 5, 2017) (No. 15:17-cv-404-OLG); *First Amended Complaint of San Antonio*, *supra* note 103, at 30 ("Rep[resentative] Geren . . . admitted that local police officers have no skills or training to determine immigration status.")

<sup>274</sup> *Officer Rodriguez Interview*, *supra* note 106; *Chief Martin Interview*, *supra* note 105; *Commander Lara Interview*, *supra* note 115 (stating that the El Paso County Sheriff's Office would not be providing immigration-law training because the sheriff's office is attempting to keep its operations as consistent as possible with how they were before SB4's enactment).

<sup>275</sup> *Deputy Chief Silva Interview*, *supra* note 111; *Officer Olivarez Interview*, *supra* note 120.

<sup>276</sup> *Delegation of Immigration Authority*, *supra* note 21.

<sup>277</sup> 8 U.S.C. § 1357(g).

for officers not engaged in the kind of enforcement authorized by § 287(g) agreements is likely unnecessary under SB4 alone.<sup>278</sup>

### **G. Resource Reallocation and the Tenth Amendment**

SB4's opponents argue that SB4 will require local law enforcement agencies to reallocate their resources to comply with SB4.<sup>279</sup> When Texas lawmakers first announced SB4, El Paso County Sheriff's Office was concerned about having to use its local resources for immigration enforcement.<sup>280</sup> But so far, Commander Lara believes this has not been a problem and that the sheriff's office will not have to reallocate its resources to comply with SB4.<sup>281</sup> Commander Lara did note, however, that departments that did not previously comply with ICE detainers may have to reallocate their resources. Bexar County Sheriff's Office will also not have to reallocate its resources; for them it is "business as usual."<sup>282</sup> And Officer Martin also denied that Tarrant County Sheriff's Office will have to reallocate resources.<sup>283</sup> In fact, the Tarrant County Sheriff submitted an affidavit on behalf of the State claiming that SB4 is actually cost saving because it enables him to "release inmate[s] subject to ICE detainers up to seven days early if [the County] is releasing them into federal custody."<sup>284</sup>

SB4's challengers argued that SB4 violates the Tenth Amendment, which prohibits the federal government from commandeering state resources to enforce immigration law (because immigration is the federal government's responsibility).<sup>285</sup> This is why detainers are simply

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<sup>278</sup> But if police departments are assisting undocumented immigrants in securing U or T visas, officers will need *some* immigration training to identify who qualifies for those protections.

<sup>279</sup> City of Dallas Complaint in Intervention, *supra* note 122, at 14 ("SB4 will require a re-allocation of the already limited, stretched, and strained resources of the Dallas Police Department. Resources will need to be diverted as to whatever immigration law training is permitted. Local governments will be required to comply with any ICE request to assist and cooperate including providing enforcement assistance. Dallas will no longer have discretion to decline assistance and cooperation. A refusal because resources are demanded elsewhere may trigger a complaint by ICE or someone else to the Texas Attorney General.").

<sup>280</sup> Commander Lara Interview, *supra* note 115.

<sup>281</sup> *Id.*

<sup>282</sup> Deputy Chief Silva Interview, *supra* note 111.

<sup>283</sup> Officer Martin Interview, *supra* note 105.

<sup>284</sup> Defendants' Response to Applications for Preliminary Injunction, Declaration of Bill E. Waybourn at 4, City of El Cenizo v. Texas, (W.D. Tex. June 23, 2017) (No. 15:17-cv-404-OLG).

<sup>285</sup> New York v. United States, 505 U.S. 144, 188 (1992); Printz v. United States, 521 U.S. 898, 935 (1997) ("The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political

requests and not demands. If they were demands, they would almost certainly be unconstitutional under the Tenth Amendment.

SB4, however, is a state law that instructs state and local law enforcement agencies to cooperate with the federal government. Nothing in SB4 constitutes action by the federal government that commandeers state resources. As the Fifth Circuit stated in dicta in the pending SB4 litigation, the plaintiffs were “merely recast[ing] a state-law home-rule-city argument as a hybrid Tenth Amendment and preemption claim.”<sup>286</sup> Thus, even if state and local law enforcement agencies (subdivisions of the state) reallocated their resources to comply with SB4, those actions would not violate the Tenth Amendment. In other words, “[f]or better or for worse, Texas can ‘commandeer’ its municipalities in this way.”<sup>287</sup>

### III. IS SB4 EFFECTIVE?

SB4 has cost Texas—therefore its taxpayers—a lot of money. Vast legislative resources were used to enact SB4, and Texas lawmakers almost certainly knew that SB4—a controversial bill—would lead to lengthy litigation, with taxpayers footing the bill.<sup>288</sup> This knowledge is demonstrated by Texas’s Attorney General Ken Paxton filing a preemptive law suit before SB4’s effective date, seeking a declaration that SB4 was constitutional.<sup>289</sup> Thomas Saenz, the president and general counsel for the Mexican American Legal Defense and Educational Fund, criticized Texas lawmakers, stating, “It’s an open checkbook and there are going to be lots of [law]suits . . . . Why a fiscally conservative governor and legislature would write a check like that is the untold story.”<sup>290</sup>

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subdivisions, to administer or enforce a federal regulatory program.”); *De Canas v. Bica*, 424 U.S. 351, 354 (1976) (“Power to regulate immigration is unquestionably exclusively a federal power.”).

<sup>286</sup> *El Cenizo*, 885 F.3d at 359. “In Texas, a Home Rule city . . . can pass any regulations or laws it deems necessary unless the state law prohibits it. In order for a city to be Home Rule, the population has to reach 5,000 and there has to be an election ratifying a city charter.” *Home Rule*, CITY OF CTR. TEX., <http://www.centertexas.org/city-council/home-rule> (last visited May 7, 2018).

<sup>287</sup> *El Cenizo*, 885 F.3d at 359.

<sup>288</sup> See *AG Paxton Vows to Defend the Constitutionality of Senate Bill 4*, TEX. ATT’Y GEN. (Aug. 30, 2017), <https://texasattorneygeneral.gov/news/releases/ag-paxton-vows-to-defend-the-constitutionality-of-senate-bill-4>.

<sup>289</sup> Andrea Zelinski, *supra* note 68.

<sup>290</sup> Suzanne Gamboa, *Texas’ SB4 Immigration Enforcement Law: 5 Things to Know*, NBC NEWS (May 11, 2017, 5:43 PM), <https://www.nbcnews.com/news/latino/texas-sb4-immigration-enforcement-law-5-things-know-n758126>.

In addition to the cost and resources spent on SB4, a significant amount of negative attention followed SB4's enactment. SB4 has led to serious concerns of racial profiling by local law enforcement. And until SB4 is enforced in practice, we cannot know for certain that SB4 will not lead to racial profiling. But SB4 may well embolden some officers to engage in racial profiling even though SB4 does not explicitly sanction it. SB4 has also caused some victims and witnesses not to come forward to police due to fears of deportation.<sup>291</sup> This means that criminals are escaping punishment and victims are not receiving the treatment and protection they might need. SB4 has also significantly damaged police officers' reputations within their local communities, causing them to expend time and resources on extra community outreach, even in the law enforcement agencies claiming that they do not need to reallocate their resources to comply with SB4's requirements alone.

Because of the amount of money and resources used to enact and defend SB4, combined with its various negative effects, one would think that SB4 would have a big impact on Texas residents' safety, which was, according to Governor Abbott, the primary reason for passing SB4.<sup>292</sup> But that does not appear to be the case. The extremely small number of declined detainers leave little to no room for SB4 to greatly increase safety. Thus, we must ask: Was SB4 the best use of resources for Texas lawmakers to improve its residents' safety?

In light of the mounting litigation costs, Texas lawmakers should have considered other alternatives to improving resident safety. Although there is significant data showing that undocumented immigrants are *not* a safety risk to U.S. citizens, that argument is beyond this Article's scope. Thus, assuming *arguendo* that Texas lawmakers' safety concerns are genuine, one alternative to SB4 is more aggressive enforcement of laws prohibiting employers from hiring undocumented workers. According to John Connolly, the former executive associate director of Homeland Security Investigations in Washington, D.C., the pull for illegal immigration is that people can come to the United States, buy a Social Security card and other documents at a relatively small cost, get a job, and get paid.<sup>293</sup> "If [people] are told, 'Look, don't come here any-

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<sup>291</sup> See *supra* discussion in Subpart II.B.

<sup>292</sup> See, e.g., *Texas Bans Sanctuary Cities*, *supra* note 66.

<sup>293</sup> Jay Root, *In Texas, Lawmakers Don't Mess with Employers of Undocumented Workers*, TEX. TRIBUNE (Dec. 14, 2016, 12:00 AM), <https://www.texastribune.org/2016/12/14/>

more, [the United States is] enforcing the laws, you can't get jobs,' people aren't going to make th[e] expens[ive] and . . . long journey to come here to the United States."<sup>294</sup>

But Texas's attempts at implementing electronic employment verification (E-Verify) have been weak at best. In 2014, the Texas legislature passed a bill requiring "E-Verify *only for* employees directly working for [the] state government."<sup>295</sup> Even then, the Texas legislature never gave the Texas Work Commission, the agency tasked with enforcing E-Verify rules, the power to enforce the requirements.<sup>296</sup> Accordingly, Texas businesses continue benefiting from undocumented immigrants' cheap labor without any fear of punishment.<sup>297</sup> And at the same time, Texas is spending millions on SB4 that has little potential for the change that Texas lawmakers claim we need. In other words, if Texas lawmakers are truly concerned with resident safety, they chose a fairly ineffective method of increasing safety.

Although the interviews with Texas police departments are purely anecdotal, their reactions to SB4 further support the point that SB4 may be highly ineffective. Some departments feel that immigration-law training for officers and resource reallocation to comply with SB4 are both unnecessary.<sup>298</sup> If SB4 were changing the role of local police departments, both training and resource reallocation would be necessary. Moreover, prior to the enactment of SB4, only a very few number of local departments failed to honor detainer requests.<sup>299</sup> Even if SB4 is not completely ineffective, however, the negative effects far outweigh the positive ones.

Texas residents must ask whether the true purpose of SB4 was their safety or was it to take a strong stance on immigration while "hammer[ing]"<sup>300</sup> the few counties that occasionally declined ICE detainer requests.

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lawmakers-go-easy-employers-undocumented-workers.

<sup>294</sup> *Id.*

<sup>295</sup> *Id.* (emphasis added).

<sup>296</sup> *Id.*

<sup>297</sup> *Id.* ("[I]f past performance and recent public pronouncements are any guide, Texas leaders will continue going easy on those who avail themselves of low-cost undocumented immigrant labor.").

<sup>298</sup> *See supra* Subparts II.F–II.G.

<sup>299</sup> *See supra* Subpart II.D.2.

<sup>300</sup> Abbott, *supra* note 62 ("Texas will hammer Travis County.").

## CONCLUSION

Although not all Texas law enforcement agencies were willing to discuss SB4, this Article seeks to reinforce the power of conversation. Understanding the stance of police officers—caught in the middle of SB4’s politics and legal arguments—is critical. As Justice Kennedy said in *Arizona v. United States* (the SB 1070 case), immigration-law conversations require “thoughtful, rational civic discourse.”<sup>301</sup>

Unfortunately, we cannot determine whether SB4 will lead to racial profiling based on conversation alone. And neither SB 1070 in practice nor the Court’s decision in *Arizona* provide much guidance. But one essential lesson from conversations with Texas police officers is that SB4 likely serves no purpose at all. The small percentage of declined detainee requests in Texas leave little to no room for SB4 to have any great impact. Among the 254 Texas counties, only a few regularly declined detainees. The question becomes: was SB4 worth it?

SB4—a controversial bill—created significant disruption. SB4 hurt police officers’ reputations within their local communities, causing them to expend a significant amount of time and resources on extra community outreach. SB4 also caused some victims and witnesses to fear coming forward to police and raised valid racial-profiling concerns. Texas lawmakers, ignoring these concerns, used vast resources and money to enact SB4 and now to defend it in court. Overall, it appears that during SB4’s enactment, something other than “resident safety” was at play.

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<sup>301</sup> *Arizona*, 567 U.S. at 416.