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

CITY OF EL CENIZO, TEXAS, et al.,	
Plaintiffs,	**Case No. 5:17-cv-00404-OG**
v.	**Hon. Orlando L. Garcia**
STATE OF TEXAS, et al.,	
Defendants.	

BRIEF OF AMICUS CURIAE IMMIGRATION REFORM LAW INSTITUTE IN SUPPORT OF DEFENDANTS' OPPOSITION TO PLAINTIFFS' APPLICATION FOR A PRELIMINARY INJUNCTION

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Interest of Amicus Curiae

Amicus curiae the Immigration Reform Law Institute (IRLI) is a not for profit 501(c)(3) public interest law firm incorporated in the District of Columbia. IRLI is dedicated to litigating immigration-related cases on behalf of, and in the interests of, United States citizens and legal permanent residents, and also to assisting courts in understanding and accurately applying federal immigration law. IRLI has litigated or filed *amicus curiae* briefs in important cases concerning federal preemption and the constitutional and statutory scope of state and local enforcement of immigration., including *Keller v. City of Fremont*, 719 F.3d 931 (8th Cir. 2013) and *Texas v. United States*, 787 F.3d 733 (5th Cir. 2015). IRLI is considered an expert in immigration law by the Board of Immigration Appeals, which has solicited *amicus* briefs drafted by IRLI staff from its parent organization the Federation for American Immigration Reform (FAIR) for more than twenty years.

IRLI has no parent corporation. It does not issue stock.

I. Introduction

El Cenizo is a small city bordering Mexico on the Rio Grande in Webb County, Texas. El Cenizo's public officials believe that most city denizens resent and fear enforcement of federal immigration laws. As plaintiffs, the City and mayor thus seek to invoke what they believe to be local "sovereignty" to nullify and defy such laws.

El Cenizo has no such local sovereignty, however. Under the state constitution, Texas state laws override those of localities, granting the state legislature ultimate control over cooperation by state and local law enforcement in immigration enforcement. The state legislature has duly enacted SB 4 to restrict any local nullification power.

Plaintiffs' claim that SB 4 commandeers local police in violation of the Tenth Amendment is close to frivolous. The Texas legislature may commandeer the services of local Texas police just as it can direct the operations of the Texas Highway Patrol. In SB 4, the Texas legislature has volunteered the cooperation of all law enforcement agencies in the state with federal immigration officers, which is its constitutional prerogative, under both the Eleventh Article of the Texas Constitution and the Tenth Amendment to the U.S. Constitution. Starting on SB 4's effective date in September 2017, El Cenizo—and nearly all other local law enforcement agencies in Texas—must cooperate with federal immigration officers to the same extent that state law enforcement agencies have been required to cooperate for many years.

In their pending application for a preliminary injunction, Plaintiffs cannot show a likelihood of success in prevailing on this *facial* challenge. SB 4 only mandates local police conduct which is already imposed on state officers in the Texas Rangers and the Texas Highway Patrol: *inter alia*, that local police enforce detainers, verify the citizenship or immigration status of arrestees, and transfer jailed removable aliens into federal custody in advance of completion of their local jail sentences. If these mandates were federally-preempted regulation of immigration, they would be prohibited action by state police officers as well.

Cooperation with federal immigration officers is a long-established practice in Texas, and expressly authorized by federal law. Where, as with SB 4, a local agency depends on federal classification of immigration status, by definition there can be no conflict preemption. SB 4, like earlier Texas legislation mandating cooperation by state police agencies, fully relies on federal law, in particular 8 U.S.C. §§ 1373 and 1257(g), which the Supreme Court has determined provide for authoritative state and local verification of immigration status for every purpose for which plaintiffs might need such information to comply with SB 4.

Finally, plaintiffs urge the Court to adopt the radical position that no law enforcement officer in the United States many extend a temporary detention of a non-citizen to verify a reasonable suspicion that the alien is unlawfully present in the United States without violating the Fourth Amendment. That position has no support from Supreme Court or Fifth Circuit precedent.

II. Argument

To obtain a preliminary injunction blocking the implementation of SB 4, Plaintiffs must show they are likely to prevail on the merits of one of their challenges. *See, e.g. Winter v. NRDC, Inc*., 555 U.S. 7, 20 (2008). Plaintiffs, however, are unlikely to prevail on their Tenth Amendment claim, their federal preemption claim, or their Fourth Amendment claim.

A. Plaintiffs are unlikely to prevail on their Tenth Amendment claim against SB4.

Plaintiffs assert that the SB 4 "interferes with the right of local self-government secured by the … Tenth Amendment," because Texas "lacks the authority to force local communities to infringe on their own liberty through their own law enforcement and elected representatives. 2nd Amended Complaint, ¶ 47. Plaintiffs claim Texas "cannot preemptively waive its localities' anti-commandeering rights" by "subject[ing] local entities to plenary federal control." *See* Plaintiffs' Memorandum in Support of Application for Prelim. Injunction, Doc. 24-1 ("Pls' Mem."), at 39-40. Plaintiffs' theory is that local jurisdictions in Texas have independent sovereignty that is somehow equivalent to that which the State of Texas retains against the federal government. That novel theory has never been recognized under the Tenth Amendment.

1) The Texas legislature has well-established authority to commandeer the services of local law enforcement agencies to engage in cooperative immigration enforcement.

Plaintiffs' commandeering theories are meritless. In Texas, no municipal charter or ordinance may contain any provision "inconsistent with … the general laws enacted by the legislature of this state." Texas Constitution art. 11 § 5. A Texas municipal ordinance that conflicts with state

legislation is impermissible, and is preempted by the supremacy of *state* law unless it is clearly "ancillary to and in harmony with the general scope and purpose of the state enactment…." *Brookside Village v. Comeau*, 633 S.W.2d 790, 796 (1982). SB 4 is indisputably a general law imposing statewide "policies and actions regarding immigration enforcement." Tex. Government Code § 752.053. SB 4 explicitly conflicts with, and thereby nullifies, the municipal sanctuary and immigration non-cooperation ordinances enacted by the plaintiff and plaintiff-intervenor municipalities. Neither the Texas constitution nor the Tenth Amendment bars it from doing so.

Beginning long before enactment of SB 4, Texas state law enforcement agencies have had a policy and practice of cooperating with federal immigration authorities—without the need for a written agreement with the federal government—in activities of the same type and with the same scope as those SB 4 will require of municipal agencies. *See e.g.* Texas Gov't Code §§ 411.0208(a) 0208(d), and 0209 (authorizing Department of Public Safety officers, notably Texas Rangers and Texas Highway Patrol officers, to coordinate with federal authorities at international border checkpoints and in the interior to prevent and detect unlawful movement or transfer of persons from Mexico); Tex. Code Crim. Proc. Art. 2.25 (requiring state judges to report illegal criminal aliens, as defined by Tex. Gov't Code § 493.015(a), to ICE); Tex. Gov't Code §§ 493.015(b), (d), (e) and (g) (requiring the Texas Department of Criminal Justice to identify criminal aliens in state custody, promptly notify ICE and the criminal justice division of the Governor's office of their presence, to detain jailed illegal criminal aliens "for the period immediately preceding release on parole or mandatory supervision," to provide "technology that will assist the state and federal government in ensuring the timely and efficient deportation of illegal criminal aliens," and so on). These statutes do not violate the Tenth Amendment, and neither do the parallel provisions of SB 4.

2) SB4 directs Plaintiffs to cooperate with ICE, not serve as autonomous federal immigration officers.

Plaintiffs ignore how Congress, in 8 U.S.C. 1357(g), clearly differentiates between cooperation by local police with federal immigration officers and the autonomous performance of the functions of an immigration officer by local law enforcement officers.

When a state or local employee or officer merely "cooperates" with ICE in immigration enforcement, no written agreement with the federal government is necessary. 8 U.S.C. § 1357(g)(10)(B). "[A]ny officer or employee of a State or political subdivision" may cooperate with ICE in the "*identification, apprehension, detention, or removal* of aliens not lawfully present in the United States." *Id.* (emphasis added).

The Department of Homeland Security has provided guidance as to what the agency considers cooperation. *See* Dep't of Homeland Sec., *Guidance on State and Local Governments' Assistance in Immigration Enforcement and Related Matters* (2011), *available at* https://www.dhs.gov/xlibrary/assets/guidance-state-local-assistance-immigration-enforcement.pdf:

> [T]he Department interprets the term "cooperate" in subparagraph 1357(g)(10)(B) to mean **the rendering of assistance by state and local officers to federal officials,** in the latter officials' enforcement of the [Immigration and Nationality Act], in a manner that maintains the ability to conform to the policies and priorities of DHS and **that ensures that individual state and local officers are at all times in a position to be—and, when requested, are in fact—responsive to the direction and guidance of federal officials charged with implementing and enforcing the immigration laws.**

Id. at 7 (emphasis added).

The Guidance provides a non-exhaustive list of cooperative actions that do not constitute autonomous enforcement of immigration laws. *Id.* at 13-14. The list includes "providing state

equipment, facilities, or services for use by federal immigration officials for official business." *Id.* at 14.

Section 1357(g) also provides that the Secretary of Homeland Security may, through ICE, enter into written agreements with state and local law enforcement agencies authorizing "qualified" local officers to perform "a function of an immigration officer in relation to the investigation, apprehension, or detention of aliens in the United States." 8 U.S.C. § 1357(g)(1). A "qualified" local officer performing immigration officer functions must have received "adequate training" pursuant to a "written certification" that the officer has "knowledge of, and adhere[s] to, Federal law relating to the function." 8 U.S.C. § 1357(g)(2).

Plaintiffs have failed to identify any activity which Texas local officers or officials are required to undertake pursuant to SB 4 that does not fall within the deliberately broad scope of § 1357(g)(10)(B) cooperation. Significantly, "detention" of aliens is a permissible local police function under both the cooperative and autonomous immigration law enforcement functions provided by Congress. Where a state officer "provide[s] operational support in executing a warrant," that is a paradigmatic "example[] of what would constitute cooperation under federal law." *Arizona v. United States*, 567 U.S. 387, 410 (2012) (referring to "cooperation…in the … [civil] apprehension, detention, or removal of aliens not lawfully present in the United States" under 8 U.S.C. § 1357(g)(10)(B)).

Under SB 4, Texas will lawfully commandeer local law enforcement to undertake the cooperative immigration actions which it has long mandated for state law enforcement. As Texas has made voluntary cooperation pursuant to federal standards the law of the state, El Cenizo cannot succeed with its Tenth Amendment claim.

B. Plaintiffs are unlikely to prevail on their federal preemption claim.

In addition to protesting that SB 4 "commandeers" local government to enforce immigration law, the El Cenizo Plaintiffs seek preliminary relief based on their flawed belief that "SB 4 both duplicates and extends beyond equivalent provision in federal immigration law, and it injects unilateral state enforcement decisions into the federal [comprehensive enforcement] scheme. 2nd Amended Complaint, ¶ 44. Plaintiffs allege that SB 4 "violates the Supremacy Clause" because it is a "state regulation inconsistent with federal law." *Id.*, ¶ 45. Plaintiffs' conflict preemption theory is that SB 4 "generally conflicts with the Federal scheme for cooperative enforcement," Pls' Mem., Doc. 24-1, at 13-19, and also "impermissibly relies on local determinations of immigration status," *Id.* at 19-20.

1) Plaintiffs fall very short of meeting the standard of review for a facial preemption claim.

To obtain injunctive or declaratory relief under their preemption theory, Plaintiffs, who are bringing a facial challenge prior to SB 4's effective date, must first show a strong likelihood that SB 4 will (when operational) fall into the narrow category of laws deemed to be a "regulation of immigration." Then they must either show that it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" or show that Congress expressed "the clear and manifest purpose" of completely occupying the field and displacing *all* State and local activity. *De Canas v. Bica*, 424 U.S. 351, 355-363 (1976).

In immigration preemption cases, "the proper approach is to *reconcile* 'the operation of both statutory schemes with one another rather than holding [the state scheme] completely ousted.'" *De Canas* 424 U.S. at 358, *quoting Merrill Lynch, Pierce, Fenner & Smith v. Ware*, 414 U.S. 117, 127 (1973) (emphasis added). As the District of Arizona noted in the case that would become *Whiting v. Chamber of Commerce*, "A mere difference between state and federal law is not

conflict." *Ariz. Contractors Ass'n. v. Candelaria*, 534 F. Supp. 2d 1036, 1053 (D. Ariz. 2008), *aff'd sub nom. Chicanos Por La Causa, Inc. v. Napolitano*, 558 F.3d 856 (9th Cir. 2009), *aff'd sub nom. Whiting*, 131 S. Ct. 1968 (*citing Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 141-46 (1963)).

To defeat a facial pre-enforcement challenge in a preemption case, a defendant needs "merely to identify a possible set of . . . conditions not in conflict with federal law." *Cal. Coastal Com. v. Granite Rock Co.*, 480 U.S. 572, 593 (1987); *see also United States v. Salerno*, 481 U.S. 739, 745 (1987); *Arizona*, 567 U.S. at 413-14 (rejecting construction that would invalidate an Arizona provision and instead adopting construction that would make it constitutional). The Supreme Court cautions: "In determining whether a law is facially invalid, we must be careful not to go beyond the statute's facial requirements and speculate about 'hypothetical' or 'imaginary' cases." *Washington State Grange v. Washington State Republican Party*, 128 S. Ct. 1184, 1190 (2008).[1]

Plaintiffs ask this Court to speculate about hypothetical future situations in which municipal officers claim, at most, uncertainty about their possible liability under the sanctions provisions of SB 4. *See* 2nd Amended Complaint, ¶ 10 (SB 4 effective date not until Sept. 1, 2017); ¶¶ 35-37. But SB 4 can easily be applied in a way that does not conflict with federal law.

2) SB 4 permits reliance on federal determinations of immigration status in the cooperative enforcement actions it mandates for municipal law enforcement agencies.

[1] Plaintiffs also make a void for vagueness claim, based on the possibility of uncertain future state actions against Plaintiffs, without any allegations of current or past preempted enforcement actions. 2nd Amd'd Cmplt. ¶¶ 33-38. They fail to understand that the already high standard for succeeding in a vagueness claim rises even higher in a facial challenge. An enactment is *facially* void for vagueness only when it is impermissibly vague in *all* its applications. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495 (1982). This is an extremely high hurdle that Plaintiffs simply cannot clear. The challenged law must be *utterly devoid* of a standard of conduct to which the citizen or official must conform. *High Ol' Times, Inc. v. Busbee*, 673 F.2d 1225, 1228 (11th Cir. 1982).

Plaintiffs theorize that SB 4 "upsets the careful balance Congress has struck between encouraging *local* assistance and preserving *local* discretion." Pls' Mem., Doc. 24-1, at 13. This Court must begin its review with the presumption of non-preemption, acknowledging that the Supreme Court "has never held that every state enactment which in any way deals with aliens is . . . *per se* pre-empted." *De Canas*, 424 U.S. at 354-55.

To avoid conflict preemption, a cooperating state or local agency may rely on the federal government's determination of an alien's status. *See Chamber of Commerce of the United States v. Whiting*, 131 S. Ct. 1968, 1981 (2010) (holding that when a state statute relies on verification of status from the federal government, "there can by definition be no conflict between state and federal law"); *Equal Access Educ. v. Merten*, 325 F. Supp. 2d 655, 659-60 (E.D. Va. 2004) (holding that a state policy that denied admission to college for "illegal aliens" was not preempted because it adopted federal standards).

In upholding the validity of an Arizona state immigration law requiring state or local verification of immigration status, the Supreme Court expressly identified how a permissible immigration status determination functions: "[I]f the information provided under § 1373(c) does not confirm that an employee is an unauthorized alien, then the State cannot prove its case." *Whiting*, 131 S. Ct. at 1982. The *Whiting* Court was referring to 8 U.S.C. § 1373, the statute which the El Cenizo plaintiffs argue somehow *justifies* a preliminary injunction of SB 4. This "anti-sanctuary" statute bars, *inter alia*, plaintiffs who are local government officials or employees from restricting "in any way … a local government entity from … maintaining … information regarding the immigration status, lawful or unlawful, of any individual," 8 U.S.C. § 1373(a)(1). But it also requires ICE to "respond to an inquiry by a … local government entity, seeking to verify or ascertain the citizenship or immigration status of any individual within the jurisdiction of the

agency for any purpose authorized by law, by providing the requested … information." 8 U.S.C. § 1373(c). There is thus bright-line federal law, policy and practice in place that the Supreme Court has recognized as the authoritative procedure for verification of immigration status by all local law enforcement agencies, for *every* purpose for which Plaintiffs might need to obtain or verify such information to comply with SB 4.

3) The intent of Congress is to encourage—not preempt—local enforcement of detainers and the identification of unlawfully present aliens.

The Supreme Court has consistently reiterated that "'[t]he purpose of Congress is the ultimate touchstone' in every pre-emption case." *Medtronic v, Lohr*, 518 U.S. 470, 485 (1996) (quoting *Retail Clerks v. Schermerhorn*, 375 U.S. 96, 103 (1963)); *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S.88, 98 (1992) ("The touchstone for preemption is congressional intent.")

In *De Canas v. Bica*, 424 U.S. 504 (1976), the Supreme Court explained just how high the standard is to establish preemptive congressional intent. A party bringing an implied preemption claim must demonstrate "that Congress has *unmistakably* … ordained" the preemption of the law in question. *Id.* at 356 (emphasis added). "[W]e will not infer pre-emption of the States' historic police powers absent a clear statement of intent by Congress." *Gade*, 505 U.S. at 111-12 (1992) (Kennedy, J., concurring). Article III Courts are bound by an "obligation to infer pre-emption only where Congress' intent is clear and manifest." *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 524 (1992) (Blackmun, J., dissenting).

Plaintiffs err in arguing that states "have no affirmative right to engage in immigration enforcement." *See* Pls' Mem., Doc. 24-1, at 18. Plaintiffs mistakenly argue that to avoid preemption this Court must search for congressional action authorizing such state action. Pls' Mem., Doc. 24-1, at 21-22. In *Arizona v. United States*, the Supreme Court upheld a state law against a similar preemption challenge. The Arizona law required officers to attempt to determine

the immigration status of any lawfully stopped or detained alien whom the officer had reasonable suspicion to believe is unlawfully in the country. 567 U.S. at 411.

Indeed, Plaintiffs' claim is contrary to *every* preemption case rendered by the Supreme Court. *Arizona* and the two seminal immigration-related preemption cases issued before *Arizona* took the exact opposite approach, and examined whether Congress removed state authority. *De Canas*, 424 U.S. at 355 ("there would be no need… to even discuss the relevant congressional enactments in finding pre-emption of state regulation" if the Constitution preempts all state actions); *Whiting*, 131 S. Ct. at 1977-78, 1981-82) (reviewing whether Congress revoked state action). *Arizona* made clear that congressional authorization is not necessary for a state to act; state action is only preempted where Congress has displaced state authority. "The federal scheme thus leaves room for a policy requiring state officials to contact ICE as a routine matter." *Arizona*, 567 U.S. at 412.

Plaintiffs have not and cannot identify any federal statute that directly manifests preemptive intent relevant to the mandates of SB 4. As a result, they are forced to base their preemption arguments on theoretical tension within an imaginary "balancing" of federal objectives. *See e.g.* Pls' Mem., Doc. 24-1, at 14 ("SB 4 must be enjoined to restore the balance Congress created.") But in *Whiting*, the Supreme Court held that a theoretical balancing defect is not good enough even for preliminary relief: "Implied preemption analysis does not justify a 'free-wheeling judicial inquiry into whether a state statute is in tension with federal objectives'; such an endeavor 'would undercut the principle that it is Congress rather than the courts that preempts state law.'" *Whiting*, 131 S. Ct. at 1985 (quoting *Gade*, 505 U.S. at 111 (Kennedy, J., concurring)).

The California Supreme Court has explained that, "[w]here state law mandates compliance with the federal immigration laws and regulations, it cannot be said [that state law] stands as an obstacle to accomplishment and execution of congressional objectives embodied in the

[Immigration and Nationality Act]." *In re Jose C.*, 45 Cal. 4th 534, 554 (2009) (internal citation and quotation marks omitted). Here, where Plaintiffs' argument is that a state officer is preempted from assisting the federal government in detaining someone for a federal violation, the burden to show manifest congressional preemptive intent should be even higher, because "it would be *unreasonable* to suppose that [the federal government's] purpose was to deny itself any help that the states may allow." *Marsh v. United States*, 29 F.2d 172, 174 (2d Cir. (1928) (Hand, J.) (emphasis added).

To the contrary, legislative history and the enacted statutes analyzed above demonstrate that Congress *encourages* state and local assistance in enforcing immigration laws.

> Effective immigration law enforcement requires a cooperative effort between all levels of government. The acquisition, maintenance, and exchange of immigration-related information by State and local agencies is consistent with, and potentially of considerable assistance to, the Federal regulation of immigration and the achieving of the purposes and objectives of the Immigration and Nationality Act.

S. Rep. No. 104-249, 104th Cong., 2d Sess., at 19-20 (1996). The House Conference Report to the Welfare Reform Act explained that "immigration law enforcement is as high a priority as other aspects of Federal law enforcement, and [] illegal aliens do not have the right to remain in the United States undetected and unapprehended." H.R. Conf. Rep. No. 104-725, at 383 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2183, 2649, 2771. Through legislation, Congress has encouraged state and local assistance in the enforcement of immigration laws. *United States v. Vasquez-Alvarez*, 176 F.3d 1294, 1300 (10th Cir. 1996).

Given these clear statements of Congressional policy, neither El Cenizo nor the other co-plaintiff law enforcement officials can possibly provide this Court evidence that it was unmistakably the "clear and manifest purpose" of Congress to preempt cooperative state legislation such as SB 4.

C. Plaintiffs cannot establish that they are likely to prevail on their Fourth Amendment claim.

"[F]rom almost the beginning of the Nation," federal arrests of removable illegal aliens for both criminal and civil violations have been permitted. *Abel v. United States*, 362 U.S. 217, 234 (1960). "[T]here remains overwhelming historical legislative recognition of the propriety of administrative arrest for deportable aliens." *Id*. at 233. A sovereign State has authority to make arrests for violations of federal law in order to voluntarily assist the federal government, unless Congress acts to preempt that authority. *United States v. Di Re*, 332 U.S. 581, 589 (1948), *quoted in Arizona*, 567 U.S. at 414.

The Supreme Court has long upheld the validity of administrative searches and detention based on civil violations of other laws. *See, e.g., Camara v. Mun. Court of City & Cnty. Of San Francisco*, 387 U.S. 523, 538 (1967) (upholding the use of administrative warrants for code inspections). The Supreme Court later held that aliens can be detained upon reasonable suspicion of unlawful status as long as law enforcement officers comply with federal statutes and regulations. *United States v. Brignoni-Ponce*, 422 U.S.873, 883 (1975). In upholding detentions of illegal aliens by local police, the Fifth Circuit has found that "[n]o statute precludes other federal, state, or local law enforcement agencies from taking other actions to enforce this nation's immigration laws." *Lynch v. Canatella*, 810 F.2d 1363, 1371 (5th Cir. 1987). The Fifth Circuit decision drew no distinction between civil and criminal immigration violations.

The Eighth Circuit is equally firm on this point. That Circuit considers the initial local detention of an illegal alien for subsequent transfer to ICE to be the first step in the civil process of removal. Detention and questioning of the alien by local police is simply "part of the administrative procedure" culminating in removal by federal officials. *United States v. Rodriguez-Arreola*, 270 F.3d 611, 615, 619 (8th Cir. 2001); *United States v. Quintana*, 623 F.3d 1237, 1242

(8th Cir. 2010) (holding that a state trooper took custody of an alien to initiate federal government's "administrative arrest based upon probable cause that an alien is deportable").

Likewise, the Tenth Circuit "has held that state law-enforcement officers have the general authority to make arrests for violations of federal immigration laws." *Vasquez-Alvarez*, 176 F.3d at 1296. *See also United States v. Calderon*, 728 F.2d 1298, 1301, n.3 (10th Cir. 1982) ("A state trooper has general investigatory authority to inquire into possible immigration violations."); *United States v. Santana-Garcia*, 264 F.3d 1188, 1193-94 (10th Cir. 2001); *United States v. Treto-Haro*, 287 F.3d 1000, 1006 (10th Cir. 2002). These cases concerned civil violations of federal immigration laws.

In *Carchman v. Nash*, the Supreme Court recognized a general definition of "detainer" and described the circumstances in which detainers are used:

> A detainer may be defined as a warrant filed against a person already in custody with the purpose of insuring that he will be available to the authority which has placed the detainer. Wardens of institutions holding men who have detainers on them invariably recognize these warrants and notify the authorities placing them of the impending release of the prisoner.

473 U.S. 716, 727 (1985). While *Carchman* dealt with the Interstate Agreement on Detainers (which does not apply to civil immigration matters), the Court's recognition of detainers as a form of warrant "insuring that [an inmate] will be available to the authority which has placed the detainer" is a strong indication that it viewed them as mandatory.

A number of lower court rulings agree that civil detainers impose a mandatory obligation on local law enforcement agencies. *See e.g. Ramirez-Mendoza v. Maury County*, 2013 U.S. Dist. LEXIS 10533, *20 (M.D. Tenn. Jan. 25, 2013) ("[T]he ICE detainer imposed a federal mandate upon the Defendant . . . Defendant was required by federal law to maintain custody of Plaintiff for a period not to exceed 48 hours"); *Rios-Quiroz v. Williamson County*, 2012 U.S. Dist. LEXIS

128237, *10 (M.D. Tenn. Sept. 10, 2012) ("[T]he Court finds that the regulation is mandatory.")

The *Ramirez-Mendoza* court summarized the issue:

> Construing Section 287.7(d) as a mere request also would create an impracticable or absurd result, which courts are required to avoid when construing provisions of law. It would mean that, in order for ICE to assume custody of particular, wanted aliens, ICE would have to station federal agents on the steps of jailhouses across the country to wait for them to be released. Such a construction is obviously an impractical, if not absurd, way for ICE to carry out its statutory mandate that certain criminal aliens or suspected criminal aliens "shall" be taken into custody for immigration purposes when released from the custody of [law enforcement agencies]s. See 8 U.S.C. §§ 1226(c)(1), 1226a(a)(1), and 1357(d). Interpreting Section 287.7(d) according to the plain meaning of its text, however, would create a 48-hour window of opportunity for ICE to pick up and assume custody of these particular, wanted aliens without having to wait on the jailhouse steps for them to emerge—a far more practical outcome.

2013 U.S. Dist. LEXIS 10533, *20 (internal citiation and quotation marks omitted).

Plaintiffs never explain how enforcement of immigration detainers is constitutionally distinct from enforcement of other civil detainers. The majority of immigration detainers concern civil violations of the Immigration and Nationality Act (INA). Civil arrests are effectuated to ensure that the suspect does not flee the jurisdiction or to protect the public. Civil immigration arrests result in administrative detention, rather than pre-trial or punitive detention, and, from a constitutional standpoint, are more similar to arrests intended to effectuate indefinite civil commitment in the mental health context than they are to criminal arrests. *See Kansas v. Hendricks*, 521 U.S. 346 (1997).

The claim that those seizures must observe the safeguards in place to protect the constitutional interests of *criminal* defendants, and that detainers cannot be considered mandatory unless accompanied by a judicial warrant authorizing a criminal arrest, has never been endorsed by the Supreme Court. There is no requirement that federal immigration officers obtain a judicial warrant prior to asking any other law enforcement agency to hold an alien, because there is no requirement

that ICE itself obtain a judicial arrest warrant from an Article III court prior to taking an alien into custody. The INA does not require judicial warrants for administrative immigration arrests. *See, e.g.*, 8 U.S.C. § 1226(a) (authorizing administrative warrants—not judicial warrants—for the arrest of aliens suspected of being in the United States without authorization.)

Civil immigration arrests are subject to lower suspicion thresholds than criminal arrests and a less rigid civil probable cause standard. The INA authorizes an ICE officer "to arrest any alien in the United States, if he has reason to believe that the alien so arrested is in the United States in violation of any such law or regulation and is likely to escape before a warrant can be obtained for his arrest." 8 U.S.C. § 1357(a)(2). The statute provides a distinct standard for warrantless immigration arrests—"reason to believe"—and it makes no mention whatsoever of any judicial warrant requirement. The plain language of 8 U.S.C. § 1357(a)(2) makes it clear that Congress was concerned about the likelihood that illegal aliens would escape if immigration authorities were saddled with a rigid warrant requirement.

The Supreme Court and other federal courts have repeatedly affirmed the constitutionality of civil administrative arrests under the INA. *E.g., United States v. Mendenhall,* 446 U.S. 544, 556 (1980), citing *U.S. v. Brignoni-Ponce*, 422 U.S. 873, 881-82 (1975) (holding that a government agent may conduct a "seizure" of a person in order to investigate whether that person is an illegal alien, but must articulate objective facts providing in their totality a reasonable suspicion that the subject of the seizure was an alien illegally in this country). The agent is not bound to articulate the probable cause that would be necessary for a criminal arrest. *Id.* In *United States v. Montoya de Hernandez*, 473 U.S. 531 (1985), the Supreme Court upheld the extended, incommunicado detention of an alien as a reasonable exercise of border enforcement authority, stating that

"detention for the period necessary to either verify or dispel the suspicion [of unlawful presence is] not unreasonable."

Mendenhall was followed and clarified by the D.C. Circuit in *Au Yi Lau v. INS*, 445 F.2d 217 (D.C. Cir. 1971) which stated: "We hold that immigration officers, in accordance with the Congressional grant of authority found in the INA, may make forcible detentions of a temporary nature for the purposes of interrogation under circumstances creating a reasonable suspicion, not arising to the level of probable cause to arrest, that the individual so detained is illegally in this country." *Id.* at 223. And in a case dealing with immigration administrative search warrants, the D.C. Circuit held that "[p]robable cause in the criminal law sense is not required." *Blackie's House of Beef v. Castillo*, 659 F.2d 1211, 1223 (D.C. Cir. 1981). *Id.* ("For purposes of an administrative search such as this, probable cause justifying the issuance of a warrant may be based not only on specific evidence of an existing violation but also on a showing that reasonable legislative or administrative standards for conducting an . . . inspection are satisfied") (internal citation and quotation marks omitted). Immigration officers need only show "sufficient specificity and reliability to prevent the exercise of unbridled discretion by law enforcement officials" before a valid warrant to search a commercial establishment may be issued. *Id.* at 1225. *See also Dionicio v. Allison*, No. 3:09-cv-00575, 2010 U.S. Dist. LEXIS 104389, *45-51 (M.D. Tenn. Sept. 30, 2010) (holding that the actions of defendant, a state employee, in the detention of an alien did not violate the Fourth Amendment in part because defendant was cooperating with ICE agents under § 1357(g)(10)(A)).

III. Conclusion

For the foregoing reasons, Plaintiffs' application for a preliminary injunction should be denied.

Dated: June 23, 2017

Respectfully Submitted,

/s/ Michael Hethmon_
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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing *amicus curiae* brief with the Clerk of the Court for the United States District Court for the Western District of Texas by using the CM/EFP system on June 23, 2017. The foregoing document was served via the Court's CM/EFC system on lead counsel to be noticed for the Plaintiffs, Defendants, and parties granted Intervenor status.

/s/ Michael Hethmon_
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