

No. 17-50762

**UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

CITY OF EL CENIZO, TEXAS; RAUL L. REYES, MAYOR, CITY OF EL CENIZO; TOM SCHMERBER, COUNTY SHERIFF; MARIO A. HERNANDEZ, MAVERICK COUNTY CONSTABLE PCT. 3-1; LEAGUE OF UNITED LATIN AMERICAN CITIZENS; MAVERICK COUNTY; CITY OF EL PASO,
Plaintiffs-Appellees Cross-Appellants,

CITY OF AUSTIN, JUDGE SARAH ECKHARDT, IN HER OFFICIAL CAPACITY AS TRAVIS COUNTY JUDGE; SHERIFF SALLY HERNANDEZ, IN HER OFFICIAL CAPACITY AS TRAVIS COUNTY SHERIFF; TRAVIS COUNTY; CITY OF DALLAS, TEXAS; TEXAS ASSOCIATION OF HISPANIC COUNTY JUDGES AND COUNTY COMMISSIONERS; THE CITY OF HOUSTON.
Intervenors-Plaintiffs-Appellees Cross-Appellants,

v.

STATE OF TEXAS; GREG ABBOTT, GOVERNOR OF THE STATE OF TEXAS, IN HIS OFFICIAL CAPACITY, KEN PAXTON, TEXAS ATTORNEY GENERAL,
Defendants-Appellants Cross-Appellees.

(caption continued on inside cover)

On Appeal from the United States District Court for the Western District of Texas,
San Antonio Division, Nos. 5:17-cv-404; 5:17-cv-459; 5:17-cv-489

**BRIEF FOR TAHIRIH JUSTICE CENTER, ET AL. AS AMICI CURIAE IN
SUPPORT OF APPELLEES/CROSS APPELLANTS**

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EL PASO COUNTY; RICHARD WILES, SHERIFF OF EL PASO COUNTY, IN HIS OFFICIAL CAPACITY; TEXAS ORGANIZING PROJECT EDUCATION FUND; MOVE SAN ANTONIO,
Plaintiffs-Appellees Cross-Appellants,

v.

STATE OF TEXAS; GREG ABBOTT, GOVERNOR; KEN PAXTON, ATTORNEY GENERAL;
STEVE MCCRAW, DIRECTOR OF THE TEXAS DEPARTMENT OF PUBLIC SAFETY,
Defendants-Appellants Cross-Appellees.

CITY OF SAN ANTONIO; BEXAR COUNTY, TEXAS; REY A. SALDANA, IN HIS OFFICIAL CAPACITY AS SAN ANTONIO CITY COUNCILMEMBER; TEXAS ASSOCIATION OF CHICANOS IN HIGHER EDUCATION; LA UNION DEL PUEBLO ENTERO, INCORPORATED; WORKERS DEFENSE PROJECT,
Plaintiffs-Appellees Cross-Appellants,

CITY OF AUSTIN,
Intervenor-Plaintiff-Appellee Cross-Appellant,

v.

STATE OF TEXAS; KEN PAXTON, SUED IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF TEXAS; GREG ABBOTT, SUED IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF TEXAS,
Defendants-Appellants Cross-Appellees.

CERTIFICATE OF INTERESTED PERSONS

Pursuant to Fifth Circuit Rule 29.2, which requires a “supplemental statement of interested parties, if necessary to fully disclose all those with an interest in the amicus brief,” undersigned counsel of record certifies that the following parties have an interest in this brief, but no financial interest in this litigation. These representations are made so that the judges of this Court may evaluate possible disqualification or recusal.

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TABLE OF CONTENTS

	Page
CERTIFICATE OF INTERESTED PERSONS	i
TABLE OF AUTHORITIES	iii
STATEMENT OF INTEREST.....	1
ARGUMENT	3
I. SB4 HARMS IMMIGRANTS AND THEIR COMMUNITIES	4
A. SB4 Endangers Survivors Of Gender-Based Violence By Chilling The Reporting Of Abuse	4
B. SB4 Makes Texas Communities Less Safe By Chilling The Reporting Of Abuse	11
II. SB4’S CARVE-OUT FOR VICTIMS AND WITNESSES DOES NOT INSULATE SURVIVORS OF GENDER-BASED VIOLENCE FROM THE LAW’S CHILLING EFFECT.....	14
III. SB4 CONTRAVENES CONGRESS’S INTENT TO PROTECT THE SAFETY OF UNDOCUMENTED SURVIVORS OF GENDER-BASED VIOLENCE	17
A. Violence Against Women Act.....	18
B. Trafficking Victims Protection Act.....	20
CONCLUSION	22
CERTIFICATE OF COMPLIANCE	
CERTIFICATE OF SERVICE	

TABLE OF AUTHORITIES

CASES

	Page(s)
<i>Hines v. Davidowitz</i> , 312 U.S. 52 (1941)	21

DOCKETED CASES

<i>City and County of San Francisco v. Trump</i> , No. 3:17-cv-00485- WHO (N.D. Cal.).....	2
<i>County of Santa Clara v. Trump</i> , No. 3:17-cv-00574-WHO (N.D. Cal.).....	2

STATUTES

8 U.S.C.	
§ 1101	20
§ 1325	16
§ 1367	18
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Trafficking Victims Protection Act, Pub. L. No. 106-386, 114 Stat. 1464	17, 20, 21
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STATEMENT OF INTEREST¹

This brief is filed on behalf of the Tahirih Justice Center (“Tahirih”) and additional amici Aid to Victims of Domestic Abuse, Asian Pacific Institute on Gender-Based Violence, ASISTA, Casa de Esperanza, Center Against Sexual and Family Violence, and DAYA Houston. The parties have consented to the filing of this brief.

The Tahirih Justice Center is the largest multi-city direct-services and policy-advocacy organization in the United States specializing in assisting immigrant women and girls who survive gender-based violence, including human trafficking, forced labor, domestic violence, rape and sexual assault, and female genital cutting and mutilation. Tahirih serves clients at four local offices, including in Houston, and to date has provided free legal assistance to more than 20,000 individuals.

Additional amici are immigration service providers that serve survivors of gender-based crimes in Texas, as well as national policy organizations that advocate for legal and other protections for survivors of gender-based crimes in the United States.

¹ Undersigned counsel hereby certifies that: (1) no counsel for a party authored this brief in whole or in part; (2) no party or party’s counsel contributed money that was intended to fund the preparation or submission of this brief; and (3) no person or entity—other than amici curiae, its members, or its counsel—contributed money intended to fund the preparation or submission of this brief.

Based on their experience serving and advocating for immigrant survivors of gender-based violence, amici have a special understanding of the direct and severe impact that Texas Senate Bill No. 4 (“SB4”) is already having and will continue to have on survivors by limiting their access to protection from and treatment for the effects of gender-based violence. Tahirih and several of its co-amici have appeared as amici curiae in courts throughout the country. Of particular relevance, in March 2017, Tahirih and co-amici Asian Pacific Institute on Gender-Based Violence, ASISTA, and Casa de Esperanza submitted an amicus brief to the United States District Court for the Northern District of California in two cases challenging the constitutionality of section 9(a) of Executive Order No. 13,768, 82 Fed. Reg. 8799 (Jan. 25, 2017), which threatens to render so-called “sanctuary jurisdictions” ineligible for federal funding.² The court granted amici’s motion for leave to file an amicus brief, and granted the plaintiffs’ request for a preliminary injunction of section 9(a) of the executive order.³

² Proposed Brief for Tahirih Justice Center, et al. as Amici Curiae in Support of Plaintiffs’ Motions for Preliminary Injunctions, *City and County of San Francisco v. Trump*, No. 3:17-cv-00485-WHO (N.D. Cal. Mar. 22, 2017), Dkt. No. 41-1; Proposed Brief for Tahirih Justice Center, et al. as Amici Curiae in Support of Plaintiffs’ Motions for Preliminary Injunctions, *County of Santa Clara v. Trump*, No. 3:17-cv-00574-WHO (N.D. Cal. Mar. 22, 2017), Dkt. No. 76-1.

³ Order Granting the County of Santa Clara’s and City and County of San Francisco’s Motions to Enjoin Section 9(a) of Executive Order 13,768, *City and County of San Francisco v. Trump*, No. 3:17-cv-00485-WHO (N.D. Cal. Apr. 25, 2017), Dkt. No. 82 at 28 n.14.

ARGUMENT

All Texas residents have the right to seek protection from gender-based violence, regardless of immigration status. In enacting Texas Senate Bill No. 4 (“SB4”), however, Texas has undermined the ability of immigrant survivors to seek such protection. The resulting harm relates directly to two aspects of the Appellees/Cross-Appellants’ legal challenges to SB4: the substantial threat of irreparable injury that enforcement of the law poses, especially when applied to survivors of gender violence, and the preemption concerns raised by the law.⁴ As evidenced by amici’s extensive experience working with survivors of gender-based crimes, it is apparent that SB4 is chilling and will continue to chill the reporting of domestic abuse, leaving survivors less safe and hindering local law-enforcement efforts to investigate crimes and apprehend abusers. This is true notwithstanding the narrow carve-out protections in SB4 for victims of and witnesses to crimes. Additionally, SB4 is resulting in immigration enforcement actions that directly conflict with federal immigration protections provided to immigrant survivors, flouting longstanding congressional intent.

⁴ See Brief of Appellees/Cross-Appellants, *City of El Cenizo, et al. v. Texas*, No. 17-50762 (5th Cir. Oct. 13, 2017), Doc. No. 00514195905, at 20-39, 62-67 (“Appellees/Cross-Appellants Br.”).

I. SB4 HARMS IMMIGRANTS AND THEIR COMMUNITIES

A. SB4 Endangers Survivors Of Gender-Based Violence By Chilling The Reporting Of Abuse

Immigrant women and LGBTQ individuals face increased vulnerability to gender-based violence.⁵ They often face obstacles in seeking protection from abuse that other survivors do not, such as language barriers and lack of familiarity with social services and law-enforcement systems.⁶ Immigrant survivors may already harbor fear of the police based on past experiences with abusive or hostile law enforcement in their countries of origin.⁷ Furthermore, it is commonplace for an abuser to specifically use a survivor's immigration status as a tool for abuse, by threatening to report the survivor to immigration authorities if she calls the police,

⁵ Michael Runner, et al., *Intimate Partner Violence in Immigrant and Refugee Communities: Challenges, Promising Practices, and Recommendations*, Family Violence Prevention Fund 11-12 (Mar. 2009), https://www.futureswithoutviolence.org/userfiles/file/ImmigrantWomen/IPV_Report_March_2009.pdf. In addition to immigrant women, several studies have shown that the LGBTQ community—and in particular, lesbian, bisexual, and transgender persons—experience disproportionate levels of gender-based violence at the hands of strangers and intimate partners alike. *See, e.g.*, Kate Gilles, *Gender-Based Violence Against the Transgender Community is Underreported*, Population Reference Bureau (Dec. 2011), <http://www.prb.org/Publications/Articles/2011/gender-based-violence-transgender.aspx> (noting that transgender persons “are particularly at risk of GBV because they represent a direct challenge to traditional gender norms and roles”).

⁶ *Id.*

⁷ *Id.*

or threatening to withdraw an immigration benefits application.⁸ Accordingly, as the United States Congress has recognized, many immigrant survivors of gender-based violence are reluctant to contact the police or local authorities to report abuse, because they fear that doing so will place them or a family member at risk of deportation. *See* H.R. Rep. No. 103-395, at 25 (1993).⁹

By prohibiting the adoption, enforcement, or endorsement of local policies that “materially limit[.]” local involvement in immigration enforcement, Tex. Gov’t Code § 752.053(1), SB4 amplifies this problem. The district court correctly summarized the impact of SB4 on immigrant survivors of gender-based violence:

⁸ *See also* Jason Margolis, PRI’s *The World, Some Immigrant Victims of Domestic Abuse Afraid to Seek Help Along Border* (Mar. 20, 2013), <https://www.pri.org/stories/2013-03-20/some-immigrant-victims-domestic-abuse-afraid-seek-help-along-border> (quoting Sister Rosemary Welsh, Executive Director of Casa de Misericordia in Laredo, TX, as follows: “One of the ways men would keep [immigrant women] in a domestic violence situation was saying that ‘I am a U.S. citizen’ or ‘I am [a] legal permanent resident, and you call the police, and they will deport you and I will stay with the kids.’”); *Immigrant Power and Control Wheel*, produced and distributed by National Center on Domestic and Sexual Violence, Austin, TX, and adapted from original wheel by: Domestic Abuse Intervention Project, Duluth, MN, <http://endingviolence.org/files/uploads/ImmigrantWomenPCwheel.pdf>.

⁹ *See also* U.S. Dep’t of Justice, Office of Violence Against Women, *2016 Biennial Report to Congress on the Effectiveness of Grant Programs Under the Violence Against Women Act*, 46, <https://www.justice.gov/ovw/page/file/933886/download> (“[f]ear of deportation is a tremendous concern for some immigrant victims of domestic/sexual violence, and can result in victims not calling the police for help.”); Pamela Constable, *For Immigrant Women, Domestic Violence Creates a Double Shadow*, Wash. Post, Dec. 2, 2013, https://www.washingtonpost.com/local/for-immigrant-women-domestic-violence-creates-a-double-shadow/2013/12/02/5626b85e-55e6-11e3-8304-caf30787c0a9_story.html?utm_term=.eea49cf0e2af.

“[V]ictims of family violence, sexual assault, abuse, and stalking will be reluctant to come forward to report crimes because they will face removal from the country and separation from their families.” Order at 89-90, *City of El Cenizo, et al. v. State of Texas*, 5:17-cv-00404-OLG (W.D. Tex. Aug. 30, 2017), Dkt. No. 189 (“Order”). For some mothers, deportation can mean loss of custody of a U.S. citizen child—even to an abuser. Others may unknowingly be eligible for immigration relief but have been conditioned by their abusers to believe that they are not.

Studies show that when local law enforcement and federal immigration enforcement are commingled, immigrants are deterred from contacting local officials—be it in an emergency room or by dialing 911—out of fear that doing so will result in detention or deportation. For example, one 2015 study found that in North Carolina localities where the police participated in immigration enforcement, Hispanic/Latina mothers sought prenatal care later than non-Hispanic/Latina mothers and “participants reported profound mistrust of health services, avoiding health services, and sacrificing their health and the health of their family members.”¹⁰ Another study of similar North Carolina policies found that “the majority of Hispanic interviewees stated that they would hesitate before

¹⁰ See, e.g., Rhodes, et al., *The Impact of Local Immigration Enforcement Policies on the Health of Immigrant Hispanics/Latinos in the United States*, 105 Am. J. Pub. Health 329 (Feb. 2015).

reporting crime to the authorities out of fear that a friend, neighbor, or family member might be placed in danger of deportation.”¹¹ Survey results confirm these findings. In a 2013 survey of 2,000 Latinos in Houston, Los Angeles, and Phoenix, 45 percent of respondents reported that as a result of increased cooperation between the police and immigration authorities, they were less likely to contact law enforcement if they were victims of a crime.¹² Likewise, in a 2015 survey of 800 Latinos and Latinas nationwide, 41 percent of respondents cited fear of deportation as the number-one barrier preventing Latino and Latina survivors of domestic violence from seeking help.¹³

¹¹ Nguyen & Gill, *Interior Immigration Enforcement: The Impacts of Expanding Local Law Enforcement Authority*, 53 Urb. Stud. J. 302, 14 (2015); see also Kittrie, *Federalism, Deportation, and Crime Victims Afraid to Call the Police*, 91 Iowa L. Rev. 1449, 1451 (2006) (“to the extent [survivors of domestic violence] believe that [the] police will report them to immigration authorities ... , ‘women and children will continue to endure ongoing abuse rather than call for help.’”).

¹² Theodore, *Insecure Communities: Latino Perceptions of Police Involvement in Immigration Enforcement* (May 2013), http://www.policylink.org/sites/default/files/INSECURE_COMMUNITIES_REPORT_FINAL.PDF; see also Cornelius et al., *Op-ed: Giving Sanctuary to Undocumented Immigrants Doesn’t Threaten Public Safety—It Increases It*, L.A. Times, Feb. 2, 2017, <http://www.latimes.com/opinion/op-ed/la-oe-sanctuary-cities-trump-20170202-story.html>.

¹³ *New Study of Domestic Violence and Sexual Assault in the U.S. Latin@ Community Reveals Barriers to Reporting and High Willingness to Intervene to Help Survivors*, Avon Foundation for Women (Apr. 21, 2015), <https://www.avonfoundation.org/new-study-of-domestic-violence-and-sexual-assault-in-the-u-s-latin-community-reveals-barriers-to-reporting-and-high-willingness-to-intervene-to-help-survivors/>.

News reports make clear that SB4 and related immigration enforcement efforts are already having a chilling effect on the reporting of gender-based violence in Texas. In February 2017, advocates in Texas and nationwide reported that immigrant survivors were expressing reluctance about seeking help from the police and the courts in the wake of a highly publicized incident in which U.S. Immigration and Customs Enforcement (“ICE”) agents arrested a woman inside the El Paso courthouse where she had gone to seek an order of protection.¹⁴ In April 2017, a non-profit organization in Austin that assists survivors of rape reported that fewer survivors were coming forward and that more clients were expressing fear of contacting law enforcement to report abuse.¹⁵ In Tahirih and its partners’ own survey that same month of more than 700 advocates and legal-service providers nationwide, 78 percent of respondents reported that immigrant

¹⁴ Mettler, *‘This is really unprecedented’: ICE detains woman seeking domestic abuse protection at Texas courthouse*, Wash. Post (Feb. 16, 2017), https://www.washingtonpost.com/news/morning-mix/wp/2017/02/16/this-is-really-unprecedented-ice-detains-woman-seeking-domestic-abuse-protection-at-texas-courthouse/?utm_term=.c1bb8e6e4512; see also *U.S. Commission on Civil Rights Expresses Concern with Immigrants’ Access to Justice* (Apr. 24, 2017), http://www.usccr.gov/press/2017/Statement_04-24-2017-Immigrant-Access-Justice.pdf (finding that “[t]he chilling effect on witnesses and victims is already apparent.”).

¹⁵ Medina, *Too Scared to Report Sexual Abuse. The Fear: Deportation*, N.Y. Times (Apr. 30, 2017), https://www.nytimes.com/2017/04/30/us/immigrants-deportation-sexual-abuse.html?_r=0.

survivors shared similar concerns about contacting the police.¹⁶ And Houston police chief Art Acevedo reported that during the first three months of 2017, Houston saw a 43 percent drop in the number of Hispanics reporting rape and sexual assault, which Acevedo attributed to the passage of SB4 and related immigration enforcement measures.¹⁷

Tahirih and its partner organizations have witnessed this chilling effect firsthand in reports from their clients in Texas:

- One Central American woman survived years of domestic violence at the hands of her husband, a legal permanent resident. After escaping the abusive relationship, she called a direct-services organization in Texas in anguish because she had learned that her school-aged child had been sexually assaulted by a family member and that the child had reported the abuse to a school counselor who called Child Protective Services and initiated a law-enforcement investigation. SB4 had just been signed by Governor Abbott at the time, and the service-seeker was terrified to take her daughter to the child advocacy center because she believed that doing so would result in her deportation.
- Another client who has a pending petition for a “U-visa,” which offers immigration relief to eligible victims and witnesses of crime pursuant to federal law, continues to live in constant fear of her abuser, who has threatened to take away her U.S. citizen children. She learned about SB4 on

¹⁶ Tahirih Justice Center, *2017 Advocate and Legal Service Survey Regarding Immigrant Survivors* (Apr. 2017), <http://www.tahirih.org/wp-content/uploads/2017/05/2017-Advocate-and-Legal-Service-Survey-Key-Findings.pdf>.

¹⁷ Bever, *Hispanics are going further into the shadows amid chilling immigration debate, police say*, Wash. Post (May 14, 2017), https://www.washingtonpost.com/news/post-nation/wp/2017/05/12/immigration-debate-might-be-having-a-chilling-effect-on-crime-reporting-in-hispanic-communities-police-say/?utm_term=.7ffb66e3c8c2.

the news and fears that even being pulled over while driving could lead to her being placed into deportation proceedings. She reports that her children have nightmares that she will be taken one day, and that she and her children, some of whom are also victims of violence, live in fear every day of the local police.

- One domestic-violence survivor had her application for relief approved pursuant to the Violence Against Women Act, but because she was previously removed from the country, she continues to live in fear of the effects of SB4. Uncertain of her fate under SB4, she is being treated for anxiety and depression.
- An unaccompanied child from Central America survived violence and abuse in her own country, but now fears that she will be deported back to Central America as a result of SB4. Even though the child has a legal opportunity for a hearing before an immigration judge, she is hesitant to seek asylum because of the news reports about SB4 and the fear permeating her community. She fears that contact with the police might lead to her removal. She tells service providers that even if she is victimized here in the United States, she will not work with police because she believes the police will work with immigration enforcement to send her back to a country where she experienced violence.
- A legal advocate who answers dozens of calls for a direct-services organization reports: “Immigrants calling expressing recent situations of violence are too scared to report to law enforcement because they don’t understand the difference between law enforcement and immigration enforcement. SB4, and the media coverage on SB4, has worked to make immigrants all the more scared of reporting violence to the police, thinking that the police are part of immigration enforcement.”

In short, SB4 is causing widespread fear among survivors. It also allows abusers to exert additional control over immigrant women by exploiting the perception that seeking local authorities’ help could jeopardize survivors’

immigration status. As one survivor aptly stated in the wake of SB4's passage, "This is exactly what my abuser has been waiting for."¹⁸

B. SB4 Makes Texas Communities Less Safe By Chilling The Reporting Of Abuse

By chilling the reporting of domestic violence and other crimes, SB4 also jeopardizes the safety of Texas communities more generally, as the district court found. *See* Order at 90 ("Trust between local law enforcement and the people they serve, which police departments have worked so hard to promote, will be substantially eroded and result in increased crime rates."). Fostering trust between the police and immigrants is essential to ensuring community safety and is the basis for the policies enacted in El Cenizo and similarly situated localities.¹⁹ Indeed, one recent study found that there are, on average, 35.5 *fewer* crimes committed per 10,000 people in counties that limit local participation in immigration enforcement compared to counties that do not.²⁰

¹⁸ Tahirih Updates, *Tahirih Urges House Judiciary Committee to Oppose the Harmful Davis-Oliver Act*, Tahirih Justice Center (May 23, 2017), <http://www.tahirih.org/news/tahirih-urges-house-judiciary-committee-to-oppose-the-harmful-davis-oliver-act/>.

¹⁹ *See, e.g.*, Complaint, *City of El Cenizo, et al. v. State of Texas*, 5:17-cv-00404-OLG (W.D. Tex. May 8, 2017) Dkt. No. 1 ¶ 22.

²⁰ Wong, *The Effects of Sanctuary Policies on Crime and the Economy*, Center for American Progress (Jan. 26, 2017), <https://www.americanprogress.org/issues/immigration/reports/2017/01/26/297366/the-effects-of-sanctuary-policies-on-crime-and-the-economy/>.

For these reasons, national and Texas policing groups have opposed measures such as SB4 that penalize jurisdictions that restrict local participation in immigration enforcement.²¹ In an April *Dallas Morning News* editorial, for example, the Dallas, Houston, Austin, Arlington, Fort Worth, and San Antonio chiefs of police, along with the executive director of the Texas Police Chiefs Association, opined that SB4 would “further strain the relationship between local law enforcement and ... diverse communities,” and that “[s]uch a divide between the local police and immigrant groups will result in increased crime against immigrants and in the broader community, create a class of silent victims, and eliminate the potential for assistance from immigrants in solving crimes or preventing crime.”²² While police groups have expressed concerns about the chilling effect of laws like SB4 on all victims of crime, the effect of these laws is

²¹ See Letter from the Major County Sheriffs’ Association and Major City Chiefs Association Opposing S. 2146 (Oct. 20, 2015), <http://www.aila.org/infonet/letter-county-sheriffs-opposing-s-2146>; Robbins, *Police Fear Trump Immigration Orders May Handcuff Effort to Fight Gangs*, N.Y. Times (Feb. 22, 2017), https://www.nytimes.com/2017/02/22/nyregion/police-fear-trump-immigration-orders-may-handcuff-effort-to-fight-gangs.html?_r=0 (quoting a statement by the International Association of Chiefs of Police); Noble, *Donald Trump, police union at odds over ‘sanctuary cities’ funding*, Wash. Times (Nov. 22, 2016), <http://www.washingtontimes.com/news/2016/nov/22/donald-trump-national-fraternal-order-of-police-at/> (citing National Fraternal Order of Police former Executive Director James Pasco).

²² Pughes & Acevedo, *Texas police chiefs: Do not burden local officers with federal immigration enforcement*, *Dallas Morning News* (Apr. 28, 2017), <https://www.dallasnews.com/opinion/commentary/2017/04/28/texas-police-chiefs-burden-local-officers-federal-immigration-enforcement>.

especially troubling in the context of domestic violence, given that immigrant women face increased vulnerability to gender-based violence and that intimate-partner violence often escalates over time.²³ As Chuck Wexler, executive director of the Police Executive Research Forum, recently explained, “[t]he reason police chiefs are so concerned [about SB4 and related initiatives] is that an unreported domestic violence case can become a reported homicide if police are not alerted.”²⁴

When domestic violence goes unreported, entire communities are put at risk. Studies show that the rates of recidivism for domestic-violence offenders may be higher than for other crimes, and that perpetrators of sexual violence may go on to commit other violent acts.²⁵ By deterring immigrant women and others from reporting gender-based violence, therefore, SB4 has especially troubling implications for local community safety: It hinders local law-enforcement efforts to apprehend perpetrators and prevent future crimes.

²³ See Runner, *supra* note 5; Mayo Clinic Staff, *Domestic violence against women: Recognize patterns, seek help*, Mayo Clinic (Mar. 1, 2017), <http://www.mayoclinic.org/healthy-lifestyle/adult-health/in-depth/domestic-violence/art-20048397> (noting that “[domestic] abuse often starts subtly and gets worse over time”).

²⁴ Bever, *supra* note 17.

²⁵ See *Recidivism Trends of Domestic Violence Offenders in Washington State*, Washington State Institute for Public Policy (Aug. 2013), http://www.wsipp.wa.gov/ReportFile/1541/Wsipp_Recidivism-Trends-of-Domestic-Violence-Offenders-in-Washington-State_Full-Report.pdf; Lisak & Miller, *Repeat Rape and Multiple Offending Among Undetected Rapists, Violence & Victims*, Vol. 17, No. 1 (Feb. 2002), <http://www.davidlisak.com/wp-content/uploads/pdf/RepeatRapeinUndetectedRapists.pdf>.

II. SB4’S CARVE-OUT FOR VICTIMS AND WITNESSES DOES NOT INSULATE SURVIVORS OF GENDER-BASED VIOLENCE FROM THE LAW’S CHILLING EFFECT

Under SB4’s so-called “carve-out” provision, a peace officer investigating alleged criminal activity may not inquire about the “nationality or immigration status of a victim of or witness to the offense” except where “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.” Tex. Code Crim. Proc. art. 2.13. While well-intended, this limited carve-out provision for victims of and witnesses to crimes does not diminish the law’s chilling effect on immigrant survivors of gender-based violence.

First, the carve-out is exceedingly narrow. It operates only to preclude inquiries into a person’s immigration status when that person is a victim of or witness to suspected criminal activity, *see* Tex. Code Crim. Proc. art. 2.13(d); it does not otherwise affect or limit SB4’s general requirement that localities must allow local officials to “assist[] or cooperat[e] with a federal immigration officer as reasonable or necessary, including providing enforcement assistance.” *See* Tex. Gov’t Code § 752.053(b)(3). The carve-out thus does nothing to diminish the perception or reality that, under SB4, local police in Texas function as an arm of the federal immigration authorities—precisely the circumstance that gives rise to the harms and chilling effect discussed above. Nor does the carve-out apply to the

myriad circumstances outside the context of being a victim to or witness of a crime in which a survivor might encounter the police in her community, such as during community or public-safety events.

Second, by expressly permitting officers to inquire about a victim's or witness's immigration status "if the officer has probable cause to believe that the victim or witness has engaged in specific conduct constituting a *separate* criminal offense," Tex. Code Crim. Proc. art. 2.13(e)(2) (emphasis added), the carve-out fails to account for the unique dynamics of domestic-abuse situations. When police are called to respond to a domestic-abuse incident, survivors are often arrested alongside their abusers, either because the abuser fabricates counter-charges, or because the abuser makes false reports about the survivor in retaliation for her calling the police.²⁶ For example, Tahirih knows of one incident in which an abuser retaliated against a survivor by setting fire to his house and then calling the police to report that his wife had done it; in another circumstance, an abuser retaliated by planting drugs in his wife's car and smashing her taillight in the hope that she would be pulled over.²⁷ Women who come into contact with the police as

²⁶ Legal Voice Violence Against Women Workgroup, *Abusive Litigation and Domestic Violence Survivors (DV Manual for Judges 2015)*, Appendix H, Washington State Administrative Office of the Courts (2015), <https://www.courts.wa.gov/content/manuals/domViol/appendixH.pdf>.

²⁷ Tahirih Justice Center, *Promoting Public Safety by Ensuring Access to Police Protection for Immigrant Women and Girls* (May 5, 2017), <http://www.>

a result of such circumstances are not covered by SB4's carve-out for victims and witnesses. To the contrary, under SB4, an abuser could circumvent the carve-out's protections entirely through the simple device of accusing a survivor of a crime, including an immigration-related offense, such as unlawful entry, *see* 8 U.S.C. § 1325(a).

Finally, even if the carve-out provision could in theory reduce a survivor's fear of reporting crime, it would not do so in practice unless the survivor had a detailed understanding of how the law works. Many of amici's clients do not speak English and face significant barriers to understanding SB4's key provisions, including its broad exception to the carve-out provision allowing police to ask about immigration status when they deem the inquiry necessary to investigate a criminal offense. Tex. Code Crim. Proc. art. 2.13(e)(2). Without extensive efforts to educate the public about the carve-out—which the law does not require and which might not reach survivors of domestic violence who are likely to be isolated from such outreach—the carve-out cannot mitigate SB'4 harms and chilling effect.²⁸

tahirih.org/wp-content/uploads/2017/05/White-Paper_Promoting-Public-Safety-by-Ensuring-Access-to-Police-Protection.pdf.

²⁸ Tex. Gov't Code § 752.057(a) provides only that local law-enforcement agencies “may adopt” community-outreach policies.

III. SB4 CONTRAVENES CONGRESS’S INTENT TO PROTECT THE SAFETY OF UNDOCUMENTED SURVIVORS OF GENDER-BASED VIOLENCE

Finally, by deterring immigrant survivors of gender-based violence from accessing protections specifically designed for them under federal immigration laws, SB4 directly contravenes congressional intent. To ensure that immigrant women feel safe reporting crimes to the local police, Congress has enacted multiple laws that provide assistance and protection to immigrant survivors of gender-based violence, sexual assault, and human trafficking. Two laws in particular—the Violence Against Women Act of 1994 (“VAWA”), Pub. L. No. 103-322, § 40101-40703, 108 Stat. 1796, 1953-1955, and the Trafficking Victims Protection Act of 2000 (“TVPA”), Pub. L. No. 106-386, §§ 107, 1501-13, 114 Stat. 1464-1548—are designed to encourage noncitizen women to seek out emergency services, report crimes, and cooperate with local law enforcement without fear that they will be turned over to federal immigration authorities. Both statutes, and their subsequent reauthorizations, have enjoyed longstanding and widespread bipartisan support in Congress.²⁹

SB4 undercuts and, unless enjoined, will continue to undercut the important protections of these laws for immigrant survivors of gender-based violence across

²⁹ The most recent reauthorization of VAWA, which included TVPA reauthorization, passed the Senate by a vote of 78-22 and the House of Representatives by a vote of 286-138. *See* 159 Cong. Rec. H800 (daily ed. Feb. 28, 2013); 159 Cong. Rec. S616 (daily ed. Feb. 12, 2013).

Texas. By coercing local safety officers into enforcing federal immigration laws, Tex. Gov't Code § 752.053(b)(2)-(3), the law deters the very reporting and cooperation those Acts sought to engender.³⁰ It rewards and emboldens abusers, while keeping survivors in danger—precisely the outcome Congress sought to prevent.

A. Violence Against Women Act

In passing VAWA, Congress acknowledged that “[m]any immigrant women live trapped and isolated in violent homes, afraid to turn to anyone for help. They fear both continued abuse if they stay with their batterers and deportation if they attempt to leave.” H.R. No. 103-395, at 25 (1993). For some, deportation may involve additional trauma such as forced separation from children, including those who are U.S. citizens, and even worse, relinquishment of the child directly to the abuser. One purpose of VAWA, therefore, was to “permit[] battered immigrant women to leave their batterers without fearing deportation.” *Id.*

³⁰ SB4 also raises concerns regarding whether the confidentiality protections afforded to survivors of gender-based violence under federal law would apply in cases where local law enforcement officers act as immigration officers. Under federal law, immigration officials cannot rely on information furnished solely by an abuser in making an adverse determination on a survivor’s U-visa or VAWA petition. But under SB4, an abuser could circumvent these protections by reporting adverse information to the police, knowing that it would likely be shared with immigration officials. Because local officers are not immigration officials, they may not be bound by the same confidentiality limitations. *See* 8 U.S.C. § 1367(a)(1)(E).

VAWA fulfilled this purpose in two important ways. First, it prevented U.S. Citizen and Lawful Permanent Resident abusers from exploiting their spouses' immigration status. An immigrant married to a U.S. Citizen or Lawful Permanent Resident often depends on her spouse to petition for lawful permanent residence on her behalf. In the context of an abusive relationship, however, that dependency can serve as an effective tool for the abuser to deter the survivor from reporting abuse. VAWA altered that dynamic by allowing immigrant survivors of domestic violence and sexual assault to "self-petition" for lawful permanent residence on behalf of themselves and their children without the knowledge or involvement of an abusive spouse or family member. *See* Pub. L. No. 103-322 § 40701, 108 Stat. 1953-1954. Second, VAWA permitted certain survivors who were already in immigration proceedings to seek cancellation of removal by showing extreme hardship if they were not permitted to remain in the United States, effectively shielding them from deportation. In typical immigration proceedings, to successfully obtain cancellation of removal, an applicant must demonstrate that removal would cause hardship to a qualifying relative—in many cases, an applicant's spouse. Recognizing that an applicant's spouse is often her abuser, VAWA helps to break the abusive dynamic between an immigrant survivor and her perpetrator by permitting a survivor to obtain cancellation of removal by

instead showing that removal would cause hardship to herself. *See* Pub. L. No. 103-322 § 40703, 108 Stat. 1955.

B. Trafficking Victims Protection Act

In 2000, Congress strengthened VAWA’s protections for immigrant women with the passage of the TVPA. Pub. L. No. 106-386, 114 Stat. 1464. This law not only improved access to VAWA’s existing forms of relief, but also established two additional visa classifications for noncitizens: the “U” visa for immigrant victims of violent crime, 8 U.S.C. § 1101(a)(15)(U), and the “T” visa for immigrant victims of severe forms of human trafficking, *id.* § 1101(a)(15)(T). Moreover, the TVPA expanded access to services for noncitizen survivors of gender-based violence and sexual assault and enhanced funding opportunities for local law enforcement to respond to their unique needs. Pub. L. No. 106-386 § 1512, 114 Stat. 1533.

Like VAWA, these provisions were designed “to remove immigration laws as a barrier that kept battered immigrant women and children locked in abusive relationships.” Pub. L. No. 106-386 § 1502, 114 Stat. 1518. To that end, the TVPA fosters and relies on greater collaboration between law enforcement and immigrant victims of crimes. The purpose of these protections, as expressly stated in the statutory text, is to “strengthen the ability of law enforcement agencies to detect, investigate, and prosecute cases of domestic violence, sexual assault,

trafficking of aliens, and other crimes”; to “encourage law enforcement officials to better serve immigrant crime victims and to prosecute crimes committed against aliens”; and to “facilitate the reporting of crimes to law enforcement officials by trafficked, exploited, victimized, and abused aliens who are not in lawful immigration status.” Pub. L. No. 106-386 § 1513(a)(2)(A)-(B), 114 Stat. 1533-1534. Congress thus recognized that local law enforcement succeeds in protecting public health and safety when all members of the community are willing to come forward and cooperate with authorities. And it affirmed that these protections were “in keeping with the humanitarian interests of the United States.” *Id.* § 1513(a)(2)(A), 114 Stat. 1533.

By imposing obstacles for immigrant survivors of gender-based violence seeking to access the federal protections created by VAWA and TVPA, SB4 operates to deny immigrant survivors the benefits granted to them by Congress. *Cf. Hines v. Davidowitz*, 312 U.S. 52, 67 (1941) (reiterating the well-settled proposition that a state law is preempted where it “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”). The district court correctly found that the portion of SB4 that places enforcement authority in the hands of local officers is preempted because it “likely go[es] against the program put in place by Congress.” *See* Order at 33. The same

concerns apply to the enforcement of the law as it affects survivors of gender-based violence.

CONCLUSION

The Court should affirm the district court's injunction and enjoin those provisions challenged on cross appeal that were not enjoined (Tex. Gov't Code §§ 752.053(b)(1) and (b)(2), and (a)(1) and (a)(2) in their entirety).

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g)(1), the undersigned hereby certifies that this brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5), 32(a)(7)(B)(i), and 28.1(e)(2)(A)(i).

1. Exclusive of the exempted portions of the brief, as provided in Fed. R. App. P. 32(f), the brief contains 5,042 words.

2. The brief has been prepared in proportionally spaced typeface using Microsoft Word 2016 in 14 point Times New Roman font. As permitted by Fed. R. App. P. 32(g)(1), the undersigned has relied upon the word count feature of this word processing system in preparing this certificate.

/s/ Jamie S. Gorelick

JAMIE S. GORELICK

October 20, 2017

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of October, 2017, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit using the appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

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