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TEXAS'S IMMIGRATION LAW AND CONSTITUTIONAL CHANGE

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1. In 2021, Texas Governor Greg Abbott claimed that President Biden's "open border policies" created a migration "crisis" at the U.S. southern border. He decided to take matters into his own hands. The Governor launched "Operation Lone Star," a state anti-immigration program in which Texas state officials "work around-the-clock to detect and repel illegal crossings, arrest human smugglers and cartel gang members, and stop the flow of deadly drugs . . . into our nation." In other words, Governor Abbott designed Operation Lone Star to fill a gaping void in immigration enforcement by the federal government—a void that imposes significant burdens, dangers, and harms on the state of Texas.

As part of Operation Lone Star, Governor Abbott and Texas officials adopted several key measures. For example, the state installed physical barriers along the border to deter and prevent migration. The state positioned a 300-meter floating barrier, comprised of buoys separated by saw blades that supported a submerged net, in a strategic portion of the Rio Grande River. It also installed concertina wire (or razor wire) along the banks of the Rio Grande.

Governor Abbott also initiated a program to transport migrants out of Texas and to selected cities in other parts of the country. Governor Abbott claimed that these cities, which self-identify as "sanctuary cities" for

migrants, encourage unauthorized immigration to the United States, and that they should therefore share the burden of supporting migrants when they arrive.

Most recently, Texas enacted a measure that authorizes state officials to enforce the state's own immigration law. S.B. 4 allows Texas officers to arrest and detain migrants. It also requires Texas state courts to deport migrants.

But there is a glaring problem with Operation Lone Star: It violates federal law. Under the U.S. Constitution and federal law, the federal government, not the states, has the authority and responsibility to enforce immigration law. As a general matter, federal immigration law preempts state law, leaving states with little authority in immigration-related matters. In short, Texas cannot enforce its own immigration program.

Governor Abbott and Texas officials knew this, of course. So why did they adopt their anti-immigration measures? Here's one possibility: Governor Abbott is playing politics. Governor Abbott and many of his fellow Republicans are using migration along the U.S. southern border to attack President Biden and Democrats, who, they say, are not doing enough to stop unauthorized immigration. The argument may have particular resonance in the upcoming presidential election. Indeed, former President Trump opposed a recent congressional effort to provide additional funding for immigration enforcement on the ground that this could mitigate the migration "crisis," taking the issue off the table or even handing President Biden a win on the issue. Operation Lone Star feeds the narrative that President Biden created the border "crisis" and that only Republicans can fix it.

Here's another possibility: Governor Abbott is instigating for constitutional change. Governor Abbott may believe that a reconstituted Supreme Court—including the addition of three justices appointed by then-President Trump—would ultimately reverse decades of U.S. constitutional law and upend settled federalism principles relating to immigration, or at least move incrementally in that direction. This could give Texas and other states vast new powers to enforce their own anti-immigration policies like Operation Lone Star, without regard to federal immigration law.

If Governor Abbott thinks his efforts could lead to constitutional change, big or small, he may be right. To see this, let's take a closer look at current constitutional law, then at one of Texas's policies, S.B. 4.

2. Under the U.S. Constitution's Supremacy Clause, the Constitution and federal laws are "the supreme Law of the Land." U.S. Const. art. VI, cl. 2. In particular, as relevant here, federal laws are supreme over state laws. In other words, as a general matter, federal laws preempt state laws.

Under Supreme Court precedent, federal law can preempt state in four different ways. First, federal law can expressly preempt state law. Federal law expressly preempts state law whenever valid federal law clearly says that it preempts state laws. Express preemption is easy to identify (because it's plain on the face of federal law), but it's sometimes hard to apply. That's because federal preemption clauses are sometimes ambiguous, and it's not always clear how those federal laws interact with state laws that cover the same policy ground.

Second, federal law preempts state law when federal law comprehensively covers a particular policy area, or "field." Under "field preemption," states cannot regulate "in a field that Congress . . . has determined must be regulated by its exclusive governance." *Arizona v. United States*, 567 U.S. 387, 399 (2012). Courts can infer field preemption "from a framework of regulation so pervasive that Congress left no room for the States to supplement it or where there is a federal interest so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." Id.

Third, federal law preempts state law when state law directly conflicts with federal law. Under "conflict preemption," federal law preempts a state law when an individual or organization cannot simultaneously comply with both federal law and state law.

Finally, federal law preempts state law when state law creates an obstacle to federal enforcement. Under "obstacle preemption," federal law preempts a state law that "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

In the area of immigration, the Supreme Court has long held that federal law preempts state law under these approaches. Most recently, just

twelve years ago, the Supreme Court roundly rejected Arizona's effort to implement its own immigration policies. In that case, *Arizona v. United States*, the Court held that federal immigration law preempted three provisions in Arizona's S.B. 1070. First, the Court held that federal law requiring noncitizens to carry proof of registration preempted Section 3, which forbid the "willful failure to complete or carry an alien registration document . . . in violation of" federal law. Ariz. Rev. Stat. Ann. § 13-1509(A). The Court said that Section 3 impermissibly intruded on the federal government's "field" of noncitizen registration." The Court held that Congress, by regulating the entire field of noncitizen registration, left no room for state regulation, even where (as here) state law merely incorporated federal law. The Court explained, "Were Section 3 to come into force, the State would have the power to bring criminal charges against individuals for violating a federal law even in circumstances where federal officials in charge of the comprehensive scheme determine that prosecution would frustrate federal policies." *Id*. at 402.

Second, the Court held that the *lack* of federal law regulating noncitizens' employment preempted Section 5(C), Arizona's attempt to make it a crime for "an unauthorized alien to knowingly apply for work, solicit work in a public place or perform work as an employee or independent contractor." Ariz. Rev. Stat. Ann. § 13-2928(C). The Court wrote that Section 5(C) created an obstacle to federal immigration law, because federal law only makes it illegal for *employers to hire* an unauthorized noncitizen; it does not make it a crime for noncitizens to work (although it does impose civil penalties). The Court said that "lthough Section 5(C) attempts to achieve one of the same goals as federal law—the deterrence of unlawful employment—it involves a conflict in the method of enforcement." Id. at 406. It therefore creates "an obstacle to the regulatory scheme Congress chose." *Id*.

Finally, the Court held that federal law preempted Section 6, the state's attempt to authorize state and local officers to arrest a person if they had probable cause to believe that the person was an unauthorized noncitizen. The Court said that this provision, too, created an obstacle to federal immigration law enforcement. The Court noted that federal law

does not make it a crime for an unauthorized noncitizen to remain in the United States, and therefore federal law only authorizes federal immigration officers to issue an unauthorized noncitizen a "Notice to Appear" at a federal removal proceeding. But "Section 6 attempts to provide state officers even greater authority to arrest aliens on the basis of possible removability than Congress has given to trained federal immigration officers." Id. at 408. "By authorizing state officers to decide whether an alien should be detained for being removable, Section 6 violates the principle that the removal process is entrusted to the discretion of the Federal Government." *Id*. at 109. Section 6 therefore "create an obstacle to the full purposes and objectives of Congress." *Id*. at 410.

3. On December 18, 2023, Texas Governor Greg Abbott signed S.B. 4 into law, creating new state crimes and imposing state penalties on noncitizens who unlawfully enter or attempt to enter Texas. SB 4 also authorizes state courts to remove them.

More particularly, S.B. 4 contains three relevant provisions. First, S.B. 4 makes it a state crime for a noncitizen to "enter or attempt to enter the United States at any time or place other than" a lawful point of entry. There are three exceptions: if the federal government granted the noncitizen lawful presence, including asylum; if the noncitizen received deferred removal under the Deferred Action for Childhood Arrivals program between June 15, 2021, or July 16, 2021; if the noncitizen did not enter the United States in violation of federal law. Violators may receive a fine up to $2,000 a day or imprisonment up to 180 days, or both. If the noncitizen was previously convicted under SB 4, the noncitizen may be fined up to $10,000 or imprisoned between 180 days and two years, or both.

Next, S.B. 4 makes it a crime for a noncitizen to "enter, attempt to enter" or be found in Texas after the person was previously denied admission to the United States or departed from the United States while a removal order was outstanding. Violators are subject to $4,000 or imprisonment of one year or both, with higher penalties under certain circumstances.

Third, S.B. 4 authorizes state judges and magistrates to order the removal

of noncitizens. If a person is charged under S.B. 4, a magistrate judge or state judge may "discharge the person and require the person to return to the foreign nation from which the person entered or attempted to enter" if, among other things, "the person agrees to the order" and has not "previously been" charged with or convicted of certain specified crimes. If a person is convicted under S.B. 4, a state judge "shall enter . . . an order requiring the person to return to the foreign nation from which the person entered or attempted to enter," after they serve any imposed prison sentence. A noncitizen's failure to comply with a removal order is a felony.

Finally, Texas courts cannot "abate the prosecution of an offence" under S.B. 4 "on the basis that a federal determination regarding the immigration status of the defendant is pending or will be initiated." This means that a state court must enforce S.B. 4 (as above), even if the federal government is, or will, considering removal.

Under the Court's ruling in *Arizona*, federal immigration law plainly preempts S.B. 4. So the federal government, along with two civil-society organizations and a Texas county, sued to halt the measure.

A federal district court ruled in the plaintiffs' favor and granted a preliminary injunction prohibiting state officials from enforcing its provisions. *United States v. Texas*, 2024 WL 861526 (W.D. Tex. 2024). The court held that S.B. 4's provisions that criminalized the entry of noncitizens impermissibly encroached on the federal government's "field" of immigration regulation and conflicted with federal immigration law. The court first noted that this provision "contain striking similarities" to Section 3 of S.B. 1070, the corresponding provision in Arizona law that the Supreme Court previously struck. The court then held that S.B. 4's criminalization-of-entry provisions violated federal law for the same reasons that the Supreme Court held that Section 3 of S.B. 1070 violated federal law.

Next, the court held that S.B. 4's provision authorizing Texas state courts to remove noncitizens was "patently unconstitutional." The court held that this provision, like the criminalization-of-entry provisions, impermissibly encroached on the federal government's "field" of immigration regulation

and conflicted with federal immigration law, "because it provides state officials the power to enforce federal law without federal supervision." The court wrote that this provision went beyond what "even the dissenting justices in *Arizona* believed to be constitutional."
The court entered a preliminary injunction prohibiting state officials from enforcing S.B.

4. But the United States Court of Appeals for the Fifth Circuit granted an "administrative stay." This move would have allowed S.B. 4 to go into effect. But the Fifth Circuit stayed its own administrative stay, and the Supreme Court then extended that stay (of the administrative stay) until further action by the Court. All this meant that S.B. 4 would not go into effect until the Court's next order. (The Fifth Circuit's original administrative stay did not address the merits, and it is not an order that the Supreme Court would usually review. It thus seemed like an attempt by the Fifth Circuit to allow S.B. 4 to go into effect without consideration of the merits and while dodging Supreme Court review.)
On March 19, 2024, the Court denied an application to vacate the stay, thus allowing S.B. 4 to go into effect. But just a week later, the Fifth Circuit ruled that federal immigration law likely preempted S.B. 4 and denied Texas an injunction of the district court ruling pending appeal. *United States v. Texas*, 2024 WL 1297164 (5th Cir. 2024). The court, drawing heavily on *Arizona*, followed reasoning similar to the district court.

5. Texas will undoubtedly appeal. And the Supreme Court will likely agree to hear the case. If so, Texas will face a very different Court than Arizona faced in the S.B. 1070 challenge. In particular, two conservative jurists appointed by then-President Trump replaced two justices in the *Arizona* majority. (Justice Kavanaugh replaced Justice Kennedy, who wrote the majority opinion in *Arizona*; and Justice Barrett replaced Justice Ginsburg.) A third conservative jurist appointed by then-President Trump replaced one of the partial dissenters (Justice Gorsuch replaced Justice Scalia), and the other two partial dissenters (Justices Thomas and Alito) remain on the bench. All told, if Justices Kavanaugh and Barrett rule for Texas, the Court will likely rule for Texas, and even overrule all or part of *Arizona*. (Justices Kavanaugh and Barrett have not revealed how they might rule on S.B. 4,

but they wrote separately in the Court's March 19 order to note that the Court was not ruling on the merits.)

Governor Abbott knows this, of course. And he may have seen the reconstituted Court as an invitation to enact S.B. 4 and the other components of Operation Lone Star (which are similarly working their ways through the courts, even, in one case, reaching the Supreme Court on an emergency basis). If so, Governor Abbott's immigration policies aren't just an attempt to create an election issue. They're also an effort to fundamentally change U.S. constitutional law.