No. 23A____

IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA, APPLICANT

v.

STATE OF TEXAS, ET AL.

APPLICATION TO VACATE STAY OF PRELIMINARY INJUNCTION
ISSUED BY THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

ELIZABETH B. PRELOGAR
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

PARTIES TO THE PROCEEDING

Applicant, plaintiff-appellee below, is the United States of America.

Respondents, defendants-appellants below, are the State of Texas; Greg Abbott in his official capacity as Governor of Texas; the Texas Department of Public Safety; and Steven C. McCraw in his official capacity as Director of the Texas Department of Public Safety.

The plaintiffs-appellees in the consolidated case below are American Gateways; the County of El Paso, Texas; and Las Americas Immigrant Advocacy Center.

The defendants-appellants in the consolidated case below are Steven C. McCraw in his official capacity as Director of the Texas Department of Public Safety and Bill D. Hicks in his official capacity as District Attorney for the 34th Judicial District of Texas.

RELATED PROCEEDINGS

United States District Court (W.D. Tex.):

United States v. Texas, No. 24-cv-8 (Feb. 29, 2024)

Las Americas Immigrant Advocacy Ctr. et al. v. McCraw, No. 23-cv-1537 (Feb. 29, 2024)

United States Court of Appeals (5th Cir.):

United States v. Texas, No. 24-50149 (Mar. 2, 2024)

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Pursuant to Rule 23 of the Rules of this Court and the All Writs Act, 28 U.S.C. 1651, the Solicitor General, on behalf of the United States of America, respectfully applies for vacatur of the stay issued on March 2, 2024, by the United States Court of Appeals for the Fifth Circuit (App., infra, 1a-2a).

This suit was brought by the United States to enjoin the enforcement of a new Texas law, Senate Bill 4 (SB4), that would directly regulate the entry and removal of noncitizens. SB4, which was to go into effect on March 5, 2024, would impose state criminal penalties on noncitizens who unlawfully enter or reenter Texas from Mexico and would require Texas courts to order the removal of those noncitizens to Mexico without Mexico's consent and without observing the substantive or procedural requirements of federal law governing removal. SB4 is flatly inconsistent with this

Court's decision in Arizona v. United States, 567 U.S. 387 (2012), and more than a century of this Court's precedents. Those decisions recognize that the authority to admit and remove noncitizens is a core responsibility of the National Government, and that where Congress has enacted a law addressing those issues, state law is preempted. The district court adhered to those principles and granted a preliminary injunction preventing enforcement of SB4.

Respondents appealed and moved for a stay pending appeal and an immediate administrative stay. Less than 24 hours later, before the United States had filed a full response to the stay motion, the court of appeals granted what it called an "administrative stay," stayed the effect of that stay for seven days "pending an application to the Supreme Court of the United States," expedited the appeal, and deferred the motion for a stay pending appeal to the merits panel. App., infra, 2a.

Absent this Court's intervention, SB4 will go into effect at 12:01 a.m. on March 10, 2024, profoundly altering the status quo that has existed between the United States and the States in the context of immigration for almost 150 years. And despite the 114-page district court opinion detailing multiple independent reasons why the law is invalid, that disruptive change would occur without any reasoned ruling by the court of appeals. Instead, by purporting to grant an "administrative" stay but deferring action on the underlying stay motion indefinitely, the court effectively granted a stay pending appeal without engaging in the necessary consider-

ation of likelihood of success on the merits, the balance of harms, or the public interest. Each of those factors makes clear that no stay is warranted here.

On the merits, SB4 is both field and conflict preempted. This Court has long recognized that the regulation of entry and removal of noncitizens is inseparably intertwined with the conduct of foreign relations and thus vested "solely in the Federal Government." Truax v. Raich, 239 U.S. 33, 42 (1915). In the Immigration and Nationality Act (INA), 8 U.S.C. 1101 et seq., Congress has created a comprehensive regime governing the admission and removal of noncitizens. And because the federal government has fully occupied the field of entry and removal, even "complementary state regulation" is preempted. See Arizona, 567 U.S. at 401. Just as Arizona could not "add[] a state-law penalty" for failure to comply with the INA's registration requirements, Texas may not impose state-law criminal penalties for violations of federal entry and reentry provisions and may not implement state-law "decision[s] on removability." Id. at 409. Those matters are committed to the National Government because, inter alia, they "touch on foreign relations." Id. at 401, 409. Indeed, because entry and removal are so central to federal immigration authority, the preemptive force of federal law is even plainer in this case than it was in Arizona.

SB4 also conflicts with federal law in multiple respects. It prevents the Nation from speaking "with one voice" in matters involving foreign affairs. Arizona, 567 U.S. at 409. It exceeds

the carefully limited circumstances in which Congress has authorized state officers to perform the functions of federal immigration officers or otherwise assist those officers in performing their duties. It disregards the INA's reticulated procedures for making removal determinations. It provides for prosecution of noncitizens for violating prohibitions on entry or reentry, thus intruding upon federal immigration officers' determinations regarding how to address a particular noncitizen's circumstances -- e.g., by immediately removing rather than prosecuting the noncitizen. And it requires state judges to order noncitizens removed to Mexico without Mexico's consent and without adhering to the congressionally mandated process for selecting the country of removal.

SB4 also violates the Foreign Commerce Clause. Like the Interstate Commerce Clause, that Clause encompasses regulation of the movement of persons across territorial borders. See United States v. Guest, 383 U.S. 745, 758-759 (1966). And it bars state laws that prevent the federal government from speaking with one voice in matters involving foreign affairs, as SB4 manifestly does. See Japan Line Ltd. v. Los Angeles Cnty., 441 U.S. 434, 451 (1979).

In response to the obvious legal infirmities of its law, Texas has taken the extraordinary and unprecedented position that at least some applications of SB4 are valid under the State War Clause of the Constitution, which generally prohibits States from "engag[ing] in War," with a narrow exception when a State is "actually invaded, or in such imminent Danger as will not admit of delay."

U.S. Const. Art. I, § 10, Cl. 3. That Clause has no application here. A surge of unauthorized immigration plainly is not an invasion within the meaning of the State War Clause. And even if it were, the Clause does not permit States to contradict the federal government's considered response to any invasion that has occurred. Here, Congress has taken that subject fully in hand by enacting the INA, and the State War Clause does not exempt Texas from the Supremacy Clause or the preemption principles it embodies.

The balance of harms and the public interest overwhelmingly support vacating the court of appeals' stay and preserving the status quo while this litigation proceeds. By allowing Texas to remove noncitizens to Mexico without its consent, SB4 would have significant and immediate adverse effects on the United States' relationship with Mexico -- a relationship that is critical to the federal government's ability to effectively address immigration at the southwest border. SB4 would harm the federal government's relationship with other countries and prevent the United States from conducting assessments under treaties concerning removal to countries where the noncitizen may be persecuted or tortured. And beyond its disruptive foreign relations effects, SB4 would create chaos in the United States' efforts to administer federal immigration laws in Texas.

Texas faces no remotely comparable harms from the preliminary injunction. Vacating the stay will merely preserve the longstanding status quo while the litigation proceeds, just as the relevant

provisions of the state law in Arizona were enjoined throughout the litigation in that case. See 567 U.S. at 394. Both the law and the equities overwhelmingly favor the same result here.

We respectfully request that this Court act on this application before the court of appeals' stay of its own order expires and SB4 is permitted to take effect at 12:01 a.m. on Sunday, March 10. Alternatively, if the Court does not act by then, we respectfully request the Court extend the court of appeals' seven-day stay to preserve the status quo pending the Court's consideration of the application.

STATEMENT

A. Background

1. The INA establishes a comprehensive federal statutory regime for the regulation of immigration. Congress granted the Attorney General and the Secretary of Homeland Security (Secretary) the authority to administer that regime. 8 U.S.C. 1103(a) and (g); 6 U.S.C. 251. As relevant here, the INA sets forth a comprehensive framework with detailed rules governing the entry and removal of noncitizens.[1] It identifies who may and may not be admitted to the United States, see, e.g., 8 U.S.C. 1181, 1182, 1188; prescribes how noncitizens may enter the country lawfully, see, e.g., 8 U.S.C. 1223-1225; and imposes penalties on those who unlawfully enter or reenter the country, see 8 U.S.C. 1325, 1326.

[1] This application uses the term "noncitizen" as equivalent to the statutory term "alien." See Barton v. Barr, 140 S. Ct. 1442, 1446 n.2 (2020) (quoting 8 U.S.C. 1103(a)(3)).

The INA also comprehensively governs the removal of noncitizens. Congress provided for formal removal proceedings to be conducted before the Immigration Court, a specialized tribunal in the Department of Justice. With limited exceptions for other federally initiated procedures, the formal removal proceedings are the "sole and exclusive procedure for determining whether an alien may be * * * removed from the United States." 8 U.S.C. 1229a(a)(3). Only federal officials acting on behalf of the Secretary may initiate such proceedings. 8 C.F.R. 239.1(a). Federal law establishes the grounds on which a noncitizen may be ordered removed, the requirements for commencing and administering proceedings, and the procedural protections afforded to noncitizens, see, e.g., 8 U.S.C. 1182(a), 1225, 1227(a), 1228, 1229, 1229a. Congress also provided various grounds on which a noncitizen may apply for relief or protection from removal, including asylum, withholding of removal, and protections under Article 3 of the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (Convention Against Torture or Convention), see, e.g., 8 U.S.C. 1158(a) and (b), 1231(b)(3), 1232; 8 C.F.R. 208.16(c)-208.18, 1208.16(c)-1208.18. The Executive Branch has discretion to grant various other forms of relief from removal, including cancellation of removal and adjustment to lawful-permanent-resident status. See, e.g., 8 U.S.C. 1229b(a) and (b), 1255.

One of the exceptions to the application of formal removal proceedings is the procedure for expedited removal of certain

noncitizens arriving in the United States. See DHS v. Thuraissigiam, 140 S. Ct. 1959, 1964-1966 (2020). The expedited-removal procedure authorizes immediate removal of covered noncitizens, but provides for an interview by a DHS asylum officer and review by an Immigration Judge if a noncitizen expresses fear of persecution or the intent to seek asylum. See 8 U.S.C. 1225(b)(1).

The INA also establishes the method for determining the country to which a noncitizen may be removed. See 8 U.S.C. 1231 (b). DHS has the responsibility to work with foreign governments to determine whether they will accept noncitizens who are subject to removal orders. See 8 U.S.C. 1231(b)(1) and (2); 8 C.F.R. 241.15; see also 8 U.S.C. 1158(a)(2)(A). And federal law imposes particular limits on removing a noncitizen to a "foreign territory contiguous to the United States" when the noncitizen is not a "native, citizen, subject, or national of," or prior resident of, that territory. 8 U.S.C. 1231(b)(2)(B).

The INA expressly contemplates several ways in which state and local officers may assist or cooperate with federal officials in their enforcement of the INA. State and local law-enforcement officers are expressly authorized to make arrests for violations of the INA's prohibitions against smuggling, transporting, or harboring noncitizens. See 8 U.S.C. 1324(c). Similarly, state and local officers may (if authorized by state law) arrest and detain a noncitizen who is illegally present in the United States if the noncitizen was previously convicted of a felony in the United

States and then was deported or left the United States. 8 U.S.C. 1252c. That express authority is conditioned, however, on receiving prior confirmation from federal immigration officials of the noncitizen's status, and detention may extend no longer than necessary for federal officers to take the noncitizen into custody for purposes of removal proceedings. 8 U.S.C. 1252c(a). In addition, if the Secretary determines that an actual or imminent mass influx of noncitizens presents urgent circumstances requiring an immediate federal response, he may authorize any state or local officer (with the permission of the officer's agency) to exercise the authority of federal immigration officers. See 8 U.S.C. 1103(a)(10).

Congress has also authorized DHS to enter into formal cooperative agreements with States and localities. 8 U.S.C. 1357(g). Under those agreements, appropriately trained and qualified state and local officers may perform specified functions of a federal immigration officer in relation to the investigation, apprehension, or detention of noncitizens. 8 U.S.C. 1357(g)(1)-(9). The state officers' activities under those agreements "shall be subject to the direction and supervision of the [Secretary]." 8 U.S.C. 1357(g)(3).[2] And even absent such a formal agreement, the INA provides that state and local officers may "communicate with the [Secretary] regarding the immigration status of any in-

[2] Section 1357 refers to the Attorney General, but those functions have been transferred to the Secretary. 6 U.S.C. 251(2).

dividual," or "otherwise * * * cooperate with the [Secretary] in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States." 8 U.S.C. 1357(g)(10).

2. Against the backdrop of that comprehensive framework, Texas adopted its own immigration law, SB4, with an effective date of March 5, 2024. Three provisions of SB4 are relevant here.

First, SB4 effectively makes it a state crime for a noncitizen to violate 8 U.S.C. 1325(a), the INA's criminal unlawful-entry provision, by barring noncitizens from "enter[ing] or attempt[ing] to enter [Texas] directly from a foreign nation at any location other than a lawful port of entry." Tex. Penal Code § 51.02(a). It is an affirmative defense to violations of that provision if "the federal government has granted the defendant * * * lawful presence in the United States" or "asylum." Id. § 51.02(c). Violations of Section 51.02 are Class B misdemeanors, punishable by fines up to $2000 and 180 days of imprisonment. Id. § 12.22, 51.02(b). If a noncitizen has previously been convicted under that section, a subsequent violation is a felony, punishable by fines up to $10,000 and 180 days to two years of imprisonment. Id. § 12.35, 51.02(b).

Second, SB4 creates a state crime paralleling 8 U.S.C. 1326(a), the federal unlawful reentry provision, by barring noncitizens from "enter[ing], attempt[ing] to enter," or being "found in" Texas after they have "been denied admission to" the United States, have been removed from the United States, or have

departed the United States while an order of "removal is outstanding." Tex. Penal Code § 51.03(a). SB4 provides no affirmative defenses for a violation of Section 51.03. Violations are Class A misdemeanors, punishable by fines up to $4000 and imprisonment for up to one year. Id. § 12.21, 51.03(b).

Third, SB4 allows a state judge to order the removal of a noncitizen under certain circumstances. Tex. Code Crim. P. art. 5B.002. In particular, when a person is charged with offenses under Section 51.02 or 51.03 but not yet convicted, a 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 "the person agrees to the order" and has not "previously been" charged with or convicted of specific crimes. Art. 5B.002(a)-(c). If a noncitizen is convicted under SB4, the 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 completion of the state prison sentence. Art. 5B.002(d). Texas law-enforcement personnel must monitor the noncitizen's compliance with the state removal order. Art. 5B.002(e). Failure to comply with the order is a second-degree felony. Tex. Penal Code § 51.04.

For any of the offenses created by SB4, the law states that a "court may not abate the prosecution of [the relevant offense] on the basis that a federal determination regarding the immigration status of the defendant is pending or will be initiated." Tex. Code Crim. P. art. 5B.003.

B. Proceedings Below

1. In separate suits, the United States and a set of plaintiffs comprising the County of El Paso and two private groups challenged SB4 in the District Court for the Western District of Texas. App., infra, 5a. The United States and the other plaintiffs moved for preliminary injunctions preventing the implementation of SB4, and the district court consolidated the cases. Id. at 4a. In a thorough 114-page opinion, the court granted a preliminary injunction and declined to stay the injunction pending appeal. Id. at 3a-116a.

The district court first rejected Texas's threshold arguments. App., infra, 12a-31a. The court held that the private plaintiffs have standing, id. at 12a-24a; rejected Texas's contention that certain defendants had sovereign immunity, id. at 24a-26a; held that the United States is entitled to bring a suit for equitable relief against the State, id. at 27a-29a; and declined to abstain from deciding the motions, id. at 29a-31a.

Turning to the merits, the district court held that the United States and the private plaintiffs are likely to succeed on the merits of their claims that SB4 is field preempted, conflict preempted, and inconsistent with the Foreign Commerce Clause. App., infra, 31a-67a. With respect to field preemption, the court explained that "over a century of Supreme Court cases" recognize the federal government's dominant interest in regulating entry and removal of noncitizens, id. at 32a; that Congress occupied the

field by enacting a comprehensive framework governing entry and removal of noncitizens, see id. at 35a-38a; and that this Court has squarely rejected state attempts to enact "the sort of 'concurrent' criminalization that Texas seeks to impose," id. at 38a (quoting Arizona, 567 U.S. at 400).

The district court further held that SB4 conflicts with federal law in numerous respects, including that it "provides state officials the power to enforce federal law without federal supervision," App., infra, 56a, "divests federal immigration authorities of the discretion of the enforcement of immigration laws, which touches on delicate considerations of foreign affairs," id. at 57a, "prevent[s] noncitizens from asserting affirmative defenses to removal that would have been available in the federal system," ibid., and does not adhere to federal law with respect to removal destinations, id. at 60a-61a.

With respect to the Foreign Commerce Clause, the district court held that SB4 facially discriminates against foreign commerce by criminalizing the movement only of noncitizens across an international boundary and also undermines the federal government's ability to "speak with one voice in regulating commercial affairs with foreign states." App., infra, 66a (citation omitted); see id. at 64a-67a.

The district court next rejected Texas's invocation of the State War Clause. App., infra, 67a-100a. That Clause provides that "[n]o State shall, without the Consent of Congress * * *

engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay." U.S. Const. Art. 1, § 10, Cl. 3. The court held that "Texas's argument fails for at least three reasons": "unauthorized immigration does not constitute an 'invasion'"; "Texas is not 'engaging in war' by enforcing SB4 4"; and even "if Texas were engaging in a war, it would have to abide by federal directives." App., infra, 67a-68a (brackets omitted).

Turning to the remaining preliminary injunction factors, the district court found that the United States would suffer irreparable harm if SB4 goes into effect. App., infra, 101a-106a. And the court further held that the balance of the equities and public interest weigh in favor of a preliminary injunction, given the United States' sovereign interest in regulating immigration and Texas's lack of any legitimate interest in enforcing an unconstitutional law. Id. at 109a-110a. After concluding that "the nature of SB4 does not lend itself to a partial injunction," the court enjoined the law in full. Id. at 111a.

2. Respondents appealed to the Fifth Circuit and, shortly before midnight on March 1, 2024, filed a motion for a stay pending appeal. That motion included a one-sentence "request[] [for] an administrative stay to prevent irreparable harm while the Court considers this Motion." C.A. Stay Mot. 19. Within hours, the United States filed a short opposition to respondents' request for an administrative stay. C.A. Doc. 37 (Mar. 2, 2024). The United States explained that "[a]n administrative stay 'in this context

. . . is only intended to preserve the status quo until the substantive motion for a stay pending appeal can be considered on the merits.'" Id. at 2 (quoting Doe #1 v. Trump, 944 F.3d 1222, 1223 (9th Cir. 2019)); see ibid. (collecting similar cases from other circuits). Because allowing SB4 to go into effect would dramatically alter the status quo, the United States argued that an administrative stay was not warranted. Id. at 3-4. The United States also stated that it intended to file its response to the motion for a stay pending appeal later on March 2, and that the court of appeals would then be able to resolve that motion with the benefit of adversarial briefing before SB4 was set to take effect on March 5. Id. at 4.

Early in the evening on March 2, without waiting for that full response, the court of appeals granted respondents' motion for a "temporary administrative stay," expedited the appeal "to the next available Oral Argument Calendar," and deferred consideration of respondents' motion for a stay pending appeal "to the oral argument merits panel." App., infra, 2a.[3] In response to a

[3] This practice of granting what is purportedly "administrative" relief while deferring action on the merits of a stay motion is increasingly common in the Fifth Circuit and often results in the "administrative" stay remaining in place throughout the appeal, with the merits panel ultimately denying the underlying stay motion as moot when it issues a merits opinion. See, e.g., Petteway v. Galveston Cnty., No. 23-40582 (Oct. 18, 2023) (granting administrative stay and deferring stay motion to merits panel, which affirmed but extended the administrative stay pending an en banc poll through November 20, 2023); United States v. Abbott, No. 23-50632 (Sept. 11, 2023) (granting administrative stay and deferring stay motion to merits panel, which resolved the appeal on the merits on December 1, 2023); Missouri v. Biden, No. 23-30445

request by the plaintiffs in the consolidated case, the court "stay[ed] the temporary administrative stay for seven days following the date hereof pending an application to the Supreme Court." Ibid. Judge Ramirez noted that he "would not grant a temporary administrative stay and would defer the question" to the merits panel. Ibid.

Accordingly, absent further action by this Court, the court of appeals' stay will take effect at 12:01 a.m. on Sunday, March 10, 2024, thereby allowing enforcement of SB4 for the first time. The Fifth Circuit has not yet indicated when it will assign the case to a merits panel or hold oral argument.

ARGUMENT

The United States respectfully requests that this Court vacate the Fifth Circuit's stay of the district court's preliminary injunction. "The well-established principles" that guide the determination whether "to stay a judgment entered below are equally applicable when considering an application to vacate a stay." Certain Named & Unnamed Non-Citizen Children & Their Parents v. Texas, 448 U.S. 1327, 1330 (1980) (Powell, J., in chambers). In considering such an application, this Court has thus looked to the traditional "four-factor test" for a stay. Alabama Ass'n of Real-

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(July 14, 2023) (granting administrative stay and deferring stay motion to merits panel, which resolved the case on the merits on September 8, 2023); Campaign Legal Ctr. v. Scott, No. 22-50692 (Aug. 12, 2022) (granting an administrative stay and deferring stay motion to merits panel, which resolved the appeal on the merits on September 29, 2022).

tors v. HHS, 141 S. Ct. 2485, 2488 (2021) (per curiam). That test asks: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." Nken v. Holder, 556 U.S. 418, 426 (2009) (citation omitted). Each of those factors strongly supports vacating the stay in this case. And vacatur is especially appropriate because the court of appeals has granted what amounts to a stay pending appeal without even purporting to consider the relevant factors.

I. THE GOVERNMENT IS LIKELY TO SUCCEED ON THE MERITS

If the court of appeals overturned the preliminary injunction in this case, there is a strong likelihood that this Court would grant a writ of certiorari and reverse. A decision upholding SB4 would conflict with decisions of other courts of appeals and flout this Court's binding precedent on a matter of national importance.

A. This Court Would Likely Grant Review If The Court Of Appeals Reversed The Preliminary Injunction

Review in this Court would clearly be in order if the court of appeals reverses the district court's injunction. As the district court held, SB4 is plainly preempted under this Court's decision in Arizona. See App., infra, 32a, 38a. And as the district court also recognized, see id. at 36a, 49a, 57a, other courts of appeals have repeatedly upheld injunctions barring en-

forcement of other state criminal statutes that purport to replicate federal immigration laws. See United States v. South Carolina, 720 F.3d 518, 532-533 (4th Cir. 2013); Valle del Sol Inc. v. Whiting, 732 F.3d 1006, 1026-1028 (9th Cir. 2013), cert. denied, 572 U.S. 1060 (2014); Georgia Latino Alliance for Human Rights v. Governor of Georgia, 691 F.3d 1250, 1263–1267 (11th Cir. 2012); United States v. Alabama, 691 F.3d 1269, 1285-1288 (11th Cir. 2012), cert. denied, 569 U.S. 968 (2013). A decision upholding SB4 would conflict with those decisions.

In addition, the enormous practical and legal consequences of a decision upholding SB4 would warrant this Court's review even absent a square conflict with this Court's precedents and the decisions of other courts of appeals. See, e.g., Biden v. Texas, 597 U.S. 785 (2022) (reviewing, in the absence of any circuit conflict, a preliminary injunction that interfered with the Executive's discretionary judgments about whether to return noncitizens to Mexico). The district court found that SB4 "would immediately disrupt sensitive foreign relations agreements, particularly around the destination for the removal of noncitizens," and could "irreparably derail[]" ongoing discussions with Mexico intended "to reduce irregular migration at the southern border." App., infra, 102a-103a. Moreover, Texas's attempt (C.A. Stay Mot. 15-17) to defend some applications of SB4 as an exercise of the power to "engage in War" in response to an "inva[sion]," U.S. Const. Art. I, § 10, Cl. 3, could have far-reaching ramifications

under our constitutional structure. See John Yoo, Why Texas Cannot Treat Illegal Immigration as an 'Invasion', National Review (Nov. 18, 2022), https://perma.cc/SB23-KK6Y ("[I]f the border influx amounts to war," Texas "could attack drug-cartel members not only across the border but all the way back to their hideouts. The implications for foreign relations are obvious.").

B. Federal Law Preempts SB4

The district court also correctly held that the United States is likely to prevail on the merits of its claim that SB4 is both field and conflict preempted.

1. SB4 impermissibly intrudes into a field reserved to, and occupied by, the federal government

"[T]he States are precluded from regulating conduct in a field that Congress, acting within its proper authority, has determined must be regulated by its exclusive governance." Arizona v. United States, 567 U.S. 387, 399 (2012). Field preemption "can be inferred 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.'" Ibid. (citation omitted). Congress's enactment of the INA's comprehensive and detailed regime governing entry and removal and its vesting of authority in the Executive to administer and enforce all aspects of that regime demonstrate that federal law fully occupies this field, and the dominant federal

interests in this context strongly reinforce that conclusion.

a. This Court has repeatedly held that the "authority to control immigration -- to admit or exclude aliens -- is vested solely in the Federal Government," Truax v. Raich, 239 U.S. 33, 42 (1915), and that the formulation of "[p]olicies pertaining to the entry of aliens and their right to remain here * * * is entrusted exclusively to Congress," Galvan v. Press, 347 U.S. 522, 531 (1954) (citations omitted). The allocation of that authority to the federal government reflects the fundamental proposition that the United States' "policy toward aliens is vitally and intricately interwoven with * * * the conduct of foreign relations." Harisiades v. Shaughnessy, 342 U.S. 580, 588-589 (1952). This Court has long emphasized that "[i]t is fundamental that foreign countries concerned about the status, safety, and security of their nationals in the United States must be able to confer and communicate on this subject with one national sovereign, not the 50 separate States." Arizona, 567 U.S. at 395; see Hines v. Davidowitz, 312 U.S. 52, 66 (1941) ("[T]he regulation of aliens is so intimately blended and intertwined with responsibilities of the national government that where it acts, and the state also acts on the same subject * * * the law of the State * * * must yield.").

In recognition of those dominant federal interests and the National Government's paramount authority in this area, Congress enacted the INA, which today comprehensively regulates the entry and removal of noncitizens. See Patel v. Garland, 596 U.S. 328,

331 (2022) ("Congress has comprehensively detailed the rules by which noncitizens may enter and live in the United States. When noncitizens violate those rules, Congress has provided procedures for their removal."). Congress has determined which noncitizens may be admitted to the United States and the procedures for their admission. 8 U.S.C. 1181-1188, 1201-1204. Congress has provided "the sole and exclusive procedure for determining whether an alien may be admitted to the United States or, if the alien has been so admitted, removed from the United States." 8 U.S.C. 1229a(a)(3). Congress has included a detailed process for selecting the countries to which noncitizens may be removed and called upon federal officials to coordinate with the relevant foreign governments in executing removal orders. 8 U.S.C. 1231. Congress has specified when a noncitizen's entry into the United States is a crime. 8 U.S.C. 1325(a) and (b), 1326. And Congress has provided immigration officers with broad and often unreviewable discretion in exercising the authorities it has vested in them. Arizona, 567 U.S. at 396, 409; see Reno v. American-Arab Anti-Discrimination Comm., 525 U.S. 471, 483-484, 485 n.9 (1999).

Because Congress, in the INA, has thus fully occupied the field of noncitizen entry and removal, there is "no room for the States to supplement it," even through "complementary state regulation." Arizona, 567 U.S. at 399, 401. Texas's attempt to supplement federal law through SB4 is therefore preempted. As the district court recognized (App., infra, 32a, 38a), that result is

compelled by this Court's holding in Arizona that the doctrine of field preemption prohibited the State from enacting a criminal penalty for failure by a noncitizen to comply with the INA's registration requirements. See 567 U.S. at 400-403. Like Arizona, Texas has attempted to "add[] a state-law penalty for conduct proscribed by federal law." Id. at 400. Here, as there, "federal statutory directives provide a full set of standards," including "the punishment for noncompliance." Id. at 401. Here, as there, the statutory framework "was designed as a 'harmonious whole.'" Ibid. And here, as there, "[p]ermitting the State to impose its own penalties for the federal offenses * * * would conflict with the careful framework Congress adopted." Id. at 402.

Indeed, because the regulation of entry and removal of noncitizens lies at the core of the federal government's sovereign prerogatives to regulate immigration, field preemption is even clearer in this case than in Arizona. The Court has recognized that "decision[s] on removability * * * touch on foreign relations and must be made with one voice." Arizona, 567 U.S. at 409; see Jama v. Immigration & Customs Enforcement, 543 U.S. 335, 348 (2005) ("Removal decisions, including the selection of a removed alien's destination, 'may implicate [the Nation's] relations with foreign powers' and require consideration of 'changing political and economic circumstances.'") (citation omitted).

Allowing "a single State" to make determinations regarding entry and removal would allow that State "at her pleasure" to

"embroil us in disastrous quarrels with other nations." Chy Lung v. Freeman, 92 U.S. 275, 280 (1875); accord Arizona, 467 U.S. at 395. And if multiple States followed Texas's example and enacted their own immigration policies and enforcement measures, the resulting patchwork would cause an even greater interference with the Nation's ability to speak with one voice in international affairs. See Arizona, 567 U.S. at 395. It is therefore unsurprising that even the dissenting Justices in Arizona did not suggest that States could intrude on federal prerogatives in the way that SB4 does. See id. at 427 (Scalia, J., concurring in part and dissenting in part) (noting that Arizona's law "does not represent commencement of the removal process unless the Federal Government makes it so"); id. at 457 (Alito J., concurring in part and dissenting in part) (emphasizing that under Arizona law "[t]he Executive retains complete discretion over whether [the noncitizens] are ultimately removed").

b. Texas's contrary arguments are unavailing. Texas has attempted (C.A. Stay Mot. 12) to limit Arizona to noncitizen registration. But while that was the particular field at issue in Arizona, Texas has provided no reasoned basis for confining the Court's analysis to the particular provisions of the INA at issue there. And Texas has not shown how SB4's direct regulation of the core subjects of entry and removal could withstand field preemption analysis when the state registration law in Arizona could not.

Texas has also asserted (C.A. Stay Mot. 11-12) that Congress

did not preempt the field of entry and removal because federal law provides certain immigration-related roles for States. See, e.g., 18 U.S.C. 758 (creating federal crime of fleeing from federal immigration checkpoint and from "Federal, State, or local law enforcement agents in excess of the legal speed limit"); 8 U.S.C. 1101(a)(15)(T)(i)(III)(aa) (referencing state "prosecution of acts of trafficking"). But none of Texas's cited laws permits States to regulate the entry and removal of noncitizens. And Texas simply ignores Section 1357(g), which expressly allows States to "cooperate with the [Secretary] in the identification, apprehension, detention, or removal of aliens," 8 U.S.C. 1357(g)(10)(B) (emphasis added), and thus makes clear that the role of state and local officials in this area is to assist the Secretary in enforcement of federal law. As the district court recognized (App., infra, 63a), that limited provision for States to work hand-in-hand with the federal government would mean nothing if any State could "claim[] unlimited concurrent immigration authority."

Texas also cannot avoid the preemptive force of federal law by contending that orders under SB4 are not "removals." As the district court explained, Texas's own declarant stated that SB4 envisions that state officials would "escort[] a noncitizen to the border" where the noncitizen would "either depart into Mexico or * * * face 20 years in prison if they do not." App., infra, 45a. Given that choice, "it is rather absurd to argue" that Texas is not effectively removing the noncitizens. Ibid. And, as the court

recognized (id. at 46a), the fact that the removal is not "in handcuffs" but only "under threat of handcuffs (and 20 years of prison)" does not abate the significant foreign affairs concerns created by a State's forced return of noncitizens to Mexico outside of the process Congress specified for the federal government to identify the countries to which noncitizens may be removed and to coordinate with foreign governments to determine if they will accept those noncitizens. See 8 U.S.C. 1231(b).

2. SB4 conflicts with federal immigration law

SB4 is also preempted because it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Arizona, 567 U.S. at 399 (citation omitted).

a. It would fundamentally disrupt the federal immigration regime to allow a single State to make unilateral determinations regarding unlawful entry and removal. The enforcement of federal immigration law necessarily imposes consequences for foreign nationals based on acts committed in violation of federal law and can involve a sensitive weighing of interests in national security, border security, foreign affairs, and reciprocal treatment of U.S. citizens abroad. See Arizona, 567 U.S. at 395. Decisions regarding entry and removal thus must take account of the federal government's foreign relations interests.

Allowing a single State to imprison foreign nationals for immigration violations or order them removed from the United States to a non-consenting foreign country without regard to the interests

of the Nation as a whole is patently inconsistent with the framework Congress enacted. Just as there was an impermissible "conflict" when a State premised tort liability on fraud committed against a federal agency due to the "somewhat delicate balance" that would be "skewed by allowing" such state-law claims, see Buckman Co. v. Plaintiffs' Legal Committee, 531 U.S. 341, 348 (2001), so too would SB4 upset the balance Congress struck in providing for federal enforcement of the immigration laws. See Arizona, 567 U.S. at 406 (holding that even though Arizona's law "attempts to achieve one of the same goals as federal law," it "would interfere with the careful balance struck by Congress").

In recognition of the necessity of ensuring the Nation speaks "with one voice" in matters with such significant implications for foreign affairs, Congress provided for only "limited circumstances in which state officers may perform the functions of an immigration officer." Arizona, 567 U.S. at 408, 409. In each of those circumstances, the state officers are subject to the oversight of federal officials, who take the lead in fashioning enforcement priorities and techniques that the state officers must respect. For example, States may enter into an agreement with DHS to allow qualified state officers to carry out functions of an immigration officer "subject to the direction and supervision of the [Secretary]," and only after they have "received adequate training." 8 U.S.C. 1357(g)(2)-(3); see Arizona, 567 U.S. at 408-409. Outside of such formal agreements, state officers may "cooperate with the

[Secretary] in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States." 8 U.S.C. 1357(g)(10)(B). Such cooperation, for example, could include participation in a "joint task force with federal officers." Arizona, 567 U.S. at 410. But "no coherent understanding of the term ['cooperate'] would incorporate the unilateral decision of state officers to arrest an alien for being removable absent any request, approval, or other instruction from the Federal Government." Ibid. SB4 thus conflicts with federal law by "go[ing] far beyond" the measures contemplated by Congress, "defeating any need for real cooperation," and "allow[ing] the State to achieve its own immigration policy." Id. at 408, 410.

The specifics of SB4's entry and removal provisions further illustrate its incompatibility with the scheme Congress enacted. SB4 denies both the federal government and individual noncitizens access to the INA's procedures for determining removability, 8 U.S.C. 1225(b) and 1227, and prevents noncitizens from asserting defenses to removal that would be available in the federal system, including asylum, see 8 U.S.C. 1158(a)(1), withholding, see 8 U.S.C. 1231(b)(3), and protections under the Convention Against Torture, see 8 C.F.R. 1208.16(c)(2). Indeed, SB4 expressly rejects any deference to federal removal proceedings that could result in a grant of asylum or other relief or protection from removal by prohibiting a state court from "abat[ing] the prosecution" on "the basis that a federal determination regarding the immigration sta-

tus of the defendant is pending or will be initiated." Tex. Code Crim. P. art. 5B.003. In so doing, "SB4 plainly conflicts with federal law by instructing state judges to disregard pending federal defenses." App., infra, 58a. Similarly, SB4 fails to replicate the exemption from the federal prohibition on reentry for noncitizens who enter with the Secretary's consent. See 8 U.S.C. 1326. SB4 thus criminalizes conduct federal law deems permissible.

SB4 also conflicts with federal law because it permits state judges to order a noncitizen to return to Mexico without following the federally prescribed process for selecting the country of removal and coordinating with that country. Under federal law, a noncitizen who does not enter through a port of entry first must designate a country of removal, which can be disregarded only in certain circumstances. 8 U.S.C. 1231(b)(2)(A) and (C). If the noncitizen cannot be removed to that country, there is a hierarchy of removal countries, starting with the noncitizen's country of citizenship. 8 U.S.C. 1231(b)(2)(D) and (E). And the INA places specific limits on removal to a "foreign territory contiguous to the United States." 8 U.S.C. 1231(b)(2)(B). Accordingly, removal to Mexico is not permissible in every case under federal law.

Under SB4, however, removal is always "to the foreign nation from which the person entered" Texas, Tex. Code Crim. P. art. 5B.002(c) and (d) -- that is, Mexico. That requirement conflicts with federal law and would "hamper diplomatic discussions regarding immigration with Mexico." App., infra, 60a. Indeed, this

Court already recognized that mandating the return of non-Mexican nationals to Mexico "impose[s] a significant burden upon the Executive's ability to conduct diplomatic relations with Mexico." Biden, 597 U.S. at 806. Allowing Texas (or other States) to require that result would impose still greater burdens.

b. Texas has failed to confront the multiple ways in which SB4 conflicts with the federal immigration laws. Texas has instead asserted (C.A. Stay Mot. 14) that a noncitizen can comply with both SB4 and federal law. But that ignores this Court's longstanding test for conflict preemption, which is not limited to impossibility. See, e.g., Hines, 312 U.S. at 67.

Texas has argued (C.A. Stay Mot. 12-13) that even if SB4 is broader than federal law in some respects, it is valid under this Court's reasoning in Kansas v. Garcia, 140 S. Ct. 791, 806 (2020). But Kansas dealt with state criminal statutes prohibiting "fraud, forgeries, and identity theft" that applied to "citizens and aliens alike." Id. at 798. In that context, this Court held that the State could apply those laws to noncitizens' use of the identity of other persons on employment forms, even where such an application overlapped with federal law prohibiting the provision of false information on the particular form at issue. Id. at 806-807. In so holding, Kansas did not overrule Arizona or authorize States to enact their own criminal laws governing entry and removal. Rather, Kansas dealt with a generally applicable law that did not "frustrate[] any federal interests." Id. at 806. Here, by contrast,

SB4 specifically targets noncitizens and regulates their entry and removal in a way that frustrates the INA's comprehensive scheme and implicates sensitive issues of foreign relations.

C. SB4 Violates The Foreign Commerce Clause

SB4 also violates the Foreign Commerce Clause. That Clause recognizes that "[f]oreign commerce is preeminently a matter of national concern." Japan Line, Ltd. v. Los Angeles Cnty., 441 U.S. 434, 448 (1979). And the power to regulate commerce has long been understood to encompass the power to regulate the movement in commerce of both persons and commodities. See, e.g., United States v. Guest, 383 U.S. 745, 758-759 (1966). This Court has thus struck down state statutes regulating shipmasters bringing foreign passengers to the States under a dormant Foreign Commerce Clause analysis that reiterated that the "whole subject has been confided to Congress by the Constitution." Henderson v. Mayor of New York, 92 U.S. 259, 274 (1875); see Chy Lung, 92 U.S. at 280.

In assessing state laws implicating foreign commerce rather than interstate commerce, "a more extensive constitutional inquiry is required." Japan Line, 441 U.S. at 446. That inquiry is necessary because if a state law disadvantages foreign nations, such nations may retaliate "so that the Nation as a whole would suffer." Id. at 450. Thus, in addition to considering whether the law discriminates against or unduly burdens foreign commerce, courts must assess whether the state laws would "prevent[] the Federal Government from 'speaking with one voice when regulating

commercial relations with foreign governments.'" Id. at 451. If so, the law "is unconstitutional under the Commerce Clause." Ibid.

SB4 plainly fails that test. It targets only noncitizens, criminalizes their movements and orders their removal across an international border, disrupts the uniformity of the immigration laws, and prevents the federal government from conveying a unified message in an area of sensitive foreign affairs. See, pp. 21-23, 25-29, supra. SB4 therefore violates the Foreign Commerce Clause.

D. The State War Clause Does Not Save SB4 From Preemption

Notwithstanding the preemptive effect of federal immigration law and SB4's incompatibility with the Foreign Commerce Clause, Texas has argued that a preliminary injunction is unwarranted "because at least some applications of SB4 are constitutional" under the State War Clause. C.A. Stay Mot. 15. The district court correctly rejected that argument. See App., infra, 67a-100a.

1. With narrow exceptions, the Constitution provides for a "complete delegation of authority to the Federal Government to provide for the common defense," while "divest[ing] the States of like power." Torres v. Texas Dep't of Pub. Safety, 597 U.S. 580, 590 (2022). That structure reflects the Founders' concern that "'bordering States . . . under the impulse of sudden irritation, and a quick sense of apparent interest or injury[,]' might take action that would undermine foreign relations." Arizona, 567 U.S. at 395 (quoting The Federalist No. 3, at 39 (John Jay) (Clinton Rossiter ed., 2003)). To prevent such an occurrence, the State

War Clause generally prohibits any State to "engage in War," U.S. Const. Art. I, § 10, Cl. 3, leaving decisions about whether and how war should be waged to the federal government alone.

At a time when communications or troops could take weeks to travel from one part of the country to another, however, the Founders recognized the need to account for fast-arising developments to which the federal government had not yet had time to respond. Accordingly, the State War Clause carves out from its general prohibition a narrow exception applicable when a State is "actually invaded, or in such imminent Danger as will not admit of delay," U.S. Const. Art. I, § 10, Cl. 3.

2. For at least three reasons, the State War Clause and its "actually invaded" exception do not save SB4 from invalidity.

a. The exception to the State War Clause applies only where a State has been "actually invaded" or faces the "imminent" threat of such "Danger." U.S. Const. Art. I, § 10, Cl. 3. Because Texas has not been (and is not in imminent danger of being) "actually invaded," it cannot invoke that exception.

The original public meaning of the phrase "actually invaded" indicates that the exception was intended to apply narrowly and is not triggered by "surges in unauthorized immigration" of the sort targeted by SB4. App., infra, 69a. As the district court thoroughly demonstrated, "[c]ontemporary definitions of 'invasion' and 'actually invaded' as well as common usage of the term in the late Eighteenth Century predominantly referred to an 'invasion' as a

hostile and organized military force, too powerful to be dealt with by ordinary judicial proceedings." Id. at 70a; see id. at 71a-75a (surveying contemporaneous dictionaries and usage).

Even if a more expansive understanding of "actually invaded" were linguistically possible, context confirms that the Founders used the phrase in a constrained manner. The State War Clause reflects an intent generally to prohibit States from "engag[ing] in War." U.S. Const. Art. I, § 10, Cl. 3. In recognizing an exception from that prohibition, it was natural for the Founders to refer to circumstances in which a State's temporary engaging in war would be necessary because of the inadequacy of the States' police powers. In contrast, there would have been no need to authorize States to engage in war -- particularly given the risks that would pose to foreign policy, see The Federalist No. 3, at 39 -- to address circumstances that could be addressed through other means. Courts have thus consistently recognized that "invasion" does not include unlawful immigration.[4]

b. Even if Texas could establish that it has been "actually invaded," the effect would be to exempt it temporarily from the

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[4] See California v. United States, 104 F.3d 1086, 1090-1091 (9th Cir.) (observing that James Madison described "invasion" as involving "situations wherein a state is exposed to armed hostility"), cert. denied, 522 U.S. 806 (1997); New Jersey v. United States, 91 F.3d 463, 468 (3d Cir. 1996) (noting that State identified "no support whatsoever" interpreting "the term 'invasion' to mean anything other than a military invasion"); Padavan v. United States, 82 F.3d 23, 28 (2d Cir. 1996) (holding that "invasion" entails "expos[ure] to armed hostility * * * that is intending to overthrow the state's government").

State War Clause's general prohibition on "engag[ing] in War." U.S. Const. Art. I, § 10, Cl. 3. It is not that prohibition, however, that renders SB4 invalid. Enforcement of SB4 is unconstitutional because it is preempted under the Supremacy Clause and inconsistent with the Foreign Commerce Clause, not because it qualifies as prohibited war-making. Congress in the INA addressed the circumstances that Texas would characterize as an invasion, and the State is not free to disregard those provisions.

Texas appears to accept that SB4 is not genuinely "a 'wartime measure'" of the sort that would require an exception from the State War Clause. C.A. Stay Mot. 17 (quoting App., infra, 88a). It has argued, however, that "'the greater power' to wage war" necessarily "'includes the lesser' power to" enforce SB4. Ibid. (quoting Moyer v. Peabody, 212 U.S. 78, 84-85 (1909)). But as the district court observed, "Texas is not engaging in war -- through SB 4 or otherwise -- so it cannot claim that SB 4 is a necessary domestic component of the war effort." App., infra, 89a.

c. Texas's reliance on the exception to the State War Clause also suffers from a third, related flaw. As indicated by the reference to "such imminent Danger as will not admit of delay," U.S. Const. Art. I, § 10, Cl. 3, "the State War Clause grants states the power to engage in war for a very limited time before the federal government can respond," App., infra, 76a. But "once the federal government has had time to respond to the purported invasion," id. at 94a, States are not free to contradict the fed-

eral government's considered decision about how (and whether) to "engage in War" in response to particular circumstances.

Here, Congress has enacted a statute that comprehensively addresses immigration, including illegal immigration. And in this suit, the United States is invoking that statute and seeking to enjoin Texas's enforcement of SB4, in part because the State's enforcement of SB4 would seriously harm the Nation's foreign relations. Under those circumstances, the State War Clause provides no basis for allowing Texas to enforce SB4 over the United States' explicit opposition. See Torres, 597 U.S. at 592 ("The States ultimately ratified the Constitution knowing that their sovereignty would give way to national military policy.").

E. The United States May Sue In Equity To Enjoin Preempted State Laws

The district court correctly recognized that the United States may sue in equity to enjoin the operation of preempted state laws -- especially where, as here, the state laws interfere with the United States' administration and enforcement of federal immigration or other laws. The United States brought just such a suit in Arizona. See 567 U.S. at 393; App., infra, 26a-29a. And it has brought many similar suits against other States. See, e.g., United States v. California, 921 F.3d 865, 875-877 (9th Cir. 2019) (considering preemption and intergovernmental-immunity challenges to three California laws); South Carolina, 720 F.3d at 532-533 (affirming injunction barring application of preempted state laws

affecting immigration in suit brought by the United States); Alabama, 691 F.3d at 1285-1288 (same).

Those suits reflect a particularly well-settled application of the principle that the United States may, in appropriate cases, bring a suit in equity to vindicate the interests of the National Government under the Constitution. The canonical precedent recognizing that authority is In re Debs, 158 U.S. 564 (1895). There, the United States obtained an injunction against the Pullman rail strike, which had "forcibly obstructed" interstate commerce. Id. at 577. In recognizing the United States' authority to seek that relief, this Court reasoned that "[e]very government, entrusted, by the very terms of its being, with powers and duties to be exercised and discharged for the general welfare, has a right to apply to its own courts for any proper assistance in the exercise of the one and the discharge of the other." Id. at 584.

Contrary to Texas's argument (C.A. Stay Mot. 9), the rule applied in Debs is not limited to suits brought "to abate a public nuisance." Rather, Debs endorsed and embodied the "general rule that the United States may sue to protect its interests." Wyandotte Transp. Co. v. United States, 389 U.S. 191, 201 (1967). Applying that same general rule, subsequent decisions have recognized that when the United States sues in equity to protect other sovereign interests, such as the United States' obligation "to carry out treaty obligations," "no statute is necessary to authorize the suit." Sanitary Dist. v. United States, 266 U.S. 405,

425-426 (1925); see, e.g., United States v. American Bell Tel. Co., 128 U.S. 315, 367-368 (1888) (suit to protect the public from fraudulent patents); Heckman v. United States, 224 U.S. 413, 438-439 (1912) (suit to protect Indian tribes). Texas identifies no sound basis for holding that the United States' sovereign interests at issue here are any less deserving of protection in equity.[5]

In addition, the United States may proceed against the officer defendants under the doctrine of Ex parte Young, 209 U.S. 123, 167 (1908). A suit against state officials is proper under that doctrine where, as here, the plaintiff alleges an imminent or "ongoing violation of federal law and seeks relief properly characterized as prospective." Virginia Office for Prot. & Advocacy v. Stewart, 563 U.S. 247, 255 (2011) (citation omitted); see Ex parte Young, 209 U.S. at 156 (holding state officers who "threaten" to engage in "an unconstitutional act * * * may be enjoined by a Federal court of equity from such action"). Texas has argued that suits under Ex parte Young "may not be brought by governments" because the doctrine is purportedly "limited to 'private parties.'" C.A. Stay Mot. 9 (citation omitted). But this Court has squarely rejected that view, holding that "there is no warrant in our cases for making the validity of an Ex parte Young action turn on the identity of the plaintiff" and thus allowing such a suit brought by a government agency to proceed. Stewart, 563 U.S. at 256.

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[5] Indeed, SB4 likely would interfere with the United States' compliance with treaty obligations under the Convention Against Torture. See p. 27, supra; App., infra, 58a-59a.

II. THE EQUITIES OVERWHELMINGLY FAVOR VACATUR OF THE STAY

The balance of harms and public interest overwhelmingly support vacatur of the court of appeals' stay. The preliminary injunction entered by the district court simply maintains the longstanding status quo while this litigation proceeds; the court of appeals' stay, on the other hand, would result in direct and irreparable harms to core federal interests.

1. Enforcement of SB4 would interfere with the United States' conduct of foreign affairs. It would also result in substantial injuries to the federal government's interests in avoiding state intrusion into the administration of a statutory scheme committed to the federal government's exclusive authority.

To start, SB4 would significantly harm the United States' relationship with Mexico, the "United States' largest trading partner." App., infra, 103a. As the district court found, "[t]he United States engages in regular talks with Mexico to reduce irregular migration at the southern border," but those "discussions may become irreparably derailed if SB 4 takes effect." Id. at 102a-103a; see D. Ct. Doc. 14-1, at ¶¶ 11-16 (Jan. 12, 2024) (Jacobstein Decl.) (declaration of senior State Department official regarding anticipated effects of SB4 on the United States' relationship with Mexico). Indeed, this Court has recognized that mandating the return of non-Mexican nationals to Mexico "impose[s] a significant burden upon the Executive's ability to conduct diplomatic relations with Mexico." Biden, 597 U.S. at 806.

Enforcement of SB4 is likely to damage other international relationships as well. "It is fundamental that foreign countries concerned about the status, safety, and security of their nationals in the United States must be able to confer and communicate on this subject with one national sovereign, not the 50 separate States." Arizona, 567 U.S. at 395. By overriding federal control of "immigration policy," SB4 would undermine the efficacy of those communications and create a risk that other nations may respond to perceived mistreatment in Texas with "harmful reciprocal treatment of American citizens abroad." Ibid. And because SB4 has no provision to prevent refoulement (the return of a person to a country in which she would face persecution or torture), implementation of the law could likely also cause the United States to violate its treaty obligations. See p. 27, supra; Jacobstein Decl. ¶ 25; App., infra, 106a.

SB4 would also displace federal officers' exercise of discretion in enforcing the immigration laws, including their choice between criminal prosecution and removal. And because SB4 prohibits abatement of a state prosecution while the federal government conducts asylum or adjustment-of-status proceedings, see Tex. Code Crim. P. art. 5B.003, a noncitizen facing SB4 enforcement proceedings "would be unable to participate fully in federal immigration proceedings," "attend scheduled interviews," or "comply with required identity and security check procedures." D. Ct. Doc. 14-3, at 7 (Jan. 12, 2024). Arrests under SB4 would also,

ironically, cause DHS to "lose the ability to pursue expedited removals, which must be used to remove noncitizens within 14 days of their arrival." App., infra, 105a; see id. at 106a-107a (identifying additional forms of harm to the United States).

2. In contrast to the profound harms that enforcement of SB4 would cause to the United States, Texas would face no cognizable harm from a preliminary injunction that merely maintains the longstanding status quo while this litigation proceeds. In its motion for a stay pending appeal, Texas made a cursory invocation of "the public's interest in seeing that laws are enforced." C.A. Stay Mot. 18. As the district court explained, the preliminary injunction would leave Texas free to address "'drug smuggling, human trafficking, and terrorism'" using the same "expansive police powers * * * to regulate crime within its borders" that it has relied on "[f]or the past century." App., infra, 110a (citation omitted). All the preliminary injunction does is prevent Texas from interfering in "the federal field of unlawful entry and removal," ibid., as required by the Constitution and the INA. Texas has no valid interest in achieving that disruptive result.

CONCLUSION

This Court should vacate the stay entered by the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General

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