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Legal Sidebar

Federal Preemption and Texas S.B. 4

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In November 2023, Texas passed Senate Bill 4 (S.B. 4), which makes it a crime for an alien to, among other things, enter or attempt to enter the state from a foreign nation through a location other than a lawful port of entry. The law—which would require an alien, if convicted, to accept a magistrate judge's order to "return to the foreign nation from which the person entered or attempted to enter"—was set to become effective on March 5, 2024. Prior to the law going into effect, a group of nonprofits, a Texas county, and the United States filed suit to halt the law's implementation, arguing among other things that S.B. 4 was preempted because it intrudes on the federal government's exclusive authority over the admission and removal of aliens, interferes with federal immigration authorities' ability to carry out their statutory authorities, and conflicts with federal statutes allowing certain aliens who unlawfully entered the United States to obtain relief from removal.

The cases were consolidated, and in February 2024, a federal district court granted the plaintiffs' request to block S.B. 4 from taking effect. The Fifth Circuit issued an interlocutory decision denying Texas's motion to stay the injunction pending appeal, and S.B. 4 remains paused to date. With the change in presidential Administration in 2025, the United States subsequently filed a notice of voluntary dismissal of its suit. After dismissing the United States' suit, the district court consolidated the original case filed by a group of nonprofits and a Texas county with a different case challenging S.B. 4. On June 24, 2025, a federal district court stayed the consolidated case, including "all deadlines and proceedings." This Legal Sidebar discusses the contents of S.B. 4, the ongoing litigation, and several considerations for Congress. For a more detailed overview of federal preemption and immigration, see this CRS report.

Texas S.B. 4

Texas S.B. 4 has four main provisions related to immigration enforcement. The first provision makes it a state crime for an alien to enter or attempt to enter Texas anywhere other than at a lawful port of entry. A first violation of this provision is a misdemeanor and carries a fine of up to $2,000 and/or imprisonment for up to 180 days. The second makes it a crime for an alien to reenter (or attempt to reenter) Texas after being removed or ordered removed from the United States. Unless an enhancement applies, a violation of this provision is a misdemeanor and carries a fine of up to $4,000 and/or imprisonment for up to one year. The third authorizes a state judge or magistrate judge to order, under certain circumstances, the removal of an alien charged under either of the first two provisions back to "the foreign nation from which the person entered or attempted to enter" and requires identification of the officer or state agency

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"responsible for monitoring compliance" with the order. Additionally, such an order is mandatory any time an alien is convicted of either of the first two provisions. The fourth provision prevents a state court from abating a prosecution "on the basis that a federal determination regarding the immigration status of the defendant is pending or will be initiated."

S.B. 4 substantially overlaps with the federal statutes criminalizing unlawful entry and reentry, 8 U.S.C. §§ 1325(a) and 1326(a). Section 1325(a) generally makes it a federal crime to improperly enter or attempt to enter the United States, while Section 1326(a) makes it a federal crime for a previously removed alien to reenter the United States without authorization. A first-time offense under Section 1325(a) is punishable by up to six months' imprisonment and both criminal and civil fines. A subsequent violation is a felony punishable by fine and imprisonment for up to two years. Similarly, a violation of Section 1326(a) is a felony subject to a fine and/or imprisonment for up to two years.

Pending Litigation

In legal challenges to S.B. 4, the plaintiffs make similar preemption arguments to those made in *Arizona v. United States*. In that case, the Supreme Court recognized that the United States has "broad, undoubted power over the subject of immigration" and that states "may not pursue policies that undermine federal law." The Court ultimately held that most provisions of an Arizona statute that sought to deter unlawfully present aliens from remaining in the state were preempted by federal law. Here, Texas countered that S.B. 4 is generally not preempted and argued, in part, that federal law does not preempt its authority to defend its borders when it has been "invaded." This theory, informed by Justice Scalia's partial dissent in *Arizona*, rests on the notion that the sovereignty of a state includes the right to exclude people who have no right to be in the United States. Texas also claimed that the organizational and El Paso County plaintiffs lacked standing to sue.

District Court Issues Preliminary Injunction

In February 2024, a federal district court granted a preliminary injunction blocking S.B. 4 from taking effect. As an initial matter, the district court rejected the state's arguments that the nonfederal plaintiffs—two nonprofit organizations and El Paso County—did not satisfy constitutional standing requirements necessary to bring suit. The court decided that the nonprofit organization plaintiffs, which alleged indirect harms under S.B. 4, had standing because they showed sufficient injury extending "beyond upsetting their abstract social or political goals." The court held that El Paso County also alleged a traceable injury to S.B. 4 because the law would "force it to increase expenditures and jail capacity."

The district court also determined that S.B. 4 was preempted under the Constitution's Supremacy Clause, which establishes that the Constitution, treaties, and federal laws are "the supreme Law of the Land." As such, under the doctrine of federal preemption, federal law generally supersedes conflicting state measures. There are two categories of federal preemption: express and implied. Implied preemption can occur in multiple circumstances. One circumstance, known as "field" preemption, occurs when a pervasive scheme of federal regulation implicitly precludes supplementary state regulation or when states attempt to regulate a field where there is a sufficiently dominant federal interest. "Conflict" preemption, in contrast, occurs when simultaneous compliance with both federal and state regulations is impossible or when state law poses an obstacle to the accomplishment of federal goals. The district court held that S.B. 4 was preempted and spent the majority of its analysis on field preemption. First, the court recognized that the field of immigration is deeply intertwined with the federal government's foreign relations and that the federal government has an interest in admitting and removing aliens. Second, the court indicated that there is no "question that the federal government occupies the field of immigration" given the countless federal immigration statutes and treaties in existence and that Congress has made it clear there is no room for states to supplement this existing framework. Third, relying on the Supreme Court's analysis in

Arizona, the court held that two sections of S.B. 4 seeking to "vest a state with the power to punish federal immigration offenses" were similar to the law in question in *Arizona* that the Supreme Court ruled was largely preempted. Fourth, the court held that the provision in S.B. 4 "authorizing state officials to conduct removals ... intrudes into a particularly sensitive area of foreign affairs" and was field preempted for that reason.

Relying on *Arizona*, the court also held that S.B. 4 gives state officers "the power to enforce federal law without supervision" and was thus conflict preempted, as "federal immigration law is conducted under the watch of federal officials in a uniform way across all 50 states." In addition, the court held that S.B. 4 takes away federal immigration officers' discretion in the enforcement of immigration law, instructs "judges to disregard pending federal defenses," contradicts federal immigration law requiring consideration of various factors related to removal, and exceeds penalties that currently exist under federal immigration law. Finally, the court addressed Texas's "invasion" argument that it has a constitutional right to defend itself from an "invasion at the border." This argument relied on the Compact Clause of the U.S. Constitution, which provides that "[n]o State shall, without the Consent of Congress ... engage in War, unless actually invaded, or such imminent Danger as will not admit of delay." The court held that unlawful immigration is not considered an "invasion" under the U.S. Constitution, enactment of S.B. 4 was not a wartime response, and even if Texas were at war it would have to "cede authority to the federal government to conduct that war once the federal government has had time to respond to the purported invasion." According to the court, "Texas either *is* engaging in war, in which case it must obey federal war directives once the federal military has responded, or it *is not* engaging in war, in which case the [Compact Clause] does not apply."

Subsequent Judicial Proceedings

Texas appealed, and after several rounds of rulings from the Fifth Circuit and the Supreme Court, the Fifth Circuit issued an interlocutory decision denying Texas's motion to stay the injunction pending appeal. The Fifth Circuit held that Texas failed to show that it would likely succeed on the merits in the case and that there was sufficient authority to support the claim that S.B. 4 is field or conflict preempted. On appeal, Texas again argued that the plaintiff organizations and El Paso County lacked standing to bring suit, but the Fifth Circuit found it unnecessary to consider these arguments because the United States had standing, which was enough "to satisfy Article III's case-or-controversy requirement." The Fifth Circuit was also not convinced that the Compact Clause, or Texas's "invasion at the border" argument, would compel a different result.

The United States' lawsuit was initially filed during the Biden Administration. Following the change in Administration, on February 11, 2025, the Fifth Circuit directed the parties to file supplemental briefing on whether they had changed positions on any issues on appeal. On March 18, 2025, the United States filed a notice of voluntary dismissal with the district court. At an April 2025 status conference, the district court made comments suggesting that some of President Trump's executive orders and actions since taking office could impact the court's view of the merits of the case. The court also expressed continued concern over S.B. 4's provision giving state judges "authority to, on their own, deport people." On April 3, 2025, the district court closed the case involving the United States. The district court then un-stayed the original case filed in 2023 by a group of nonprofits and a Texas county (the Las Americas plaintiffs) and consolidated that case with a different case filed in 2024 by a nonprofit and individual plaintiffs (the La Union plaintiffs). The case with these remaining plaintiffs is now titled *Las Americas Immigrant Advocacy Center v. Martin*. On May 5, 2025, Director Freeman Martin of the Texas Department of Public Safety, one of the defendants in the case, filed an answer and a motion to dismiss the Las Americas plaintiffs' complaint, arguing that the plaintiffs lack standing, that the claim against him is barred by state sovereign immunity and the Eleventh Amendment, and that the plaintiffs' claims fail as a matter of law. The defendant argues, for example, that President Trump's recognition of an "invasion at the border"

bolsters "Texas's original invocation of a constitutional affirmative defense, but fundamentally undermines Plaintiffs' claims." Further, the defendant argues that with recent federal and state collaboration on immigration enforcement in Texas, at least some applications of S.B. 4 are not preempted. On June 17, 2025, the remaining defendants filed a similar answer and motion to dismiss the La Union plaintiffs' complaint. On June 24, 2025, the district court stayed the consolidated case, including "all deadlines and proceedings" because "the preliminary injunction order issued in Las Americas remains on appeal."

It is unclear whether the United States leaving the case will affect the ability of the consolidated suit to proceed. Texas earlier argued that the nonfederal plaintiffs did not satisfy constitutional standing requirements. Although the district court previously ruled that the nonfederal entities had standing, the Fifth Circuit found it unnecessary to reach the issue on account of the United States' participation in the suit. If the consolidated case proceeds and is appealed, the Fifth Circuit might need to directly address the remaining plaintiffs' standing to bring suit.

Considerations for Congress

Several other states—including Oklahoma, Iowa, Louisiana, Florida, and Arizona—have adopted measures similar to Texas S.B. 4, and all have been the subject of litigation. For more information about these other measures, see this CRS report. Congress has considered measures to address some of the issues and arguments in the pending litigation. For example, H. Res. 1031, introduced in the 118th Congress, would have expressed the sense of Congress that the situation at the southern U.S. border is an "invasion." The bill's sponsor indicated that the bill was intended "to help support legal arguments of states in federal court." H. Res. 50, introduced in the 119th Congress, would declare, among other things, that "from 2021 through 2024, the United States failed to protect the [southern border states] against invasion pursuant to" the Guarantee Clause of the Constitution and that states have "the sovereign right to exclude from [their] territory any person who does not have the right to be here" and can defend themselves from "invasion."

Congress may also consider enacting legislation that amends or repeals existing federal immigration statutes upon which some states have patterned their own enforcement measures. For example, the New Way Forward Act (H.R. 2374) in the 118th Congress would have, among other things, repealed the illegal entry and reentry statutes under 8 U.S.C. §§ 1325 and 1326 and statutes addressing communication and coordination between federal and state or local law enforcement regarding immigration enforcement under 8 U.S.C. §§ 1373 and 1644. Alternatively, Congress may consider legislation that provides the states with greater control over immigration regulation within their borders. For example, the State Immigration Enforcement Act (H.R. 218) in the 119th Congress would allow states and localities to enact and enforce civil and "criminal penalties that penalize the same conduct that is prohibited" in the civil and criminal provisions of federal immigration laws. This bill would appear to seek to allow the enactment of a state law such as S.B. 4 without the concern that such state law could be preempted by federal immigration law.

Congress could also enact legislation that further expands immigration enforcement cooperation between the federal government and state and local governments. Section 1357(g) of Title 8 of the *U.S. Code* permits U.S. Immigration and Customs Enforcement (ICE) to enter into cooperative agreements ("287(g) agreements") with state and local law enforcement to perform certain immigration functions under ICE's direction and oversight. The 287(g) Program Protection Act (H.R. 756) in the 119th Congress would require the Department of Homeland Security to approve applications for 287(g) agreements within 90 days and would prevent termination or denial of any applications without a compelling reason. On the other hand, Congress could constrict this kind of cooperation. For example, the PROTECT Immigration

Act (S. 1336) in the 117th Congress would have rescinded state and local immigration enforcement authority under 8 U.S.C. § 1357(g).

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