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IS IT TOO LATE TO PROSECUTE GOVERNOR GREG ABBOTT?

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IS IT TOO LATE TO PROSECUTE GOVERNOR GREG ABBOTT?

Brian Owsley[1]

INTRODUCTION

During the Biden Administration, the federal government and the Texas state government, headed by Governor Greg Abbott, were engaged in a battle over immigration policy and control of the Texas-Mexico border. This battle fit within a wider bipartisan struggle where other Republican governors and legislatures also enacted policies hostile to federal immigration policy. Indeed, some governors and states followed Governor Abbott's lead in confronting the Biden Administration's immigration policy.

Moreover, the Republican-controlled House of Representatives issued articles of impeachment against Department of Homeland Security Secretary Alejandro Mayorkas because he failed to adequately control undocumented immigrants at the Texas-Mexico border.[2] This battle prompted a clash between President Joe Biden and Texas Governor Greg Abbott, raising policy issues, political questions, and constitutional concerns.

However, Governor Abbott's approach to immigration policy appeared to be in tension with itself. On the one hand, he pushed the Texas Legislature to enact legislation authorizing Texas to engage in immigration policy. At the same time, he took measures and encouraged others to take steps that appear to violate federal criminal immigration statutes. Specifically, he engaged in conduct and encouraged others to transport or move undocumented individuals within the United States, which violates federal law.[3] In other words, Governor Abbott appears to have crossed the

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[2] Rebecca Beitsch, *Republicans Impeach Mayorkas in Historic Vote*, THE HILL (Feb. 12, 2024, at 19:21 ET), https://thehill.com/homenews/house/4466356-republicans-impeach-mayorkas-in-historic-vote/ (on file with UNT Dallas Law Review).

[3] Sergio Martínez-Beltrán, *Texas Has Spent More Than $148 Million Busing Migrants to Other Parts of the Country*, TEXAS TRIBUNE (Feb. 21, 2024, at 10:00 CT), https://www.texastribune.org/2024/02/21/texas-migrants-busing-cost-greg-abbott/ (on file with UNT Dallas Law Review).

line from engaging in politics into a realm where he breaks the federal laws he often complains about, while the federal government ignores his actions.

Governor Abbott and his state immigration policies have multiple legal problems. First, to the extent that they involved the creation of immigration law, they run afoul of the Federal Constitution and its Supremacy Clause. Federal law retains exclusive jurisdiction for federal courts regarding the prosecution of criminal immigration matters.[4] Second, to the extent that Governor Abbott caused the transportation of undocumented individuals across the United States, he was violating federal criminal law.

In Part I, this article outlines some of the recent immigration initiatives implemented by state officials, most notably by Governor Abbott. In conjunction with Governor Abbott's enactment of state laws criminalizing immigration matters, Part II discusses the Supreme Court's jurisprudence regarding criminal immigration, most notably the decision in *Arizona v. United States*.[5] In light of this jurisprudence, the four components of the Texas law should be found to be preempted. In Part III, this article looks at the history of immigration policy before Governor Abbott's recent endeavors. Finally, in Part IV, the article focuses on Governor Abbott's conduct and potential criminal culpability in the era of the second Trump Administration.

I. STATE INITIATIVES CHALLENGING THE FEDERAL GOVERNMENT'S ROLE IN IMMIGRATION POLICY DURING THE BIDEN ADMINISTRATION

The federal government has historically controlled immigration policy based on constitutional principles. Immigration policy became a central issue in the 2024 presidential election. Texas, led by Governor Abbott, challenged the federal immigration policy implemented by President Biden.

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[4] 8 U.S.C. § 1329; *see also* Ga. Latino All. for Hum. Rts. v. Governor of Georgia, 691 F.3d 1250, 1263–64 (11th Cir. 2012) ("[F]ederal courts maintain exclusive jurisdiction to prosecute for these crimes and interpret the boundaries of the federal statute.").

[5] 567 U.S. 387 (2012). Shortly after the House of Representatives delivered the articles of impeachment to the Senate, the Democrat-controlled body dismissed the charges against Secretary Mayorkas. Mary Clare Jalonick & Farnoush Amiri, *Senate Rejects Impeachment Articles Against Mayorkas, Ending Trial Against Cabinet Secretary*, AP NEWS (Apr. 17, 2024, at 22:51 CT), https://apnews.com/article/mayorkas-senate-impeachment-trial-democrats-29aa775c0e866f4160f320583f261a72 (on file with UNT Dallas Law Review); Ben Jacobs, *It Was Supposed to Be a Shocking Impeachment. Folks, It Fizzled.*, SLATE (Apr. 19, 2024, at 5:45), https://slate.com/news-and-politics/2024/04/immigration-impeachment-marjorie-taylor-greene-mayorkas-johnson-schumer-homeland-security.html (on file with UNT Dallas Law Review).

A. Governor Abbott Launched Operation Lone Star to Promote His Immigration Policies.

In March 2021, Governor Abbott launched Operation Lone Star to enhance security along the Texas-Mexico border in response to inadequate protection from the federal government. In support of this initiative, the Texas Legislature authorized almost two billion dollars for border security, including $750 million for the building of a border wall.[6] Funding also went to Texas National Guard soldiers who were stationed along the border as well as some troopers with the Texas Department of Public Safety.[7] Additionally, some of the money was allocated to enable the conversion of three detention centers into facilities to hold arrested individuals pursuant to Operation Lone Star.[8] The spending for Operation Lone Star ballooned to over ten billion dollars for the barriers and law enforcement personnel.[9]

As part of Operation Lone Star, Texas officials placed concertina wire along the Texas border with Mexico to deter people from entering the state by crossing the Rio Grande.[10] Moreover, Texas erected a thousand-foot barrier that floated in the river between Mexico and Texas.[11] United States Border Patrol agents began cutting the concertina wire, which enraged Texas officials.[12]

In October 2023, Texas Governor Abbott and other Texas state officials sued the United States Department of Homeland Security, its secretary, Alejandro Mayorkas, and other federal officials, seeking to prohibit them from cutting the concertina wire.[13] The complaint sought a preliminary injunction, or a stay of agency action based on the Administrative Procedure

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[6] James Barragan, *Bill Tripling Texas' Border Security Budget and Allocating $750 Million to Wall Construction Becomes Law*, TEXAS TRIBUNE (Sept. 17, 2021), https://www.texastribune.org/2021/09/17/texas-border-wall-security-budget-abbott/ (on file with UNT Dallas Law Review).

[7] *Id.*

[8] *Id.*

[9] Martínez-Beltrán, *supra* note 3.

[10] Texas v. U.S. Dep't of Homeland Sec., No. DR-23-CV-00055-AM, 2023 WL 8285223, at *1, *1 (W.D. Tex. Nov. 29, 2023); Uriel J. Garcia, *Texas Strings Concertina Wire Along New Mexico Border to Deter Migrants*, TEXAS TRIBUNE (Oct. 17, 2023), https://www.texastribune.org/2023/10/17/texas-border-new-mexico-concertina-wire-abbott/ (on file with UNT Dallas Law Review) ("National Guard members also installed 18 miles of concertina wire along the Rio Grande in El Paso.").

[11] Garcia, *supra* note 10.

[12] *Texas v. U.S. Dep't of Homeland Sec.*, 2023 WL 8285223, at *1.

[13] *See generally* Plaintiff's Original Complaint, Texas v. U.S. Dep't of Homeland Sec., No. 2:23-CV-00055, 2023 WL 7002546 (W.D. Tex. Oct. 24, 2023).

Act, as well as common law conversion and trespass to chattel.[14] Eventually, they sought a temporary restraining order barring the cutting of the wire.

In response to the lawsuit, border patrol officials argued that the concertina wire limited its agents from patrolling the border and apprehending individuals with no status to be in the United States.[15] Moreover, they asserted that the wire prevented them from rescuing individuals who may be in distress in the Rio Grande.[16]

After hearings on the motion for a preliminary injunction, United States District Judge Alia Moses denied the motion.[17] First, she determined that the United States Border Patrol and its officials had sovereign immunity that barred the common law claims against it.[18] Moreover, she found that the Texas litigants failed to satisfy their burden that they would likely succeed on the merits of their Administrative Procedure Act claims.[19]

The Texas officials then appealed the denial of their motion for a preliminary injunction and moved for a stay pending their appeal.[20] The United States Court of Appeals for the Fifth Circuit determined that the trespass to chattels claim fit within the Administrative Procedure Act and that it was not barred by immunity.[21] Furthermore, the panel concluded that the Texas litigants were likely to succeed on the merits of their claim and suffer irreparable harm if the preliminary injunction was not granted.[22] Thus, on December 19, 2023, the Fifth Circuit granted the motion to stay pending appeal.

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[14] *Id.* at ¶¶ 61–74.
[15] Texas v. U.S. Dep't of Homeland Sec., 2023 WL 8285223, at *2.
[16] Camilo Montoya-Galvez, *Texas Attorney General Refuses to Grant Federal Agents Full Access to Border Park: 'Your Request is Hereby Denied'*, CBS NEWS (Jan. 27, 2024, at 23:05 ET), https://www.cbsnews.com/news/texas-attorney-general-ken-paxton-refuses-federal-agents-access-shelby-park-eagle-pass-border/ (on file with UNT Dallas Law Review); Dennis Romero, *Woman, 2 Children Die Crossing Rio Grande as Border Patrol Says Texas Troops Prevented Them from Intervening*, NBC NEWS (Jan. 13, 2024, at 23:26 CT), https://www.nbcnews.com/news/us-news/woman-2-children-die-crossing-rio-grande-border-patrol-says-was-preven-rcna133842 (on file with UNT Dallas Law Review); *see also* Texas v. U.S. Dep't of Homeland Sec., 2023 WL 8285223, at *14.
[17] Texas v. U.S. Dep't of Homeland Sec., 2023 WL 8285223, at *1.
[18] *Id.* at *7–10.
[19] *Id.* at *10–17.
[20] Texas v. U.S. Dep't of Homeland Sec., 88 F.4th 1127, 1130 (5th Cir. 2023).
[21] *Id*. at 1133–34.
[22] *Id.* at 1135–36.

However, without any explanation, the United States Supreme Court, in a 5-4 vote, vacated the Fifth Circuit's stay.[23] Justices Alito, Gorsuch, Kavanaugh, and Thomas all voted to deny the Department of Homeland Security's application to vacate the stay.[24]

B. Texas Enacted State Laws to Supplant Federal Immigration Policy.

In 2023, the Texas Legislature passed legislation that Governor Abbott subsequently signed into law, criminalizing illegal entry into Texas by foreign nationals at any place other than a port of entry.[25] Additionally, this Texas statute criminalizes the return to Texas by foreign nationals who have previously been removed from the United States or are subject to a removal order.[26]

Known as SB4 because it originated from the Texas Senate as a bill, the statute also authorizes Texas law enforcement officers to ask people they encounter about their immigration status.[27] Moreover, it authorizes Texas state judges to deport individuals who have ongoing criminal proceedings in which they have not been convicted, provided that the defendant agrees and is not ineligible for this option due to additional criminal charges or prior criminal convictions.[28] Finally, the statute prevents judges from dismissing or staying a state prosecution pursuant to the statute because of a pending federal determination regarding the individual's immigration status.[29]

The federal government filed an action against the State of Texas, Governor Abbott, as well as the Director of Texas Department of Public Safety.[30] Pursuant to a motion for injunctive relief, Senior United States District Judge David Ezra for the United States District Court for the Western District of Texas issued a preliminary injunction on February 29, 2024.[31]

In the order, Judge Ezra determined that the Supremacy Clause established that SB4 was preempted.[32] Moreover, he found that the Texas

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[23] Dep't of Homeland Sec. v. Texas, 144 S. Ct. 715, 715 (2024).
[24] *Id.*
[25] Tex. Penal Code Ann. § 51.02 (2024).
[26] *Id.* § 51.03.
[27] Tex. Code of Crim. Proc. Ann. Art. 5B.002–003 (2024).
[28] *Id.* at Art. 5B.002 (2024).
[29] *Id.* at Art. 5B.003 (2024).
[30] United States v. Texas, 719 F. Supp. 3d 640, 652 (2024).
[31] *Id*. at 651.
[32] *Id*. at 651–52.

statute also violated the dormant Commerce Clause.[33] Judge Ezra rejected Governor Abbott's argument that the increased immigration in Texas constituted an invasion that authorized Texas to defend its borders pursuant to the United States Constitution.[34] Because the United States would suffer irreparable harm if SB4 went into effect, Judge Ezra issued a preliminary injunction of the statute.[35]

The Texas defendants appealed Judge Ezra's order issuing a preliminary injunction to the Fifth Circuit, which issued a temporary administrative stay of that order for seven days.[36] However, two days later, Justice Samuel Alito administratively stayed the Fifth Circuit's order.[37] On March 12, 2024, he extended the Supreme Court's administrative stay until March 18, 2024.[38] When that administrative stay was about to lapse, Justice Alito extended it indefinitely.[39] However, the next day, the Supreme Court, in a 6-3 vote, issued an order denying the application for a stay and vacating Justice Alito's administrative stay.[40]

Justice Sonia Sotomayor issued a dissent joined by Justice Ketanji Jackson.[41] Justice Elena Kagan issued an additional dissent.[42] In a concurring opinion written by Justice Amy Barrett and joined by Justice Brett Kavanaugh, Justice Barrett explained that because the Fifth Circuit simply issued an administrative stay as opposed to a stay pending appeal, the four-factor test set forth in *Nken v. Holder* was unwarranted.[43] However, she

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[33] *Id.* at 663.
[34] *Id.* at 679–80; *see also* U.S. CONST. art. I, § 10, cl. 3 ("No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.").
[35] *United States v. Texas*, 719 F. Supp at 695–97.
[36] United States v. Texas, No. 24-50149, 2024 WL 909612, at *1, *1 (5th Cir. Mar. 2, 2024) (per curiam) (unpublished).
[37] United States v. Texas, No. 23A814, 2024 WL 909451, at *1, *1 (U.S. Mar. 4, 2024) (unpublished).
[38] United States v. Texas, No. 23A814, 2024 WL 1055544, at *1, *1 (U.S. Mar. 12, 2024) (unpublished).
[39] United States v. Texas, No. 23A814, 2024 WL 1151565, at *1, *1 (U.S. Mar. 18, 2024) (unpublished).
[40] United States v. Texas, 144 S. Ct. 797, 797 (2024).
[41] *Id.* at 800 (Sotomayor, J, dissenting).
[42] *Id.* at 805 (Kagan, J, dissenting).
[43] *Id.* at 797–98 (Barrett, J, concurring) (discussing *Nken v. Holder*, 556 U.S. 418, 434 (2009)).

cautioned that there is a legitimate concern an appellate court may delay considering these factors.[44]

Seemingly in response to Justice Barrett's concurring opinion, on the same day the Fifth Circuit determined that its administrative stay should be lifted and dissolved with oral arguments the next day.[45] At oral argument before the Fifth Circuit, Texas Solicitor General Aaron Nielson, arguing on behalf of the Texas litigants, acknowledged that "maybe Texas went too far" in enacting SB4.[46] On March 26, 2024, Chief Judge Priscilla Richman issued an order denying Texas's application for a stay of Judge Ezra's preliminary injunction.[47] Specifically, the Fifth Circuit found that Texas failed to establish it would likely prevail on its preemption claims or its invasive claims.[48]

C. Other States Passed Legislation Similar to the Texas Model Seeking to Supplant Federal Immigration Policy in Various Ways.

In May 2023, the Florida legislature enacted a law signed by Governor Ron DeSantis that criminalized "knowingly and willfully transport[ing] into this state an individual whom the person knows, or reasonably should know, has entered the United States in violation of law and has not been inspected by the Federal Government…."[49] This Florida law echoes the federal statute criminalizing the transportation of undocumented individuals.[50]

In response, a group of plaintiffs with various immigration statuses filed a lawsuit against Governor DeSantis and other Florida officials, including Florida Attorney General Ashley Moody.[51] The plaintiffs filed a motion for preliminary injunction which was granted by a Federal District Judge Roy Altman.[52] He found that the state law was preempted by a federal law which prohibits anyone from knowingly transporting or harboring

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[44] *Id.* at 799–800 (Barrett, J, concurring).
[45] United States v. Texas, 96 F.4th 797, 798 (5th Cir. 2024) (per curiam).
[46] Devan Cole & Tierney Snead, '*Maybe Texas Went Too Far' With Immigration Law, State Lawyer Tells Federal Court*, CNN (Apr. 3, 2024, at 12:51 ET), https://edition.cnn.com/2024/04/03/politics/texas-sb4-immigration-5th-circuit/index.html (on file with UNT Dallas Law Review).
[47] United States v. Texas, 97 F.4th 268, 272 (5th Cir. 2024).
[48] *Id.* at 288.
[49] FLA. STAT. § 787.07(1) (West) (effective July 1, 2023).
[50] *See generally* 8 U.S.C. § 1324.
[51] Farmworkers Ass'n of Fla., Inc. v. Moody, 734 F. Supp. 3d 1311, 1319 (2024).
[52] *Id*. at 1318.

undocumented individuals.[53] Specifically, he explained that criminalizing the transportation of an undocumented individual within the state exceeded the authorization within the Immigration and Nationality Act such that states could prosecute such individuals.[54]

On April 10, 2024, similar to Texas's SB4, Iowa's Republican Governor Kim Reynolds signed a new law criminalizing illegal reentry into Iowa by individuals who have previously been deported or removed from the United States.[55] The law was set to go into effect on July 1, 2024, but was temporarily blocked by a federal judge.[56]

The Iowa law authorizes a state trial judge to order the return of such individual to the country from which the individual entered, provided that the individual agrees to the removal.[57] This law also makes it a felony for anyone to refuse to return to a foreign country when ordered by the state judge.[58] Finally, as with SB4, the statute mandates that "[a] court many not abate the prosecution of an offense under this chapter on the basis that a federal determination regarding the immigration status of the person is pending or will be initiated."[59]

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[53] *Id*. at 1334.
[54] *Id.* at 1323–24; *see also id.* at 1333 ("[F]ederal courts maintain exclusive jurisdiction to prosecute for these crimes and interpret the boundaries of the federal statute." (quoting Ga. Latino All. for Hum. Rts. v. Governor of Georgia, 691 F.3d 1250, 1263–64 (11th Cir. 2012)).
[55] IOWA CODE ANN. § 718C.2 (West 2024).
[56] United States v. Iowa, 737 F. Supp. 3d 725, 751 (S.D. Iowa 2024), *aff'd*, 126 F.4th 1334 (8th Cir. 2025), *vacated*, No. 24-2265, 2025 WL 1113191 (8th Cir. Apr. 15, 2025); *see also* Alisha Ebrahimji & Alexandra Ross, *Iowa Governor Signs Bill that Would Make it a Crime for Some Undocumented Migrants to be in the State*, CNN (Apr. 11, 2024, at 10:46 ET), https://www.cnn.com/2024/04/11/us/iowa-immigration-enforcement-bill-signed/index.html (on file with UNT Dallas Law Review); Hannah Fingerhut, *New Iowa Law Gives State Authority to Arrest and Deport Migrants*, L.A. TIMES (April 12, 2024, at 9:49 PT), https://www.latimes.com/world-nation/story/2024-04-10/iowa-governor-signs-bill-that-gives-state-authority-to-arrest-and-deport-some-migrants (on file with UNT Dallas Law Review); William Morris, *Federal Judge Calls Iowa's New Immigration Law 'Not Defensible,' Grants Injunction*, DES MOINES REGISTER (June 18, 2024, at 16:15 CT), https://www.desmoinesregister.com/story/news/crime-and-courts/2024/06/17/iowa-immigration-law-enforcement-blocked-by-federal-court/74130393007/ (on file with UNT Dallas Law Review).
[57] *Compare* IOWA CODE ANN. § 718C.4 (West 2024), *with* Tex. Code Crim. Proc. Ann. art. 5B.002 (2024).
[58] IOWA CODE ANN. § 718C.5 (West 2024).
[59] *Compare* IOWA CODE ANN. § 718C.6 (West 2024), *with* Tex. Code Crim. Proc. Ann. art. 5B.003 (2024).

In the same month that Governor Reynolds signed Iowa's new law, Governor Kevin Stitt signed a similar one in Oklahoma which criminalized an individual's entry into the state when they had not entered the United States legally: "A person commits an impermissible occupation if the person is an alien and willfully and without permission enters and remains in the State of Oklahoma without having first obtained legal authorization to enter the United States."[60] A person who is convicted for such a violation is guilty of a misdemeanor with a potential sentence of one year and a $500 fine.[61] However, any subsequent conviction for the same offense is a felony with a potential sentence of two years and a $1,000 fine.[62]

The federal government filed a lawsuit against various Oklahoma officials challenging the Oklahoma statute, seeking declaratory and injunctive relief. The district court granted the motion because the United States established that it was likely to prevail on the merits regarding its claim that the Oklahoma statute was field preempted.[63]

Some states have attempted but failed to enact similar legislation as that passed in Texas, Iowa, and Oklahoma. For example, Katie Hobbs, the Democratic governor of Arizona, vetoed a bill from the Republican-controlled legislature that was passed along party lines.[64] Like SB4, the Arizona bill criminalized entry and reentry into Arizona by undocumented individuals.[65] Similar bills in both Mississippi and West Virginia died in committee.[66] However, several other states still have such laws pending in the legislative process.[67] These legislative endeavors, regardless of their ultimate success, demonstrated the stark political divide between the federal government during the Biden administration and many Republican-

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[60] OKLA STAT. ANN. tit. 21 § 1795(B) (West 2024); *see also* United States v. Oklahoma, 739 F. Supp. 3d 985, 994 (W.D. Okla. 2024).
[61] OKLA STAT. ANN. tit. 21 § 1795(C)(1) (West 2024).
[62] *Id.* § 1795(C)(2).
[63] *See generally United States v. Oklahoma*, 739 F. Supp. 3d at 1006.
[64] *Arizona's Democratic Governor Vetoes Border Bill Approved by Republican-Led Legislature*, AP NEWS (Mar. 5, 2024, at 18:20 CT), https://apnews.com/article/arizona-border-bill-hobbs-veto-67830241558eb25d931da176cc306
6bc (on file with UNT Dallas Law Review).
[65] S.B. 1231, 56th Leg., 2d Reg. Sess. (Ariz. 2024).
[66] S.B. 2284, 2024 Leg., Reg. Sess. (Miss. 2024); S.B. 777, 2024 Leg., Reg. Sess. (W. Va. 2024).
[67] H.B. 753, 67th Leg., 2d Reg. Sess. (Idaho 2024); S.B. 522, 2023–2024 Leg., Reg. Sess. (Kan. 2024); S.B. 388, 2024 Leg., Reg. Sess. (La. 2024); H.B. 2523, 102d Gen. Assemb., 2d Reg. Sess. (Mo. 2024); H.B. 5350, 125th Gen. Assemb., 125th Sess. (S.C. 2024).

controlled statehouses. In the end, this divide affected the 2024 presidential outcome.

D. Governor Abbott Transported Undocumented Individuals from Texas to Cities Across the Country.

Additionally, as part of his immigration policy, Governor Abbott bussed undocumented individuals to large Democratic run cities. Specifically, he directed the chief of Texas's Division of Emergency Management "to begin coordinating the voluntary transportation, to Washington, D.C. and other locations outside the State of Texas . . ." via bus or plane.[68] Since initiating the busing in 2022, Governor Abbott sent over 100,000 undocumented individuals to places like New York City, Chicago, Denver, and Washington, D.C.[69] Governor Abbott admitted as much in press releases from the Office of the Texas Governor.[70] He "vowed to continue sending migrants to sanctuary cities until the Biden Administration secures the border."[71]

In December 2023, New York City Mayor Eric Adams issued Emergency Executive Order 538 in response to the buses from Texas. Specifically, he limited their arrival times to Monday through Friday from 8:30 a.m. until 12:00 p.m. at only one specific location with the possibility that violators will be fined and have their buses impounded.[72] Mayor Adams explained that "[w]ith that executive order, we're saying that between a certain period of time, you are allowed to drop off migrants in the city, but

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[68] Letter from Greg Abbott, Governor of Tex., to W. Nim Kidd, Chief, Tex. Div. of Emergency Mgmt. (Apr. 6, 2022) (on file with UNT Dallas Law Review).
[69] Martínez-Beltrán, *supra* note 3.
[70] Press Release, Off. of the Tex. Governor, Texas Transports Over 100,000 Migrants to Sanctuary Cities (Jan. 12, 2024) (on file with UNT Dallas Law Review); *see also* Press Release, Off. of the Tex. Governor, Operation Lone Star Buses Over 50,000 Migrants to Sanctuary Cities (Oct. 6, 2023) (on file with UNT Dallas Law Review).
[71] Brandon Gillespie & Adam Shaw, *Texas Gov. Abbott Sends Stark Message to Sanctuary Cities as Migrant Crisis Continues*, FOX NEWS (Jan. 29, 2024, at 15:03 ET), https://www.foxnews.com/politics/texas-governor-abbott-stark-message-sanctuary-cities-migrant-crisis (on file with UNT Dallas Law Review).
[72] Press Release, Emergency Executive Order 538, Off. of the Mayor of N.Y.C. (Dec. 27, 2023) (on file with UNT Dallas Law Review); Jennifer Bisram & Zinnia Maldonado, *New York City Mayor Eric Adams Issues New Requirements for Charter Buses Carrying Asylum Seekers from Texas*, CBS NEWS (Dec. 28, 2023, at 18:30 ET), https://www.cbsnews.com/newyork/news/new-york-city-mayor-eric-adams-issues-new-requirements-for-charter-buses-carrying-asylum-seekers-from-texas/ (on file with UNT Dallas Law Review).

you're going to do it at the location that we specify so we don't overtax our resources, our manpower and create a disorderly environment."[73]

In response to the overwhelming number of migrants that Governor Abbott was bussing to New York City, Mayor Adams filed lawsuits against the bus companies that were bringing undocumented individuals to the city.[74] In addition to bussing undocumented persons, Governor Abbott flew about 180 immigrants from El Paso to New York, but they were diverted to Philadelphia due to weather before being bused the rest of the way to New York.[75]

When Governor Abbott found it difficult to bus undocumented people to Chicago, he flew 120 such persons from El Paso to Chicago.[76] This flight echoed two flights initiated by Florida Governor Ron DeSantis from San Antonio to Martha's Vineyard in Massachusetts in September 2022.[77] Moreover, he flew people from El Paso to Sacramento in June 2023.[78]

Governor Abbot developed a pattern of transporting undocumented individuals from Texas to other parts of the United States. Indeed, he has

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[73] *More Migrant Buses Arrive in NYC Despite Mayor Adams' Executive Order*, EYEWITNESS NEWS ABC 7 (Dec. 29, 2023), https://abc7ny.com/nyc-migrants-crisis-mayor-adams-executive-order-buses/14239225/ (on file with UNT Dallas Law Review).

[74] Adam Shaw, *NYC Mayor Adams Sues Texas Bus Companies for Transporting Migrants to Sanctuary City, Seeks $700 Million,* FOX NEWS (Jan. 4, 2024, at 16:30 CT) (on file with UNT Dallas Law Review).

[75] *Mayor Announces Executive Order for Buses Transporting Migrants to NYC Amid Flight Chaos*, EYEWITNESS NEWS ABC 7 (Dec. 27, 2023), https://abc7ny.com/nyc-200-migrants-philadelphia-port-authority/14229009/ (on file with UNT Dallas Law Review).

[76] Uriel J. García, *Texas Flies over 120 Immigrants to Chicago in Expansion of Gov. Greg Abbott's Busing Plan*, TEXAS TRIBUNE (Dec. 20, 2023, at 16:00 CT), https://www.texastribune.org/2023/12/20/texas-plane-immigrants-chicago-greg-abbott-busing/ (on file with UNT Dallas Law Review).

[77] Amy Simonson, Priscilla Alvarez & Devan Cole, *DeSantis Claims Credit for Sending 2 Planes Carrying Migrants to Martha's Vineyard in Massachusetts*, CNN (Sept. 15, 2022, at 20:34 ET), https://www.cnn.com/2022/09/14/politics/marthas-vineyard-massachusetts-migrants-planes/index.html (on file with UNT Dallas Law Review); William Melhado & Jinitzail Hernández, *Migrants in San Antonio Lured onto Massachusetts Flights with False Promises of Housing and Jobs*, TEXAS TRIBUNE (Sept. 16, 2022, at 22:00 CT), https://www.texastribune.org/2022/09/16/migrants-texas-massachusetts-ron-desantis/ (on file with UNT Dallas Law Review).

[78] Ashley Zavala, *Florida Gov. DeSantis Defends Migrant Relocation Flights from Texas to Sacramento*, KCRA 3 NEWS (June 7, 2023, at 18:03 PT), https://www.kcra.com/article/florida-gov-desantis-defends-migrant-relocation-flights-from-texas-to-sacramento/44121511 (on file with UNT Dallas Law Review).

been boastful in acknowledging his role in this policy and the resulting actions.

II. THE SUPREME COURT'S JURISPRUDENCE UNDERCUTS SB4

Even though the Supreme Court, in *Arizona v. United States*, upheld the Arizona provision only regarding routine immigration checks during lawful arrests or detentions, Texas and Governor Abbott have reasserted the challenge. One scholar characterized *Arizona v. United States* as a "stunning setback" for such laws based on the rejection of the state's approach by "[a] decisive majority."[79]

Similarly, other state courts have determined that state laws should not impinge on the federal government's role in regulating immigration. For example, the Supreme Court of Colorado held the Immigration and Nationality Act preempted state law by criminalizing the smuggling of undocumented individuals.[80] Colorado's law mirrored many aspects of the federal version, but it criminalized distinct conduct and provided for different penalties than the federal statute.[81]

There are four major components to SB4. This section will analyze each one separately in light of existing jurisprudence, including *Arizona v. United States* and the Supremacy Clause. None of the four components survive scrutiny under the existing case law or the Constitution. Further, although there has been a change in the White House, President Trump and his advisors favor strict immigration policy and strong executive power, the latter of which could create a basis for conflict with state Republican leaders.

A. The Supreme Court Decision in Arizona v. United States is Controlling and Preempts SB4.

In April 2010, the Arizona State Legislature passed the Support Our Law Enforcement and Safe Neighborhoods Act, also known as S.B. 1070, which Governor Jan Brewer signed into law.[82] Later that year, the United

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[79] Lucas Guttentag, *Immigration Preemption and the Limits of State Power: Reflections on Arizona v. United States*, 9 Stan. J. of Civ. Rts. & Civ. Liberties, 1, 1–2 (2013).
[80] Fuentes-Espinoza v. People, 408 P.3d 445, 445 (Colo. 2017).
[81] *Id.* at 454.
[82] Arizona v. United States, 567 U.S. 387, 393 (2012); *see also* Guttentag, *supra* note 79, at 7–8 (discussing S.B. 1070 and the legislature's intent).

States filed in federal court seeking to stop the statute's enforcement before the law could take effect.[83]

The district court did not enjoin the entire act, but it enjoined four provisions that (1) interfered with the existing federal statute by creating state-law penalties for unlawful presence in the United States,[84] (2) created a state-law crime for working or seeking work while not authorized to do so,[85] (3) required state and local officers to verify the citizenship or alien status of anyone who was lawfully arrested or detained,[86] and (4) authorized warrantless arrests of aliens believed to be removable from the United States.[87] In addition to the likelihood of success, the trial court also found that the United States would suffer irreparable harm.[88] On appeal, the United States Court of Appeals for the Ninth Circuit affirmed the district court.[89]

The United States Supreme Court then addressed whether federal immigration statutes precluded Arizona's efforts at cooperative law enforcement and preempted the four provisions of the Arizona statute on their face.[90] As an initial matter, the Court explained that the federal government "has broad, undoubted power over the subject of immigration and the status of aliens," which echoed over a century of the Court's jurisprudence.[91]

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[83] *See generally* United States v. Arizona, 703 F. Supp. 2d 980 (D. Ariz. 2010), *aff'd*, United States v. Arizona, 641 F.3d 339 (9th Cir. 2011), *aff'd in part, rev'd in part,* Arizona v. United States, 567 U.S. 387 (2012).
[84] *Id.* at 998–99.
[85] *Id.* at 1000.
[86] *Id.* at 993.
[87] *Id.* at 1004–06.
[88] *Id.* at 1006–07.
[89] United States v. Arizona, 641 F.3d 339, 339 (9th Cir. 2011), *aff'd in part*, *rev'd in part*, Arizona v. United States, 567 U.S. 387 (2012).
[90] Arizona v. United States, 567 U.S. 387, 398 (2012) ("The issue is whether, under pre-emption principles, federal law permits Arizona to implement the state-law provisions in dispute.").
[91] *Id.* at 394–95 ("The federal power to determine immigration policy is well settled."); *see also* De Canas v. Bica, 424 U.S. 351, 354 (1976) ("Power to regulate immigration is unquestionably exclusively a federal power."); Galvan v. Press, 347 U.S. 522, 531 (1954) ("Policies pertaining to the entry of aliens and their right to remain here are . . . . entrusted exclusively to Congress . . . ."); Hines v. Davidowitz, 312 U.S. 52, 66–67 (1941) ("[W]here the federal government, in the exercise of its superior authority in this field, has enacted a complete scheme of regulation and has therein provided a standard for the registration of aliens, states cannot, inconsistently with the purpose of Congress, conflict or interfere with, curtail or complement the federal law, or enforce additional or auxiliary regulations."); Truax v. Raich, 239 U.S. 33, 42 (1915) ("The authority to control immigration—to admit or exclude aliens—is vested solely in the Federal government."); Chy Lung v. Freeman, 92

Pursuant to the Supremacy Clause, the federal government may preempt state laws.[92] Such statutes can be preempted in two ways. First, if the subject matter is such that the federal government occupies the entire field, then states are preempted even if their statutes arguably are complementary to the federal objectives. Second, the preemption doctrine applies when state laws conflict with federal ones.

The Supreme Court, in an opinion written by Justice Anthony Kennedy, struck down three of these provisions for violating the Supremacy Clause. First, the Court determined that Arizona's law criminalizing a person's unlawful presence in the United States conflicted with the federal alien registration requirements and enforcement provisions already in place.[93] Applying *Hines v. Davidowitz*, the Court determined that Congress created a comprehensive federal plan for alien registration such that the federal government occupied the field.[94]

Second, it held that Arizona's law criminalizing working or seeking work while not authorized was preempted because its method of enforcement interfered with the careful balance Congress struck with federal laws on the unauthorized employment of aliens.[95] Specifically, the Court explained that Arizona's law constituted an obstacle to the federal regulation and control established in the Immigration Reform and Control Act of 1986.[96]

U.S. 275, 280 (1875) ("The passage of laws which concern the admission of citizens and subjects of foreign nations to our shores belongs to Congress, and not to the States.").

[92] *See* U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."); *accord Arizona v. United States*, 567 U.S. at 399; State v. Anaya-Espino, 114 So. 3d 1248, 1254 (La. Ct. App. 2013), *writ denied*, 133 So. 3d 671 (La. 2014) ("The Supremacy Clause of the U.S. Constitution requires the invalidation of any state legislation that burdens or conflicts in any manner with any federal laws or treaties.").

[93] *Arizona v. United States*, 567 U.S. at 400–03.

[94] *Id.* at 400–01("The present regime of federal regulation is not identical to the statutory framework considered in *Hines*, but it remains comprehensive." (citing *Hines*, 312 U.S. at 74)); *see also* Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 372 (2000) (field preemption exists "[w]hen Congress intends federal law to 'occupy the field' . . . .").

[95] *Arizona v. United States*, 567 U.S. at 403–07.

[96] *Id.* at 406 ("The correct instruction to draw from the text, structure, and history of IRCA is that Congress decided it would be inappropriate to impose criminal penalties on aliens who seek or engage in unauthorized employment. It follows that a state law to the contrary is an obstacle to the regulatory system Congress chose.") (citation omitted).

Third, the Court ruled that warrantless arrests of aliens believed to be removable were preempted because it usurped the federal government's authority to use discretion in the removal of noncitizens under federal immigration law.[97] Indeed, Arizona's law provided state law enforcement officers greater authority than federal officers.[98] These violations created an obstacle to carrying out the purposes and objectives of federal immigration laws.

The Court also determined that verifying the citizenship or alien status of anyone who was arrested or detained was constitutional on its face. This provision merely allows state law enforcement officials to communicate with the federal officers during otherwise lawful arrests.[99] The provision has three limitations that protect individual rights: a detainee is presumed not to be an undocumented alien if producing a valid Arizona driver's license or similar identification; an officer may not consider race, color, or national origin during a check; and the check must be implemented consistent with federal law.[100] This decision did not foreclose any future constitutional challenges to the law on an as-applied basis.

Justice Antonin Scalia concurred in part and dissented in part, asserting that all four provisions were constitutional.[101] Specifically, he argued that the Arizona statute does not conflict with federal law but enforces federal immigration restrictions more effectively.[102] Like Justice Scalia, Justice Clarence Thomas also concurred in part and dissented in part because he thought all four provisions were constitutional.[103]

Finally, Justice Samuel Alito wrote separately concurring in part and dissenting in part.[104] As an initial matter, he agreed that Section 2(B) was constitutional because the federal law already allowed state law enforcement officers who have lawfully stopped or detained individuals to verify their immigration status.[105] He further agreed with the majority insofar as he would have found Section 3, criminalizing the violation of the federal alien

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[97] *Id.* at 407–10.
[98] *Id.* at 408–09.
[99] *Id.* at 411–12.
[100] *Id.* at 411.
[101] *Arizona v. United States*, 567 U.S. at 416–37 (Scalia, J., concurring in part and dissenting in part).
[102] *Id.* at 437.
[103] *See generally id.* at 437–40 (Thomas, J., concurring in part and dissenting in part).
[104] *Id.* at 440–59 (Alito, J., concurring in part and dissenting in part).
[105] *Id.* at 441.

registration statute, to be unconstitutional because the federal government established an "all-embracing system."[106]

Notwithstanding these partial dissents, the Supreme Court was very clear. The federal government is responsible for immigration. The states are prohibited from much legislative action concerning both civil and criminal immigration matters based on both field preemption and conflict preemption.

B. Texas Law is Preempted by Federal Law Criminalizing Illegal Entry.

Section 51.02 of the Texas Penal Code criminalizes illegal entry into Texas by a foreign national at a place not designated for entry into the state: "A person who is an alien commits an offense if the person enters or attempts to enter this state directly from a foreign nation at any location other than a lawful port of entry."[107] This language is strikingly similar to the federal statute barring illegal entry: "Any alien who … enters or attempts to enter the United States at any time or place other than as designated by immigration officers. . . . "[108]

In enacting § 1325, Congress provided for a complete system regarding criminal sanctions for individuals who fail to enter the United States legally.[109] The Immigration and Nationality Act "provides a comprehensive framework to penalize" illegal entry into the United States by undocumented individuals.[110] Congress defines alien as "any person not a citizen or national of the United States."[111]

While there is typically a presumption against federal preemption, this presumption generally does not apply to immigration, as it is an area traditionally subject to extensive federal regulation.[112] As the Supreme Court explained, "Federal law makes a single sovereign responsible for maintaining a comprehensive and unified system to keep track of aliens within the

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[106] *Id.* (quoting Hines v. Davidowitz, 312 U.S. 52, 74 (1941)).
[107] Tex. Penal Code Ann. § 51.02(a), *invalidated by*, United States v. Texas, 719 F. Supp. 3d 640 (W.D. Tex. 2024).
[108] 8 U.S.C. § 1325(a)(1); *see also* United States v. Aldana, 878 F.3d 877, 882–883 (9th Cir. 2017) (holding that an individual who fails to enter the United States at a facility designed for immigration officers to accept entry applications violates § 1325).
[109] 8 U.S.C. § 1325(a)(1); Ga. Latino All. for Hum. Rts. v. Governor of Georgia, 691 F.3d 1250, 1263–64 (11th Cir. 2012).
[110] *Ga. Latino All. for Hum. Rts.*, 691 F.3d at 1263–64.
[111] 8 U.S.C. § 1101(a)(3).
[112] United States v. South Carolina, 720 F.3d 518, 529 (4th Cir. 2013).

Nation's borders."[113] Because the Supreme Court determined that Congress occupies the field of immigration, "'even complementary state regulation is impermissible.'"[114] Moreover, the Supreme Court explained that even when a state seeks to enact a statute adopting the federal standards, that approach cannot overcome field preemption.[115] Thus, the criminalization of illegal entry is covered by the field preemption for immigration because the federal government has definitively determined that entry of undocumented individuals into the United States is a significant federal concern.[116]

In *Gonzales v. City of Peoria*, a decision predating the Supreme Court's decision in *Arizona v. United States*, the United States Court of Appeals for the Ninth Circuit considered a civil rights action regarding the arrest of individuals for being in the United States without proper authorization.[117] Specifically, the City of Peoria, Arizona issued a policy statement that local law enforcement officers could arrest and book persons violating federal immigration laws to beheld for the Border Patrol.[118] Peoria's police chief indicated that the city's officers only arrested individuals for such violations that they encounter independently and where questioning revealed the person did not have legal status to be in the United States.[119]

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[113] Arizona v. United States, 567 U.S. 387, 401–02 (2012); *accord* State v. Anaya-Espino, 114 So. 3d 1248, 1255 (La. Ct. App. 2013); *see also* 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."); Elkins v. Moreno, 435 U.S. 647, 664 (1978) (the Immigration and Nationality Act is "a comprehensive and complete code covering all aspects of admission of aliens to this country . . . ."); Velasquez-Rios v. Wilkinson, 988 F.3d 1081, 1088–89 (9th Cir. 2021); Lozano v. City of Hazelton, 724 F.3d 297, 316 (3d Cir. 2013).

[114] United States v. Alabama, 691 F.3d 1269, 1282 (11th Cir. 2012) (quoting *Arizona v. United States*, 567 U.S. at 401); Utah Coal. of La Raza v. Herbert, 26 F. Supp. 3d 1125, 1145 (D. Utah 2014) ("[W]hen the Federal Government systematically and comprehensively regulates in a given area, states may be preempted from legislating in the same area, even if legislation is complimentary."); State v. Martinez, 896 N.W.2d 737, 756 (Iowa 2017) (quoting *Arizona*, 567 U.S. at 401).

[115] *United States v. Alabama*, 691 F.3d at 1282 (citing *Arizona v. United States*, 567 U.S. at 401–02).

[116] Ga. Latino All. for Hum. Rts. v. Governor of Georgia, 691 F.3d 1250, 1264 (11th Cir. 2012); *accord* United States v. South Carolina, 720 F.3d 518, 531 (4th Cir. 2013).

[117] Gonzales v. City of Peoria, 722 F.2d 468, 472 (9th Cir. 1983), *overruled by,* Hodgers-Durgin v. de la Vina, 199 F.3d 1037 (9th Cir. 1999).

[118] *Id.*

[119] *Id.* at 473.

The *Gonzales* court distinguished the Immigration and Nationality Act's civil provisions from its criminal provision.[120] Specifically, it deemed the civil provisions to be so pervasive of a regulatory scheme that they demonstrated the federal government's exclusive power over immigration.[121] Analyzing the Act's criminal provisions, however, the court determined that they were narrow and unsupported by a complex administrative scheme.[122]

In *Gonzales*, the court acknowledged that illegal entry pursuant to § 1325 did not contain an express authorization of local enforcement.[123] However, the panel rejected the appellants' argument that Congress intended to prevent local enforcement based on the Act's legislative history.[124]

Nonetheless, a state law enforcement officer executing an arrest for a criminal immigration violation must enunciate specific facts establishing that the violation is indeed criminal as opposed to civil.[125] Specifically, a person's unlawful presence in the United States may arise from an illegal entry based on a criminal violation but may also stem from some non-criminal conduct that would be a civil immigration matter.[126] There are various means, such as overstaying a valid visa or change of student status, by which an individual with no legal status may be in the United States without actually violating federal criminal immigration laws.[127]

Even if state law enforcement officers can arrest individuals for illegally entering Texas when they do not come through a lawful port of entry, this does not mean Texas courts have concurrent jurisdiction.[128] Instead, such properly arrested individuals would have to be turned over to federal officials for prosecution in federal court.[129] In *Lozano v. City of Hazelton*, the Third

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[120] *Id.* at 476.
[121] *Id.* at 474–75.
[122] *Id.* at 475.
[123] *Gonzales*, 722 F.2d at 475.
[124] *Id.*; *see also* People v. Barajas, 147 Cal. Rptr. 195, 199 (Cal. App. Ct. 1978) (holding that local police officers could arrest people for violating federal immigration laws involving reentry into the United States after deportation).
[125] Martinez-Medina v. Holder, 673 F.3d 1029, 1035–36 (9th Cir. 2011).
[126] Arizona v. United States, 567 U.S. 387, 407 (2012) ("As a general rule, it is not a crime for a removable alien to remain present in the United States.") (citing INS v. Lopez-Mendoza, 468 U.S. 1032, 1038 (1984)); *see Gonzales*, 722 F.2d at 476 (noting that illegal presence can arise from both civil and criminal violations); *see also Holder*, 673 F.3d at 1036 n.4.
[127] *Gonzales*, 722 F.2d at 476; *Holder*, 673 F.3d at 1036 n.4.
[128] Lozano v. City of Hazelton, 724 F.3d 297, 316–17 (3d Cir. 2013).
[129] *Id.*

Circuit rejected the government's position that "by authorizing state and local officials to arrest individuals guilty of harboring, Congress specifically invited state and local governments into this field."[130] Additionally, as the Ninth Circuit explained more recently, applying *Arizona v. United States*, "the scheme governing the crimes associated with the movement of unauthorized aliens in the United States, like the registration scheme addressed in *Arizona* (and *Hines*), provides 'a full set of standards' designed to work as a 'harmonious whole.'"[131]

The Supreme Court rejected the argument that a state may create laws that survive a preemption challenge when the state and federal law employ the same standards if the federal government occupies the field.[132] Moreover, when the state penalties conflict or are inconsistent with the federal penalties, such disparities "conflict with the careful framework Congress adopted."[133] The Texas penalty is comparable in terms of the maximum sentence, but the fines are different.[134] That difference provides another basis for arguing that field preemption should bar this Texas law.

In *Arizona v. United States*, the Court focused on non-citizen *registration* while Texas has focused on non-citizen *entry* into the country.[135] Nonetheless, the Texas law is preempted based on its attempt to address illegal entry because the essence of the federal statute involves entry of non-citizens.[136] In the end, there is a strong argument that SB4's criminalization of illegal entry is unconstitutional.

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[130] *Id.*
[131] Valle del Sol Inc. v. Whiting, 732 F.3d 1006, 1024–25 (9th Cir. 2013); State v. Martinez, 896 N.W.2d 737, 756 (Iowa 2017) (quoting Hines v. Davidowitz, 312 U.S. 52, 72, 74 (1941)).
[132] Arizona v. United States, 567 U.S. 387, 402 (2012).
[133] *Id.* (citations omitted).
[134] Tex. Penal Code Ann. § 51.03(b) (establishing the offense as a Class A misdemeanor); *compare id.* at § 12.22(1) (establishing a $4,000 fine), *with* 18 U.S.C. § 3571(b)(6) (establishing a $5,000 fine).
[135] *Arizona v. United States*, 567 U.S. at 388.
[136] United States v. Texas, 97 F.4th 268, 280 (5th Cir. 2024); *see also* United States v. Oklahoma, 739 F. Supp. 3d 985, 1002 (W.D. Okla. 2024) (holding that if Oklahoma's statute was allowed, it would "undermine the long-standing, comprehensive federal framework that defines immigration policy."); *contra* People v. Montes, 179 N.E.3d 278, 293 (Ill. App. Ct. 2020) (interpreting *Arizona v. United States* as not preempting state charges regarding illegal entry); *contra* Gomez-Ramos v. State, 676 S.E.2d 382, 385 (Ga. Ct. App. 2009) (rejecting defendant's preemption argument of state law regarding bond forfeiture based on § 1326).

C. Texas Law is Preempted by Federal Law Criminalizing Illegal Reentry.

Section 51.03 of the Texas Penal Code criminalizes illegal reentry into Texas by a foreign national who has previously been deported or removed: "A person who is an alien commits an offense if the person enters, attempts to enter, or is at any time found in this state after the person: (1) has been denied admission to or excluded, deported, or removed from the United States; or (2) has departed from the United States while an order of exclusion, deportation, or removal is outstanding."[137] This language is strikingly similar to the federal statute barring illegal reentry by "any alien who … has been denied admission, excluded, deported, or removed or has departed the United States while an order of exclusion, deportation, or removal is outstanding."[138]

As with § 1325, in enacting § 1326, Congress provided for a complete system regarding criminal sanctions for individuals who enter the United States illegally.[139] As one federal district court applying *Arizona v. United States* explained, Congress has fully occupied the field of alien registration such that state regulation is constitutionally impermissible.[140]

As with the criminalization of illegal entries, states are preempted from enacting legislation criminalizing illegal reentries. The federal government fully occupies this field under the Immigration and Nationality Act because it created detailed controls and penalties for individuals who entered the United State illegally.[141] Therefore, Texas is preempted from enacting legislation to criminalize illegal reentries.

D. Removal of Undocumented Individuals by Texas State Judges in Criminal Proceedings is Preempted by Federal Law.

Article 5B.002 of the Texas Code of Criminal Procedure authorizes Texas state judges to order the release and return to another nation of any undocumented individual who appears before the state judge if the individual

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[137] Tex. Penal Code Ann. § 51.03(a).
[138] 8 U.S.C. § 1326(a)(1).
[139] 8 U.S.C. § 1325(b); 8 U.S.C. § 1326(b).
[140] United States v. Iowa, 737 F. Supp. 3d 725, 747 (S.D. Iowa 2024) (citing *Arizona v. United States*, 567 U.S. at 401).
[141] *United States v. Texas*, 97 F.4th at 287–88; *United States v. Oklahoma*, 739 F. Supp. 3d at 997; Utah Coal. of La Raza v. Herbert, 26 F. Supp. 3d 1125, 1144 (D. Utah 2014).

agrees to this removal.[142] Moreover, the state judge may order the removal of anyone convicted of these laws upon completion of any sentence.[143]

Removal proceedings are a civil matter controlled by the federal government.[144] Pursuant to the Immigration and Nationality Act, Congress mandated that the Attorney General of the United States is responsible for removal of aliens.[145] Moreover, only the Attorney General is authorized to detain individuals subject to removal.[146] Congress established a comprehensive framework for the federal government to manage the removal of individuals who lack legal status to remain in the United States, including provisions for voluntary departure.[147] Moreover, there is a means by which removal orders receive judicial review.[148]

Contrary to the scenario presented by Texas criminal laws, states cannot use state law to thwart a federal immigration official's authority to deport undocumented individuals. For example, in *Welfare of Y.W.*, notwithstanding evidence that smugglers abused the applicant during his escape to the United States and that Chinese officials would harm him if he returned to China, the Minnesota state trial court lacked jurisdiction to consider such an order based on preemption principles.[149] Although these

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[142] Tex. Code Crim. Proc. Ann. Art. 5B.002(c)(1) (2024).
[143] *Id*. at Art. 5B.002(d).
[144] Harisiades v. Shaughnessy, 342 U.S. 580, 594 (1952) ("Deportation, however severe its consequences, has been consistently classified as a civil rather than a criminal procedure.") (citations omitted); *accord* Hinds v. Lynch, 790 F.2d 259, 264 (1st Cir. 2015); Ntiamoah v. Lynch, 664 F. App'x. 112, 115 (2d Cir. 2016) (unpublished); Flores-Leon v. I.N.S., 272 F.3d 433, 440 (7th Cir. 2001).
[145] 8 U.S.C. § 1231(a)(1)(A); *accord* Johnson v. Guzman Chavez, 594 U.S. 523, 528 (2021); *see also* In re Welfare of Y.W., Nos C8-96-715, CX-96-649, 1996 WL 665937, at *1, *2 (Minn. Ct. App. Nov. 19, 1996), *review denied* (Feb. 26, 1997) ("Congress granted the United States Attorney General exclusive custody over illegal immigrants.") (citing 8 U.S.C. § 1231(a) (2006)).
[146] 8 U.S.C. § 1231(a)(2); *see also* Kit Johnson, *Immigration Preemption After United States v. Arizona*, 161 U. PA. L. REV. ONLINE 100, 102 (2012) ("Federal power with respect to immigration is 'exclusive' and includes the authority to determine who should and should not be allowed to remain in the United States.") (citing 8 U.S.C. § 1229a(a)(3)).
[147] 8 U.S.C. § 1229(c).
[148] 8 U.S.C. § 1252; *see also* Velasquez-Rios v. Wilkinson, 988 F.3d 1081, 1089 (9th Cir. 2021) ("Congress may make laws defining the proper sphere in which a person who is not a citizen and is in the United States without proper authority and documentation may be removed from this country, and that Congress, but not individual states, can give an escape hatch for removal in certain cases where equitable circumstances are thought to warrant cancellation of removal as a matter of federal law") (citation omitted).
[149] *Welfare of Y.W.*, 1996 WL 665937, at *4; *accord* In re Welfare of C.M.K., 552 N.W.2d 768, 770 (Minn. Ct. App. 1996) (holding that state trial court lacked jurisdiction over

types of state proceedings were implemented to protect vulnerable undocumented minors, the Supremacy Clause prohibited such state action.[150] In reaching this decision, the *Y.W.* court went so far as to acknowledge "the commendable efforts put forth by [the foster parents] in their attempt to ensure the safety and well-being of Y.W. and in their struggle to protect him from further suffering under the political regime from which he fled."[151]

During oral argument in *United States v. Texas*, Chief Judge Richman expressed skepticism of a state's right to remove undocumented individuals from the United States.[152] Moreover, the Texas Solicitor General acknowledged that states lack the police power to exclude individuals.[153] The Fifth Circuit explained that Congress manifested its intent to occupy the field by creating a complex, national system regarding removal of undocumented individuals.[154]

A state may not enact its own scheme to expel non-citizens in light of the Immigration and Nationality Act. For example, the Eleventh Circuit rejected Alabama's attempt to enforce a state law expelling non-citizens from the state.[155] Similarly, an Oklahoma federal court recently determined that the state's attempt to expel non-citizens was also preempted.[156] Additionally, a California state court determined that, based on the preemption doctrine, police officers lacked the authority to advise undocumented individuals that they must leave the United States if they do not obtain legal status.[157]

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pending deportation proceedings against an undocumented juvenile because federal immigration law preempted the proceeding); In re Zaim R., 822 N.Y.S.2d 368, 374 (N.Y. Fam. Ct. 2006).

[150] *Welfare of Y.W.*, 1996 WL 665937, at *2 n.4 ("If Y.W. were adjudicated CHIPS, the government would be restrained from deporting him; indeed, this was the purpose of the CHIPS adjudication.").

[151] *Id.*; *see also id.* at *5 (Randall, J., concurring) ("I believe we have followed the law, but I feel uneasy. We have accomplished nothing constructive. I am not comfortable with the INS holding itself out as Y.W.'s guardian, while at the same time they vigorously line up a case to deport him.").

[152] Rebecca Shabad & Kyla Guilfoil, *Appeals Court Seems Skeptical of Texas' Argument for Immigration Law,* NBC News (Mar. 20, 2024, at 15:17 CT), https://www.nbcnews.com/politics/immigration/appeals-court-hear-oral-arguments-controversial-texas-immigration-law-rcna144234 (on file with UNT Dallas Law Review).

[153] *Id*.

[154] United States v. Texas, 97 F.4th 268, 285 (5th Cir. 2024).

[155] United States v. Alabama, 691 F.3d 1269, 1294 (11th Cir. 2012).

[156] United States v. Oklahoma, 739 F. Supp. 3d 985, 1002 (W.D. Okla. 2024).

[157] Sturgeon v. Bratton, 95 Cal. Rptr. 3d 718, 733–734 (Cal Ct. App. 2009).

The Supreme Court recently reemphasized its ruling in *Arizona v. United States* regarding the federal government's exclusive role in the removal of non-citizens.[158] Specifically, the Court stated, "[T]he Executive Branch … retains discretion over whether to remove a noncitizen from the United States."[159] Thus, Texas's authorization of its state judges to remove undocumented individuals violates the Supremacy Clause.

E. Texas State Judges Cannot Dismiss a Criminal Prosecution While the Federal Government is Assessing the Texas State Defendant's Immigration Status.

Article 5B.002 of the Texas Code of Criminal Procedure prohibits Texas judges from dismissing or staying a state prosecution pursuant to the statute because of a pending federal determination of the individual's immigration status.[160] This statutory requirement appears to usurp the authority established for federal courts dealing with immigration matters. Indeed, the Texas provision is in direct conflict with federal law.

As with the problems concerning state judges ordering the removal of undocumented individuals, there are similar issues when state judges cannot override the federal approach to immigration matters such as asylum. For example, a person convicted of entering the United States illegally may still pursue an asylum claim even after serving the sentence for illegal entry.[161] Of course, if an individual can seek asylum after being convicted and serving a sentence for a federal criminal immigration offense, that person can file an asylum claim before or during any federal prosecution.

One conflict is that removal proceedings are based on civil law as opposed to criminal law.[162] Moreover, federal immigration officials have discretion in whether to initiate removal proceedings while state judges lack any discretion.[163] For example, in *State v. Martinez*, the Iowa Supreme Court noted that the defendant entered the United States as a child and qualified for

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[158] United States v. Texas, 599 U.S. 670, 679 (2023) (citing Arizona v. United States, 567 U.S. 387, 396 (2012).
[159] *Id.*
[160] Tex. Code of Crim. Proc. Ann. Art. 5B.003 (2024).
[161] United States v. Reyes-Salgado, 13 F. App'x 705, 706 (9th Cir. 2001); C.M. v. United States, 672 F. Supp. 3d 288, 346 (W.D. Tex. 2023); United States v. Vazquez-Hernandez, 314 F. Supp. 3d 744, 762 (W.D. Tex. 2018); Ms. L. v. U.S. Immigr. & Customs Enf't, 302 F. Supp. 3d 1149, 1164 (S.D. Cal. 2018).
[162] *Arizona v. United States*, 567 U.S. at 402.
[163] *Id*. at 396.

Deferred Action for Childhood Arrivals, known as DACA.[164] Moreover, she had no criminal history and her four children were United States citizens.[165] Federal immigration officials have discretion to consider a person's personal history in making decisions whether to proceed with immigration proceedings against any individual and may decide against such proceedings with someone who has this type of background.[166] This type of flexibility for federal officials demonstrates why the mandatory nature of Texas's approach conflicts with federal law and is thus preempted.

Additionally, individuals who seek asylum are in turn authorized to remain in the United States. The Texas statute contravenes the rights of individuals to seek asylum and remain in the country while doing so. Anyone who enters the United States, including those persons who enter at places that are not designated for entry into the country, can still seek asylum.[167] Thus, for many reasons, state judges lack authority to interject themselves and thus interfere with federal immigration matters.

III. THE HISTORY OF CONGRESSIONAL LEGISLATION OF IMMIGRATION LAW IN THE UNITED STATES DEMONSTRATES THAT THE FEDERAL GOVERNMENT IS RESPONSIBLE

American immigration law has a lengthy history due to the country's nativist tendencies. In 1882, Congress enacted the Chinese Exclusion Act, which prohibited Chinese laborers from entering the United States for a period of ten years.[168] In the *Chinese Exclusion Case*, the Supreme Court held that Chinese laborers who attempted to reenter the United States could be barred because Congress had broad powers regarding immigration.[169]

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[164] State v. Martinez, 896 N.W.2d 737, 756–57 (Iowa 2017).
[165] *Id.* at 757.
[166] *Id*.
[167] 8 U.S.C. § 1158(a)(1); *see also* O.A. v. Trump, 404 F. Supp. 3d 109, 146–51 (D.D.C. 2019) (rule prohibiting asylum to individuals who entered the United States outside of a designated port of entry was inconsistent with statutory authority).
[168] Chinese Exclusion Act, Pub. L. No. 47-126, 22 Stat. 58, 58–59 (1882); *see also* United States v. Zheng, 87 F.4th 336, 340 (6th Cir. 2023); Howard S. Myers, III, *America's Immigration Policy—Where We Are and How We Arrived: An Immigration Lawyer's Perspective*, 44 MITCHELL HAMLINE L. REV. 743, 747–48 (2018) (discussing the Chinese Exclusion Act as the first American immigration law that prohibited entrance based on national origin).
[169] *See* Chae Chan Ping v. United States, 130 U.S. 581, 602–03 (1889); *see also* Fong Yue Ting v. United States, 149 U.S. 698, 718 (1893) (upholding an amendment to the Chinese Exclusion Act requiring a certificate of residence and removal for Chinese nationals who failed to obtain such certificates).

In the Immigration Act of 1924, Congress implemented quotas based on national origin for entry into the United States.[170] This quota system essentially prohibited people from Asia from entering the country.[171] In 1929, Congress first established criminal punishments for illegal entry and illegal reentry.[172]

In 1952, Congress enacted the Immigration and Nationality Act, which wove together various federal immigration statutes enacted since the forming of the nation.[173] Among other things, the Act reiterated criminal penalties for undocumented individuals who entered the United States at a time and place other than as designated for entry into the United States.[174] This section of the Immigration and Nationality Act has evolved and currently criminalizes illegal entry by an undocumented individual.[175]

Additionally, in the Immigration and Nationality Act, Congress criminalized, as a felony, the reentry by a person who had been previously deported from the United States.[176] The current iteration of this felony prohibits the reentry of individuals who have previously been deported *or removed*.[177]

As the Supreme Court determined, "United States Customs and Border Protection … is responsible for determining the admissibility of aliens and securing the country's borders."[178] Furthermore, "Immigration and Customs Enforcement (ICE), a second agency, 'conducts criminal investigations involving the enforcement of immigration-related statutes.'"[179]

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[170] Immigration Act of 1924, Pub. L. No. 68-139 § 5, 43 Stat. 153, 155 (1924).
[171] Myers, III, *supra* note 168, at 747.
[172] Pub. L. No. 70-1018, 45 Stat. 1551 (1929); *accord* United States v. Hernandez-Lopez, 583 F. Supp. 3d 815, 819 (S.D. Tex. 2022); Mary Fan, *The Case for Crimmigation Reform*, 92 N.C. L. REV. 75, 106 (2013).
[173] Myers, III, *supra* note 168, at 750; United States v. Rodriguez-Arevalo, 603 F. Supp. 3d 142, 145 (M.D. Pa. 2022); *Hernandez-Lopez*, 583 F. Supp. 3d at 819.
[174] Immigration & Nationality Act, Pub. L. No. 82-414, § 275, 66 Stat. 163, 229 (1952); *Hernandez-Lopez*, 583 F. Supp. 3d at 819.
[175] 8 U.S.C. § 1325; *see also* Arizona v. United States, 567 U.S. 387, 395 (2012) (noting that unlawful entry is a federal crime).
[176] Immigration & Nationality Act § 276, 66 Stat. at 229 (1952).
[177] 8 U.S.C. § 1326; *see also Arizona v. United States*, 567 U.S. at 395 (noting that unlawful reentry is a federal crime); Juliet Stumpf, *The Crimmigation Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 380 (2006) (discussing the evolution of federal immigration laws from barring convicted individuals' entry into the United States to criminalization of immigration violations themselves).
[178] *Arizona v. United States*, 567 U.S. at 397.
[179] *Id.* (citation omitted).

These criminal law enforcement agencies are the largest within the federal government.[180]

In the Immigration Reform and Control Act of 1986, Congress introduced criminal penalties for employers who hired individuals with no legal status to be in the country.[181] For example, employers had to verify an employee's eligibility based on specific documentation.[182] Even so, the federal government rarely prosecutes employers for such violations.[183]

IV. TRANSPORTING OR MOVING UNDOCUMENTED INDIVIDUALS WITHIN THE UNITED STATES VIOLATES FEDERAL CRIMINAL LAW

Governor Abbott's misguided immigration policy is not illegal even though state attempts to usurp authority over immigration are unconstitutional. However, his disregard for federal authority regarding immigration and disdain for the Supremacy Clause caused him to push the envelope further. In sending over 100,000 undocumented individuals across the country, he violated federal criminal immigration law.

In 1917, Congress first criminalized harboring or concealing undocumented individuals.[184] With the comprehensive development of criminal immigration law in the Immigration and Nationality Act, the federal government continued criminalizing the bringing in or harboring of undocumented foreign nationals.[185] That statutory language has evolved, but still criminalizes the same conduct today.[186] Specifically, the current law prohibits anyone from "knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, [transporting], or [moving] or [attempting] to transport or move such alien

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[180] Stumpf, *supra* note 177.
[181] Immigration Reform and Control Act, Pub. L. No. 99-603, 100 Stat. 3359 (1986); *see also* 8 U.S.C. § 1324a.
[182] 8 U.S.C. § 1324a(b); *see also* Chamber of Com. of U.S. v. Whiting, 563 U.S. 582, 609 (2011) ("Congress's objective in authorizing the development of E–Verify was to ensure reliability in employment authorization verification, combat counterfeiting of identity documents, and protect employee privacy.").
[183] *See generally* Brian L. Owsley, *Supply and Demand in the Illegal Employment of Undocumented Workers*, 71 CATH. L. REV. 227 (2022).
[184] United States v. Sanchez-Vargas, 878 F.2d 1163, 1168 (9th Cir. 1989) (citing Act of February 5, 1917, chs. 27–29, § 8, 39 Stat. 874, 880).
[185] Pub. L. No. 82-414, § 274, 66 Stat. 163, 228 (1952); United States v. Zheng, 87 F.4th 336, 340 (6th Cir. 2023).
[186] 8 U.S.C. § 1324.

within the United States by means of transportation or otherwise, in furtherance of such violation of law."[187]

Furthermore, anyone who agrees to a conspiracy to transport or move such an undocumented individual or who aids and abets this transportation or movement can also be prosecuted pursuant to this statute.[188] Thus, federal prosecutors have numerous potential offenses with which they could charge Governor Abbott related to transporting undocumented individuals.

Although the Supreme Court has little analyzed the crime of transporting or moving undocumented individuals, it is well established in lower federal courts.[189] The penalty for conviction is a maximum of twenty years in cases involving serious bodily injury or life in prison when there is a resulting death.[190] Otherwise, the maximum is ten years where the defendant acted for financial gain or five years in all other circumstances.[191] Moreover, the sentencing judge also has the authority to fine any of these defendants up to $250,000 in lieu of, or in addition to, jail time.[192]

The default statute of limitations for most federal criminal offenses is five years.[193] However, for offenses related to smuggling or trafficking

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[187] 8 U.S.C. § 1324(a)(1)(A)(ii); *see also Sanchez-Vargas*, 878 F.2d at 1170 (statutory purpose was to criminalize conduct by those persons who transported undocumented individuals even when they did not bring them into the United States).
[188] 8 U.S.C. § 1324(a)(1)(A)(v); *see also* United States v. Jaquez, 107 F.4th 473, 477 (5th Cir. 2024).
[189] *See, e.g.,* United States v. Guerra-Garcia, 336 F.3d 19, 23–25 (1st Cir. 2003) (evidence was sufficient to establish that defendant agreed to transport undocumented individuals); United States v. Hernandez-Sanchez, 315 F. App'x 308, 310 (2d Cir. 2008) (evidence was sufficient to establish defendant had the requisite intent to transport undocumented persons); United States v. Nguyen, 637 F. App'x 699, 700–01 (3d Cir. 2016) (evidence was sufficient to sustain jury verdict for transportation of undocumented workers); United States v. Guerrero-Damian, 241 F. App'x 171, 173 (4th Cir. 2007) (per curiam) (evidence was sufficient to support conviction for transporting undocumented individuals); United States v. Irias-Romero, 82 F.4th 422, 425–26 (5th Cir. 2023) (a jury could reasonably find the evidence sufficient to convict defendant of transporting undocumented individuals); United States v. Stonefish, 402 F.3d 691, 696–97 (6th Cir. 2005); United States v. Martinez-Vazquez, 135 F. App'x 61, 62–63 (9th Cir. 2005); United States v. Covarrubia-Mendiola, 241 F. App'x 569, 578–79 (10th Cir. 2007).
[190] 8 U.S.C. § 1324(a)(1)(B)(iii), (iv); *accord* United States v. Alvarado-Casas, 715 F.3d 945, 950 (5th Cir. 2013); United States v. Mejia-Luna, 562 F.3d 1215, 1221 (9th Cir. 2009); United States v. Carasa-Vargas, 420 F.3d 733, 736 (8th Cir. 2005).
[191] 8 U.S.C. § 1324(a)(1)(B)(i)–(ii); *accord Carasa-Vargas*, 420 F.3d at 736.
[192] *See* 18 U.S.C. § 3571(b)(3) ("[A]n individual who has been found guilty of an offense may be fined not more than . . . for a felony, not more than $250,000 . . . .").
[193] 18 U.S.C. § 3282(a) ("Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found

undocumented individuals, Congress set the statute of limitations at ten years.[194]

A. The Federal Government Could Charge Governor Abbott with Transporting Undocumented Individuals.

The purpose of criminalizing the transportation of undocumented individuals is to prevent people who did not assist in bringing people into the country illegally from escaping punishment for their conduct.[195] In other words, this violation is separate and apart from any conduct assisting undocumented individuals from being brought into the United States.

For the federal government to establish a violation of the statute criminalizing the transportation of undocumented individuals, it must demonstrate four elements: "(1) the transporting or moving of an alien within the United States, (2) that the alien was present in violation of law, (3) that the defendant was aware of the alien's status, and (4) that the defendant acted willfully in furtherance of the alien's violation of the law."[196] The United States Court of Appeals for the Fifth Circuit condenses the same offense into three elements: "To convict [a defendant] on this count, the jury had to find beyond a reasonable doubt that (1) an alien entered or remained in the United States in violation of the law, (2) [a defendant] transported the alien within the United States with intent to further the alien's unlawful presence, and (3) [a defendant] knew or recklessly disregarded the fact that the alien was in the

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or the information is instituted within five years next after such an offense shall have been committed.").

[194] 18 U.S.C. § 3298 ("No person shall be prosecuted, tried, or punished for any non-capital offense or conspiracy to commit a non-capital offense . . . under section 274(a) of the Immigration and Nationality Act unless the indictment is found or the information is instituted not later than 10 years after the commission of the offense."); *accord* United States v. Pena-Garza, No. 6:15-27, 2017 WL 5886144, at *1, *5 (S.D. Tex. Nov. 29, 2017) (addressing § 3298 as applicable to conspiracy to transport undocumented individuals); United States v. Abdi, No. 1:13-cr-484, 2014 WL 3828165, at *1, *3 (N.D. Ga. Aug. 4, 2014) (same).

[195] United States v. Sanchez-Vargas, 878 F.2d 1163, 1170 (9th Cir. 1989).

[196] United States v. Barajas-Chavez, 162 F.3d 1285, 1287 (10th Cir. 1999) (en banc) (quotation omitted); *accord* United States v. Guerra-Garcia, 336 F.3d 19, 22–23 (1st Cir. 2003) (citations omitted); United States v. Silveus, 542 F.3d 993, 1002 (3d Cir. 2008) (citations omitted); United States v. Guerrero-Damian, 241 F. App'x 171, 173 (4th Cir. 2007) (per curiam); United States v. Hernandez, 913 F.2d 568, 569 (8th Cir. 1990) (per curiam); *see also* Zavala v. Wal-Mart Stores, Inc., 393 F. Supp. 2d 295, 305 (D.N.J. 2005); United States v. One 1984 Chevrolet Truck, VIN IGHBC34JXEV103195, 682 F. Supp. 1221, 1225 (N.D. Ga. 1988).

country in violation of the law."[197]

The evidence against Governor Abbott would establish that he knew the people being bussed to various cities via Operation Lone Star were undocumented individuals even if he did not know who they were specifically.[198] It is clear that Operation Lone Star's purpose was to transport undocumented individuals out of Texas to various cities. It is difficult to imagine that Governor Abbott would have any argument that he did not know he was transporting undocumented individuals. In fact, he has released several official press releases boasting about his actions.[199] Moreover, during a speech at the Republican National Convention, he told the audience that he would maintain the transportation of undocumented individuals: "We have continued busing migrants to sanctuary cities all across the country. . . . Those buses will continue to roll until we finally secure our border."[200] Governor Abbott's statements should be more than enough to establish that he acted "willfully" to further the unlawful presence of these individuals.

As evidenced by the press releases and other statements, Governor Abbott's motivation in sending the undocumented individuals to various sanctuary cities was largely done to send the Biden Administration a political message.[201] Although he is attempting to send a political message with his busing program, he can still be convicted of violating federal law.[202]

Nonetheless, to be convicted of transporting undocumented individuals, the government does not have to establish that the defendant knew the undocumented individual had no legal status in the United States. Instead, the statutory language explicitly provides an alternative basis for the

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[197] United States v. Nolasco-Rosas, 286 F.3d 762, 765 (5th Cir. 2002) (citations omitted); *accord* United States v. Yusuf, 57 F.4th 440, 445 (5th Cir. 2023); United States v. Gaspar-Felipe, 4 F.4th 330, 341 (5th Cir. 2021).

[198] United States v. Lira-Villareal, 102 F. App'x 406, 409–10 (5th Cir. 2004) (per curiam).

[199] *See, e.g.*, Press Release, *supra* note 70.

[200] Laura Strickler & Didi Martinez, *Texas Gov. Greg Abbott Vows to Keep Busing Migrants North. One Problem: Not Enough Migrants.*, NBC News (Aug. 14, 2024, at 16:10 CDT), https://www.nbcnews.com/investigations/texas-gov-greg-abbott-vows-keep-busing-migrants-north-one-problem-not-rcna166412 (on file with UNT Dallas Law Review).

[201] Jennie Taer, Alex Oliveira & Carl Campanile, *I Only Bused Migrants to NYC Because Eric Adams Opened His Big Mouth—and Lied, Texas Gov. Greg Abbott Says*, N.Y. POST (Sept. 30, 2024, at 05:48 ET), https://nypost.com/2024/09/30/us-news/greg-abbott-i-bused-migrant-to-nyc-because-of-mayor-adams/ (on file with UNT Dallas Law Review).

[202] *Cf.* United States v. Aguilar, 883 F.2d 662, 687 (9th Cir. 1989) (holding that defendant's religious motivation does not negate intent to commit the crime of transporting undocumented individuals).

government to establish intent by proving that the defendant acted in reckless disregard of the undocumented individual's status.[203] With Governor Abbott's acknowledgment that he has caused over 100,000 undocumented individuals to be bussed to various cities across the country, federal prosecutors have the opportunity to file over 100,000 separate counts.

B. The Federal Government Could Charge Governor Abbott with Conspiracy to Transport Undocumented Individuals.

In addition to over 100,000 separate potential counts, the United States could charge Governor Abbott with conspiracy counts as well. The conspiracy charge is often referred to as the prosecutor's best friend because it reduces evidentiary issues.[204] Generally, establishing a conspiracy simply requires establishing an agreement between two or more persons to commit a criminal offense with the specific intent to achieve the conspiracy's goal or objective through the commission of the underlying criminal offense and an overt act in furtherance of the agreement by one of the co-conspirators.

In order for the government to convict an individual for conspiracy to transport undocumented individuals, it must establish three elements: "(1) two or more people directly or indirectly agreed to transport an alien within the United States; (2) the defendant knew of the unlawful purpose of the agreement; and (3) the defendant joined the agreement willfully."[205] As with other conspiracies, a defendant does not need to know all of the co-conspirators or each of the actions done in furtherance of the conspiracy.[206] In proving the elements of a conspiracy charge, the government may use circumstantial evidence to establish association with other co-conspirators as well as concerted action with them.[207] In a prosecution for conspiracy to transport people unlawfully present in the United States, the defendant's lack of a financial gain or motive is irrelevant.[208]

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[203] United States v. Guerra-Garcia, 336 F.3d 19, 22–23 (1st Cir. 2003).
[204] Steven M. Kowal, *Defending Food and Drug Criminal Cases in a New Era of Criminal Enforcement*, 46 FOOD DRUG COSMETIC L.J. 273, 276, 294–298 (1991).
[205] United States v. Foreman, 84 F.4th 615, 622 (5th Cir. 2023); *accord* United States v. Jaquez, 107 F.4th 473, 477 (5th Cir. 2024); *Guerra-Garcia*, 336 F.3d at 23; United States v. Jimenez-Elvirez, 862 F.3d 527, 533–34 (5th Cir. 2017) (citations omitted).
[206] *Guerra-Garcia*, 336 F.3d at 23 (citation omitted).
[207] *Jimenez-Elvirez*, 862 F.3d at 534 (citation omitted).
[208] United States v. Hill, 454 F. App'x 330, 333 (5th Cir. 2011) (per curiam) (citations omitted).

Further, the Supreme Court determined that co-conspirators are culpable for the criminal acts of their co-conspirators when undertaken in furtherance and within the reasonably foreseeable scope of the conspiracy.[209] Pursuant to the *Pinkerton* Doctrine, Governor Abbott can be found guilty of conspiracy for the criminal conduct of his co-conspirators.[210]

Here, the government would be able to provide evidence that Governor Abbott engaged in a conspiracy with others to transport undocumented individuals to various states across the country. His involvement in causing the undocumented individuals to be transported to cities would be evidence of his involvement in a conspiracy.[211] Moreover, consistent with federal conspiracy law, including the *Pinkerton* Doctrine, Governor Abbott cannot avoid the foreseeable consequences of his criminal conduct once he enters into the conspiracy.

C. The Federal Government Could Charge Governor Abbott with Aiding and Abetting the Transportation of Undocumented Individuals.

In order for the government to convict someone for aiding and abetting a scheme to transport undocumented individuals, it must demonstrate three elements: "(1) that the defendant associated with the criminal venture, (2) participated in the venture, and (3) sought by action to make the venture succeed."[212] In *Romero-Cruz*, the Fifth Circuit further explained that a "defendant 'associated' if he shared in the criminal intent of the principal, and the defendant 'participated' if he engaged in affirmative conduct designed to aid the venture."[213] In a prosecution for aiding and

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[209] Pinkerton v. United States, 328 U.S. 640, 646, 648 (1946).
[210] *See id.* at 646 ("so long as the partnership in crime continues, the partners act for each other in carrying it forward"); *see also* United States v. Ashley, 606 F.3d 135, 142–43 (4th Cir. 2010) ("The *Pinkerton* doctrine makes a person liable for substantive offenses committed by a co-conspirator when their commission is reasonably foreseeable and in furtherance of the conspiracy.") (citation omitted); United States v. Vazquez-Botet, 532 F.3d 37, 62 (1st Cir. 2008) ("[U]nder the Pinkerton doctrine, a defendant can be found liable for the substantive crime of a coconspirator provided the crime was reasonably foreseeable and committed in furtherance of the conspiracy.").
[211] *See* United States v. Velasquez-Cruz, 929 F.2d 420, 423–24 (8th Cir. 1991) (upholding a conviction for transporting undocumented aliens where the defendant was not just along for the ride but participated in organizing the transportation).
[212] United States v. Romero-Cruz, 201 F.3d 374, 378 (5th Cir. 2000) (citation omitted); United States v. McMahon, 562 F.2d 1192, 1195 (10th Cir. 1977) (citations omitted).
[213] *Romero-Cruz*, 201 F.3d at 378 (citation omitted).

abetting the transportation of people unlawfully present in the United States, the defendant's lack of a financial gain or motive is irrelevant.[214]

Governor Abbott was not reticent about his program of bussing undocumented individuals to various sanction cities across the United States. His statements form the basis of an admission to violating federal law. The best place to charge Governor Abbott based on venue is where the crimes were committed. Because he resides in Austin, that city would provide a likely choice. There would also be a basis to charge him in the various cities where he sent undocumented individuals in violation of federal law.

Governor Abbott knew the people he was sending to various Democratic-controlled sanctuary cities did not have legal status to be present in the United States. In *United States v. Irias-Romero*, the Fifth Circuit noted that not only did the defendant acknowledge that the smuggled individual was in the country illegally, but the individual herself testified that the defendant knew of her unlawful status.[215]

V. CONCLUSION

With the conclusion of the Biden Administration, the Texas government and Governor Abbott seem to have taken a more conciliatory tone toward the federal government regarding federal immigration. Nevertheless, the fact remains that some policies and state laws encroach on the federal government's role in immigration.

The likelihood of any federal prosecution of Governor Abbott for transporting undocumented individuals throughout the country is greatly reduced in a Trump Administration. Of course, given the tendency for President Trump to attack political enemies, if Governor Abbott fell out of favor with President Trump, he might be vulnerable. Indeed, President Trump has indicated a willingness to target political enemies. Moreover, with a ten-year statute of limitations for the charges, Governor Abbott could still be charged after President Trump is no longer in office.

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[214] United States v. Lopez-Martinez, 543 F.3d 509, 515–16 (9th Cir. 2008); United States v. Nolasco-Rosas, 286 F.3d 762, 766 (5th Cir. 2002); *see also* United States v. Angwin, 271 F.3d 786, 802 (9th Cir. 2001); United States v. Hill, 454 F. App'x 330, 332–33 (5th Cir. 2011) (per curiam) (citation omitted).

[215] United States v. Irias-Romero, 82 F.4th 422, 425 (5th Cir. 2023).