
FIRST AMENDMENT — FACIAL REVIEW — FIFTH CIRCUIT
REVERSES INJUNCTION OF TEXAS’S SANCTUARY CITIES BILL. —
City of El Cenizo v. Texas, 890 F.3d 164 (5th Cir. 2018).

Freedom of speech is the “indispensable condition” of “nearly every other form of freedom.”¹ Ignoring this principle, the Texas legislature recently sought to constrain local officials’ speech on politically important issues. In May 2017, Texas adopted Senate Bill 4² (SB 4). The law punished cities, counties, community colleges, and their employees and elected officials for “adopt[ing], enforc[ing], or endors[ing] a policy” that limited federal immigration enforcement.³ SB 4 not only prohibited local government entities from immigration-related actions; it also restricted individuals’ speech about those actions.⁴ Recently, in *City of El Cenizo v. Texas*,⁵ the Fifth Circuit preliminarily enjoined SB 4 only so far as it prohibited *elected* officials from endorsing certain immigration policies.⁶ The court left the same provision regarding endorsement intact for appointed officials and other employees.⁷ Although judicial restraint may have counseled in favor of this narrow holding, First Amendment values and the circumstances of the case should have pushed the court to uphold the plaintiffs’ facial challenges.

The Texas state legislature passed SB 4 in May 2017.⁸ During the bill’s drafting, Texas Governor Greg Abbott explained the purpose of the bill as “putting the hammer down” on sanctuary cities.⁹ He promised to “assert[] fines” and “seek[] court orders” to put officials in such cities “behind bars.”¹⁰

As passed, SB 4 contained two main components. First, SB 4 required local law enforcement to comply with federal ICE detainer requests.¹¹

¹ *Palko v. Connecticut*, 302 U.S. 319, 327 (1937), *overruled on other grounds by* *Benton v. Maryland*, 395 U.S. 784 (1969).

² S.B. 4, 2017 Tex. Gen. Laws 7 (codified at TEX. GOV’T CODE ANN. § 752.053 (West Supp. 2018) and TEX. CODE CRIM. PROC. ANN. art. 2.251 (West Supp. 2018)).

³ TEX. GOV’T CODE ANN. § 752.053(a)(1).

⁴ *Id.* (prohibiting “endorse[ment]”).

⁵ 890 F.3d 164 (2018).

⁶ *Id.* at 191–92.

⁷ *Id.* at 184–85.

⁸ 2017 Tex. Gen. Laws 7, 13.

⁹ Andrew Eicher, *Texas Gov. Abbott on Levin: “I’m Putting the Hammer Down” on Sanctuary Cities*, CNSNEWS (Feb. 6, 2017, 2:32 PM), <https://www.cnsnews.com/blog/andrew-eicher/texas-gov-abbot-levin-im-putting-hammer-down-sanctuary-cities> [<https://perma.cc/8LT3-88S7>].

¹⁰ *Id.*

¹¹ TEX. CODE CRIM. PROC. ANN. art. 2.251 (West Supp. 2018). An “ICE detainer” is a request from the U.S. Immigration and Customs Enforcement (ICE) “that, if an immigrant of interest to ICE is in the custody of local authorities for any reason, the authorities voluntarily delay that individual’s release by up to 48 hours to allow ICE to transfer him or her into immigration custody.” Tad Heuer & Daniel McFadden, *Massachusetts High Court Rules State Law Does Not Authorize Detention Based on ICE Detainers Alone*, BOS. B.J., Fall 2017, at 14, 14.

Second, SB 4 mandated that a “local entity” could not “adopt, enforce, or endorse” policies under which the entity “prohibit[ed] or materially limit[ed]” immigration enforcement.¹²

Under SB 4, a “local entity” included the “governing body” of cities and counties, as well as the officers and employees of that entity, including the sheriff, local police department, and district attorney.¹³ SB 4 imposed civil¹⁴ and criminal¹⁵ penalties. Local entities found to have violated SB 4 were subject to \$1000 to \$1500 fines for a first violation and \$25,000 to \$25,500 fines for subsequent violations, with each day of continuing violation counted as a separate violation.¹⁶ Elected or appointed officials in violation were also subject to removal from office.¹⁷

Immigrants’ rights groups criticized SB 4 as “likely to deter business[]” and harmful to public safety.¹⁸ The Texas Major Cities Chiefs and the Texas Police Chiefs Association also expressed opposition to the bill.¹⁹ Several Texas cities, counties, local officials, and advocacy groups challenged SB 4 before it went into effect, seeking a preliminary injunction.²⁰

The district court²¹ issued a preliminary injunction in August 2017, finding the plaintiffs likely to prevail on several claims.²² The court found that SB 4’s prohibition on the endorsement of certain policies (“endorse provision”) violated the First and Fourteenth Amendments for three reasons.²³ First, the court found that the endorse provision was

¹² TEX. GOV’T CODE ANN. § 752.053(a)(1) (West Supp. 2018).

¹³ *Id.* § 752.051(5). The law excluded from liability hospitals, school districts, and certain community centers, as well as officers employed by those entities. *Id.* § 752.052.

¹⁴ *Id.* § 752.056.

¹⁵ TEX. PENAL CODE ANN. § 39.07 (West Supp. 2018) (making failure to comply with an ICE detainer request a misdemeanor).

¹⁶ TEX. GOV’T CODE ANN. § 752.056.

¹⁷ *Id.* § 752.0565. The law enabled private citizens to file sworn complaints with the Texas Attorney General, who could then file suit in state court. *Id.* § 752.055. The Attorney General was required to file a petition regarding removal if presented with evidence establishing probable grounds of a violation by a public officer. *Id.* § 752.0565(b).

¹⁸ NAT’L IMMIGRATION FORUM, FIVE THINGS TO KNOW ABOUT TEXAS’ SB 4 BILL (2017), <https://immigrationforum.org/wp-content/uploads/2017/05/SB-4-five-questions.pdf> [https://perma.cc/B2BY-KTB2].

¹⁹ Tex. Major Cities Chiefs & Tex. Police Chiefs Ass’n, *Texas Police Chiefs: SB 4 Is Not Comprehensive Immigration Reform*, STATESMAN (Sept. 25, 2018, 6:42 PM), <https://www.statesman.com/news/20170428/texas-police-chiefs-sb-4-is-not-comprehensive-immigration-reform> [https://perma.cc/P2RY-WB9N].

²⁰ *City of El Cenizo*, 890 F.3d at 175. A few weeks later, Texas amended its complaint in a separate federal lawsuit, seeking a declaratory judgment that the plaintiffs’ legal arguments in the initial case were invalid. See First Amended Complaint for Declaratory Judgment at 41, Texas v. Travis County, No. 17-cv-425 (W.D. Tex. May 31, 2017), ECF No. 23.

²¹ Chief Judge Garcia wrote the opinion issuing the injunction.

²² *City of El Cenizo v. Texas*, 264 F. Supp. 3d 744, 812–13 (W.D. Tex. 2017).

²³ *Id.* at 775–86.

unconstitutionally overbroad.²⁴ The court explained that the First Amendment protects “[s]tatements by public officials on matters of public concern.”²⁵ Public officials, “[w]hether elected, appointed, or otherwise employed,” have the same First Amendment rights as private citizens to speak on matters of public concern such as immigration enforcement.²⁶ SB 4 silenced the speech of public officials on that issue, and so “reache[d] a substantial amount of constitutionally protected conduct.”²⁷ The law constrained a “long list of identified speakers” and had no time, place, or manner restrictions.²⁸ Even the bill’s author could not explain the full reach of the endorse provision, except that he intended for it to be sweeping.²⁹

Second, the court found SB 4 discriminated by viewpoint.³⁰ The law targeted and punished speakers on the basis of their views on local immigration policy.³¹ Speech critical of existing immigration law was effectively prohibited, while speech favoring it was permitted.³² Third, the court found SB 4 impermissibly vague.³³ The statute did not specify what conduct or speech constituted “endorsement.”³⁴ It therefore failed to give citizens fair notice and could enable arbitrary enforcement by

²⁴ *Id.* at 782.

²⁵ *Id.* at 775 (quoting *Pickering v. Bd. of Educ.*, 391 U.S. 563, 574 (1968)).

²⁶ *Id.* at 775–76 (citing *Lane v. Franks*, 573 U.S. 228, 231 (2014); *Pickering*, 391 U.S. at 568). *Lane* explained that speech involves matters of public concern if it can “be fairly considered as relating to any matter of political, social, or other concern to the community,” or if it “is a subject of legitimate news interest.” 573 U.S. at 241 (quoting *Snyder v. Phelps*, 562 U.S. 443, 453 (2011)).

²⁷ *City of El Cenizo*, 264 F. Supp. 3d at 779.

²⁸ *Id.* at 780–81.

²⁹ *Id.* at 788. The district court reprinted part of an exchange between SB 4’s author, Senator Charles Perry, and another state senator:

Senator Garcia: [E]ndorse, what’s your intent here? . . .

Senator Perry: . . . [I]t’s a, it’s a, it’s a more deliberative term that says we are going to endorse, enforce, support, identify with, and it is, becomes part of our DNA, our culture to endorse that, that we believe enough in it to put our name on it. So, that’s basically the nomenclature, if you will. We get there through different ways, too, but that’s just, I think, an emphasis of how much this is important to the State of Texas to do. . . .

Senator Garcia: So, if the sheriff or the police chief submits an opinion piece to their local paper about this topic . . . is that endorsing a sanctuary policy that would put them out of office?

Senator Perry: I would say it would be because it’s effectively creating a culture of contempt and noncompliance.

S. JOURNAL, 85th Leg., Reg. Sess. A-66 to A-67 (Tex. 2017); see *City of El Cenizo*, 264 F. Supp. at 778.

³⁰ *City of El Cenizo*, 264 F. Supp. at 784.

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

the state.³⁵ In light of these failings, the district court enjoined several provisions of SB 4.³⁶ Texas then appealed the preliminary injunction.³⁷

The Fifth Circuit affirmed in part and vacated in part.³⁸ Writing for the panel, Judge Jones³⁹ upheld nearly all of SB 4, save for the endorse provision as applied to elected officials.⁴⁰ Judge Jones explained that the word “endorse” was not “readily susceptible” to a narrowing construction that would avoid constitutional concerns about prohibiting the core political speech of elected officials.⁴¹ Texas had argued that the court should interpret “endorse” to mean “sanction” — “the use of official authority to ratify or authorize” — so that the endorse provision would affect only official speech.⁴² The court rejected this interpretation, reasoning that it would render “endorse” surplusage, because SB 4 already included the verbs “adopt” and “enforce.”⁴³ The court then acknowledged that elected officials’ “endorsement” of policies contrary to SB 4, without an accompanying action to “adopt” or “enforce” such policies, was core political speech.⁴⁴

Having rejected Texas’s attempt to narrow the reach of the endorse provision, the Fifth Circuit then conducted a bifurcated analysis of the provision’s effect on elected and nonelected officials. As to the former, the court explained that SB 4 proscribed the core political speech of elected officials by banning those officials from endorsing certain local policies.⁴⁵ Under the First Amendment, regulations of “the substance of elected officials’ speech” are subject to strict scrutiny.⁴⁶ Texas had already conceded that if “endorse” could not be construed narrowly, the provision would be unconstitutional as applied to elected officials.⁴⁷

³⁵ *Id.* The district court also found that SB 4’s prohibition on local policies that limited assistance with federal immigration officers was preempted by federal immigration law. *Id.* at 771, 775. It further concluded that SB 4’s use of the words “materially limits” was unconstitutionally vague under the Fourteenth Amendment, *id.* at 791, and that SB 4’s mandate that local law enforcement comply with ICE detainees violated the Fourth Amendment, *id.* at 805.

³⁶ *Id.* at 809, 812–13.

³⁷ *City of El Cenizo*, 890 F.3d at 175.

³⁸ *Id.* at 192.

³⁹ Judge Jones was joined by Judge Smith. Judge Prado, a member of the original Fifth Circuit panel, retired from the court before the issuance of the opinion. The case was decided by a quorum. *Id.* at 173 n.1 (citing 28 U.S.C. § 46(d) (2012)).

⁴⁰ *Id.* at 173.

⁴¹ *Id.* at 182–83 (quoting *United States v. Stevens*, 559 U.S. 460, 481 (2010)).

⁴² *Id.*; see also Ken Paxton, Policy Essay, *Providing Sanctuary to the Rule of Law: Sanctuary Policies, Lawlessness, and Texas’s Senate Bill 4*, 55 HARV. J. ON LEGIS. 237, 257 (2018).

⁴³ *City of El Cenizo*, 890 F.3d at 183–84.

⁴⁴ *Id.* at 184. The court further noted that official and individual speech overlapped in this context, such that the endorse provision could not be read to apply only to official speech. *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.* (citing *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1665–66 (2015)).

⁴⁷ See *id.* Texas likely conceded this point in acknowledgement of *Bond v. Floyd*, 385 U.S. 116 (1966), which held that elected officials cannot be excluded from their positions because of their speech, see *id.* at 137.

By contrast, the Fifth Circuit provided two justifications for refusing to enjoin the endorse provision for nonelected officials and employees of local government entities. First, the Fifth Circuit reasoned that those individuals might be required to obey SB 4 as “government speech.”⁴⁸ The government speech doctrine allows the state to advance its viewpoint through speech by public employees pursuant to their official duties.⁴⁹ Second, the court declined to consider whether SB 4 was overbroad in that it constrained local government employees’ private speech. The Fifth Circuit noted that such employees were not plaintiffs in the instant case,⁵⁰ and explained that future as-applied challenges were preferable to “‘gratuitous wholesale attacks’ under the overbreadth doctrine.”⁵¹ The court rejected each of the remaining claims.⁵²

The Fifth Circuit could have chosen to analyze the endorse provision in terms of the First Amendment doctrines of overbreadth and viewpoint discrimination, rather than solely in terms of elected officials’ speech. Judicial restraint may have counseled in favor of the latter route. But the circumstances of the case and underlying First Amendment values should have pushed the court to take the former approach. The Fifth Circuit should have evaluated the overbreadth and viewpoint discrimination issues in *City of El Cenizo*. Those analyses likely would have led to a ruling in the plaintiffs’ favor. Ultimately, *City of El Cenizo* demonstrates why judicial restraint sometimes ought to give way in order to vindicate First Amendment values.

Viewpoint discrimination and overbreadth are two different types of facial challenges under the First Amendment.⁵³ The viewpoint

⁴⁸ *City of El Cenizo*, 890 F.3d. at 184–85.

⁴⁹ *Id.* at 185; see also *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2474 (2018).

⁵⁰ The plaintiff group did include the Texas Association of Chicanos in Higher Education (TACHE), a professional association whose members include public employees of community colleges, which are considered regulated “local entities” under SB 4. See Letter from Belinda Saldaña Harmon, TACHE State President, to TACHE Member (June 5, 2017), https://tache.memberclicks.net/assets/docs/newsarchives/2017/tachesb4membershipletter_6_7_17.pdf [<https://perma.cc/ZA3W-SY3W>].

⁵¹ *City of El Cenizo*, 890 F.3d at 185 (quoting *Bd. of Trs. v. Fox*, 492 U.S. 469, 485 (1989)).

⁵² First, the court found that federal immigration law did not preempt SB 4. The Fifth Circuit explained that while the federal statute on federal-local cooperation in immigration enforcement “regulate[d] *how* local entities may cooperate[,] SB 4 specific[d] *whether* they cooperate.” *Id.* at 177. Second, the court rejected the argument that SB 4’s “assistance-cooperation” provision was conflict preempted by federal law, by similarly distinguishing state and federal objectives. *Id.* at 179–81. Third, the court rejected the plaintiffs’ Fourth Amendment claim, holding that the plaintiffs did not establish that the ICE detainer mandate was unconstitutional in every application. *Id.* at 187. Fourth, the Fifth Circuit rejected the claim that the phrase “materially limits” in SB 4 was unconstitutionally vague under the Fourteenth Amendment. The court reasoned that “materially” is not a vague concept in the law. *Id.* at 190. Fifth and finally, the court rejected a Tenth Amendment anticommandeering challenge, noting that it was not raised in district court. *Id.* at 191.

⁵³ Cf. Richard H. Fallon, Jr., *Fact and Fiction About Facial Challenges*, 99 CALIF. L. REV. 915, 936–37, 951 (2011).

discrimination analysis asks whether the government has regulated speech on the basis of its substantive content or viewpoint.⁵⁴ A government statute that does so explicitly is presumed unconstitutional,⁵⁵ with the government bearing the burden of proving otherwise under strict scrutiny.⁵⁶ The overbreadth doctrine, on the other hand, “prohibits the Government from banning unprotected speech if a substantial amount of protected speech is prohibited or chilled in the process.”⁵⁷ Courts conducting the overbreadth analysis must construe the statute at issue and determine if “a substantial number of its applications are unconstitutional, judged in relation to the statute’s plainly legitimate sweep.”⁵⁸

The Supreme Court has framed the First Amendment overbreadth doctrine as a “departure from traditional rules of standing”⁵⁹ that allows litigants “unharmed by the defect in a statute” to challenge the potential unconstitutional application of the law to others.⁶⁰ This relaxation of usual standing rules protects third parties whose speech might be chilled by a challenged statute. It also incentivizes legislatures to be precise when drafting laws affecting expression.⁶¹ The Supreme Court has indicated that as-applied challenges should “ordinarily” be considered before overbreadth challenges.⁶² The practical result of this approach, as explained in *Brockett v. Spokane Arcades, Inc.*,⁶³ is that a court generally cannot conduct an overbreadth analysis where the plaintiff has successfully brought an as-applied challenge in the same case.⁶⁴ Although

⁵⁴ See *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995) (“The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.”).

⁵⁵ *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992).

⁵⁶ *United States v. Stevens*, 559 U.S. 460, 468 (2010).

⁵⁷ *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 255 (2002).

⁵⁸ *Stevens*, 559 U.S. at 473 (quoting *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 n.6 (2008)). The First Amendment overbreadth doctrine contrasts with general overbreadth analysis, which requires the plaintiff to “establish ‘that no set of circumstances exists under which [the law] would be valid,’ or that the statute lacks any ‘plainly legitimate sweep.’” *Id.* at 472 (citations omitted) (first quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987); and then quoting *Washington v. Glucksberg*, 521 U.S. 702, 740 n.7 (1997) (Stevens, J., concurring in the judgments)).

⁵⁹ *Bd. of Trs. v. Fox*, 492 U.S. 469, 484 (1989) (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973)).

⁶⁰ *Id.* (citing *Broadrick*, 413 U.S. at 610).

⁶¹ Marc E. Isserles, *Overcoming Overbreadth: Facial Challenges and the Valid Rule Requirement*, 48 AM. U. L. REV. 359, 369 n.41 (1998).

⁶² *Fox*, 492 U.S. at 485. But see *Stevens*, 559 U.S. at 472–73 (conducting facial analysis to invalidate federal statute, without analyzing the ordinance as applied); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391–92 (1992) (same, with local ordinance).

⁶³ 472 U.S. 491 (1985).

⁶⁴ *Id.* at 504 (“[W]here the parties challenging the statute are those who desire to engage in protected speech that the overbroad statute purports to punish . . . [t]he statute may forthwith be declared invalid to the extent that it reaches too far, but otherwise left intact.”); see also *United States v. Nat’l Treasury Emps. Union*, 513 U.S. 454, 478 (1995) (“[W]e neither want nor need to provide relief to nonparties when a narrower remedy will fully protect the litigants.”).

Brockett has been criticized⁶⁵ and followed inconsistently,⁶⁶ it provides support to lower courts seeking to avoid an overbreadth analysis.⁶⁷

The Fifth Circuit took advantage of *Brockett* in precisely this way. The court disposed of the *City of El Cenizo* plaintiffs' claims by focusing on SB 4's application⁶⁸ to elected officials. Texas had already conceded that Supreme Court precedent barred the state from punishing elected officials on account of their political speech.⁶⁹ Having resolved the plaintiffs' as-applied challenge, the court refused to consider the plaintiffs' challenges regarding overbreadth and viewpoint discrimination. In doing so, the Fifth Circuit implicitly but misguidedly invoked the principles of judicial restraint underlying the *Brockett* line of cases. These include: (1) the desire to avoid "premature interpretation of statutes on the basis of factually barebones records";⁷⁰ (2) judicial efficiency in avoiding "consideration of many more applications than those immediately before the court";⁷¹ (3) constitutional avoidance in not "anticipat[ing] a question of constitutional law in advance of the necessity of deciding it";⁷² (4) not "short circuit[ing] the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution";⁷³ and (5) allowing state courts to construe state statutes in the first instance.⁷⁴

These reasons for judicial restraint, while valuable in general, have limited force in considering the plaintiffs' viewpoint discrimination and

⁶⁵ See, e.g., Alan K. Chen, *Statutory Speech Bubbles, First Amendment Overbreadth, and Improper Legislative Purpose*, 38 HARV. C.R.-C.L. L. REV. 31, 71-72 (2003); Henry Monaghan, *Overbreadth*, 1981 SUP. CT. REV. 1, 3, 8 ("[A] litigant has always been permitted to . . . insist that his conduct be judged in accordance with a rule that is constitutionally valid. . . . [A] challenge to the content of the rule applied is independent of . . . the litigant's predicament." *Id.* at 8.).

⁶⁶ See, e.g., *Bd. of Airport Comm'rs v. Jews for Jesus, Inc.*, 482 U.S. 569, 574 (1987); see also Fallon, *supra* note 53, at 946.

⁶⁷ For example, the Fifth Circuit followed *Brockett*'s reasoning in *Serafine v. Branaman*, 810 F.3d 354, 362-64 (5th Cir. 2016), and *Moore v. City of Kilgore*, 877 F.2d 364, 390-91 (5th Cir. 1989) (opinion of Higginbotham, J.). See also *Moore*, 877 F.2d at 366 (per curiam) (noting Judge Higginbotham's opinion constitutes the panel's holding on the issue of facial validity).

⁶⁸ One could question the Fifth Circuit's choice to characterize its holding as pertaining to SB 4 "as applied" to officials. The *City of El Cenizo* plaintiffs brought an injunction action prior to the enforcement of SB 4. 890 F.3d at 175. Because the statute had not yet been applied, the court's entire analysis was arguably facial, with the elected-nonelected distinction simply supporting a partial, rather than total, invalidation of the endorse provision. For more on the often-blurry distinction between as-applied and facial challenges, see Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 HARV. L. REV. 1321, 1324 (2000).

⁶⁹ *City of El Cenizo*, 890 F.3d at 184.

⁷⁰ *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450 (2008) (quoting *Sabri v. United States*, 541 U.S. 600, 609 (2004) (internal quotation marks and brackets omitted)).

⁷¹ *Bd. of Trs. v. Fox*, 492 U.S. 469, 485 (1989).

⁷² *Wash. State Grange*, 552 U.S. at 450 (quoting *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 346 (1936) (Brandeis, J., concurring)).

⁷³ *Id.* at 451.

⁷⁴ *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 508 (1985) (O'Connor, J., concurring).

overbreadth claims in *City of El Cenizo*. First, the case did not present an undeveloped or ill-litigated fact pattern. The alleged harm to public employees was so proximate to the case that both the plaintiffs and the state briefed the issue of First Amendment protection for public employees, and the district court assessed it.⁷⁵ Second, judicial economy weighed in favor of addressing harm to public employees. The Fifth Circuit's decision forces those individuals to file a new suit, wasting courts' time and resources.

Third, constitutional avoidance should not factor as heavily where a constitutional harm already exists.⁷⁶ SB 4's endorse provision clearly applies to some protected speech, because it regulates individuals' political speech and has no time, place, or manner restrictions. There is a "realistic danger"⁷⁷ that SB 4 will compromise the speech of public employees by chilling their expression while a new suit is pending.⁷⁸ This chilling makes it unlikely that as-applied challenges would properly vindicate First Amendment interests.⁷⁹

Fourth, courts' typical concern about "short circuit[ing] the democratic process" should not apply where, as here, the challenged law itself short circuits the democratic process by censoring public debate. If, as the plaintiffs alleged, SB 4 constituted viewpoint and content discrimination on a matter of high public salience, judicial intervention would likely protect democratic deliberation, rather than harm it. Fifth, the traditional inclination to remand cases involving construction of state statutes to state courts could not have played a role in this case, because the Fifth Circuit began its opinion by construing SB 4's endorse provision. The Fifth Circuit did not need to — and should not have — delayed analysis of the overbreadth issue in this case.⁸⁰

These considerations counseled in favor of an exception to the judicial restraint principles expressed in *Brockett*. The Fifth Circuit ought

⁷⁵ *City of El Cenizo v. Texas*, 264 F. Supp. 3d 744, 775–76 (W.D. Tex. 2017); Memorandum in Support of Plaintiffs' Application for Preliminary Injunction at 30, *City of El Cenizo*, 264 F. Supp. 3d 744 (No. 17-cv-404), ECF No. 24-1; Defendants' Response to Applications for Preliminary Injunction at 44 n.22, *City of El Cenizo*, 264 F. Supp. 3d 744 (No. 17-cv-404), ECF No. 91.

⁷⁶ See *Bd. of Airport Comm'rs v. Jews for Jesus*, 482 U.S. 569, 575–76 (1987) ("[I]t is difficult to imagine that the [ordinance restricting speech in an airport] could be limited by anything less than a series of adjudications, and the chilling effect of the resolution on protected speech in the meantime would make such a case-by-case adjudication intolerable.")

⁷⁷ See *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 801 (1984).

⁷⁸ *Id.* at 800 n.19 ("[W]here the statute unquestionably attaches sanctions to protected conduct, the likelihood that the statute will deter that conduct is ordinarily sufficiently great to justify an overbreadth attack." (citing *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 217 (1975))).

⁷⁹ Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844, 854–55 (1970); see also *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973) ("[T]he possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that protected speech of others may be muted . . .").

⁸⁰ See *City of El Cenizo*, 890 F.3d at 184–85.

to have considered the plaintiffs' overbreadth and viewpoint discrimination claims, despite the disposition of their as-applied challenge. In doing so, the court would have actually vindicated the purposes underlying the First Amendment overbreadth doctrine: to "ensure that lawmakers regulate speech-related activities with great precision"⁸¹ and to avoid "chilling the First Amendment rights" of parties not before the court.⁸² The Fifth Circuit should have conducted a facial analysis.

If the court had taken up the facial challenge, it likely would have found for the plaintiffs on both overbreadth and viewpoint discrimination grounds. SB 4's endorse provision likely would have failed an overbreadth analysis. The statute has no time, place, or manner restrictions. It applies to almost all local officials and employees, regardless of their connection to immigration policy. Even with the Fifth Circuit's injunction related to elected officials, SB 4's endorse provision could forbid a janitor from speaking to his neighbors at a town hall, a secretary in a mayor's office from joining a pro-immigration advocacy group, or an engineer at a local water district office from writing an op-ed for her neighborhood newspaper.⁸³ SB 4's overbreadth is underscored by its author's statements,⁸⁴ which indicate that the endorse provision was intended to be inexact. These flaws remain even after elected officials are removed from SB 4's reach. Government employees are subject to the constraints of the *Garcetti-Pickering*⁸⁵ line of cases: employees retain First Amendment protection for their statements on matters of public concern, so long as the statements do not interfere with and are not made pursuant to their official duties.⁸⁶ SB 4 on its face reaches many examples of such protected speech.⁸⁷ The Fifth Circuit ought to have

⁸¹ Chen, *supra* note 65, at 31.

⁸² *Sec'y of State v. Joseph H. Munson Co.*, 467 U.S. 947, 958 (1984) ("Facial challenges to overly broad statutes are allowed not primarily for the benefit of the litigant, but for the benefit of society — to prevent the statute from chilling the First Amendment rights of other parties not before the court.").

⁸³ See Memorandum of Law in Support of Application for Preliminary Injunction by City of San Antonio, Texas, Rey A. Saldana, Texas Association of Chicanos in Higher Education, La Union del Pueblo Entero, and Workers Defense Project at 26, *City of El Cenizo v. Texas*, 264 F. Supp. 3d 744 (W.D. Tex. 2017) (No. 17-cv-404); see also *City of El Cenizo*, 264 F. Supp. 3d at 781.

⁸⁴ See *supra* note 29.

⁸⁵ See *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006) ("[W]hen public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes . . ."); *Pickering v. Bd. of Educ.*, 391 U.S. 563, 574 (1968) ("[S]tatements by public officials on matters of public concern must be accorded First Amendment protection . . .").

⁸⁶ *Garcetti*, 547 U.S. at 421; *Pickering*, 391 U.S. at 572–73. The district court argued that the *Garcetti-Pickering* cases should not apply to the SB 4 challenge, because in passing the law Texas was "the sovereign and not the employer." *City of El Cenizo*, 264 F. Supp. 3d at 776 n.41; see also Rachel Proctor May, *Punitive Preemption and the First Amendment*, 55 SAN DIEGO L. REV. 1, 29 (2018) (explaining why the reasons for the employee speech doctrine may not apply to the relationship between the state as sovereign and local government employees).

⁸⁷ See *City of El Cenizo*, 890 F.3d at 184 (noting that SB 4 proscribed "core political speech").

struck down the provision in recognition of “the need for precision in drafting to avoid conflict with first amendment rights.”⁸⁸

SB 4’s endorse provision also facially violates the First Amendment because it discriminates on the basis of viewpoint. Texas conceded during oral argument that a national debate regarding immigration enforcement is ongoing.⁸⁹ SB 4 allows speech on one side of this debate and not the other. The Fifth Circuit ought to have recognized this imbalance and applied strict scrutiny to SB 4’s endorse provision. Texas failed to demonstrate that the provision advanced a legitimate state interest.⁹⁰ Even if Texas had made such a showing, the provision was not narrowly tailored: it covered both the official and private speech of all elected officials, appointed officials, and employees of all local government entities in the state, regardless of whether those individuals have an official role related to immigration enforcement. SB 4’s prohibition amounts to censorship of citizens’ private speech on matters of public concern.

By upholding SB 4’s viewpoint-based and overbroad restrictions, the court has made it more difficult for Texans to engage in deliberative democracy. SB 4 muzzles local government officials and employees who possess immigration-related expertise that could be useful for policy discussions, such as law enforcement agents and public benefits administrators. SB 4 also silences officials and employees in roles unrelated to immigration, restricting their ability to contribute to local debates as private citizens. This outcome impoverishes public discourse.

In disposing of the *City of El Cenizo* plaintiffs’ First Amendment claims on the narrowest grounds possible, the Fifth Circuit failed to give effect to the purposes of the First Amendment. Given that the case was in a preliminary injunction posture, the court should have been especially sensitive to the risk of chilling citizens’ speech as proceedings continued. It should have recognized the egregious threat to expression posed by a statute silencing citizens’ speech on matters of public concern, with no restriction and on the basis of viewpoint. The Fifth Circuit may never see an as-applied challenge to SB 4’s endorse provision by a public employee. But that silence won’t necessarily mean the court was right to favor judicial restraint — instead, it may mean that SB 4 successfully chilled valuable speech.

⁸⁸ Note, *supra* note 79, at 845.

⁸⁹ See *City of El Cenizo*, 264 F. Supp. 3d at 780 (“[T]here is an ongoing debate in this country about federal immigration law, how it should be enforced, who it should be enforced against [. . .] [and] Senate Bill 4 was passed specifically in response to a number of Texas localities *expressing their will . . .*” (third alteration in original) (emphasis added) (quoting Transcript of Preliminary Injunction Hearing at 103:4–5, 106:3–5, *City of El Cenizo*, 264 F. Supp. 3d (No. 17-cv-404))).

⁹⁰ See, e.g., Response and Reply Brief of Defendants - Appellants - Cross-Appellees at 37, *City of El Cenizo*, 890 F.3d 164 (No. 17-50762) (mentioning a public safety rationale for SB 4’s ICE detainer provision, but providing no justification for the endorse provision).