Written Testimony of

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The American Civil Liberties Union ("ACLU") thanks the U.S. House Judiciary Subcommittee on the Constitution and Limited Government for the opportunity to submit this statement for the Subcommittee's hearing on what authority, if any, the states have to engage in border enforcement when they disagree with the federal government's approach.

The ACLU is a nonpartisan public interest organization with 4 million members and supporters, and 53 affiliates nationwide—all dedicated to protecting the principles of freedom and equality set forth in the Constitution. The ACLU has a long history of defending civil liberties, including immigrants' rights. The ACLU, together with partner organizations, has vigorously and successfully challenged numerous unlawful state and local immigration regulations and policies, including Arizona's SB 1070 and similar laws in other states, such as South Carolina and Alabama; Indiana's effort to exclude refugees; and local ordinances seeking to penalize people who house or employ immigrants, such as those in Hazleton, Pennsylvania, and Farmers Branch, Texas.

Our testimony today reviews the well-established principles of constitutional law that forbid states from taking immigration matters into their own hands, and the evidence that such efforts have been not just unlawful, but profoundly harmful and counterproductive by any measure. We also briefly address claims by some state officials that they can override these constitutional limits by declaring that an "invasion" is underway. These claims are unsupported, dangerous, and cannot stand up to even cursory scrutiny.

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1. The Constitution prohibits state regulation of immigration

For 150 years—ever since Congress began systematically regulating immigration—the Supreme Court has been crystal clear: Regulation of entry into and expulsion from the United States are exclusively federal matters from which the States are excluded. *See, e.g.*, *Chy Lung v. Freeman*, 92 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."); *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."); *Hines v. Davidowitz*, 312 U.S. 52, 62 & n.10 (1941) (noting the "continuous recognition by this Court" of "the supremacy of the national power

. . . over immigration . . . and deportation"); *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410, 419 (1948) ("The Federal Government has broad constitutional powers in determining what aliens shall be admitted to the United States [and] the period they may remain," and "the states are granted no such powers"); *De Canas v. Bica*, 424 U.S. 351, 354 (1976) ("Power to regulate immigration is unquestionably exclusively a federal power."); *Arizona v. United States,* 567 U.S. 387, 409 (2012) ("the removal process is entrusted to the discretion of the Federal Government").

The lower courts have likewise recognized that entry, exclusion, and deportation are exclusively federal matters. *See, e.g.*, *Texas v. United States*, 50 F.4th 498, 516 (5th Cir. 2022) (because "[p]olicies pertaining to the entry of aliens and their right to remain here are entrusted exclusively to Congress[,] [a]n attempt by Texas to establish an alternative classification system . . . would be preempted") (cleaned up); *Villas at Parkside Partners v. City of Farmers Branch, Tex.*, 726 F.3d 524, 537 (5th Cir. 2013) (en banc); *United States v. Alabama*, 691 F.3d 1269, 1293 (11th Cir. 2012) ("The power to expel aliens has long been recognized as an exclusively federal power."); *Lozano v. City of Hazleton*, 724 F.3d 297, 315 (3d Cir. 2013) (similar). Texas state courts agree. *Hernandez v. State*, 613 S.W.2d 287, 290 (Tex. Crim. App. 1980); *Gutierrez v. State*, 380 S.W.3d 167, 173, 176 (Tex. Crim. App. 2012).

States cannot evade this rule by claiming they are merely stepping into the shoes of the federal government and enforcing (or reinforcing) federal laws. The federal system includes several alternative removal procedures, including full removal proceedings with trial-like processes subject to administrative and judicial appeals, 8 U.S.C. § 1229a, and expedited removal proceedings, a shortened form of proceedings applicable to recent border crossers, 8 U.S.C. § 1225(b)(1). And it includes a range of protections that are available even to people who entered unlawfully or are removable on other grounds. Asylum, a form of humanitarian protection that can lead to permanent residence and eventually citizenship, is specifically available "whether or not" a noncitizen enters "at a designated port of arrival," and "irrespective of such [noncitizen's] status." 8 U.S.C. § 1158(a)(1). Removal to persecution or torture is prohibited, in compliance with the United States' obligations under international treaties. *See id.* § 1231(b)(3); Pub. L. No. 105-277, Div. G, Title XXII, § 2242, 112 Stat. 2681, 2681-822 (1998) (codified as Note to 8 U.S.C. § 1231). In addition, individuals who are placed in full removal proceedings may apply for other forms of relief Congress has extended, including cancellation of removal. 8 U.S.C. § 1229b(b).

Noncitizens may also apply affirmatively for numerous other forms of relief outside of removal proceedings, including visas for victims of crimes and trafficking, § 1101(a)(15)(U); 1101(a)(15)(T); temporary protected status, § 1254(a), and Special Immigrant Juvenile Status for noncitizens under 21 years of age, § 1101(a)(27)(J).

Given the complexities of this system, and the range of tools it provides to federal authorities, federal discretion is and must be a central feature of the immigration system. A "principal feature of the removal system is the broad discretion exercised by immigration officials." *Arizona*, 567 U.S. at 396. Federal officials "decide whether it makes sense to pursue removal at all." *Id.* Federal officials choose among the several removal processes Congress established. *See Biden v. Texas*, 142 S. Ct. 2528, 2535 (2022). Federal officials decide whether to deploy the associated criminal immigration charges. *See Ga. Latino All. for Hum. Rts. v. Governor of Ga.*, 691 F.3d 1250, 1265 (11th Cir. 2012). And once removal procedures have been initiated, federal officials decide whether to extend relief to otherwise removable noncitizens. *See, e.g.*, *INS v. Yueh-Shaio Yang*, 519 U.S. 26, 30 (1996).

That is why, time and again, the courts have ruled that when a state purports to stand in the federal government's shoes and take over federal immigration enforcement for itself, it unlawfully "violates the principle that the removal process is entrusted to the discretion of the Federal Government." *Arizona*, 567 U.S. at 409; *Farmers Branch*, 726 F.3d at 534 (same); *id*. at 546 (Dennis, J., specially concurring) (same); *Alabama*, 691 F.3d at 1295; *United States v. South Carolina*, 720 F.3d 518, 531-32 (4th Cir. 2013); *Georgia Latino All.*, 691 F.3d at 1265.

Again, this has been settled law for 150 years. In 1875 the Supreme Court explained that if the Constitution allowed states to reject federal policy and set up their own immigration regimes, "a single State [could], at her pleasure, embroil us in disastrous quarrels with other nations." *Chy*, 92 U.S. at 280; *see also United States v. Texas*, 599 U.S. 670, 679 (2023) (immigration policy discretion "implicates not only 'normal domestic law enforcement priorities' but also 'foreign-policy objectives'") (quoting *Reno v. American-Arab Anti-Discrimination Comm*., 525 U.S. 471, 490-91 (1999)); *Hines*, 312 U.S. at 64 ("Experience has shown that international controversies of the gravest moment, sometimes even leading to war, may arise from real or imagined wrongs to another's subjects inflicted, or permitted, by a government."). "The Constitution of the United States is no such instrument." *Chy*, 92 U.S. at 280.

Of course state officials may hold the opinion that that a particular administration goes too far or not far enough in its exercise of discretion, and may find an administration's policies frustrating. State officials may also believe that Congress was wrong to create the various immigration procedures and forms of relief in the federal immigration code.

But immigration policy is and must be a *federal* decision. If the rule were different, the already-difficult task of managing and operating the immigration system would be infinitely more complex. No administration—and no Congress—would stand a chance of developing a coherent immigration policy, and the end result would be worse on every metric—including fairness, efficiency, efficacy of enforcement, and impact on international relations.

2. State immigration enforcement efforts unjustifiably harm immigrants and citizens alike

Following Arizona's passage of SB 1070 in 2010, several states quickly enacted similar laws. Most of the laws were immediately blocked in court, and the Supreme Court sealed SB 1070's fate in 2012, enjoining almost all of its key provisions. But even before that ruling, the vast majority of states that initially considered their own copycat measures decided not to advance them. One significant reason is that they saw what state immigration enforcement actually means in practice.

In Alabama, the one state where courts initially allowed a state immigration scheme to take effect, a crisis ensued. Terrified parents kept their children out of school to avoid the threat of immigration queries. Families lost their water service because they lacked government-issued ID. Immigrants were told by landlords that they were no longer welcome as renters. People were racially profiled by police and questioned about their immigration status. Latine shoppers buying groceries were asked by check-out clerks for their papers, and children who did show up at school were asked why they hadn't yet gone back to Mexico. New verification rules meant long lines for everybody at DMVs and courthouses, and hassles for businesses seeking to renew their licenses. Experts estimated that, if the law stayed in effect, losses to the state economy could amount to billions of dollars annually.

In Arizona, where most parts of SB 1070 never went into effect, the possibility that they would nevertheless terrified communities, caused some people to move out of the state, and cost

the state hundreds of millions of dollars in conference cancellations and lost output. Longer-term, however, other results became apparent: the bill's sponsor became the first state lawmaker in Arizona history to be recalled, and young people opposed to the law became a generation of activists that continues to shape the state's politics today.

What we're seeing happen now only reinforces the lessons of the past. A recent Wall Street Journal article on Texas's Operation Lone Star is instructive. It notes: "Texas has spent two years and billions of dollars on the most aggressive attempt by any state to take control over federal border security. There's no indication it has worked." Texas has spent $4.5 billion so far, yet the massive spending has not achieved its stated objectives of reducing unlawful immigration. In fact, "it is precisely the areas of the border targeted most intensively by Operation Lone Star that have experienced the most rapid increases in unlawful border crossings since the operation began."

While ineffective in achieving its objectives, the Texas scheme has nevertheless caused enormous harms, contributing to hundreds of injuries and deaths.

A November 2023 Human Rights Watch report found that vehicular pursuits under Operation Lone Star have led to crashes that killed at least 74 people and injured at least another 189, including drivers, passengers and bystanders. Among those injured was a seven-year-old girl out to get ice cream with her grandmother. Since OLS went into effect in 2021, our colleagues at the ACLU of Texas have also documented the use of racial profiling in OLS traffic stops. In December, a U.S. citizen family in El Paso were rammed off the road and detained by armed, plainclothes officers with Operation Lone Star in unmarked vehicles who were ostensibly looking for smugglers.

Various news outlets have reported on other harms caused by Texas's actions under Operation Lone Star, including a miscarriage and severe lacerations suffered by a pregnant woman entangled in razor wire Texas has deployed; instructions to "to push a nursing mother back into the river, to deny water to migrants even in extreme heat and to block a 4-year-old who was trying to cross coils of razor wire from reaching shore"; and diversions of funds from criminal and juvenile justice systems to deploy police and military personnel to the border.

3. Declaring an "invasion" does not give a state the power to regulate immigration

In an attempt to deflect from the long line of precedent demonstrating that, under our Constitution, states cannot take immigration matters into their own hands, some activists and state officials have started to argue that a state's authority to "engage in War" when it is "actually invaded," under Article I, Section 10, Clause 3 of the Constitution, amounts to a constitutional trump card. The claim is that the present circumstances amount to "actual invasion," and that efforts to deter, detain, or remove immigrants are therefore lawful exercises of states' authority to "engage in War."

First, the claim of invasion, a term that conjures a military incursion by a hostile nation, is nonsensical on its face. After all, the increased immigration at the border is driven by people seeking *fleeing* hostility and asking the United States for *protection*. Whether by seeking interviews at ports of entry or by flagging down Border Patrol officials after entering without inspection, people are presenting themselves to US officials for inspection and processing from the US under our laws, not attempting to overthrow the US or our laws.

In addition, the law contains no support whatsoever for the claim that present circumstances amount to an "actual invasion" that inverts the Constitution's clear prohibitions on states' engaging in war or taking over immigration enforcement. To the contrary, previous attempts by states to claim that higher levels of unauthorized immigration amount to "invasion" uniformly failed. See *Padavan v. United States*, 82 F.3d 23, 28 (2d Cir. 1996) ("In order for a state to be afforded the protections of the Invasion Clause, it must be exposed to armed hostility from another political entity, such as another state or foreign country that is intending to overthrow the state's government."); *New Jersey v. United States*, 91 F.3d 463, 469 (3d Cir. 1996) (finding "no support" for "reading of the term 'invasion' to mean anything other than a military invasion."); *California v. United States*, 104 F.3d 1086, 1091 (9th Cir. 1997) ("In *The Federalist* No. 43, James Madison referred to the Invasion Clause as affording protection in situations wherein a state is exposed to armed hostility from another political entity."); *Chiles v. United States*, 69 F.3d 1094, 1097 (11th Cir. 1995).

Perhaps unsurprisingly, proponents of this claim can't even agree on such basic questions as the definition of "actual invasion." And none of them grapple in any way with the implication

of their claim: that any governor can declare an "invasion" and supersede federal laws—or literally wage war against the "invader"— at their will, and that every court is required to accept the state's claim that its actions are therefore authorized by the Constitution. A federal judge recently rejected that "breathtaking" claim. *United States v. Abbott*, No. 1:23-CV-853-DAE, 2023 WL 5740596, at *12 (W.D. Tex. Sept. 6, 2023) (rejecting argument that "once Texas decides, in its sole discretion, that it has been invaded, it is subject to no oversight of its 'chosen means of waging war'"). What's more, several legal activists who are sympathetic to efforts to restrict immigration have refused to endorse the proponents' theories, *e.g.,* Jonathan Turley, Invasion or Evasion? Crisis at the Border Is a Political, Not a Constitutional Problem, THE HILL (July 6, 2022); Texas Public Policy Foundation, The Meaning of Invasion Under the Compact Clause of the U.S. Constitution.

If ever an argument proved too much, it is this one. It would destroy the Constitution's principle of federal supremacy and its careful delineations of the war power. In short, the "invasion" claim is made-up and incredibly flimsy, and the fact that some state officials are reaching for it simply underlines that the Constitution prohibits what they wish to do.