STATE OF INDIANA
LAKE COUNTY SUPERIOR COURT ROOM 5
SITTING IN HAMMOND, INDIANA

JEFF NICHOLSON, DOUGLAS GRIMES, GREG SERBON, AND CHEREE CALABRO,

Plaintiffs,

v.

CITY OF GARY, INDIANA; CITY OF GARY COMMON COUNCIL; HERBERT SMITH, JR., REBECCA L. WYATT, MICHAEL L. PROTHO, MARY BROWN, CAROLYN D. ROGERS, LINDA BARNES CALDWELL, LAVETTA SPARKS-WADE, RONALD BREWER, and RAGEN HATCHER, in their official capacities as City of Gary Common Council members; and KAREN FREEMAN-WILSON, in her official capacity as City of Gary Mayor,

Defendants.

Civil Case No. 45D05-1802-MI-00014

DEFENDANT CITY OF GARY'S MEMORANDUM IN SUPPORT OF ITS CROSS-MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Indiana's Home Rule Act grants municipalities expansive authority for the effective management of their local affairs. Under the Act, if any doubt remains about whether communities may regulate as they see fit, state law must be construed so as *not* to encroach on those efforts. This principle applies with particular force in matters concerning public safety and the operation of local institutions.

In pursuance of its broad regulatory authority, the City of Gary recently passed "An Ordinance Establishing the City of Gary Indiana as a Welcoming City." This enactment implements Gary's vision for a safe and well-functioning community: one in which all residents, assured of equal treatment under the law, are encouraged to cooperate with local authorities to achieve public security and welfare.

Plaintiffs have sued to enjoin Gary's Ordinance. They claim that Indiana law—specifically, Indiana Code § 5-2-18.2—prohibits municipalities from deciding whether and how local resources may be spent in response to federal requests for voluntary assistance in enforcing the federal government's own immigration laws. But the relevant state statutory language is far too imprecise to wrest control of local affairs from communities like Gary. Plaintiffs' theory would imperil any ordinance, rule, policy, guideline, or budgetary decision—including those directed at public safety and fiscal responsibility consistent with local needs—if it could conceivably reduce the enforcement of federal immigration laws to any degree. Such a standardless dictate would pose intolerable burdens of compliance and could not be administered in a principled or constitutional fashion.

Plaintiffs misconstrue the applicable law; they provide no evidence of a concrete injury to themselves (or anyone) stemming from a violation of Indiana law; and they wrongly minimize

the harms to local autonomy and community security that their untenable interpretation of Chapter 18.2 would inflict. Because Plaintiffs have satisfied none of the traditional prerequisites for equitable relief, and because they have raised no genuine issue of material fact concerning the City's entitlement to relief, this Court should deny Plaintiffs' Motion for Summary Judgment and grant the City's Cross-Motion for Summary Judgment.

BACKGROUND

The United States Constitution assigns the federal government primary responsibility for regulating immigration. *See* U.S. Const. art. I, § 8, cl. 4; *Arizona v. United States*, 567 U.S. 387, 394–95 (2012). In the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1101 *et seq.*, Congress set forth a complex and comprehensive scheme for the admission and naturalization of non-citizens, as well as for the removal or deportation of those who were not lawfully admitted or are otherwise deportable. *See Arizona*, 567 U.S. at 401–02 ("Federal law makes a single sovereign responsible for maintaining a comprehensive and unified system to keep track of aliens within the Nation's borders."). Congress has assigned principal responsibility for enforcing federal immigration laws to the United States Department of Homeland Security ("DHS"), including U.S. Immigration and Customs Enforcement ("ICE"), a federal law enforcement agency under DHS's auspices. *Arizona*, 567 U.S. at 387. The INA also provides for the voluntary participation of state and local officials in immigration enforcement in limited circumstances, demonstrating Congress's respect for the needs of other jurisdictions to balance competing priorities and community needs. But even though states and localities can sometimes play a supporting role in the scheme of federal immigration regulation, they may not "achieve [their] own immigration policy" through the enactment of laws that conflict with that scheme. *Arizona*, 567 U.S. at 408.

In 2011, the State of Indiana enacted Senate Enrolled Act 590 (SEA 590), which created a number of new immigration-related provisions. As part of that enactment, the General Assembly passed Indiana Code Chapter 18.2, entitled "Citizenship and Immigration Status Information and Enforcement of Federal Immigration Laws." As reflected in its title, that chapter includes two primary substantive requirements: section 3, which bars governmental entities and postsecondary educational institutions[1] from adopting policies that prohibit or restrict the sharing of individuals' citizenship or immigration status information with other governmental bodies, or the maintenance of such information, Ind. Code § 5-2-18.2-3; and section 4, which bars the same entities from limiting or restricting the enforcement of federal immigration laws, *id.* § 5-2-18.2-4. In addition, sections 5 and 6 allow "a person lawfully domiciled in Indiana [to] bring an action to compel" the compliance of a governmental body that has violated Chapter 18.2, *id.* § 5-2-18.2-5, and to obtain an injunction if the governmental body "knowingly or intentionally violated section 3 or 4," *id.* § 5-2-18.2-6. Finally, section 7 requires law enforcement agencies to provide officers with a "written notice" that the officers have a duty to cooperate with federal and state officials on matters pertaining to immigration enforcement. *Id.* § 5-2-18.2-7.[2] (Each provision of Chapter 18.2 will be referred to simply by its section number throughout.)

On May 16, 2017, the Common Council of the City of Gary, Indiana, approved City of Gary Ordinance 9100, entitled "An Ordinance Establishing the City of Gary Indiana as a Welcoming City." Compl. App. A ("Ordinance"). The Common Council adopted the Ordinance

[1] Because Plaintiffs make no claim with respect to postsecondary educational institutions, Defendant City of Gary refers only to "governmental bodies" throughout for the sake of brevity.

[2] Sections 1 and 2 are definitional, and section 8 prohibits discrimination in enforcement. Ind. Code §§ 5-2-18.2-1, -2, & -8.

in order to "demonstrate the City of Gary's commitment to ensure public safety for all city residents," "assure that each person is treated equally regardless of their immigration status," "support immigration enforcement as a federal matter," and "uphold[] the Constitution, including the 4th Amendment requirements of probable cause for arrest and detention and the 10th [A]mendment bar on commandeering of local governments to perform federal functions," among other goals. Ordinance pmbl. ¶¶ 1–3. Gary's Ordinance seeks to ensure that the immigration status of those who live, work, or pass through Gary will not affect how they are treated by Gary agencies and agents, including its police department and social services providers. Affidavit of Karen Freeman-Wilson, Mayor of City of Gary ("Freeman-Wilson Aff."), Ex. B to Gary's Designation of Evidence, ¶ 5.

In December 2017, Plaintiffs Jeff Nicholson, Douglas Grimes, Greg Serbon, and Cheree Calabro filed suit, seeking a finding that certain provisions of Gary's Ordinance violate sections 3 and 4 and an order enjoining the purported violations. The suit names as defendants the City of Gary, its Common Council, all nine members of the Common Council in their official capacities, and Gary's Mayor, Karen Freeman-Wilson, in her official capacity. Plaintiffs claim that particular portions of Gary's Ordinance that allegedly limit local law enforcement's cooperation with federal immigration authorities violate Chapter 18.2. The majority of the provisions of Gary's Ordinance are not challenged in this lawsuit.

Without awaiting discovery into Gary's interactions with ICE and other federal immigration authorities or the manner in which Gary has enforced its Ordinance, Plaintiffs filed for summary judgment on January 2, 2018. All twelve Defendants timely sought an extension of time to respond to the Complaint, to oppose Plaintiffs' Motion for Summary Judgment, and to cross-move for summary judgment. After a transfer from Lake County Circuit Court to Lake

County Superior Court, the Court granted that motion on February 16, 2018. On February 21, 2018, the City of Gary Common Council, all nine members of the Common Council, and Mayor Karen Freeman-Wilson moved to dismiss all counts against them. Also on February 21, the City of Gary timely sought an extension of time to answer the Complaint until ten days after any denial of its Cross-Motion for Summary Judgment.[3]

ARGUMENT

A party is entitled to summary judgment if there is no "genuine issue of material fact and . . . the moving party is entitled to judgment as a matter of law." *Siwinski v. Town of Ogden Dunes*, 949 N.E.2d 825, 827 (Ind. 2011) (citing Ind. R. Trial P. 56(C)). "If the parties have filed cross-motions for summary judgment, then [the Court] consider[s] each motion individually to determine if the moving party is entitled to summary judgment, while construing the facts most favorably to the nonmoving party in each matter." *Id.* "In resolving the matter, the Court will accept as true the facts established by evidence in favor of the nonmoving party while resolving all doubts against the moving party." *Id.* at 828. To the extent "the facts are not in dispute" and the Court need only interpret a statute or ordinance, the claim "presents a pure issue of law reserved for the court." *Id.*

Under Indiana law, a plaintiff generally must satisfy a four-pronged inquiry in order to obtain an injunction:

> (1) whether plaintiff's remedies at law are inadequate; (2) whether the plaintiff can demonstrate a reasonable likelihood of success on the merits; (3) whether

[3] The City's response to each allegation of the Complaint would have no bearing on this Court's resolution of Plaintiffs' Motion for Summary Judgment or the City's Cross-Motion for Summary Judgment. For that reason, as the City explained in its supporting memorandum, an Answer would serve no purpose at the present juncture, and would prove unnecessary if the City were to prevail on its Cross-Motion. In any event, the City had no obligation to answer the vast majority of Plaintiffs' Complaint, which consists largely of legal argumentation and characterizations of legal enactments. *See* Ind. R. Trial P. 8(D) (indicating that "no responsive pleading is required" for such allegations). The City has timely addressed these issues in the present Memorandum. As should also be clear from the present Memorandum, the City does not intend to contest Plaintiffs' purely factual allegations—for example, where each Plaintiff lives or works.

> the threatened injury to the plaintiff outweighs the threatened harm a grant of relief would occasion upon the defendant; and (4) whether the public interest would be disserved by granting relief.

Ferrell v. Dunescape Beach Club Condos., 751 N.E.2d 702, 712 (Ind. Ct. App. 2001). "[W]hen the plaintiff is seeking a permanent injunction, the second of the four traditional factors is slightly modified, for the issue is not whether the plaintiff has demonstrated a reasonable likelihood of success on the merits, but whether he has in fact succeeded on the merits." *Id.* at 713.

Plaintiffs fail to satisfy any of the four elements of the injunction standard as a matter of law. The Court should therefore deny Plaintiffs' Motion for Summary Judgment and grant the City's Cross-Motion for Summary Judgment.

I. The City of Gary Is Entitled to Summary Judgment Because Gary's Ordinance Does Not Violate Chapter 18.2.

A. Sections 3 and 4, properly interpreted, impose only limited and discrete requirements on Indiana governmental bodies.

As noted above, sections 3 and 4 of Chapter 18.2 provide the only substantive prohibitions at issue in this case. These provisions impose limited and discrete legal requirements on Indiana governmental bodies—forbidding them to restrict the sharing or maintenance of information in the governmental body's possession relating to an individual's citizenship or immigration status, or to restrict the federal government's ability to enforce federal immigration laws.

Plaintiffs, however, over-read the scope of Chapter 18.2 to impose a near-limitless requirement that governmental bodies in Indiana support federal immigration enforcement to the full extent permitted by federal law, whatever that boundary may be. In particular, Plaintiffs cherry-pick their favorite language from various parts of sections 3, 4, and 7 to create one overarching super-mandate "to cooperate with state and federal officials on matters pertaining to

enforcement of state and federal laws governing immigration . . . to the full extent permitted by federal law." Pls.' Summ. J. Memo. 1 (internal quotation marks omitted). As explained below, this super-mandate finds no support in the text of Chapter 18.2 or its surrounding context, cannot be squared with the localist philosophy of Indiana's Home Rule Act, and would raise grave concerns under both principles of federal preemption and the void-for-vagueness doctrine.

1. Section 3 bans policies that restrict governmental entities from sharing or maintaining citizenship or immigration status information in the governmental entity's possession.

Although Plaintiffs perceive in section 3 a broad "[i]nformation-[c]ooperation [m]andate" with respect to "all information related to immigration and citizenship," Pls.' Summ. J. Memo. 19–20, the statute in fact imposes a much narrower limitation on the policies that Indiana governmental bodies may adopt: It applies only to policies that restrict the sharing or maintaining (but not the gathering) of "citizenship or immigration status" information. Ind. Code § 5-2-18.2-3.

a. Section 3 pertains to "citizenship or immigration status" information only.

Section 3 prohibits governmental bodies from enacting policies that "prohibit[] or in any way restrict[] another governmental body or employee" from taking certain specified actions "with regard to information of the citizenship or immigration status, lawful or unlawful, of an individual." Ind. Code § 5-2-18.2-3.[4] "Citizenship or immigration status" information is not

[4] In full, Ind. Code § 5-2-18.2-3 provides:

> Sec. 3. A governmental body or a postsecondary educational institution may not enact or implement an ordinance, a resolution, a rule, or a policy that prohibits or in any way restricts another governmental body or employee of a postsecondary educational institution, including a law enforcement officer, a state or local official, or a state or local government employee, from taking the following actions with regard to information of the citizenship or immigration status, lawful or unlawful, of an individual:
>
> (1) Communicating or cooperating with federal officials.
>
> (2) Sending to or receiving information from the United States Department of Homeland Security.

defined in Chapter 18.2. However, a nearly identical phrase appears in 8 U.S.C. § 1373(a)[5] and has been read narrowly, according to its plain terms, to prohibit restrictions on the sharing of information relating solely to citizenship or immigration status—not "*all* restriction of communication between local law enforcement and federal immigration authorities," such as "restrictions of sharing inmates' release dates." *Steinle v. City & Cnty. of San Francisco*, 230 F. Supp. 3d 994, 1015 (N.D. Cal. 2017). This reading coheres with the commonly understood meaning of "citizenship or immigration status": statements of an individual's country of citizenship, whether an individual is lawfully present in the United States, and, if so, the source of permission authorizing her continued presence. *Cf. Saldivar v. Sessions*, 877 F.3d 812, 816–17 (9th Cir. 2017) ("Although the word 'status' is not defined in the INA, its general meaning is '[a] person's legal condition.'") (quoting *Black's Law Dictionary* 1542 (10th ed. 2014)).

Because section 3 largely mirrors the language of § 1373(a) and (b), it should be understood to share that statute's limited scope. *See Brownsburg Area Patrons Affecting Change*

(3) Maintaining information.

(4) Exchanging information with another federal, state, or local government entity.

[5] In pertinent part, 8 U.S.C. § 1373 reads:

(a) In general

Notwithstanding any other provision of Federal, State, or local law, a Federal, State, or local government entity or official may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, the Immigration and Naturalization Service information regarding the citizenship or immigration status, lawful or unlawful, of any individual.

(b) Additional authority of government entities

Notwithstanding any other provision of Federal, State, or local law, no person or agency may prohibit, or in any way restrict, a Federal, State, or local government entity from doing any of the following with respect to information regarding the immigration status, lawful or unlawful, of any individual:

(1) Sending such information to, or requesting or receiving such information from, the Immigration and Naturalization Service.

(2) Maintaining such information.

(3) Exchanging such information with any other Federal, State, or local government entity.

v. Baldwin, 714 N.E.2d 135, 140 (Ind. 1999) ("[W]hen a legislature adopts language from another jurisdiction, it presumably also adopts the judicial interpretation of that language."). Therefore, section 3's restrictions on policies that affect the sharing of information should be limited to the statute's express terms—applying, that is, only to "citizenship or immigration status" information, § 5-2-18.2-3, not the "full sharing of information useful to enforcement," Pls.' Summ. J. Memo. 14.

Plaintiffs provide no valid support for their expansive interpretation of section 3. Although they cite the Senate and House conference reports from the enactment of 8 U.S.C. § 1373 and § 1644,[6] respectively, the reports do not support Plaintiffs' broad understanding of "citizenship or immigration status" information. The portion of the Senate Report on section 1373 cited by Plaintiffs purports to do no more than explain how the exchange of "immigration-related information" acquired and maintained by state and local governments "is consistent with, and potentially of considerable assistance to," the INA's objectives. S. Rep. No. 104-249, at 20 (1996), *available at* https://www.congress.gov/104/crpt/srpt249/CRPT-104srpt249.pdf. It also immediately follows a sentence that refers more specifically to information "regarding a person's immigration status"—nearly the exact language used in section 1373—and so must be understood in that more limited sense. *Id.* at 19–20. The quoted portion of the House Report on section 1644 lends no further support for Plaintiffs' argument. Although the Report references both "information regarding the immigration status of an alien"—again, nearly the actual language used in section 1644—and information regarding "the presence, whereabouts, or activities of illegal aliens," H.R. Conf. Rep. No. 104-725, at 383 (1996), *reprinted in* 1996

[6] 8 U.S.C. § 1644 provides: "Notwithstanding any other provision of Federal, State, or local law, no State or local government entity may be prohibited, or in any way restricted, from sending to or receiving from the Immigration and Naturalization Service information regarding the immigration status, lawful or unlawful, of an alien in the United States."

U.S.C.C.A.N. 2649, 2771, *available at* https://www.congress.gov/104/crpt/hrpt725/CRPT-104hrpt725.pdf, the latter language was simply cited as an example of what state and local officials had "the *authority* to communicate," *id.* (emphasis added). Interpreting section 1644's prohibition as applying to all manner of information regarding "the presence, whereabouts, or activities of illegal aliens" would extend far beyond the enacted text. Courts are forbidden to "expand the plain meaning" of statutory language in this way. *George P. Todd Funeral Home, Inc. v. Estate of Beckner*, 663 N.E.2d 786, 788 (Ind. Ct. App. 1996). Finally, although Plaintiffs cite *City of New York v. United States*, 179 F.3d 29, 32–33 (2d Cir. 1999), for its quotation of these reports, that decision does not purport to construe the term "citizenship or immigration status" information. Nor do Plaintiffs point to any precedent that actually adopts their broad reading.

Even if sections 1373 and 1644 were understood to prohibit restrictions on the sharing of information beyond mere citizenship or immigration status, section 3 of Chapter 18.2 plainly applies to a narrower class of information. Section 3 refers to "information *of* the citizenship or immigration status . . . of an individual," Ind. Code § 5-2-18.2-3 (emphasis added), rather than information "regarding" such status, 8 U.S.C. §§ 1373(a), 1644. Accordingly, section 3's prohibition should be read—in accord with its plain language—to apply only to policies that restrict the sharing or maintenance of citizenship or immigration status information, not all manner of information relating to immigration enforcement.

b. Section 3 does not impose an obligation to collect information.

By its own terms, section 3 does not create any affirmative obligation to collect or assist in collecting citizenship and immigration status information, the better to share it with the federal government. Contrary to Plaintiffs' argument, section 3 should be read to apply only to the

sharing and maintenance of information already in a governmental body's possession. This reading is consistent with the plain language of section 3, the surrounding context of SEA 590, and federal statutes that permit the sharing of information with federal immigration officials. It is thus of no legal moment that Gary does not currently collect citizenship or immigration status information as a matter of course. *See* Affidavit of Richard Allen, Chief of Gary Police Dep't ("Allen Aff."), Ex. A to Gary's Designation of Evidence, ¶ 17.

"Our first task when interpreting a statute is to give its words their plain meaning and consider the structure of the statute as a whole." *ESPN, Inc. v. Univ. of Notre Dame Police Dep't*, 62 N.E.3d 1192, 1195 (Ind. 2016). "If [the statute's] language is clear and unambiguous, we simply apply its plain and ordinary meaning, heeding both what it 'does say' and what it 'does not say.'" *Day v. State*, 57 N.E.3d 809, 812 (Ind. 2016) (quoting *State v. Dugan*, 793 N.E.2d 1034, 1036 (Ind. 2003)).

The plain language of section 3 does not require the collection of citizenship or immigration status information. Section 3 bans policies that restrict, with respect to citizenship or immigration status information, "communicating or cooperating with federal officials," "sending to or receiving information from" DHS, "maintaining information," and "exchanging information." Ind. Code § 5-2-18.2-3(1)–(4). Each of these verbs describes an action to be taken with respect to information already in the possession of a governmental body. Notably absent are verbs like "collecting," "gathering," or "inquiring," each of which would have called to mind the acquisition of information in the first instance. Although the phrase "cooperating with federal officials" could be read broadly, that phrase must be understood, under the principle of *noscitur a sociis*, to bear a meaning similar to its surrounding terms in section 3. *See Day*, 57 N.E.3d at 814 ("[U]nder *noscitur a sociis*, if a statute contains a list, each word in that list should

be understood in the same general sense." (internal quotation marks and footnote omitted)). Interpreting "cooperating with federal officials" to encompass the logically prior act of acquiring information—a reading suggested nowhere else in section 3—would therefore strain the statute's text by placing that phrase severely out of step with its neighboring provisions.

The surrounding context of SEA 590 also demonstrates that section 3 focuses on citizenship and immigration status information already in the government's possession. *See Siwinski*, 949 N.E.2d at 828 (To the extent "ambiguity exists, to help determine the framers' intent, we must consider the statute in its entirety, and we must construe the ambiguity to be consistent with the entirety of the enactment."). Indiana Code § 11-10-1-2(d), also enacted as part of SEA 590, requires the Indiana Department of Correction to provide to DHS, where needed to verify immigration status, "any information regarding [a] committed criminal offender that: (1) is requested by [DHS]; and (2) is in the department's possession *or the department is able to obtain*" (emphasis added). Whereas this section envisions the communication of information beyond what the Department currently possesses, section 3 of Chapter 18.2 does nothing of the sort, suggesting that the General Assembly did not intend to require affirmative information collection under section 3.

Finally, contrary to Plaintiffs' suggestions, federal immigration statutes do not require (or even authorize) state and local governments to collect citizenship and immigration information. In particular, 8 U.S.C. §§ 1373 and 1644, on which Plaintiffs rely, use words nearly identical to section 3: § 1373(b) prohibits restrictions on "sending," "maintaining," and "exchanging" citizenship or immigration status information with other governmental entities, while § 1644 prohibits restrictions on "sending" information to and "receiving" information from the federal government. DHS's own guidance on state and local cooperation notes that "there is an

important distinction between communication of alien-status information between a state or local government and DHS, and the original acquisition of information by the state or local officer from an individual." Department of Homeland Security, *Guidance on State and Local Governments' Assistance in Immigration Enforcement and Related Matters* ("DHS Guidance") 12 (July 16, 2015), *available at* https://www.dhs.gov/sites/default/files/publications/guidance-state-local-assistance-immigration-enforcement.pdf. That guidance also makes clear that "[section] 1373, by itself, [does not] provide the state or local officers with that additional authority"—the authority to "investigate an individual's immigration status so as to acquire information that might be communicated to DHS"—which must instead "derive from another source." *Id.* And the Department of Justice has explained that "Section 1373 does not impose on states and localities the affirmative obligation to collect information from private individuals regarding their immigration status." Office of Justice Programs, U.S. Dep't of Justice, Guidance Regarding Compliance with 8 U.S.C. § 1373, *available at* https://www.bja.gov/funding/8uscsection1373.pdf. To the extent that Plaintiffs seek support in federal law for a broad mandate requiring information collection under section 3, none exists.[7]

In sum, section 3 is best read to ban Indiana governmental bodies from adopting policies that restrict only the sharing or maintenance of individuals' citizenship or immigration status information that is already in the possession of a governmental body.

2. Section 4 prohibits governmental bodies from limiting or restricting the federal enforcement of federal immigration laws.

Section 4 of Chapter 18.2 provides that "[a] governmental body or a postsecondary

[7] Plaintiffs also endeavor (at 1) to import from section 4 into section 3 a requirement to share information to "the full extent permitted by federal law." Ind. Code § 5-2-18.2-4. This language appears nowhere in section 3, which focuses on specific categories of conduct. In any case, as explained above, the federal laws cited above do not require sharing any information other than that pertaining to "citizenship or immigration status."

educational institution may not limit or restrict the enforcement of federal immigration laws to less than the full extent permitted by federal law." Section 4 is best read as referring to *federal* enforcement of federal immigration laws, because state and local governments are generally powerless to undertake such enforcement. And although Plaintiffs claim that section 4 requires governmental bodies in Indiana to "cooperate" with federal immigration authorities to the full extent permitted by federal law, this reading is not supported by the statutory text and raises grave problems with respect to Indiana's Home Rule Act, principles of federal preemption, and the void-for-vagueness doctrine. To avoid these serious concerns, section 4 should be read to prevent governmental bodies from limiting or restricting the *federal* enforcement of federal immigration laws, such as through policies that bar federal immigration officials from a locality's boundaries or from public government property.

a. Reading section 4 to limit only restrictions on federal immigration enforcement is compelled by the plain language of the statute and its surrounding provisions.

In reading section 4 to require "full-extent-enforcement-cooperation," Pls.' Summ. J. Memo. 13, Plaintiffs pay little heed to the statutory language the General Assembly actually enacted or SEA 590's surrounding context. Three key points demonstrate why section 4 is best understood as forbidding restrictions on the federal government's own enforcement of federal immigration laws.

First, section 4 prohibits governmental bodies from limiting or restricting "the *enforcement* of federal immigration laws" (emphasis added), but it says nothing about "cooperation," a term used in sections 3 and 7. Inferring a broad enforcement-cooperation mandate from section 4's text is therefore "a strained reading of the statute . . . . If the Indiana General Assembly specifically intended to mandate state cooperation with federal authorities, it

surely could have said so." *Lopez-Aguilar v. Marion Cnty. Sheriff's Dep't*, No. 116CV02457SEBTAB, 2017 WL 5634965, at *9 n.8 (S.D. Ind. Nov. 7, 2017).

Indeed, when Indiana adopted SEA 590 on May 10, 2011, other states had already enacted statutes that explicitly prohibited limitations on state and local assistance to federal immigration authorities. Given the existence of these statutes, it is sensible to conclude that the Indiana General Assembly would have written the statute differently had it intended Plaintiffs' interpretation. *See* 2011 Utah Laws Ch. 21, H.B. 497, § 6 (Mar. 15, 2011), Ex. E to Gary's Designation of Evidence ("A state or local governmental agency of this state, or any representative of the agency, may not (1) limit or restrict by ordinance, regulation, or policy the authority of any law enforcement agency or other governmental agency *to assist* the federal government in the enforcement of any federal law or regulation governing immigration . . . ." (emphasis added));[8] 2005 Ohio Laws File 61, Am. Sub. S.B. No. 9, § 1 (Jan. 11, 2006), Ex. D to Gary's Designation of Evidence ("[N]o state or local employee shall unreasonably fail to comply with any lawful request for assistance made out by any federal authorities carrying out . . . any federal immigration . . . investigation");[9] *cf. Day*, 57 N.E.3d at 812–13 (comparing statute to model provision and concluding that the rejection of a particular term "was intentional, not accidental").

Plaintiffs contend (at 14) that sections 3, 4, and 7 of Chapter 18.2 must be read *in pari materia*, and that doing so reveals a cooperation mandate latent within section 4. But reading statutes *in pari materia* is meant to give effect to the terms of each statute, not to concoct an amalgam that bears no resemblance to its constituent parts. For example, as noted above, section

[8] This provision is currently codified at Utah Code § 76-9-1006.

[9] This provision is currently codified at Ohio Rev. Code § 9.63(A).

3 requires cooperation with federal officials only with respect to sharing citizenship and immigration status information—not with respect to immigration enforcement (*e.g.*, the arrest, detention, and removal of unlawfully present individuals). Although Plaintiffs claim (at 14) that information-sharing should be seen as merely one stage of enforcement, this argument would render section 3 wholly superfluous. After all, if section 4's reference to "enforcement" required information-sharing of the type Plaintiffs envision, section 3 would serve no independent purpose. *See Siwinski*, 949 N.E.2d at 828 ("If possible, every word must be given effect and meaning, and no part should be held to be meaningless if it can be reconciled with the rest of the [statute].").

Moreover, contrary to Plaintiffs' assertion, the Court should not understand the "duty to cooperate" referenced in section 7 as implying some unstated duty in section 4. Section 7 requires every "law enforcement agency" to "provide each law enforcement officer with a written notice that the law enforcement officer has a duty to cooperate with state and federal agencies and officials on matters pertaining to enforcement of state and federal laws governing immigration." Ind. Code § 5-2-18.2.-7. That provision does not purport to impose a duty to cooperate; it instead obligates law enforcement agencies to provide *notice* of a duty located elsewhere. According to Plaintiffs (at 12), the duty recognized by section 7 is merely a "summar[y]" of "the foregoing requirements of §§ 3 and 4." That understanding cannot be correct: Whereas section 7 assumes that "each law enforcement officer . . . has a duty to cooperate," Ind. Code § 5-2-18.2-7, sections 3 and 4 impose limitations on an entirely different class of entities—governmental bodies and postsecondary educational institutions.

Although Plaintiffs offer no plausible account of section 7's individualized duty, the drafting history of SE 590 furnishes some insight into the nature of that obligation. In the

original draft bill, the "duty to cooperate" fell within a chapter called "Citizenship and Immigration Status Information." S.B. 590, Sec. 2, Ch. 18, § 5 (introduced Jan. 20, 2011), *available at* http://www.in.gov/legislative/bills/2011/PDF/IN/IN0590.1.pdf. Naturally, then, it appeared alongside section 3, which speaks of "[c]ommunicating or *cooperating* with federal officials" with respect to individuals' citizenship and immigration status. *Id.* § 3; Ind. Code § 5-2-18.2-3 (emphasis added). Section 4, by contrast, originally appeared in a subsequent chapter that bore a separate title. *See* S.B. 590, Sec. 3, Ch. 19, § 4. The absence of any mention of cooperation in section 4 suggests that it cannot be the source of any duty referred to in section 7, a fact that SE 590's drafting history confirms. Neither, then, does section 7's notice requirement—one that appears to have been inadvertently relocated during the drafting process—justify affording section 4 the implausibly broad reading Plaintiffs ascribe to it.

Second, section 4 focuses on the enforcement of "federal immigration laws," not on the enforcement of state law. Admittedly, the statutory text is "not clear regarding *whose* enforcement of 'federal immigration laws'" is at issue. *Lopez-Aguilar*, 2017 WL 5634965, at *8. But this ambiguity should be informed by the text of section 3, which, by contrast, refers explicitly to policies that restrict governmental actors at the state and local levels, "including a law enforcement officer, a state or local official, or a state or local government employee." Ind. Code § 5-2-18.2-3.

This distinction is illuminated by the parallel structure animating the INA. As noted above, the INA authorizes the sharing of citizenship and immigration status information between state and local governments, on the one hand, and federal officials, on the other. *See* 8 U.S.C. §§ 1373, 1644. But, at the same time, the INA entrusts immigration enforcement to the federal government; state and local law enforcement officials generally lack authority to enforce federal

immigration laws on their own. *See Arizona*, 567 U.S. at 409 ("[T]he removal process is entrusted to the discretion of the Federal Government."). In certain limited circumstances, federal law authorizes state and local officials to engage directly in the enforcement of immigration laws. *See id.* at 408; 8 U.S.C. § 1103(a)(10) (allowing the Attorney General to authorize state and local law enforcement officers to exercise the powers of a federal immigration officer in the event of "an actual or imminent mass influx of aliens"); § 1252c(a) (allowing state and local law enforcement to arrest an individual who is illegally present and had previously left the country after a felony conviction); § 1324(c) (granting authority to arrest for criminal transportation or harboring of illegal aliens to "all other officers whose duty it is to enforce criminal laws"); § 1357(g)(1) (authorizing state and local law enforcement to perform the functions of federal immigration officers after entering into a voluntary written agreement with the Attorney General and receiving appropriate training).[10] But these are merely "specific, limited" exceptions to the default regime of federal enforcement. *Arizona*, 567 U.S. at 410. Thus, the "enforcement of *federal* immigration laws" referred to in section 4 is enforcement *by federal officials*, not by state and local law enforcement officers.

Third, and finally, the limited goals of section 4 are clarified by the drafting history of SEA 590. In particular, two key provisions of the original draft bill that would have directed state and local law enforcement officers to participate in immigration enforcement were deleted from the final bill. First, Chapter 19 of the original draft of the Act would have required a law enforcement officer to request verification of an individual's citizenship and immigration status where the officer, in the course of conducting an otherwise lawful stop, detention, or arrest, had

[10] Neither the State of Indiana nor the City of Gary has such an agreement. *See* U.S. Immigration & Customs Enforcement, *Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act*, https://www.ice.gov/287g (last updated Jan. 10, 2018).

reasonable suspicion to believe that the individual stopped was not lawfully present in the United States. Chapter 19 further would have allowed for the transfer to ICE custody of detained individuals verified to be present unlawfully. *See* S.B. 590, Sec. 3, ch. 19, §§ 5(c), 6. These provisions were excluded from the final bill, while a provision *prohibiting* law enforcement officers from requesting verification of immigration status and citizenship information from witnesses and victims of crimes remained in the enacted version. *See* Ind. Code § 5-2-20-3. Second, the original bill directed the superintendent of the state police to negotiate a memorandum of agreement with DHS under 8 U.S.C. § 1357(g) to authorize Indiana state and local law enforcement officials to enforce federal immigration laws. S.B. 590, Sec. 8, § 21.5(a). The enacted version omitted this provision and instead merely urged the legislative council to study the feasibility of entering into such an agreement. SEA 590, § 25, *available at* http://www.in.gov/legislative/bills/2011/SE/SE0590.1.html. No such agreement has come into existence. *See supra* n.10. Taken together, the revisions made to Senate Bill 590 before its enactment clarify the Indiana General Assembly's decision not to create or mandate a role for state and local officials in federal immigration enforcement.

Ample evidence suggests that the General Assembly understood the removal of Chapter 19 in just these terms. After Senate Bill 590 was first introduced, a number of the bill's critics, including many local officials, expressed concerns that it would "mak[e] federal immigration enforcement the responsibility of police officers," thereby "burdening police departments, alienating citizens who raise officers' suspicions, and chasing away companies, conventions and prospective employees." Heather Gillers, *Kenley: Revamp Immigration Proposal*, Indianapolis Star, Mar. 15, 2011, at A1, Ex. F to Gary's Designation of Evidence. Based on these criticisms, the enacted version of the bill was "stripped of provisions that . . . would have required local and

state police to enforce federal immigration laws." Mary Beth Schneider, *Immigration Bill Shifts Its Emphasis to Employers*, Indianapolis Star, Apr. 15, 2011, at A1, Ex. G to Gary's Designation of Evidence. Section 4's reference to the "enforcement of federal immigration laws" should be read in light of this shift.

For the reasons set out above, the domain of section 4 is limited to actions that restrict the federal government's efforts to enforce federal immigration laws. This commonsense reading does not leave the statute toothless. Under section 4, localities cannot exclude ICE agents from public places like courthouses and libraries, nor can federal authorities be barred from conducting raids using their own personnel and equipment. In other words, section 4 ensures that no part of Indiana can become a true *sanctuary* for undocumented immigrants, where they are shielded from all federal immigration enforcement. But nothing in section 4 prevents the City of Gary from withholding enforcement assistance that neither state nor federal law requires it to provide.

b. Plaintiffs' expansive reading of section 4 cannot be squared with Indiana's Home Rule Act.

The Indiana Home Rule Act, as interpreted by the Indiana Supreme Court, establishes a strong presumption in favor of localities' ability to manage their own affairs and places a heavy burden on parties asserting state law preemption. Reading section 4 broadly to bar local policies that regulate cooperation with federal immigration enforcement would violate these bedrock principles.

The Indiana Home Rule Act declares it to be "[t]he policy of the state . . . to grant units all the powers that they need for the effective operation of government as to local affairs." Ind. Code § 36-1-3-2. In enacting the Home Rule Act, the Indiana General Assembly expressly abrogated its previous rule that local governments possessed only those powers expressly granted

to them. *Id*. § 36-1-3-4(a). The Home Rule Act specifies a reverse approach—that a local government has "all powers granted it by statute" and "all other powers necessary or desirable in the conduct of its affairs, even though not granted by statute," *id*. § 36-1-3-4(b). Crucially, the Act requires courts to resolve "[a]ny doubt as to the existence of a power of a unit . . . in favor of its existence." *Id*. § 36-1-3-3(b); *see also Anderson v. Gaudin*, 42 N.E.3d 82, 86 (Ind. 2015) (citing home rule principles in rejecting a challenge to the amendment of an ordinance that established a county-wide fire protection district).

As the Indiana Supreme Court has explained, "this statutory scheme demonstrates a legislative intent to provide counties, municipalities, and townships with expansive and broad-ranging authority to conduct their affairs." *City of N. Vernon v. Jennings Nw. Reg'l Utils.*, 829 N.E.2d 1, 5 (Ind. 2005). A local government may exercise any power that "is not expressly denied [to it] by the Indiana Constitution or by statute; and . . . is not expressly granted to another entity." Ind. Code § 36-1-3-5(a). Moreover, a properly enacted city ordinance "stands on the same general footing as an act of the Legislature," *Pittsburgh, Cincinnati, Chicago & St. Louis Ry. Co. v. Hartford City*, 85 N.E. 362, 363 (Ind. 1908), and is "presumptively valid" until "clearly proven" otherwise, *City of Indianapolis v. Clint's Wrecker Serv., Inc.*, 440 N.E.2d 737, 740 (Ind. Ct. App. 1982).

An exacting inquiry is required before determining that state law preempts a local ordinance. *Clint's Wrecker Serv.*, 440 N.E.2d at 746 (plaintiffs face a "heavy burden" to have an ordinance invalidated on state law preemption grounds). Even when the state has chosen to regulate in an area, "local governments may 'impose additional, reasonable regulations, and supplement burdens imposed by non-penal state law, provided the additional burdens are logically consistent with the statutory purpose.'" *Ind. Dept. of Nat'l Res. v. Newton Cnty.*, 802

N.E.2d 430, 433 (Ind. 2004) (quoting *Hobble ex rel. Hobble v. Basham*, 575 N.E.2d 693, 696–97 (Ind. Ct. App. 1991)).

In addition to the general presumption in favor of local authority, Indiana law expressly authorizes localities to manage their government, personnel, equipment, finances, operations, and police powers in sweeping terms. For example, those units are expressly empowered under state law to "regulate conduct, or use or possession of property, that might endanger the public health, safety, or welfare," Ind. Code § 36-8-2-4, as well as to "establish, maintain, and operate a police and law enforcement system to preserve public peace and order," including by "provid[ing] facilities and equipment for that system," *id*. § 36-8-2-2. More expansively, each locality enjoys statutory authority to "establish and operate a government," *id*. § 36-1-4-2, and to "pass ordinances, orders, resolutions, and motions for the government of the city, the control of the city's property and finances, and the appropriation of money," *id*. § 36-4-6-18. Finally, state law places the burden of managing a city's liability squarely on its own shoulders by expressly withholding the "power to condition or limit its civil liability, except as expressly granted by statute." *Id*. § 36-1-3-8.

Read in this context, Gary's ample express statutory authority, coupled with its broad residuum of authority under the Home Rule Act, mandate a narrow reading of any state law restricting how it may manage its affairs in some respect. This is particularly true with regard to its police power. *See, e.g.*, *City of Carmel v. Martin Marietta Materials, Inc.*, 883 N.E.2d 781, 787 (Ind. 2008) (approving extensive mining regulations that did not comply with statutory requirements for zoning ordinances because, under Indiana's "'home rule' philosophy," the city could separately regulate under its general power to regulate for public safety and welfare); *Beta Steel Corp. v. Porter Cnty.*, 695 N.E.2d 979, 981–82 (Ind. 1998) ("Cities and counties are each

granted the broad authority to regulate conduct that might endanger the public health, safety, or welfare.") (citing Ind. Code § 36-8-2-4); *Foster v. Bd. of Comm'rs*, 647 N.E.2d 1147, 1149 (Ind. 1995) (upholding a county's moratorium on building permits "as an appropriate exercise of its police power"). In fact, the preamble to Gary's Ordinance explicitly invokes the City's public safety authority from the first sentence. *See* Ordinance pmbl. ¶ 1 (Ordinance seeks to further Gary's "commitment to ensure public safety for all city residents and specifically enable immigrants to report crimes"). Gary's concern is warranted, as public safety depends on full cooperation from all residents with respect to reporting, investigating, and prosecuting violations of state criminal law. *See* Allen Aff. ¶¶ 4–5.

Against this backdrop of extensive authority, section 4 cannot fairly be interpreted to deny Gary the authority to place sensible parameters on its own role in immigration enforcement. For starters, section 4 is far too vague to "preempt[] the immigration-law field," as Plaintiffs claim (at 19). *See Lopez-Aguilar*, 2017 WL 5634965, at *8 (noting several ambiguities in section 4). Indiana courts have rejected field preemption claims predicated on significantly more exhaustive and detailed statutory schemes than that presented here. In *Town of Cedar Lake v. Alessia*, 985 N.E.2d 55 (Ind. App. 2013), for example, the court rejected plaintiffs' argument that Indiana law had established a "comprehensive legislative scheme that preempts the Town's authority to abolish the Parks Department and the Park Board," *id.* at 62. The statutory scheme specified such precise terms as the number of members and how they should be appointed, duties and salaries for the board, the timing of meetings, the manner of leasing and selling property, and rules regarding gifts, taxes, and fees. Ind. Code §§ 36-10-3-1 to -45. Nonetheless, the court reasoned that,

> [w]hile those provisions demonstrate a thoughtful legislative framework for the operation of park boards and parks departments, there is no language in those

> statutes that suggests the General Assembly sought to tie the hands of municipalities that create park boards and parks departments so as to prevent reconsideration of those decisions. Indeed, conspicuously absent from Indiana Code Chapter 36-10-3 is any restriction on a municipal corporation's authority to dissolve a park board and parks department.

Town of Cedar Lake, 985 N.E.2d at 62–63. Therefore, the court held that under home rule principles, the town retained that authority. *See also Town of Avon v. W. Central Conservancy Dist.*, 957 N.E.2d 598, 607–08 (Ind. 2011) (refusing to find field preemption despite the Department of Natural Resource's extensive authority to regulate groundwater, because the state agency's regulation left the potential for other entities to regulate the withdrawal of groundwater); *Allen v. City of Hammond*, 879 N.E.2d 644, 648–49 (Ind. App. 2008) (upholding an ordinance imposing business license requirements on law offices within city limits, despite the State's general regulation of attorney licensure). Much as in *Town of Cedar Lake*, *Town of Avon*, and *City of Hammond*, Chapter 18.2's statutory scheme is not sufficiently pervasive to occupy those aspects of the immigration law field not already regulated at the federal level. Section 4 simply has not created a "harmonious whole" of regulations. *Arizona*, 567 U.S. at 401.

Section 4 also does nothing to limit Gary's extensive express and implied police power, nor does it "expressly grant" to the state any of that local power. Section 4 prohibits local restrictions on the general "enforcement of federal immigration laws," without any more specificity. The vague language of section 4 thus fails to clear the high bar needed to effect a limitation on the regulatory power exercised through Gary's Ordinance. *See Clint's Wrecker Serv.*, 440 N.E.2d at 740 (explaining that "all doubts are to be resolved against" the party challenging an ordinance's validity). Under home rule principles, it would be inappropriate to read such a general and imprecisely worded statute to thwart a broad range of specific action by localities. *Tippecanoe Cnty. v. Ind. Mfr.'s Ass'n*, 784 N.E.2d 463, 466 (Ind. 2003) (emphasizing

that the Home Rule Act "completely . . . reversed" Indiana's prior restrictive approach toward local authority).

In fact, reading section 4 to impose Plaintiffs' proposed "full-extent-enforcement-cooperation mandate" could infringe on Gary's local power in myriad unpredictable ways. If Gary were unable to enact any regulations governing how its agencies interact with the community and with the federal government regarding immigration law, its agencies would be deprived of any guidance or tools needed to ensure compliance with state and federal law. Local participation in federal immigration enforcement carries a substantial risk of liability, particularly absent clear parameters for when and how local authorities may assist the federal government. *See, e.g., Lopez-Aguilar*, 2017 WL 5634965 (settling a Fourth Amendment lawsuit based on local court officers' roles in fulfilling an ICE detainer request). Section 4 provides no guidance for how local law enforcement should go about fulfilling the "limited" role they are permitted to play in immigration without running afoul of constitutional protections. *See Arizona*, 567 U.S. at 408 (describing the "limited circumstances in which state officers may perform the functions of an immigration officer"). For their own fiscal protection, cities must be able to regulate to fill these sorts of gaps in state law. *See Town of Avon*, 957 N.E.2d at 608 (reserving gaps in state regulation for local power).

Moreover, how Gary chooses to spend its limited resources and regulate the conduct of its employees and agencies is a quintessentially local affair. *See, e.g.*, Ind. Code § 36-4-6-18. State law prohibits Gary from limiting its own civil liability, Ind. Code § 36-1-3-8, and denies it "[t]he power to impose a tax, except as expressly granted by statute," *id.* § 36-1-3-8(a)(4); *see also id*. §§ 36-1-3-8(a)(5)–(6) (limiting a city's ability to impose fees). A reading of Section 4 that required Gary to expend new and undefined resources would entail diminished expenditures

for other priorities, and would deny Gary the ability to manage its liability and protect the public fisc by equipping its agencies with regulatory guidance. Gary does not systematically train its officers to help enforce federal immigration laws, nor can it presently afford to pay for such training. Allen Aff. ¶¶ 7–8, 10. In fact, significant budgetary shortfalls complicate Gary's efforts to manage its own local public safety concerns. *Id.* ¶¶ 15–16. If Plaintiffs' reading were adopted, Gary would be stuck with an overly broad, imprecise mandate to re-prioritize its local affairs, serious difficulties raising funds to provide any essential services so displaced, and increased liability with little recourse to manage it.

Reading section 4 to prohibit Indiana governmental bodies from restricting federal immigration enforcement preserves Gary's authority to fill in the substantial gaps left by section 4's indefinite pronouncement—namely, by specifying how its agencies can manage the city's limited resources; continue to protect public health, safety, and welfare; and reduce the incidence of costly constitutional violations. Under this narrower reading, the Ordinance is "logically consistent" with section 4 by defining the parameters of Gary's local role in immigration enforcement, while refraining from directly regulating federal enforcement of immigration law. *Newton Cnty.*, 802 N.E.2d at 433 (citing *Hobble*, 575 N.E.2d at 697). This understanding thus best satisfies the Court's obligation to avoid unnecessary clashes between two or more enactments. *See Town of Avon*, 957 N.E.2d at 606 (choosing an interpretation that "harmonizes the effect of both sets of statutes—our first objective when confronted with two seemingly-conflicting provisions").

c. Plaintiffs' reading of section 4 would raise serious concerns under federal law.

As explained above, Plaintiffs would read section 4 to ban Indiana governmental bodies from limiting or restricting their own cooperation with federal immigration enforcement efforts

to "less than the full extent permitted by federal law." Because this understanding of section 4 would raise two serious concerns under federal law—that the statute would be both federally preempted and unconstitutionally vague—deep-rooted doctrines of avoidance require that section 4 be read to apply only to efforts to impede federal enforcement of federal immigration laws, which would raise neither of these concerns.

First, as the U.S. Supreme Court has counseled, state statutes should not be unnecessarily "construe[d] . . . so as to create a conflict between federal and state legislation." *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 647 (1990); *see also Lukus v. Westinghouse Elec. Corp.*, 419 A.2d 431, 439 (Pa. Super. 1980) ("[I]f preemption may be avoided by construing a statute narrowly, then we should construe the statute narrowly."). Plaintiffs' interpretation of section 4 would needlessly clash with an important element of congressional design.

Under federal law, the decision whether to assist with any particular immigration enforcement activity is left to the discretion of state and local officials and policy-makers, who are ultimately responsible to their communities for allocating their limited resources as they deem most appropriate to meet local needs. Plaintiffs' reading of section 4 effectively would turn localities' voluntary cooperation under federal law into a mandate imposed by state law—a command reinforced by the threat of litigation (this case being but one example), and the time and expense it entails. Because this state-law mandate would conflict with Congress's voluntary scheme for state and local participation, Plaintiffs' expansive reading of section 4 would raise serious federal preemption concerns.

As the Supreme Court has explained, "state laws are preempted when they conflict with federal law." *Arizona*, 567 U.S. at 399 (quoting *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372 (2000)). "This includes cases where . . . the challenged state law 'stands as an

obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Id.* at 399–400 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). Importantly, a state law need not work at cross-purposes with a federal regulatory scheme to be preempted; rather, a "conflict in technique can be as fully disruptive to the system Congress erected as [a] conflict in overt policy." *Id.* at 406 (quoting *Motor Coach Emp. v. Lockridge*, 403 U.S. 274, 287 (1971)).

In the INA, Congress created a carefully calibrated framework that reflects its decision to allow local officials to support immigration enforcement in certain circumstances while preserving local authority to decide what kinds of enforcement cooperation are consistent with local public safety priorities, resources, and rights. That balance is reflected throughout the INA. In particular, where Congress has created opportunities for local officers to participate in immigration enforcement, it also has taken care to protect the right of local governments to decide whether and how to participate. *See, e.g.*, 8 U.S.C. § 1103(a)(10) (requiring "the consent of the head" of a local jurisdiction for its officers to respond to a mass influx of aliens in this way); *Id.* § 1252c(a) (limiting certain immigration-related arrests performed by local officials to those "permitted by . . . local law"); *Id.* § 1357(g)(1), (9) (clarifying that "political subdivisions" need not enter into written agreements authorizing local officials to act as immigration officers, and requiring those agreements to be "consistent with . . . local law"); *Lopez-Aguilar*, 2017 WL 5634965, at *10 (explaining that ICE detainer requests "do not . . . compel a state or local law enforcement agency to detain suspected aliens subject to removal") (quoting *Galarza v. Szalczyk*, 745 F.3d 634, 636 (3d Cir. 2014)). It is not surprising that Congress would safeguard local governments' ability to choose whether to supplement federal enforcement on their own time and dime. *See* 8 U.S.C. § 1357(g)(1) (explaining that immigration enforcement pursuant to a

written agreement with DHS is to be carried out "at the expense of the State or political subdivision").

By removing local authorities' discretion in immigration matters, the "full-extent-enforcement-cooperation mandate" Plaintiffs inject into section 4 would upset the careful "balance between competing regulatory and policy objectives" struck by federal law. *Buquer v. City of Indianapolis*, 797 F. Supp. 2d 905, 921 (S.D. Ind. 2011); *see also* DHS Guidance 3 (setting out these competing priorities). Even a state law that "attempts to achieve one of the same goals as federal law" can be subject to preemption if it adopts its own method of effectuating that goal. *Arizona*, 567 U.S. at 406; *cf.* DHS Guidance 8 (A state should not "adopt its own mandatory set of directives to implement the state's own enforcement policies . . . *even if the state or local government's own purpose is to enforce federal immigration law*." (emphasis added)).

By contrast, reading section 4 to instruct governmental bodies in Indiana not to restrict the federal enforcement of federal statutes, pursuant to the federal government's own policies and priorities, would not undercut the scheme Congress provided for in the INA. In short, the federal government begins by determining its own enforcement priorities and deciding whether any given situation warrants federal officials' use of their own broad enforcement powers. Then, consistent with section 4's focus on federal enforcement of federal immigration laws and Congress's choice to allow voluntary cooperation by state and local entities, local governments can assess whether and how to support federal enforcement efforts. In this way, the fact that Gary has placed outer bounds on cooperation with federal immigration enforcement does not raise the same preemption concerns as Plaintiffs' erroneous construction of section 4.

In its Ordinance, Gary simply exercised the discretion federal law affords to all local

governments by setting out the circumstances in which cooperating with federal immigration enforcement would unduly compromise other public safety interests. *See* Ordinance pmbl. ¶ 2.[11] This Court should reject Plaintiffs' contrary interpretation, one that would unnecessarily imperil Chapter 18.2 under principles of federal preemption.

Second, if section 4 were read to impose Plaintiffs' proposed "full-extent-enforcement-cooperation mandate," it might well run afoul of the Fourteenth Amendment's due process prohibition on excessively vague laws. "Courts have an overriding obligation to construe our statutes in such a way as to render them constitutional if reasonably possible." *Brownsburg Area Patrons*, 714 N.E.2d at 141 (internal quotation marks omitted). To implement this command, "[w]hen the validity of [a statute] is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that [courts] will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *Ind. Wholesale Wine & Liquor Co. v. State ex rel. Indiana Alcoholic Beverage Comm'n*, 695 N.E.2d 99, 106 (Ind. 1998) (quoting *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring)).

A statute may be invalidated for vagueness "if it 'fails to provide notice enabling ordinary people to understand the conduct that it prohibits.'" *Brown v. State*, 868 N.E.2d 464, 467 (Ind. 2007) (quoting *Rhinehardt v. State*, 477 N.E.2d 89, 93 (Ind. 1985)).[12] "[A] statute which either

[11] In fact, the Gary Police Department *does* cooperate with federal authorities in ways that are not prohibited by the Ordinance. It is currently negotiating with the Department of Homeland Security to permit the agency to use the Police Department's firing range. The Police Department provides security at the Gary/Chicago International Airport to protect the safety of protestors and airport personnel when federal authorities transport immigration detainees out of the airport from surrounding jurisdictions. And the Police Department works with multiple federal agencies on the "Gary for Life" program, an initiative designed to reduce gang-related criminal activity. Allen Aff. ¶ 18.

[12] Section 4, as interpreted by Plaintiffs, would raise vagueness concerns under both the United States and Indiana Constitutions. This discussion focuses on the Fourteenth Amendment because "the analysis of a due process

forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law." *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926).

In particular, under Plaintiffs' reading, section 4's single, undefined command—that governmental bodies may not "limit or restrict the enforcement of federal immigration laws to less than the full extent permitted by federal law"—would be virtually unbounded. *See Lopez-Aguilar*, 2017 WL 5634965, at *8 ("It is not clear how "federal immigration laws are defined, nor is it clear what is meant by 'limit[ing] or restrict[ing]' activities by a governmental body. Finally, it is far from clear what 'the full extent permitted by federal law' means." (internal citation omitted) (brackets in original)). And Plaintiffs would visit such guesswork not only on local legislatures but also on *every* entity located within *every* governmental institution in Indiana, including police departments. *See* Ind. Code § 5-2-18.2-1 ("As used in this chapter, 'governmental body' has the meaning set forth in IC 5-22-2-13."); *id.* § 5-22-2-13 ("'Governmental body' means an agency, a board, a branch, a bureau, a commission, a council, a department, an institution, an office, or other establishment of any of the following: (1) The executive branch. (2) The judicial branch. (3) The legislative branch. (4) A political subdivision.").

If section 4 were read to impose a "full-extent-enforcement-cooperation mandate," a wide variety of state and local policies that tangentially affect federal enforcement capabilities would seemingly run afoul of section 4. Under Plaintiffs' theory, a governmental body violates section 4 whenever it acts in a way "that could lead to" less immigration enforcement than is possible

vagueness challenge under the Indiana Constitution and the U.S. Constitution is identical, and the Indiana courts rely on the same cases and standards in ruling on these challenges." *Whatley v. Zatecky*, 833 F.3d 762, 771 (7th Cir. 2016) (citing Indiana case law).

under federal law. Pls.' Summ. J. Memo. at 29. Such a standard would not only be nonsensical from a policy perspective; it would be impossible for courts to administer in a principled fashion. Are local governments forbidden to shift resources from law enforcement to other priorities, such as education or wastewater treatment? Must Gary change its local jail protocols to allow it to hold inmates beyond the current maximum of 48 hours, *see* Allen Aff. ¶ 14, and incur the costs of constructing new facilities, for the sake of complying with voluntary ICE detainer requests?[13] Must Gary refuse to transfer inmates in its local jail to any jurisdiction that does not assist federal immigration authorities as much as possible? *See id.* ¶ 14 (explaining that, due to the local jail's limited holding capacity, transfers are conducted to the county jail three times per day). Would not a courthouse or public library "limit" the scope of potential immigration enforcement by closing at 5 PM rather than 6 PM? To put it mildly, this Court should hesitate to conclude that every statute, ordinance, rule, policy, guideline, or budgetary decision issued by any governmental body at the state or local level violates section 4 unless it ensures the maximum amount of immigration enforcement conceivably allowed under federal law. Surely communities such as Gary need not "participate in a joint task force with federal officers" or "provide operational support in executing a warrant," *Arizona*, 567 U.S. at 410, if their limited resources would be better spent elsewhere—for example, in investigating violent criminal offenses.

The very purpose of vagueness doctrine is to ensure that no one bear the burden of attempting to comply with such "an unascertainable standard." *Coates v. Cincinnati*, 402 U.S. 611, 614 (1971). Read Plaintiffs' way, section 4 would fail to provide sufficient notice of what is prohibited, putting governmental entities to an impossible choice. If they were to adopt

[13] As explained below, the Fourth Amendment prohibits the continuation of detention based only on an ICE detainer or administrative warrant. *See infra* at 41–43.

fiscally responsible policies conducive to public health and safety, they would run the risk—and face any associated costs—of defending a lawsuit such as this one. If they instead declined to adopt such policies, they would forsake the well-being of the very citizens they are charged with serving, while also subjecting themselves to suit if they inadvertently overstepped their limited roles in immigration enforcement. Although statutes involving "civil matters need not be as precise as those which impose criminal penalties," *Whatley v. Zatecky*, 833 F.3d 762, 777 (7th Cir. 2016), Plaintiffs' reading of section 4 would provide virtually no guidance to Indiana governmental bodies seeking to steer clear of its prohibition.

In sum, Plaintiffs' reading of section 4 would raise serious vagueness concerns because it would impose a nearly limitless burden on governmental bodies that the General Assembly could not have intended. By contrast, the potential consequences of reading section 4 to prohibit only restrictions on federal enforcement of federal immigration laws are far clearer and would not demand an undefined commitment on the part of state and local governmental entities. This Court should "presum[e] that [the Indiana General Assembly] did not intend the alternative which raises serious constitutional doubts." *Clark v. Martinez*, 543 U.S. 371, 381 (2005).

B. The challenged provisions of Gary's Ordinance do not violate sections 3 or 4, properly interpreted.

1. Gary's Ordinance is consistent with section 3's prohibition on policies that restrict the sharing or maintenance of citizenship or immigration status information.

As set forth above, section 3 of Chapter 18.2 bars policies that prohibit or restrict the sharing and maintenance of information relating to an individual's citizenship or immigration status. Although Plaintiffs claim that several provisions of Gary's Ordinance violate section 3, only three of them—sections 26-52 and 26.59, and a portion of section 26-55(d)—meaningfully

address matters falling within section 3's purview. These provisions, however, are entirely consistent with section 3.

As an initial matter, section 26.59 of the Ordinance authorizes Gary officials to share the very information addressed by section 3. Section 26.59 provides that "[n]othing in this chapter prohibits any municipal agency from sending to, or receiving from, any local, state, [or] federal agency, information regarding an individual's citizenship or immigration status," defined as "a statement of the individual's country of citizenship or a statement of the individual's immigration status." Because this provision expressly *allows* for the sharing of "information of the citizenship or immigration status . . . of an individual," Ind. Code § 5-2-18.2-3, it fully satisfies section 3's requirements.

Although section 26-55(d) prohibits Gary agencies and agents from accepting requests from ICE "to provide information on persons who may be the subject of immigration enforcement operations," this provision includes a carve-out allowing Gary officials to share information with ICE "as may be required under [section 26.59] of this ordinance."[14] As noted above, because section 26.59 allows Gary agencies to send and receive citizenship and immigration status information (as required by section 3 of the state law), section 26-55(d) does not in fact prohibit or restrict the sharing of the information to which section 3 is directed.

Finally, Plaintiffs urge (at 23) that section 26-52 of the Ordinance violates section 3 of Chapter 18.2. Section 26-52 bars city agencies and agents from "*request[ing]* information about or otherwise *investigat[ing]* or assist[ing] in the investigation of the citizenship or immigration status of any person unless such inquiry or investigation is required by an order issued by a court

[14] Although the text of the ordinance reads "except as may be required under section 11 of this ordinance," this was a scrivener's error. Section 26.61, the eleventh provision of Gary's Ordinance, simply specified when the Ordinance would take effect. Section 26.59, however, links naturally with the Ordinance's informational provisions by confirming that they do not forbid compliance with section 3 of Chapter 18.2.

of competent jurisdiction" (emphases added). But, as explained above, section 3 of the state law, properly read, does not ban policies that limit the ability of local officials to *collect* citizenship or immigration status information, nor does section 26-52 of Gary's Ordinance restrict the maintenance or sharing of information in the possession of the City's agencies. Section 3 therefore simply does not bar this form of local regulation.

Moreover, section 26-52's prohibition on "assisting" in an investigation does not violate section 3's prohibition on restricting cooperating with federal officials with respect to citizenship and immigration status information. As explained above, the cooperation that section 3 requires must be understood in light of that provision's surrounding terms, which address the maintenance and sharing of information already in the government's possession, not the collection of new information. Plaintiffs' reading of section 3 would expand the meaning of "cooperation" far beyond that limited information-sharing context. *See, e.g.*, Pls.' Summ. J. Memo. at 27 (arguing that section 3's putative "information-cooperation mandate" covers both "requests to support or assist in an immigration enforcement operation" as well as entry into formal § 1357(g)(1) agreements). The text of section 3 simply does not encompass independent local law enforcement investigations, tactical assistance or support to federal operations, or any activity other than sending or maintaining existing "information" regarding a person's citizenship or immigration status.

Reading section 3 to prohibit policies limiting other forms of assistance, moreover, would violate the principles underlying Indiana's Home Rule Act. Given that Act's broad protection of local authority, section 3's brief and undefined reference to "cooperating with federal officials" "with regard to information of the citizenship or immigration status . . . of an individual" is far too ambiguous to "expressly deny" Gary the power to regulate the investigatory duties of its law

enforcement officers. Ind. Code § 36-1-3-3(b). Nor do those phrases "expressly grant" such power to anyone else. *Id*. § 36-1-3-5(a). In any case, any doubt on that score must be resolved against a broad reading of the state statute and in favor of preserving the Ordinance. Ind. Code § 36-1-3-3(b); *see also Yater v. Hancock Cnty. Planning Comm'n*, 614 N.E.2d 568, 575–77 (Ind. App. 1993) (citing home rule principles in holding that a statute granting the Indiana Department of Transportation authority to "consent to *openings* made in a state highway" did not prohibit a city from enacting additional regulation governing *access* to the same highway (emphases added)). Therefore, given the vast authority reserved to localities under Indiana law, section 3 must be read narrowly to preserve both the statute and the Ordinance. *Hobble*, 575 N.E.2d at 696–97 ("In construing the statute or ordinance, all doubts are to be resolved against the challenger and, if possible, the ordinance is to be construed as valid.").

Plaintiffs purport to identify one final infirmity in section 26-52: that the definition of "citizenship or immigration status" in section 26-51 of the Ordinance, which is incorporated into section 26-52, is broader than the parallel definition in section 26.59. Pls.' Summ. J. Memo 21. This is a red herring. Even if section 26-52 barred the collection of a broader range of information than 26.59 allows to be shared, that would not affect whether section 26-52 runs afoul of section 3 of the state law. Neither section 3 nor any federal statute prohibits restrictions on the *collection* of information regarding citizenship or immigration status, so the range of information barred from collection has no bearing on the information that Gary must permit its agencies and agents to share, which is adequately covered by 26.59.

Two months after Gary enacted its Ordinance, the City's Corporation Counsel certified in a federal grant application—under penalty of perjury—that Gary complies fully with 8 U.S.C. § 1373, the statute on which section 3 was modeled. *See* Ex. C to Gary's Designation of

Evidence. The City's certificate of compliance was well grounded. For all of the reasons explained above, each provision of Gary's Ordinance complies fully with section 3 of Chapter 18.2.

2. Gary's Ordinance is consistent with section 4's prohibition on policies that interfere with federal immigration enforcement.

As noted above, section 4 of the state law, properly interpreted, bars governmental bodies only from limiting or restricting federal immigration officials from enforcing federal immigration laws. The challenged provisions of Gary's Ordinance present no conflict with section 4, because they merely specify what forms of enforcement cooperation Gary agencies and agents may render when federal immigration authorities request their assistance.

First, Plaintiffs claim that each provision of Gary's Ordinance that they challenge violates their broad reading of section 4. As explained in the previous section, the information-collection and information-sharing sections of Gary's Ordinance (sections 26-52 and 26.59, and a portion of section 26-55(d)) do not violate section 3, because they do not restrict Gary officials from sharing the narrow classes of information at which that provision is directed. Nor do they run afoul of section 4: Those provisions regulate the types of cooperation that Gary agencies and agents may render, without restricting federal authorities' own enforcement of federal immigration laws.

Turning to the remaining challenged provisions of the Ordinance, section 26-55 similarly regulates only the types of cooperation that localities may decline to furnish, not the separate enforcement efforts of federal immigration authorities. Subsections (a)–(c) restrict municipal agents and agencies from stopping, arresting, detaining, or continuing to detain a person based solely on an immigration detainer, administrative warrant, or the belief that a person is not present legally in the United States or has committed a civil immigration violation. These

provisions do not purport to limit the ability of *federal* immigration authorities to rely on the listed grounds to stop, arrest, or detain an individual.[15]

Subsections (d) and (e), respectively, direct Gary agencies and agents not "to accept requests by ICE or other agencies to support or assist in any capacity with immigration enforcement operations" and instruct city agencies not to enter into an agreement under 8 U.S.C. § 1357(g) to enforce federal immigration laws. Again, these provisions do not restrict ICE's own activities or seek to limit what federal authorities may do to enforce federal immigration laws.

Next, section 26-55(f) limits Gary agents and agencies from affirmatively assisting federal authorities in enforcing federal immigration laws absent "a valid and properly issued criminal warrant." The prohibited forms of cooperation extend to (1) "permit[ting]" ICE agents access to detained persons; (2) "transfer[ring]" any person to ICE custody; (3) "permit[ting]" ICE agents to use Gary's facilities, information,[16] and equipment; and (4) "expend[ing] . . . time" responding to ICE inquiries or communicating with ICE about a person's custody status, release date, or contact information. It is true that, absent these provisions, ICE might enjoy slightly greater resources and opportunities to enforce federal immigration laws. But that is not what section 4 requires. Section 26-55(f) targets not ICE's own activities—which section 4 would prohibit Gary from regulating—but the City's own expenditure of its limited resources in supporting federal enforcement.

Finally, section 26.58(c) requires the Gary Police Department to consider the "extreme potential negative consequences of an arrest," including a heightened risk of deportation, when

[15] In any case, the Fourth Amendment prohibits Gary officials from performing the acts identified in subsections (a)–(c). *See infra* at 41–43.

[16] "[E]xcept as may be required under section [26.59] of this Ordinance." *Id.* § 26-55(f)(3).

exercising its discretion to arrest an individual. This provision does not regulate federal immigration enforcement, nor can it plausibly be construed as limiting or restricting immigration enforcement *at all*. Section 26.58(c) merely provides guidance for local officers' exercise of discretion in conducting arrests for criminal offenses under state law. Plaintiffs' rationale for challenging section 26.58(c)—that it "bar[s] activity that could lead to convictions" that might create the occasion for later federal immigration enforcement, Pls.' Summ. J. Memo. 29—exposes the intolerable breadth of Plaintiffs' "full-extent-enforcement-cooperation mandate." Section 4 cannot fairly be interpreted to forbid efforts to minimize both ethnic profiling[17] and arrests that bear little relation to sound policing policies and public safety priorities.

In sum, because the challenged provisions do not restrict federal authorities' own enforcement of federal immigration laws, the Ordinance does not violate section 4 of Chapter 18.2.

3. Plaintiffs do not seek relief for a violation of section 7.

It is not clear from Plaintiffs' Summary Judgment Memorandum whether they intend to claim that the challenged provisions of Gary's Ordinance violate section 7 of Chapter 18.2. In some places in their brief, Plaintiffs contend that section 7 "inform[s]" or "clarifie[s]" sections 3 and 4, Pls.' Summ. J. Memo. 20–21, 24, 28–29; in others, they allege that certain provisions of the Ordinance violate section 7, *id.* at 19, 22, 27, 29–30. Because Plaintiffs' proposed summary judgment order does not include section 7 among the provisions of Chapter 18.2 that they claim have been violated, the City of Gary assumes that no such violation is alleged.

In any case, section 6, on which Plaintiffs rely (at 31) in seeking relief, allows for an

[17] Section 8 of Chapter 18.2 mandates that "[t]his chapter . . . be enforced without regard to *race*, religion, gender, *ethnicity*, or *national origin*." Ind. Code § 5-2-18.2-8 (emphases added).

injunction only for violations of sections 3 and 4, so a purported violation of section 7 cannot form the basis for an injunction in this action.[18] Moreover, section 7 applies only to "law enforcement agenc[ies]," not to "governmental bodies." *Compare* Ind. Code. § 5-2-18.2-7 (incorporating the definition of "law enforcement agency" in Ind. Code § 5-2-17-2), *with id.* §§ 5-2-18.2-3, -4. No law enforcement agency has been named as a defendant in this suit, and Plaintiffs have not alleged that any law enforcement agency has failed to provide the notice required by section 7. Therefore, even if Plaintiffs intend to allege a violation of section 7, they have asserted no cognizable claim under that provision.

C. Even if section 4 were to require state and local cooperation in federal immigration enforcement, most of Gary's Ordinance would remain valid.

Even if the Court were to accept Plaintiffs' reading of section 4—that it prevents Indiana governmental bodies from limiting or restricting their own cooperation in federal immigration enforcement—most provisions of Gary's Ordinance would nonetheless remain valid.[19]

1. Three provisions of Gary's Ordinance effectuate the requirements of the Fourth Amendment.

As noted above, section 26-55(a)–(c) of Gary's Ordinance restricts municipal agents and agencies from stopping, arresting, detaining, or continuing to detain a person based solely on an immigration detainer, administrative warrant, or "the belief that a person is not present legally in

[18] The original draft bill *did* authorize injunctive relief for violations of the "duty to cooperate," *see* S.B. 590, Section 2, Ch. 18, §§ 4–5, further suggesting that section 7's role in the enacted Chapter 18.2 was not fully thought through as its drafters mixed and matched various provisions.

[19] Plaintiffs do not detail in their Complaint or Summary Judgment Memorandum what types of cooperation they believe are required by section 4. If the Court were to discern a cooperation mandate in section 4, that mandate should be limited to *genuine* cooperation—*i.e.*, only those forms of cooperation invited or expressly authorized by the federal government. "Otherwise, a local government would be acting beyond the scope of [its] authority," and section 4 arguably would be preempted by federal law. *Utah Coalition of La Raza v. Herbert*, 26 F. Supp. 3d 1125, 1143 (D. Utah 2014) (imposing this limitation on Utah Code Ann. § 76-9-1006(1), a provision similar to section 4); *see also Lopez-Aguilar*, 2017 WL 5634965, at *8 ("Plainly, federal immigration law does not permit, and Section 4 therefore does not require, every law enforcement officer employed by a state governmental body to engage in the enforcement of federal immigration law on the same terms and basis as federal officials, free from any restriction by the governmental body (even, presumably, as to enforcement priorities).").

the United States, or that the person has committed a civil immigration violation." Under Plaintiffs' reading of section 4, Chapter 18.2 requires local cooperation to "the full extent permitted by federal law." Federal law includes not only those portions of the INA that permit state and local participation in immigration enforcement, but also the constitutional limits on that participation. One such limit is the Fourth Amendment's prohibition on unreasonable searches and seizures, which Gary officials would violate if they did *not* abide by the prohibitions of section 26-55(a)–(c).

ICE issues detainers to advise another federal, state, or local "law enforcement agency that [DHS] seeks custody of an alien presently in the custody of that agency, for the purpose of arresting and removing the alien." 8 C.F.R. § 287.7(a). Detainers "request that such agency advise [DHS], prior to release of the alien, in order for [DHS] to arrange to assume custody." *Id*. They also ask the agency to "maintain custody of the alien for a period not to exceed 48 hours" past when the individual otherwise would be released "in order to permit assumption of custody by" ICE. *Id.* § 287.7(d). In effect, ICE detainers ask local law enforcement agencies to hold detainees for a period of 48 hours after the authority to detain them under state law has expired. *See Lunn v. Commonwealth*, 477 Mass. 517, 528 (2017). Under federal law, ICE detainers are merely requests; they "do not and cannot compel a state or local law enforcement agency to detain suspected aliens subject to removal." *Galarza*, 745 F.3d at 636.[20]

Additionally, federal law authorizes certain federal law enforcement officers to issue warrants of arrest for administrative immigration violations. *See* 8 C.F.R. § 287.5(e)(2). Administrative warrants are not criminal warrants. They "state probable cause of removability

[20] Not that Gary could comply with ICE detainers even if it wished to; the City's one local jail does not have adequate facilities to hold inmates for longer than 48 hours. Most inmates are held for only a few hours before being transferred to Lake County facilities. Allen Aff. ¶ 14.

rather than of a criminal offense"; are directed to federal officers, not state or local officers; and "are not issued by a detached, neutral magistrate, but may be issued by any one of a broad array of ICE officers." *City of El Cenizo v. Texas*, 264 F. Supp. 3d 744, 799 n.76 (W.D. Tex. 2017), *appeal docketed*, No. 15-50762 (5th Cir. Sept. 5, 2017).

Arresting, detaining, or continuing to detain an individual based only on an ICE detainer, an administrative warrant, or the mere belief that someone has committed a civil immigration violation is a seizure subject to the strictures of the Fourth Amendment. Under the Fourth Amendment, "seizures are reasonable only if based on probable cause to believe that the individual has committed a crime." *Bailey v. United States*, 568 U.S. 186, 192 (2013) (internal quotation marks omitted). Numerous courts therefore have concluded that "[d]etention pursuant to an ICE detainer request is a Fourth Amendment seizure that must be supported by probable cause." *City of El Cenizo*, 264 F. Supp. 3d at 799; *see also Morales v. Chadbourne*, 793 F. 3d 208, 217 (1st Cir. 2015) ("Because Morales was kept in custody for a new purpose after she was entitled to release, she was subjected to a new seizure for Fourth Amendment purposes—one that must be supported by a new probable cause justification."); *Miranda-Olivares v. Clackamas Cnty.*, No. 3:12-cv-02317-ST, 2014 WL 1414305, at *10 (D. Or. Apr. 11, 2014) ("[T]he continued detention exceeded the scope of the Jail's lawful authority over the released detainee, constituted a new arrest, and must be analyzed under the Fourth Amendment.").

Deportation and removal proceedings—the underlying bases for immigration detainers and administrative warrants—are civil in nature. *See INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984). As the Supreme Court recognized in *Arizona*, "[a]s a general rule, it is not a crime for a removable alien to remain present in the United States." *Arizona*, 567 U.S. at 407. Because the Fourth Amendment requires probable cause to believe that a *crime* has occurred,

"[i]f the police stop someone based on nothing more than possible removability, the usual predicate for an arrest is absent.'" *Id*. Therefore, "without more, the Fourth Amendment does not permit a stop or detention based solely on unlawful presence." *Melendres v. Arpaio*, 695 F.3d 990, 1000 (9th Cir. 2012).

Because local "officers have no authority to arrest individuals for civil immigration offenses, . . . detaining individuals beyond their date for release violate[s] the individuals' Fourth Amendment rights." *Roy v. Cnty. of Los Angeles*, No. 2:12-cv-09012 (FFMx), ECF No. 346, at 39–41 (C.D. Cal. Feb. 7, 2018); *see also Santos v. Frederick Cnty. Bd. of Comm'rs*, 725 F.3d 451, 464 (4th Cir. 2013) ("[L]ocal officers generally lack authority to arrest individuals suspected of civil immigration violations." (citing *Arizona*, 567 U.S. at 407)). Although federal law authorizes federal officials to make civil immigration arrests, it does not generally authorize state and local law enforcement officers to do so. *See* 8 U.S.C. § 1357(a) (allowing federal officers to conduct warrantless arrests in limited circumstances); 8 C.F.R. §§ 241.2(b), 287.5(e)(3) (listing federal officers permitted to execute administrative arrest and removal warrants); *see also Lunn*, 477 Mass. at 518–19 (explaining that federal law does not authorize state officers to detain or arrest individuals pursuant to a civil detainer). Nor could state law authorize state and local officers to arrest or detain individuals for civil immigration offenses. *See City of El Cenizo*, 264 F. Supp. 3d at 799 ("[S]tates retain no inherent authority to effect arrests or detentions in immigration matters.").

In sum, because the listed bases in section 26-55(a)–(c) of the Ordinance—immigration detainers, administrative warrants, unlawful presence, and civil immigration violations—are civil immigration matters, any seizure by local law enforcement on these grounds alone would violate the Fourth Amendment. Therefore, under section 4, "the full extent of federal permission for

state-federal cooperation in immigration enforcement does not embrace detention of a person based solely on" these grounds. *Lopez-Aguilar*, 2017 WL 5634965, at *10.

2. Most other provisions of Gary's Ordinance do not violate an "enforcement-cooperation" reading of section 4.

Just as section 26-55(a)–(c) of Gary's Ordinance would survive any reading of section 4, at least four other challenged provisions of Gary's Ordinance would be consistent with Plaintiffs' enforcement-cooperation theory, should the Court choose to adopt it.

Section 26.59 of the Ordinance, analyzed above primarily with respect to section 3 of the state law, does not violate this reading of section 4. Section 26.59 *authorizes* the sharing of information with federal authorities, so it hardly amounts to a prohibition on cooperation.

Section 26-52 would largely withstand Plaintiffs' broader reading, as well. Among other things, that provision directs Gary agencies and agents not to "request[] information about or otherwise investigate" an individual's citizenship or immigration status, entirely apart from any federal requests for assistance. So most of section 26-52 falls outside the domain of whatever section 4 might prohibit under Plaintiffs' theory.

The same is true of section 26-55(e) of the Ordinance. That provision directs that "[n]o agency or agent shall enter into an agreement under Section 1357(g) of Title 8 of the United States Code . . . ." Section 1357(g)(1) allows local officers to perform the functions of federal immigration officers, pursuant to a written agreement with the Attorney General, but only to the extent "consistent with . . . local law." In enacting section 26-55(e), therefore, Gary has not forbidden its agencies to engage in a form of enforcement cooperation "permitted by federal law," Ind. Code § 5-2-18.2-4, because what is "permitted" under federal law is expressly limited by what is allowed under local law.

Finally, section 26-58(c) of the Ordinance does not regulate Gary officials' ability to

comply with requests for assistance in the enforcement of federal immigration laws. Rather, section 26-58(c) merely cautions local police officers to exercise a form of discretion in conducting arrests for state law criminal offenses.

In sum, even if the Court were to read section 4 to prevent localities from providing guidance to their officials on when and how to cooperate with federal immigration authorities, sections 25-55(a)–(c) and (e), 26.58(c), and 26.59 of the Ordinance, and much of section 26-52, would nonetheless be consistent with that reading.[21]

II. The City of Gary Is Entitled to Summary Judgment Because Plaintiffs Fail to Satisfy the Remaining Elements of the Permanent Injunction Standard.

As explained in Part I, the City of Gary is entitled to summary judgment in its favor on Plaintiffs' request for injunctive relief because the Ordinance does not violate sections 3 and 4 of Chapter 18.2, properly construed. However, even if the Court were to conclude that some provisions of the Ordinance were inconsistent with the constraints imposed by section 4, Plaintiffs nonetheless would not be entitled to an injunction because they have failed to satisfy the remaining three equitable elements required to obtain an injunction: (1) that their "remedies at law are inadequate," *i.e.*, that they are suffering from irreparable harm; (2) that "the threatened injury to [them] outweighs the threatened harm a grant of relief would occasion upon the [City]"; and (3) that "the public interest would [not] be disserved by granting relief." *Ferrell*, 751 N.E.2d at 712. Because a permanent injunction "is an extraordinary equitable remedy which should be granted with caution," *Irwin R. Evens & Son, Inc. v. Bd. of Indianapolis Airport Auth.*, 584

[21] Assuming this scenario, the City of Gary acknowledges that sections 26-55(d) and (f), and part of section 26-52, limit city agencies' cooperation in response to requests by ICE for assistance in immigration enforcement operations. As explained immediately below, these provisions should not be enjoined unless Plaintiffs satisfy all four prerequisites for injunctive relief with respect to them. In any case, any enjoined provisions could be severed from the remainder of the Ordinance, which would continue in full force. *See* Ordinance § 26.60 (directing that any invalid portion of the ordinance be severed); *Hobble ex rel. Hobble v. Basham*, 575 N.E.2d 693, 699 (Ind. Ct. App. 1991) ("[I]f one section of a city ordinance or legislative act can be separated from the other sections and upheld as valid, it is the duty of the court to do so.").

N.E.2d 576, 583 (Ind. Ct. App. 1992), the Court should deny Plaintiffs' request for an injunction for failure to satisfy these non-merits grounds as well.

A. Plaintiffs must satisfy all four prongs of the traditional test for equitable relief.

In their Summary Judgment Memorandum, Plaintiffs contend that they have standing to challenge Gary's Ordinance under section 5 of Chapter 18.2 and Indiana's public standing doctrine. *See* Pls.' Summ. J. Memo. 4–5. But Indiana's public standing doctrine addresses only who may sue; it does not override the established equitable principles guiding the issuance of an injunction and the need for judicial discretion in granting such an extraordinary remedy. *See Old Utica Sch. Pres., Inc. v. Utica Twp.*, 46 N.E.3d 1252, 1256, 1258 (Ind. Ct. App. 2015) (holding that a group of citizens found to "ha[ve] standing based on the public standing doctrine" were nonetheless not entitled to a permanent injunction, since there was "no evidence in the record of any injury the Citizens have suffered"). Nor can Plaintiffs otherwise support their apparent position that they must demonstrate only success on the merits.

1. Sections 5 and 6 do not excuse Plaintiffs from the need to satisfy all four prongs of the injunction analysis.

Plaintiffs' Summary Judgment Memorandum fails to meaningfully address the elements needed to obtain an injunction. Rather, citing sections 5 and 6 of Chapter 18.2, they conclusorily assert (at 2) that "Chapter 18.2 provides for injunctive relief without proof of irreparable harm." But sections 5 and 6 do not bear that weight in the context of this case.

For an injunction to issue on a lesser showing than the traditional four-pronged test, Indiana law requires the General Assembly to "expressly" state its intent to alter the standards governing equitable relief. *Cobblestone II Homeowners Ass'n, Inc. v. Baird*, 545 N.E.2d 1126, 1129 (Ind. Ct. App. 1989). Section 5 does not meet this exacting standard. It provides: "If a governmental body . . . violates this chapter, a person lawfully domiciled in Indiana may bring an

action to compel the governmental body . . . to comply with this chapter." Ind. Code § 5-2-18.2-5. This provision confers standing and authorizes "an action to compel" as the appropriate form of relief. *See Lopez-Aguilar*, 2017 WL 5634965, at *8 (concluding that section 5 "creates a private right of action for violations of Chapter 18.2"). But it does not purport to alter the substantive doctrines applicable to obtaining injunctive relief, and certainly not with the clarity required under Indiana law. Therefore, section 5 does not relieve Plaintiffs of the burden of proving irreparable harm.

Section 6 presents a closer issue, but the Court need not decide this question because the facts of this case do not satisfy the prerequisites for injunctive relief under section 6. Under that section, "[i]f a court finds that a governmental body or postsecondary educational institution knowingly or intentionally violated section 3 or 4 of this chapter, the court shall enjoin the violation." Ind. Code § 5-2-18.2-6. To the extent that section 6 might be thought to eliminate the irreparable harm requirement, it does so only for "knowing[] or intentional[]" violations of sections 3 and 4. Here, even if the Court were to conclude that Gary's Ordinance violates section 4 in some respects, any violation could not have been knowing or intentional.

First, Plaintiffs adduce virtually no affirmative evidence concerning what section 6 actually requires: proof that any violation of Chapter 18.2 was knowing or intentional. They simply assert that the City "[k]nowingly and [i]ntentionally [e]nacted the Ordinance," Pls.' Summ. J. Memo 15, and that "the Ordinance violates Chapter 18.2," *id.* at 3. Although, as Plaintiffs note (at 15), the Ordinance does not expressly reference Chapter 18.2, this absence hardly demonstrates the City's knowing or intentional disregard of sections 3 and 4. Plaintiffs wrongly attempt to substitute a "strict liability" standard for the stringent "knowing and intentional" standard actually prescribed by section 6.

More broadly, the facts of this case do not substantiate Plaintiffs' extraordinary claim that the City deliberately flouted applicable state law in enacting the Ordinance. As set forth above, section 3 clearly does not prohibit any part of Gary's Ordinance. And although section 4 is ambiguous, the fact that the Ordinance is wholly consistent with the most reasonable reading of section 4—and that only a limited portion of the Ordinance could possibly violate section 4 on a broader reading—indicates that any purported violation was not knowing or intentional. The face of the Ordinance indicates the Common Council's "purpose and intent" in enacting it: to "uphold[] the Constitution" and "support immigration enforcement as a federal matter," among other goals. Ordinance pmbl. ¶¶ 1–2. Plaintiffs have offered no reason to impugn the Common Council's good faith in articulating the reasons for its enactment of the Ordinance.

In sum, because Plaintiffs have failed to prove a knowing or intentional violation of sections 3 and 4, section 6 of Chapter 18.2 does not excuse their failure to satisfy each prong of Indiana's permanent injunction standard.

2. Plaintiffs cannot benefit from Indiana's "per se" rule because Gary's Ordinance does not clearly violate Chapter 18.2.

Under Indiana law, the party seeking an injunction generally "carries the burden of demonstrating an injury which is certain and irreparable if the injunction is denied." *Ferrell*, 751 N.E.2d at 713. However, pursuant to Indiana's "per se" rule, if "the action to be enjoined clearly violates a statute" the plaintiff need not show either irreparable harm or that he "will suffer greater injury than the defendant." *Leone v. Comm'r, Ind. Bureau of Motor Vehicles*, 933 N.E.2d 1244, 1248 n.6 (Ind. 2010). Even if Plaintiffs were to invoke this rule for the first time in response to the City's Cross-Motion, they would not be entitled to its benefits.

Because the per se rule relieves the plaintiff "of several showings usually necessary to obtain injunctive relief," its invocation "is only proper when it is clear that [a] statute has been

violated." *Ind. Family & Soc. Servs. Admin. v. Walgreen Co.*, 769 N.E.2d 158, 161–62 (Ind. 2002) (internal quotation marks omitted); *see also Schrenker v. Clifford*, 387 N.E.2d 59, 61 (1979) (granting permanent injunction to enforce state statute that "clearly" and "unambiguous[ly]" prohibited the conduct at issue). As explained in Part I *supra*, Plaintiffs are hard-pressed to claim that Gary's Ordinance clearly violates section 3 or section 4 of Chapter 18.2. A provision of the Ordinance explicitly ensures compliance with section 3, and section 4 is far too imprecise to have been plainly breached by Gary's effort to regulate its officials' responses to federal requests for voluntary cooperation.

Indeed, the Court of Appeals reasoned in just this manner in an analogous challenge to a Lake County Board of Elections decision regarding early voting locations. *See Curley v. Lake Cnty. Bd. of Elections & Registration*, 896 N.E.2d 24 (Ind. Ct. App. 2008). There, the Court of Appeals concluded that the statutory provisions setting forth permissible polling locations "are subject to more than one reasonable and plausible interpretation and are, therefore, ambiguous." *Id.* at 39. Because the Board's decision was not "clearly unlawful," the *Curley* plaintiffs could not avail themselves of the per se rule. *Id.* As in *Curley*, Plaintiffs here cannot benefit from the per se rule and so must prove both that they are suffering from irreparable harm and that they will suffer greater injury than the City of Gary absent an injunction—two showings they have not made.

Furthermore, as *Curley* notes, "even when the [per se] rule does apply, it does not trump the equitable nature of . . . injunctions," and "[a]n injunction is to be denied if the public interest would be substantially adversely affected, even if the plaintiff has a claim." *Id.* at 33. For this reason, as set forth below, Plaintiffs would not be entitled to an injunction even if the per se rule

were to apply.[22]

B. Even if some provisions of Gary's Ordinance violate section 4, Plaintiffs have failed to demonstrate that they are suffering from irreparable harm.

Under Indiana law, "[t]he burden is on the plaintiff seeking the injunction to demonstrate that certain and irreparable injury would result if the injunction were denied." *Crawley v. Oak Bend Estates Homeowners Ass'n, Inc.*, 753 N.E.2d 740, 744 (Ind. Ct. App. 2001) (internal quotation marks omitted). Plaintiffs seek an injunction against each of several distinct provisions of Gary's Ordinance. Plaintiffs cannot prevail in any respect, then, unless they identify an irreparable injury flowing from a violation of each provision that they ask this Court to enjoin.

Plaintiffs have made no such showing. They offer only conclusory and generalized allegations that they are suffering "irreparable harm to their public interests and right . . . as a result of the Ordinance and Gary Defendant[s'] noncompliance with the public duty established by Chapter 18.2," and that they "have no adequate remedy at law." Compl. ¶ 62 (incorporated into Pls.' Summ. J. Memo. 2–3). In Indiana, though, "[a]n injunction will not be issued where the applicant cannot demonstrate the present existence of an actual threat" of injury. *Adams v. City of Ft. Wayne*, 423 N.E.2d 647, 651 (Ind. Ct. App. 1981) (internal quotation marks omitted); *see also Old Utica Sch. Pres.*, 46 N.E.3d at 1258 (rejecting plaintiffs' bare assertion that the fact of violations caused them sufficient harm). The mere fact that the Ordinance exists is insufficient to demonstrate actual irreparable harm with respect to any of its provisions.

Plaintiffs point to no evidence that Gary agencies or agents have been asked to provide information to, or otherwise cooperate with, federal immigration authorities since the Ordinance's enactment—let alone that they have refused such requests. The threadbare

[22] Finally, it is worth noting that the Indiana Supreme Court in recent years has suggested that some applications of the per se rule "may not reflect sound injunction law." *Leone*, 933 N.E.2d at 1248 n.6. The *Leone* Court did not confront this issue head-on because it concluded that the relevant statute was not clearly violated.

evidentiary record also contains no indication that Gary has been asked to enter into a written agreement under 8 U.S.C. § 1357(g)(1). The City, however, has provided sworn evidence to the contrary: Gary's Police Chief is unaware of any incident in which ICE has *ever* contacted the Gary Police Department for assistance, including by issuing detainer requests. Allen Aff. ¶ 19. It is not surprising that Plaintiffs have made no effort to provide such evidence, as their suit is predicated on the unsustainable claim that the mere existence of Gary's ordinance has irreparably harmed them. *See, e.g.*, Pls.' Compl. ¶ 90 (asking the Court to "enjoin [a] provision of the Ordinance" based on the theory that the City "violated Indiana's Chapter 18.2").

Accordingly, Plaintiffs have offered no evidence from which the Court might conclude that they have suffered irreparable harm from a violation of any of the Ordinance's provisions—a prerequisite for enjoining those provisions under Indiana law.[23]

C. Any threatened injury to Plaintiffs does not outweigh the harm the City of Gary would suffer if one or more provisions of its Ordinance were invalidated, and the public interest would be disserved by granting an injunction.

In determining whether to issue an injunction, a "trial court must weigh the harm to defendant if the injunction is issued as compared to the harm to plaintiff if the injunction is denied . . . , and the court must consider whether an injunction is in the public's interest." *Irwin R. Evens & Son*, 584 N.E.2d at 583–84. Here, Plaintiffs have failed to allege that they have suffered *any* actual harm, while the City of Gary and its residents would be severely harmed by an injunction against the challenged provisions of its Ordinance.

In enacting its Ordinance, Gary sought to convey to the local community—and to those who might come to Gary to work, live, or visit—that Gary is a "welcoming city." The preamble

[23] Plaintiffs' failure to allege any concrete injury in their Complaint, moreover, precludes them from attempting to identify issues of material fact concerning irreparable injury in response to the City's Cross-Motion for Summary Judgment. A party cannot advance new legal arguments by designating evidence in support of its existing claims at the summary judgment stage.

to the Ordinance sets out the elements of this objective: "to recognize the present and historic importance of immigrants to our community," to "demonstrate the City of Gary's commitment to ensure public safety for all city residents and specifically enable immigrants to report crime," and to "assure that each person is treated equally regardless of their immigration status." Ordinance pmbl. ¶¶ 1–3.

Enjoining the challenged provisions of the Ordinance would undermine these important goals. First, barring Gary from regulating its cooperation in immigration enforcement would undermine public safety. Communities are most secure when residents feel free to report violations of state criminal law and assist with any resulting investigations and prosecutions. Allen Aff. ¶¶ 4–5. But undocumented immigrants—and U.S. citizens related to them—who are victims of or witnesses to crime, including domestic violence and sexual assault, may be reluctant to report those crimes because they fear removal from the country and separation from their families. Freeman-Wilson Aff. ¶ 8. Moreover, fear that local law enforcement will engage in immigration enforcement may cause local residents to withdraw from the community, deterring them from seeking needed healthcare and sending their children to school on a regular basis. *Id.* ¶ 9. Protecting these interests requires all members of a community to feel welcome, trust their local government, and participate fully in the city's affairs. Without that trust, all Gary residents would suffer—including those who hold U.S. citizenship.

Additionally, enjoining Gary's enforcement of its Ordinance—especially without clear guidance as to exactly what Chapter 18.2 prohibits—would severely curtail Gary's ability to set its own budgetary and public safety priorities to address the most pressing needs of the community. This risk is particularly acute in light of the financial challenges Gary currently faces, Allen Aff. ¶¶ 15–16; Freeman-Wilson Aff. ¶ 10, as well as Indiana's restrictions on local

funding. Moreover, a prohibition on policies that *could* lead to less-than-maximal immigration enforcement would severely curb Gary's ability to guide and supervise its employees. Aside from the harm to Gary's governance interests, this scenario also could lead to civil liability, which would fall squarely on the City's shoulders. *See* Allen Aff. ¶ 11; Freeman-Wilson Aff. ¶ 11; *cf. City of El Cenizo*, 264 F. Supp. 3d at 788 ("[L]ocalities who err too far on the side of caution" in heeding the broadest reading of state law "may become liable . . . for failing to adopt policies . . . that would have deterred officer misconduct.").

In comparison to these clear harms to the City of Gary, its residents, and the public interest, Plaintiffs' conclusory assertions of injury cannot sustain their request for an injunction.

III. Even if the City Is Not Entitled to Summary Judgment, Disputed Issues of Material Fact Preclude the Entry of Summary Judgment in Plaintiffs' Favor.

Even if the Court were to reject each of the preceding arguments, Plaintiffs still would not be entitled to summary judgment. That is because a factual dispute would remain as to whether any violation of Chapter 18.2 was "knowing[] or intentional[]" within the meaning of section 6. Above, the City offered several ways of demonstrating that the Gary Common Council did not knowingly or intentionally violate sections 3 or 4 in enacting the Ordinance. *See supra* at 47–48. If, however, the Court were to hold that the City has not conclusively demonstrated this point, it should also find that Plaintiffs have not thoroughly rebutted it. Plaintiffs have offered virtually no evidence to support their remarkable claim that the Common Council knowingly and intentionally flouted state law. The mere fact that the Ordinance "is silent about Indiana's Chapter 18.2," Pls.' Summ. J. Memo 15, hardly demonstrates a conscious choice to violate it. The dearth of evidence on this point precludes the entry of summary judgment in Plaintiffs' favor.

CONCLUSION

Because Gary's Ordinance does not violate sections 3 or 4 of Chapter 18.2 under the best readings of those statutes, and because Plaintiffs have not shown that they are entitled to an injunction, this Court should deny Plaintiffs' Motion for Summary Judgment and grant the City of Gary's Cross-Motion for Summary Judgment on all counts.

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Respectfully submitted,

GREGORY L. THOMAS (#11341-49)
City Attorney, City of Gary
401 Broadway, Suite 101A
Gary, Indiana, 46402
Tel: (219) 881-1400

MARY B. MCCORD (6335-95-TA)
JOSHUA A. GELTZER (6336-95-TA)
AMY L. MARSHAK (6333-95-TA)
DANIEL B. RICE (6334-95-TA)
Institute for Constitutional Advocacy and Protection
Georgetown University Law Center
600 New Jersey Ave. NW
Washington, DC 20001
Tel: (202) 662-9042

JILL E. HABIG (6355-95-TA)
Public Rights Project, a project of the Tides Center
4096 Piedmont Ave. #149
Oakland, CA 94611
Tel: (510) 289-7824

Counsel for Defendant City of Gary