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 REPLY IN FAVOR OF ITS CROSS-MOTION FOR SUMMARY JUDGMENT AND RESPONSE TO THE STATE OF INDIANA'S CONSOLIDATED RESPONSE TO MOTIONS FOR SUMMARY JUDGMENT

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INTRODUCTION

The inquiry required by this case is straightforward: What do the various provisions of Chapter 18.2 of the Indiana Code mean? And do the challenged portions of Gary's "Welcoming City" Ordinance conflict with those statutes, properly interpreted? As explained below, nothing in the City of Gary's Ordinance conflicts with the two provisions of Chapter 18.2 on which Plaintiffs' challenge rests. Section 3 of Indiana Code § 5-2-18.2 effectuates the requirements of 8 U.S.C. § 1373 and therefore bars governmental bodies in Indiana from restricting the maintenance and sharing of citizenship and immigration-status information with federal, state, and local authorities. Section 4 of Indiana Code § 5-2-18.2 directs governmental bodies in Indiana not to interfere with *federal* immigration enforcement under *federal* law. The challenged provisions of Gary's Ordinance do not run afoul of these directives.

The City's reading of Chapter 18.2 hews closely to the statutory text, reflects the legislative history underlying these provisions, and conforms to federal statutory and constitutional principles. By contrast, both the private Plaintiffs and the State ignore the plain text and distinct subject matters of sections 3 and 4 and seek to impose a broad "cooperation" super-mandate that draws on language cherry-picked from these separate statutory provisions and section 7 of Chapter 18.2.[1]

In addition to Plaintiffs' disregard for the language of sections 3 and 4, the implications of their position are stark. In this most recent round of briefing, Plaintiffs have doubled down on their assertion that municipalities in Indiana must do anything and everything they can—without limit—to cooperate in immigration enforcement in any and all ways federal agents might

[1] This brief refers to the group of private citizens who originally filed suit as "the private Plaintiffs" to distinguish them from the State, which intervened as a plaintiff at a later date. When discussing arguments raised by both the private Plaintiffs and the State, the brief refers to them collectively as "Plaintiffs."

request. As set forth in the City's summary judgment motion and further explained below, meeting such a demand would conflict with home-rule principles and impose unworkable burdens on localities; would raise preemption and vagueness concerns; and, in the context of compliance with civil detainer requests, would be prohibited by the Fourth Amendment. Because the City's interpretation is the most sensible reading of Chapter 18.2's text, and because its Ordinance therefore does not violate Chapter 18.2, summary judgment should be granted in the City's favor.[2]

ARGUMENT

I. Section 3's Requirements Are Limited to the Maintenance and Sharing of Citizenship and Immigration-Status Information.

As explained in the City's motion for summary judgment, section 3 prohibits only those policies that restrict the maintenance or sharing of "information of the citizenship or immigration status" of any individual. Ind. Code § 5-2-18.2-3; *see* City Mot. 7–13. The City's Ordinance expressly permits the sharing of the information addressed in section 3, *see* Ordinance section 26.59, so the Ordinance does not violate section 3. *See* City Mot. 33–37.

A. The phrase "information of . . . citizenship or immigration status" does not mean all information useful for immigration enforcement.

All parties agree that 8 U.S.C. § 1373, the federal statute on which section 3 is based, dictates the scope of section 3. *See, e.g.*, Pls.' Summ. J. Reply and Opp'n Mem. 26 ("Pls.' Reply"); State of Indiana's Consolidated Response to Mots. for Summ. J. 20 ("State Mem.").[3]

[2] Of the 12 Defendants named in this case, the City of Gary alone submitted a motion for summary judgment because all of the other Defendants are entitled to absolute immunity for actions undertaken in their legislative capacity. Those Defendants have filed a motion to dismiss, which remains pending. They join in the City's opposition to Plaintiffs' motions for summary judgment and will file their own motions for summary judgment if their motion to dismiss is denied.

[3] Although Plaintiffs point as well to 8 U.S.C. § 1644, they do not argue that § 1644 imposes different requirements from § 1373. *See City of Chicago v. Barr*, 961 F.3d 882, 889 (7th Cir. 2020) (recognizing that the two statutes effectively impose equivalent obligations).

Plaintiffs contend that § 1373's phrase "information regarding . . . citizenship and immigration status" covers *any* information useful to immigration enforcement, including topics as far afield as immigrants' home addresses, contact information for relatives, and release dates from custody. Pls.' Reply 29; State Mem. 20. As explained in the City's summary judgment motion, this reading bears no relation to the plain language of either § 1373 or section 3 and should be rejected. *See* Def. City of Gary's Cross-Mot. for Summ. J. 7–10 ("City Mot.").

Federal courts have held that § 1373 is far more limited than Plaintiffs claim: "The phrase 'citizenship or immigration status,' plainly means an individual's category of presence in the United States—e.g., undocumented, refugee, lawful permanent resident, U.S. citizen, etc.—and whether or not an individual is a U.S. citizen, and if not, of what country. The phrase 'information regarding' includes only information relevant to that inquiry." *City of Philadelphia v. Sessions*, 309 F. Supp. 3d 289, 333 (E.D. Pa. 2018), *aff'd in part, vacated in part on other grounds*, 916 F.3d 276 (3d Cir. 2019); *see also United States v. California*, 921 F.3d 865, 890 (9th Cir. 2019) (holding that "the phrase 'information regarding the citizenship or immigration status, lawful or unlawful, of any individual' is naturally understood as a reference to a person's legal classification under federal law," and does not include information such as release dates or contact information); *Steinle v. City & Cty. of San Francisco*, 919 F.3d 1154, 1164 (9th Cir. 2019) ("[N]o plausible reading of 'information regarding' 'immigration status' encompasses the state or local release date of an inmate who is an alien."). As explained by the district court in *United States v. California*, "[a] contrary interpretation would know no bounds. The phrase could conceivably mean 'everything in a person's life.' . . . While an immigrant's release date or home address might assist immigration enforcement officers in their endeavors, neither of these pieces of information ha[s] any bearing on one's immigration or citizenship status." 314 F.

Supp. 3d 1077, 1102–03 (E.D. Cal. 2018); *California*, 921 F.3d at 892 n.17 ("[T]he range of facts that might have some connection to federal removability or detention decisions is extraordinarily broad.").

In arguing to the contrary, Plaintiffs rely primarily on the Second Circuit's decision in *City of New York v. United States*, 179 F.3d 29 (2d Cir. 1999), and the legislative history of § 1373 and 8 U.S.C. § 1644 cited therein. In particular, the private Plaintiffs take out of context that court's use of the word "nullify" to support their claim that the Second Circuit necessarily interpreted § 1373 broadly in the course of deciding that case. *See* Pls.' Reply 13. But the Second Circuit did not have reason to define the scope of information covered by § 1373, nor did it hold that § 1373 "nullified" New York's policy at issue. Rather, New York City had sought a declaratory judgment that § 1373 is facially unconstitutional under the Tenth Amendment's anti-commandeering principle and therefore that the City's policy restricting information-sharing did not violate § 1373. *City of New York*, 179 F.3d at 33. Although the Second Circuit rejected New York's argument, its holding was limited to deciding that § 1373 does not facially violate the Constitution. *Id.* at 35, 37. The decision did *not* purport to address the ways in which New York City's policy did—or did not—conflict with § 1373 and so had no reason to address the scope of the statute. *Id.*[4]

The brief paragraphs of legislative history in the committee reports accompanying §§ 1373 and 1644, which were cited in *City of New York* and are relied on by Plaintiffs here, do

[4] Recently, in *State of New York v. U.S. Department of Justice*, the Second Circuit again suggested in dicta a broad reading of § 1373 based on the committee reports accompanying §§ 1373 and 1644. 951 F.3d 84, 97 (2d Cir. 2020). As in *City of New York*, however, the *State of New York* court had no reason to define the information to which § 1373 applies: the decision addressed the State's challenge to whether the federal government could require compliance with § 1373 as a condition of a federal grant, not whether New York in fact complied with § 1373. Moreover, the court later characterized § 1373 as addressing only "voluntary communication *about citizenship or immigration status*." *Id.* at 109 (emphasis added).

not change this analysis. Where the text of a statute is clear, courts should not look to legislative history that contradicts the plain text. *See Day v. State*, 57 N.E.3d 809, 812 (Ind. 2016) ("If [a statute's] language is clear and unambiguous, we simply apply its plain and ordinary meaning . . . ."). Here, "the plain and unambiguous statutory text simply does not accomplish what the Conference Report says it was designed to accomplish." *Steinle*, 919 F.3d at 1164 n.11; *see also California II*, 921 F.3d at 892 n.18 (rejecting the relevance of § 1373's committee report, but also noting that the report's phrasing "suggests that 'information regarding the immigration status' does *not* include 'the presence, whereabouts, or activities' of noncitizens").[5]

The private Plaintiffs further assert that the word "regarding" in § 1373 broadens the category of "citizenship and immigration status" information to encompass any information relevant to immigration enforcement in any way. Pls.' Reply 22. This is plainly incorrect. Courts have cautioned against reading words like "regarding" too broadly in order to give effect to the presumption against preemption. As the Ninth Circuit explained in rejecting the same argument that Plaintiffs raise here, "if the term 'regarding' were 'taken to extend to the furthest stretch of its indeterminacy, then for all practical purposes preemption would never run its course, for [r]eally, universally, relations stop nowhere.'" *California II*, 921 F.3d at 892 (quoting *N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995) (brackets in original)). "[T]hat, of course, would be to read Congress's words of limitation as mere sham, and to read the presumption against pre-emption out of the law whenever Congress speaks to the matter with generality." *Travelers Ins. Co.*, 514 U.S. at 655. Because § 1373 seeks to preempt state and local law, its use of "regarding" should be read

[5] Plaintiffs also cite *Bologna v. City & Cty. of San Francisco*, 192 Cal. App. 4th 429 (2011), an out-of-state intermediate appellate court decision, which turned on whether § 1373 "was designed to protect the public from violent crimes," such that it could form the basis for a negligence per se claim. *Id.* at 439. Stray observations about § 1373's reach were unnecessary to the court's holding.

narrowly. This is even *more* true of section 3, which uses the word "of," not "regarding." *See* Ind. Code § 5-2-18.2-3 ("information *of* the citizenship or immigration status, lawful or unlawful, of an individual" (emphasis added)). "Of" simply does not mean "in any way relating to," as the private Plaintiffs claim.[6]

Moreover, if Congress had intended § 1373 to sweep as broadly as Plaintiffs claim, it would have used much more direct language to define the statute's scope, as it did in other immigration-related statutes. *California*, 921 F.3d at 892 (drawing this conclusion); *see, e.g.*, 8 U.S.C. § 1360(b) (information "as to the *identity and location* of aliens in the United States" (emphasis added)); *id.* § 1184(k)(3)(A) ("information concerning the alien's *whereabouts and activities*" (emphasis added)); *id.* § 1231(a)(3)(C) (information "about the alien's *nationality, circumstances, habits, associations, and activities, and other information* the Attorney General considers appropriate" (emphasis added)). Likewise, if the Indiana General Assembly intended section 3 to have a similarly broad scope, it would have used more straightforward language.

Finally, if one looks at the contrast between § 1373 (a) and (b), which use "regarding," and § 1373(c), which does not, the word "regarding" serves a clear purpose unrelated to expanding the category beyond "citizenship or immigration status."[7] *See* Pls.' Reply 13 n.15.

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[6] The private Plaintiffs also attempt to draw support for their expansive definition from the fact that Gary's Ordinance includes different definitions of "citizenship or immigration status" information in separate provisions. Pls.' Reply 11, 13 n.14 (citing sections 26-51 and 26.59 of Gary's ordinance). Neither provision purports to define the term for purposes of section 3 or 8 U.S.C. § 1373, nor could it: City ordinances are irrelevant to the meaning of terms used in state and federal law. In any case, section 26.59 allows the City to share the information covered by § 1373 and section 3. Any restrictions on sharing other information is consistent with those laws. *Cf. California II*, 921 F.3d at 891 (where state law "expressly *permit[ted]* the sharing of" information covered by § 1373, it did not conflict with the statute even though it restricted sharing other information).

[7] In pertinent part, with emphasis added, 8 U.S.C. § 1373 provides:

> (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,

Subsections (a) and (b) address the responsibilities of federal, state, and local entities to provide "citizenship or immigration status" information to federal immigration authorities, while subsection (c) in turn sets out the obligations of federal immigration authorities to provide such information on request. "Regarding" distinguishes between unofficial immigration-status information that may be in the possession of state and local officials—e.g., self-reported information, third-party statements, or copies of immigration documents—and the official immigration-status information maintained by federal immigration authorities. "[G]iven § 1373's focus on reciprocal communication between states and the federal government," these subparts should be understood to concern the same scope of information. *California*, 921 F.3d at 892. Plaintiffs simply provide no good reason to read either § 1373 or section 3 beyond their plain text.

B. Section 3's use of the phrase "cooperating with federal officials" does not encompass either collecting information or complying with federal detainer requests.

Section 3 prohibits governmental bodies from enacting policies that restrict officials from "communicating or cooperating with federal officials," "sending . . . or "receiving," "maintaining," or "exchanging" "information of the citizenship or immigration status, lawful or unlawful, of an individual." Ind. Code § 5-2-18.2-3. The City explained in its motion for

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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 . . .*

(c) Obligation to respond to inquiries

The Immigration and Naturalization Service shall respond to an inquiry by a Federal, State, or local government agency, seeking to verify or ascertain *the citizenship or immigration status of any individual* within the jurisdiction of the agency for any purpose authorized by law, by providing the requested verification or status information.

summary judgment that, like § 1373, section 3 prohibits policies that restrict the *maintenance* and *sharing* of information, but it does not prohibit policies that limit the *acquisition* of such information. *See* City Mot. 10–13. Indeed, Plaintiffs do not dispute that the federal government itself has made clear that § 1373 does not require or authorize local officials to obtain citizenship or immigration-status information. *Id.* at 13.

Nonetheless, Plaintiffs raise convoluted arguments that section 3 in fact imposes obligations far beyond the actual words of the statute simply because it bans policies that restrict "communicating or *cooperating* with federal officials." Ind. Code § 5-2-18.2-3(1) (emphasis added). First, Plaintiffs—seemingly abandoning their view that section 3's purpose is to effectuate § 1373—argue that section 3 requires municipalities to assist in investigations because Plaintiffs believe that a separate federal statute, 8 U.S.C. § 1357(g)(10)(B), allows for such cooperation. *See* Pls.' Reply 44–45; *see also* State Mem. 14. The State also argues that "cooperating" means that, "once the information is communicated to federal authorities, local officers are to cooperate with federal officials' decisions of what to do with that information," including complying with ICE detainer requests. State Mem. 16.

Reading "cooperating" to require localities to participate in investigations and comply with detainers—that is, to stop, arrest, and detain people—would expand section 3's reach to conduct far afield from sharing and maintaining immigration-status information. The doctrine of *noscitur a sociis* dictates that "cooperating" be "understood in the same general sense" as the words surrounding it. *Day*, 57 N.E.3d at 814. Those words demonstrate that the General Assembly intended "cooperating" to reach only the same general range of information-sharing activities otherwise covered by the statute. Indeed, it would be surprising for the General Assembly to tuck away requirements as consequential as demanding participation in immigration

investigations or compliance with detainer requests in a cryptic reference to "cooperating with federal officials" that is explicitly limited by the language "with regard to information of the citizenship or immigration status . . . of an individual." This is especially so when the rest of the provision focuses solely on sharing this limited category of information.[8]

The State further reasons that, if "cooperating" is limited to sharing information already in the City's possession, then it would have no meaning independent of "communicating," which is listed in the same provision. State Mem. 16. But this is hardly the case. The Indiana General Assembly could have understood "communicating" to encompass affirmatively offering citizenship or immigration-status information, while "cooperating" requires local officers to respond to federal requests for such information, rendering both words meaningful.

Moreover, Plaintiffs fail to acknowledge the serious redundancy problem that their readings would create. Under their readings, "cooperating" in section 3 requires participation in immigration enforcement. But Plaintiffs also argue that section 4 requires the very same cooperation with requests from federal immigration officials. Under this approach, sections 3 and 4 would perform no independent functions, making one or the other utterly superfluous.

For these reasons and the reasons stated in the City's summary judgment motion, section 3 bars only limitations on maintaining and sharing citizenship and immigration-status information. Because the City's Ordinance does not restrict the sharing of citizenship or immigration-status information, the Ordinance does not violate section 3.

[8] The State's reading also introduces a strange anomaly. Under that reading, section 3 would impose a duty to cooperate with a detainer request *only* when the entity receiving the request provided information that led to the request. The court should not assume that the word "cooperating" was used in this odd way.

II. Section 4 Limits Restrictions on Federal Immigration Enforcement, Not Local "Cooperation."

According to Plaintiffs, to understand section 4, the Court must combine sections 3, 4, and 7 of Chapter 18.2 to conjure up an overarching super-mandate requiring local law enforcement to cooperate with any requests by federal immigration authorities. *See* Pls.' Reply 33; State Mem. 12. In their view, so long as an action is requested by federal officials, it qualifies as "cooperation" under 8 U.S.C. § 1357(g)(10)(B), which permits state and local support to federal immigration officials. *See* State Mem. 2; Pls.' Reply 23–24. In this way, they claim, federal requests can negate any constitutional concerns and bypass the rest of § 1357(g)—which requires state and local officials to obtain a written agreement with the federal government (a "§ 287(g) agreement"), submit to supervision by the Attorney General, and receive training in immigration law before they may perform the functions of an immigration officer. For the reasons stated in the City's summary judgment motion, Plaintiffs' interpretations of section 4 fail on every score. *See* City Mot. 13–33. Instead, the Court should read section 4 to bar what it says—state and local restrictions on federal immigration enforcement—and conclude that Gary's Ordinance, which addresses only the actions of Gary officials and not federal immigration authorities, does not violate section 4.[9]

A. The text and context of section 4 support an enforcement-based, not cooperation-based, reading.

As explained in the City's summary judgment motion, Plaintiffs' reading of section 4 blurs the lines between the distinct subject matters of sections 3, 4, and 7 of Chapter 18.2. *See* City Mot. 14–20. The State never even attempts to explain how its reading squares in any way

[9] Peppered throughout Plaintiffs' briefs are references to Gary Police Department Policy Number 1-92, which provides that the department will provide "information, assistance, and support" to federal, state, and local "criminal justice agencies" as "allowed by law." *See* Pls.' 2d Summ. J. Evid. Ex. C. Reliance on this document is a red herring. Because the City's ordinance forbids providing certain types of information and assistance to federal immigration enforcement—with a focus on *civil*, not criminal, enforcement at that—Policy 1-92 is inapplicable.

with the *actual enacted text* of section 4, which uses the term "enforcement," *not* "cooperation." The private Plaintiffs, by contrast, claim that "enforcement" is merely an umbrella term that includes cooperation. Pls.' Reply 33. But this explanation runs contrary to the structure of federal immigration law, which treats enforcement and cooperation separately. And the fact that both sections 3 and 7 use the word "cooperate"—and that similar statutes in other states explicitly reference cooperation and assistance to federal law enforcement, *see* City Mot. 15—demonstrates that this omission is meaningful.

Moreover, throughout their sprawling responsive brief, the private Plaintiffs repeatedly rely on a distinction without a difference that belies the expansive reach of their interpretation of section 4. They frequently argue that Chapter 18.2 does not affirmatively require the City to take any action; rather, according to their argument, it merely requires local governmental bodies to *refrain* from enacting policies that limit their cooperation in federal enforcement. *See, e.g.*, Pls.' Reply 24 & n.21, 44–45. But that is not what section 4 says; unlike section 3, section 4 does not refer to "policies" or "cooperation." And, in the context of day-to-day decision-making, the private Plaintiffs' reading of section 4 would make a decision by the City to devote local law enforcement resources to a non-immigration priority—or even to direct funding away from law enforcement and to other priorities like public schools or roads—an impermissible limitation on resources available for immigration-enforcement cooperation. Even a passive choice not to seek a § 287(g) agreement—a choice the State of Indiana has made—would have the same practical effect on immigration enforcement as affirmatively deciding against entering into such an agreement, thereby violating Plaintiffs' reading of section 4.[10] This illusory distinction between

[10] Although the private Plaintiffs claim that section 26-55(e) of Gary's Ordinance, which prohibits the City from entering into a § 287(g) agreement, violates Chapter 18.2, the State does not raise this argument. Perhaps this is because no state agency has entered into such an agreement—even though section 4 governs all "governmental

required actions and prohibited policies therefore offers no solace to municipalities in Indiana that face the risk of a multiplicity of lawsuits by any resident who believes that the City's choices in some way impede its cooperation in federal immigration enforcement.

At the same time, the private Plaintiffs seem to argue that, even under the City's interpretation, section 4 requires the City to undertake *affirmative* actions to cooperate with federal immigration enforcement because a failure to cooperate has the effect of impeding the effectiveness of federal enforcement. Pls.' Reply 32–33. But courts have recognized that there is a meaningful "difference between actively thwarting federal law enforcement and taking a passive approach to federal immigration enforcement." *Colorado v. U.S. Dep't of Justice*, No. 19-CV-00736-JLK, 2020 WL 1955474, at *10 (D. Colo. Apr. 23, 2020); *see also City of Chicago v. Sessions*, 888 F.3d 272, 281 (7th Cir. 2018) (explaining that welcoming city policies do "not interfere in any way with the federal government's lawful pursuit of its civil immigration activities, and presence in such localities will not immunize anyone to the reach of the federal government").[11] Neither the language of section 4—which does not mention "cooperation"—nor the convoluted logic of Plaintiffs' position supports this result. The City's Ordinance does not restrict federal immigration enforcement by federal officials, so it does not run afoul of section 4.

Plaintiffs attempt to bolster their misrepresentation of statutory provisions with naked assertions of the "clear" legislative intent of the Indiana General Assembly. *See, e.g.*, Pls.' Reply 70. For the most part, these arguments are based solely on their *ipse dixit* that the General

bod[ies]" in Indiana, including state agencies. *See* Ind. Code §§ 5-2-18.2-1, 5-22-2-13; U.S. Immigration & Customs Enforcement, *Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act*, https://www.ice.gov/287g (last updated June 12, 2018) (listing jurisdictions with § 287(g) agreements).

[11] Plaintiffs argue that section 26.58(c) of the ordinance, which directs the Gary Police Department to "arrest an individual only after determining that less severe alternatives . . . would be inadequate," violates Chapter 18.2 because non-arrest effectively makes it more difficult for federal immigration officials to remove the non-arrested individual. Pls.' Reply 50–53; State Mem. 18. That the City's policy could conceivably result in less immigration enforcement in certain circumstances is too attenuated to conclude that it "actively thwart[s] federal" immigration enforcement. *Colorado*, 2020 WL 1955474, at *10. It thus does not run afoul of section 4. *See* City Mot. 38–39.

Assembly must have intended maximum immigration enforcement in passing Senate Enrolled Act 590 ("SEA 590"), of which Chapter 18.2 was a part. But this position fails to reckon with the actual evidence of the drafting history of SEA 590, which illuminates a process of compromise responsive to the concerns of affected constituencies—including the deliberate deletion of provisions that would have required law enforcement officers to participate in immigration enforcement. *See* City Mot. 18–20.

Although the State cites two provisions of SEA 590 outside of Chapter 18.2—sections 8 and 20—as support for its argument that the Act was meant to require state and local immigration-enforcement assistance, *see* State Mem. 12 n.3, those sections do not support the State's arguments. Section 8 of SEA 590 requires the Indiana Department of Correction to provide to the Department of Homeland Security, where needed to verify immigration status, certain information "in the department's possession or [which] the department is able to obtain." Ind. Code § 11-10-1-2(d). This statute is an information-collection and information-sharing provision, and it does not generally require enforcement cooperation. In any case, it bears only on those who are in the Department of Correction's custody, so it does not demonstrate an intent to require anything of local law enforcement officers interacting with the general public.[12]

Section 20, which purported to allow law enforcement officers to arrest an individual on the basis of a removal order, an ICE detainer request, or probable cause to believe that the individual had been indicted for or convicted of an aggravated felony, has been enjoined as unconstitutional. *See Buquer v. City of Indianapolis*, No. 1:11-cv-00708-SEB-MJD, 2013 WL 1332158 (S.D. Ind. Mar. 28, 2013). But, even assuming the General Assembly's enactment of

[12] Furthermore, as explained in the City's motion, section 8's instruction to the Department to "obtain" information demonstrates that section 3, which does not include such language, does not regulate the acquisition of information. *See* City Mot. 12.

this unconstitutional provision is relevant to its intent with respect to section 4, the State is incorrect about the inference to be drawn. Section 20 sought merely to *permit* the enforcement of detainer requests—not require it. The section would have been unnecessary if Chapter 18.2 independently required local law enforcement officers to cooperate with detainer requests, as the State now claims.

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

Plaintiffs fail to meaningfully address the conflict between their sweeping interpretations of section 4 and Indiana's Home Rule Act. *See* City Mot. 20–26. For example, relying on the principle that a state statute can "expressly den[y] a power" to a municipality, Ind. Code § 36-1-3-5(a), the State asserts that the "Indiana General Assembly has without doubt denied local governments the power" to do anything less than fully cooperate in federal immigration enforcement. State Mem. 12; *see also* Pls.' Reply 41. But because section 4 is ambiguous in critical ways, reading section 4 to require unconditional cooperation in immigration enforcement would conflict with the Home Rule Act and governing case law.

First, although the state may expressly deny a power to a municipality, "[a]ny doubt as to the existence of a power of [the municipality] shall be resolved in favor of its existence." Ind. Code § 36-1-3-3(b). Section 4's ambiguity should be resolved in favor of the less intrusive reading advocated by the City—that the statute commands localities not to interfere with federal immigration enforcement, but does not mandate local cooperation. Second, Indiana law expressly authorizes local governments to exercise police powers and to manage their finances, operations, and employees. *See, e.g.*, Ind. Code §§ 36-8-2-4, 36-4-6-18. Reading into section 4 a broad cooperation mandate would seriously—and unnecessarily—undermine these express powers. And finally, far clearer and more detailed state statutory schemes have been deemed

insufficient under the Home Rule Act to preempt the relevant field, so there is no basis to find field preemption here, as Plaintiffs claim. *See* City Mot. 23–25 (citing cases).

Moreover, although this case arises in the context of a municipal ordinance, section 4 applies to *any* action by a governmental body that "limit[s] or restrict[s] the enforcement of federal immigration laws to less than the full extent permitted by federal law." Ind. Code § 5-2-18.2-4. Under Plaintiffs' reading, as noted *supra* at 12, there would be nothing to stop private individuals empowered under Chapter 18.2 from challenging a city's day-to-day decision-making based on its purported effect on the city's ability to devote maximum resources to immigration enforcement, even to the detriment of all other city priorities. Such a broad reading could cripple municipalities' ability to manage their own personnel and operations and to protect public safety, and would open up the possibility of near-endless litigation. *See* Affidavit of Richard Allen, Chief of Gary Police Dep't ("Allen Aff."), Ex. A to Gary's Designation of Evidence ¶¶ 11, 15–16; Affidavit of Karen Freeman-Wilson, Mayor of City of Gary ("Freeman-Wilson Aff."), Ex. B to Gary's Designation of Evidence ¶¶ 8–11. Indiana's home-rule principles protect against this kind of standardless interference.

C. An expansive reading of section 4 would raise serious concerns under federal law.

In its summary judgment motion, the City explained why section 4 is ambiguous and why reading a broad cooperation mandate into section 4 would raise serious concerns under federal law. *See* City Mot. 26–33. The private Plaintiffs insinuate that an avoidance posture, rather than an outright constitutional challenge, is somehow improper. Pls.' Reply 1–2 & n3. But this is incorrect: Here, the City is defending its Ordinance's compliance with state law, and a facial constitutional challenge would be appropriate only if the statute would be invalid under each proffered interpretation. When section 4 is understood properly as prohibiting interference with

federal enforcement of federal immigration laws, it does not raise the same preemption or vagueness concerns.[13]

First, Plaintiffs dispute the City's contention that a broad cooperation mandate would clash with an important element of the design of federal immigration law and therefore could be preempted. In particular, they claim that preemption is never an issue with respect to cooperation alone, and that any policy mandating cooperation is no more preempted than a policy limiting cooperation. Pls.' Reply 55; State Mem. 32–33. But these arguments miss the point. Federal immigration law expressly makes cooperation voluntary, and this design allows each governing entity to decide for itself and its law enforcement officers how to balance its priorities and limited resources. Thus, a state law mandating cooperation by localities and universities could be preempted while a local ordinance setting the terms of that cooperation would not be.

As Plaintiffs note, the Fifth Circuit recently rejected a related argument, concluding that Congress chose voluntary state and local cooperation solely because the Tenth Amendment requires it. *See City of El Cenizo v. Texas*, 890 F.3d 164, 181 (5th Cir. 2018); Pls.' Reply 56, State Mem. 32.[14] But this conclusion fails to accord proper respect to Congress's deference to localized decision-making regardless of whether the Constitution demands it in particular circumstances. Indeed, Congress often chooses to allow states and localities to tailor their participation in federal programs to the needs of their own populations, even in fields Congress

[13] Additionally, to be clear, although Gary's Ordinance cites the Tenth Amendment for the principle that the federal government cannot commandeer local governments to perform federal functions, the City's summary judgment motion does not contend that section 4 violates the Tenth Amendment. Plaintiffs' arguments on this point are therefore irrelevant.

[14] The Fifth Circuit's decision in *El Cenizo* vacated in relevant part the district court's decision in that case, 264 F. Supp. 3d 744 (W.D. Tex. 2017), which was cited in the City's summary judgment motion. The Fifth Circuit's *El Cenizo* decision is distinguishable in some material respects, as discussed throughout this reply brief, and is otherwise not binding on this Court.

surely could regulate in their entirety. *See, e.g.*, *Hodel v. Va. Surface Min. & Reclamation Ass'n, Inc.*, 452 U.S. 264, 289 (1981) ("[T]he Surface Mining Act establishes a program of cooperative federalism that allows the States, within limits established by federal minimum standards, to enact and administer their own regulatory programs, structured to meet their own particular needs.").

Moreover, the core of Plaintiffs' position—that unilateral enforcement activities by states and localities may be preempted, but cooperation never is—raises a significant risk of a conflict with 8 U.S.C. § 1357(g). According to Plaintiffs' argument, if federal immigration authorities request that local law enforcement investigate potential civil immigration violations or detain suspected violators, local officers *may* do so under § 1357(g)(10)(B) and *must* do so under section 4. Effectively, this would mean that, so long as a federal official requests it, state and local officials can undertake *any* immigration enforcement function. But this would vitiate the INA's requirement that, in order to perform the functions of an immigration officer under federal law, state and local officials must enter into a written agreement, submit to the supervision of the U.S. Attorney General, and undergo training in the complexities of immigration law. *Id.* § 1357(g)(1)–(3). Plaintiffs should not be allowed to undermine Congress's carefully crafted scheme—one designed to ensure uniform standards of immigration enforcement while respecting constitutional rights—by their expansive reading of Chapter 18.2.

Contrary to Plaintiffs' arguments, the Supreme Court has not characterized all forms of cooperation as permissible under federal law. In *Arizona v. United States*, 567 U.S. 387, 410 (2012), the Court listed examples of what DHS claimed "would constitute cooperation under federal law," including "participat[ing] in a joint task force with federal officers, provid[ing] operational support in executing a warrant, or allow[ing] federal immigration officials to gain

access to detainees held in state facilities," but it did not include on that list complying with detainer requests. Indeed, at no point did *Arizona* draw a clear-cut distinction between unilateral conduct and compliance with federal requests. Instead, the Court stated that "unilateral state action to detain" would go "far beyond" the cooperation authorized by § 1373 (g)(10)(B), without specifying where the line of permissible cooperation would fall. *Id.* *Arizona* therefore demands a more nuanced respect for the "significant complexities" of federal immigration enforcement and the standards that Congress has imposed. *Id.* at 409.

Second, the State's primary response to the City's vagueness argument is that a municipality cannot assert a Fourteenth Amendment claim against the State. State Mem. 35. But this mistakes the posture of this case: the City has *not* raised a Due Process challenge to invalidate a state statute; rather, as a defendant in this action, it has raised vagueness concerns as a matter of statutory construction. By contrast, *City of East St. Louis v. Circuit Court for Twentieth Judicial Circuit*, 986 F.2d 1142, 1144 (7th Cir. 1993), which the State cites in support of its argument, holds only that the city-plaintiff there did not have *standing* to bring its claim under the Fourteenth Amendment. Moreover, even if the City cannot assert a due process claim against the State, Chapter 18.2 also applies to "postsecondary educational institution[s]," which include any "private postsecondary educational institution that receives state or federal funds." Ind. Code § 5-2-18.2-2.2. The statute should be interpreted uniformly with respect to all who are bound by it, so the Court must still consider this important issue.

Plaintiffs further claim that there is a "core" of state and local immigration-related activities permitted under federal law that the City may not limit or prohibit. Pls.' Reply 71–72; State Mem. 37. But section 4 contains no language to delimit the "core" that Plaintiffs claim, as the concepts of "limit or restrict" and "enforcement" are, under Plaintiffs' reading, extremely

broad. *See* City Mot. 31 (suggesting a variety of decisions that might have the effect of limiting enforcement). That Plaintiffs can self-servingly claim to understand what qualifies as the "core" hardly sets a clear boundary for cities to follow. And, tellingly, the State offers no answer to the questions raised in the City's motion regarding how far a broad cooperation mandate could extend—providing no comfort to municipal officials across Indiana who must make difficult choices about resource allocation every day. *See* City Mot. 32; Allen Aff. ¶ 16 (describing public safety budget shortfalls).

Furthermore, this case is different in significant ways from *El Cenizo*, which rejected a vagueness challenge to the term "materially limit" in a Texas statute similar to section 4. *See El Cenizo*, 890 F.3d at 190–91. Although the two statutes have some similarities, the Texas statute at issue contained both a general prohibition against policies and practices that "prohibit or *materially* limit the enforcement of immigration laws," Tex. Gov't Code § 752.053(a) (emphasis added), and "specific examples of what conduct local entities cannot limit," *El Cenizo*, 890 F.3d at 190 (citing Tex. Gov't Code § 752.053(b)(1)–(4)). The Fifth Circuit concluded that this statute was not vague both because of the specific examples provided and because the qualifier that a limitation must be material "makes the challenged phrase more definite, not less." *Id.* Neither of these elements is present in section 4.[15]

Moreover, the State's response in this case stands in marked contrast to the State of Texas's position in *El Cenizo*. There, Texas confirmed that its statute would not apply to "immigration-neutral local policies regarding bona fide resource allocation," such as policies

[15] Additionally, in *El Cenizo*, the plaintiffs asserted a facial, pre-enforcement vagueness challenge to Texas's law, which involves a more "exacting standard." 890 F.3d at 190; *see also City of South Miami v. DeSantis*, 408 F. Supp. 3d 1266, 1304 (S.D. Fla. 2019) (rejecting a facial vagueness challenge to a state law requiring municipalities to "use best efforts" to support the enforcement of federal immigration law). Here, by contrast, the City has raised constitutional vagueness concerns in response to an actual challenge to its ordinance under the statute, so these concerns about broad, pre-enforcement challenges do not apply.

regarding "overtime or patrolling locations." *Id.* at 191. The Texas statute at issue contained additional qualifying language that lends more naturally to this limitation: it barred policies that limit certain officials from "assisting or cooperating with a federal immigration officer *as reasonable or necessary*, including providing enforcement assistance." Tex. Gov't Code Ann. § 752.053(b)(3) (emphasis added). Because the purported cooperation mandate here is conjured from scattered terms in three statutes, no such qualification limits what may be asked of Indiana's cities, and the State has not proposed in this case any limiting principle similar to that acceded to by Texas.

III. The Fourth Amendment Prohibits Local Officers Acting Under Color of State Law from Detaining Individuals Pursuant to ICE Detainer Requests.

As the City explained in its summary-judgment motion, the Fourth Amendment prohibits local law enforcement officers, acting under color of state law, from detaining individuals pursuant to ICE's administrative detainer requests because the detention qualifies as a new arrest that requires probable cause that a crime has been committed. *See* City Mot. 40–44. Plaintiffs' arguments to the contrary are not convincing.[16]

According to Plaintiffs' view of the Fourth Amendment, because *federal* immigration officials may detain an individual on probable cause of a civil immigration violation and because the collective-knowledge doctrine imputes the knowledge of probable cause to local officials who receive the detainer request, local officials do not violate the Fourth Amendment when they detain an individual pursuant to an ICE detainer request. *See* Pls.' Reply 57–67; State Mem.

[16] The State incorrectly treats the Fourth Amendment question as part of the City's constitutional avoidance argument. State Mem. 22. If the Court concludes that section 4 addresses itself only to impediments to federal immigration enforcement, not state and local cooperation, then it need not reach the question of whether the Fourth Amendment permits state and local officers to honor ICE detainer requests. Only if the Court concludes that section 4 bars restrictions on cooperation must it resolve whether the Fourth Amendment permits state and local officers to detain individuals pursuant to administrative detainers.

23–29. But this argument fails to recognize that civil and criminal violations are different for purposes of the Fourth Amendment because local officers do not have the authority to detain individuals based on suspected civil immigration offenses.

Compliance with a detainer request is an independent Fourth Amendment seizure that, by its very nature, occurs when detention is no longer supported by a state-law interest. *See, e.g.*, *Ramon v. Short*, 2020 MT 69, ¶ 29, 399 Mont. 254, 268 ("There is broad consensus around the nation that an immigration detainer constitutes a new arrest."); *People ex rel. Wells v. DeMarco*, 168 A.D.3d 31, 39 (N.Y. App. Div. 2018); *see also* 8 C.F.R. § 287.7(d) (detainer requests detention after the point at which an individual otherwise would be released from state or local custody).[17] In order to effectuate that seizure consistent with the Fourth Amendment, local officials must have authority to arrest and detain individuals for civil immigration violations. But state and local officers may do so only in the specific, limited circumstances authorized by federal law. Specifically, under § 1357 (g), state and local officers may be authorized to perform the functions of an immigration officer—including arresting or detaining an individual on a civil immigration violation—only with a written agreement, training, and supervision by the Attorney General.

Plaintiffs do not dispute that state and local law enforcement officers may not unilaterally arrest or detain individuals on suspicion of civil immigration violations. *See Santos v. Frederick*

[17] In its motion for summary judgment, the City cited *Lopez-Aguilar v. Marion County Sheriff's Department*, No. 116CV02457SEBTAB, 2017 WL 5634965 (S.D. Ind. Nov. 7, 2017), which had approved a stipulated agreement enjoining the Marion County Sheriff's Department from enforcing civil immigration detainers. The Seventh Circuit later vacated the district court's judgment, concluding that the district court should have permitted the State of Indiana to intervene in order to appeal and holding that the district court lacked jurisdiction to grant injunctive relief. 924 F.3d 375, 380 (7th Cir. 2019). In its opinion, the Seventh Circuit never addressed the meaning or scope of Chapter 18.2 or whether any particular application of Chapter 18.2 would raise constitutional concerns; it merely described the State of Indiana's position on the merits for purposes of analyzing its claim to standing. On remand, the parties ultimately settled the case and agreed to a voluntary dismissal, so there was no final adjudication on the merits of Lopez-Aguilar's claims.

Cty. Bd. of Comm'rs, 725 F.3d 451, 463–68 (4th Cir. 2013). Instead, they attempt to distinguish compliance with detainer requests as mere "cooperation" with ICE, which, according to their argument, is permitted under § 1357 (g)(10)(B). Pls.' Reply 63–64; State Mem. 26–28. But § 1357 (g)(10)(B)'s cooperation clause does not provide law enforcement officers acting under color of state law the authority to arrest or detain individuals on suspicion of removability. *See Lunn v. Commonwealth*, 477 Mass. 517, 535 (2017) ("Significantly, the United States does *not* contend that § 1357(g)(10) affirmatively confers authority on State and local officers to make arrests pursuant to civil immigration detainers . . . ."); *Ramon*, 399 Mont. at 274 (rejecting the argument that § 1357(g)(10) authorizes arrests as "cooperation" because this "would essentially render the purpose of 287(g) agreements meaningless"); *Esparza v. Nobles Cty.*, No. A18-2011, 2019 WL 4594512, at *10 (Minn. Ct. App. Sept. 23, 2019) (same); *People ex rel. Wells*, 168 A.D.3d at 52 (same).

Indeed, *Arizona* makes clear that the Fourth Amendment does not permit a local law enforcement officer acting under color of state law to detain an individual on suspicion of removability alone. Although "[t]here may be some ambiguity as to what constitutes cooperation under the federal law . . . Congress has put in place a system in which state officers may not make warrantless arrests of aliens based on possible removability except in specific, limited circumstances." *Arizona*, 567 U.S. at 410 (quoted in *Ramon*, 399 Mont. at 274); *see also C.F.C. v. Miami-Dade Cty.*, 349 F. Supp. 3d 1236, 1258–59 (S.D. Fla. 2018) ("Only when acting under color of federal authority—that is, as directed, supervised, trained, certified, and authorized by the federal government—may state officers effect constitutionally reasonable seizures for civil immigration violations."). And since the Supreme Court's decision in *Arizona*, multiple courts have concluded that local officers acting under color of state law violate the

Fourth Amendment when they make arrests purely on suspicion of a civil immigration violation. *See Melendres v. Arpaio*, 695 F.3d 990, 1000–01 (9th Cir. 2012) (concluding that, absent a § 1357 (g) agreement, local law enforcement may "enforce only immigration-related laws that are criminal in nature"); *Lopez-Flores v. Douglas Cty.*, No. 6:19-CV-00904-AA, 2020 WL 2820143, at *6 (D. Or. May 30, 2020) (finding a violation of the plaintiff's Fourth Amendment rights because "defendants [did] not have authority to detain plaintiff as there was no formal agreement allowing them to do so"); *C.F.C.*, 349 F. Supp. 3d at 1259 ("Plaintiffs have alleged plausible facts to support their contention that the County violated their Fourth Amendment rights when it arrested C.F.C. and S.C.C. based on a detainer and without probable cause that either of them had committed a crime.").[18]

If a local officer acting pursuant to state law does not have the authority to detain an individual on suspicion of removability, then it does not matter *who* makes the probable-cause determination.[19] For this reason, Plaintiffs' reliance on the collective-knowledge doctrine is beside the point. *See People ex rel. Wells*, 168 A.D.3d at 47 (rejecting the collective-knowledge doctrine because, if the local officer does not have "authority to arrest for a civil matter," the officer cannot "make a 'lawful' arrest"); *see also Lopez-Flores*, 2020 WL 2820143, at *6 (declining to extend the collective-knowledge doctrine to the civil immigration context).

[18] Some courts have held that detentions based on ICE detainer requests and administrative warrants do not violate the Fourth Amendment. *See, e.g.*, *Lopez-Lopez v. Cty. of Allegan*, 321 F. Supp. 3d 794, 801 (W.D. Mich. 2018). But these cases fail to grapple adequately with the distinction between arrests based on probable cause of a criminal offense and the administrative warrants at issue here—which provide only probable cause of a *civil* offense and are issued by an executive branch official, not a neutral, detached judicial officer.

[19] The State cites *Virginia v. Moore*, 553 U.S. 164 (2008), for the broad proposition that statutory arrest authority is irrelevant to the Fourth Amendment if the arrest is supported by probable cause. State Mem. 28–29. But *Moore*'s actual holding was much narrower: that "warrantless arrests for crimes committed in the presence of an arresting officer are reasonable under the Constitution," even if state law does not authorize an arrest for the specific crime. *Id.* at 176. *Moore* is therefore far afield from the Fourth Amendment issue here—arrests for civil violations based solely on administrative warrant absent authorization to conduct such arrests. *See Lopez-Flores*, 2020 WL 2820143, at *5 ("[T]he *Moore* Court said nothing about police authority to arrest someone for conduct that is not a crime at all." (internal quotation marks omitted)).

Although the Fifth Circuit recently rejected a Fourth Amendment challenge to Texas's statute requiring state and local officials to honor detainer requests, *see El Cenizo*, 890 F.3d at 187–89, its analysis was mistaken. The Fifth Circuit's analysis is in tension with *Arizona*, which struck down a state law purporting to authorize state and local officers to conduct arrests for civil immigration violations, as well as the Ninth Circuit's far more persuasive reasoning in *Melendres*. The Eighth Circuit's brief analysis in *United States v. Ovando-Garzo*, 752 F.3d 1161, 1164 (8th Cir. 2014), also is unpersuasive, as it does not address whether local law enforcement officers may make a separate seizure based on a civil immigration detainer.[20]

Moreover, the *El Cenizo* court's analysis relied in significant part on Texas's express detainer-cooperation provision, Tex. Crim. Proc. Code § 2.251, which, the court concluded, authorized "state officers to carry out federal detention requests." *See El Cenizo*, 890 F.3d at 188. Even if that court were correct that state law may authorize detentions pursuant to ICE detainer requests—which it is not—the court's reasoning is inapplicable here. Despite the State's efforts to read Chapter 18.2 to the contrary, neither section 3's reference to "cooperating" nor section 4's vague and prohibitory language *affirmatively* authorizes detentions under color of state law.

Finally, under Plaintiffs' theory, local law enforcement *always* must honor ICE detainers, as their reading of section 4's "full extent" language suggests no exceptions. This would be so even if a local officer has reason to doubt the existence of probable cause of removability or receives additional information that undermines the probable cause determination. And, without

[20] *Ovando-Garzo* involved a traffic stop in which a local police officer questioned the passengers of the vehicle about their immigration status after the driver was arrested for driving with a suspended license. 752 F.3d at 1162–63. The Eighth Circuit held that the officer "did not unreasonably prolong the traffic stop," so the immigration-related questioning did not qualify as a separate seizure under the Fourth Amendment. *Id.* at 1164. Thus, *Ovando-Garzo* does not address the relevant factual scenario at issue here: whether local law enforcement may engage in a distinct Fourth Amendment seizure on the basis of a civil detainer.

proper immigration training—which, the City has explained, is effectively unavailable to it, *see* City Mot. 26—a local officer may be unaware of what information would be relevant to probable cause and might simply defer to the federal request even if probable cause is lacking. Such an absolute mandate could subject individuals to wholly improper detentions and the City to significant liability. *See, e.g.*, *Hernandez v. United States*, 939 F.3d 191, 206 (2d Cir. 2019) (denying motion to dismiss a *Monell* claim for municipal liability under 42 U.S.C. § 1983 where plaintiff alleged a policy of honoring ICE detainers without engaging in any independent inquiry); *C.F.C.*, 349 F. Supp. 3d at 1264 (denying motion to dismiss a *Monell* claim based on enforcement of ICE detainers); Freeman-Wilson Aff. ¶ 11.

IV. Plaintiffs Have Waived Their Request for Relief Under Ind. Code § 5-2-18.2-7 and for Additional Forms of Relief.

The private Plaintiffs boldly ask in their reply brief that this Court include as a new form of relief a requirement that the City's police department issue a written notice to officers that they must cooperate with federal immigration laws pursuant to section 7. *See* Pls.' Reply 74. But their complaint asserts no claims for violations of section 7, and their summary judgment motion likewise seeks no such relief. Plaintiffs accordingly are not entitled to this relief. And, in any case, the parties have not briefed this issue in any meaningful respect—including whether the City's existing directives regarding cooperation with law enforcement suffice to meet its obligations under section 7. The Court should not entertain this belated and inadequate request.

What is more, in their response to the State's summary judgment brief—their third submission on the instant motions—the private Plaintiffs again seek new forms of affirmative relief, including the posting of a notice on the City's website of any order invalidating any portions of the Ordinance along with a hyperlink to any such order, a similar notice to City employees, and a written report back to this Court confirming that it has taken these steps. Pls.'

Response to State's Summ. J. Mem. 21. These requests are clearly waived. The private Plaintiffs were permitted the opportunity to file an additional brief solely to respond to the State's brief. To the extent they present new arguments unresponsive to the State's brief, it is a blatantly improper attempt to supplement their already copious submissions.

In any case, such relief is unwarranted. Indiana Code § 5-2-18.2-5 authorizes an "action to compel [a] governmental body . . . to comply with this chapter." It does not authorize any further affirmative relief. Moreover, under Indiana law, "[p]ermanent injunctions are limited to prohibiting injurious interference with rights," so any injunction "should not be more extensive than is reasonably required to protect the interests of the party in whose favor it is granted." *Crawley v. Oak Bend Estates Homeowners Ass'n, Inc.*, 753 N.E.2d 740, 744 (Ind. Ct. App. 2001). Here, the sole interest asserted by the private Plaintiffs is their interest in the City's compliance with state law, and the private Plaintiffs have shown no reason that the additional measures they propose are necessary to protect that interest. Any additional requested relief is therefore wholly inappropriate.

V. Plaintiffs Have Failed to Show that Injunctive Relief Is Proper Here.

The private Plaintiffs contend that, if they are correct on the merits, they need not make any additional showing to warrant this Court's exercise of its equitable powers. This is incorrect.

In particular, Plaintiffs claim that because they seek a statutory injunction, they need not satisfy the traditional requirements for injunctive relief. Pls.' Reply 42–43, 72–73; State Mem. 4. They rely on Indiana Code § 5-2-18.2-6, which provides: "If a court finds that a governmental body . . . knowingly or intentionally violated section 3 or 4 of this chapter, the court shall enjoin the violation." The City demonstrated in its summary judgment brief why any purported violation by the City could not have been "knowing[] or intentional[]." *See* City Mot. 47–48. In response, the private Plaintiffs and the State claim that, under Indiana law, the language

"knowingly or intentionally" *always* imposes only a general intent standard—i.e., "the intent to do the prohibited act, or the knowledge that one is doing so," *Simon v. City of Auburn Bd. of Zoning Appeals*, 519 N.E.2d 205, 210 (Ind. Ct. App. 1988), which Plaintiffs interpret to mean nothing more than the intent to pass the ordinance. *See* Pls.' Reply 1.

But Indiana courts have interpreted "knowing or intentional" statutory mens rea requirements differently in different statutes. *See, e.g.*, *Pittman v. State*, 45 N.E.3d 805, 818 (Ind. Ct. App. 2015) (stalking requires the offender to "intend the result" of making the victim feel "terrorized, frightened, intimidated, or threatened"). There are compelling reasons here to reject Plaintiffs' overly broad general-intent standard. An injunction invalidating a duly enacted city ordinance—sought outside of the context of any enforcement of that ordinance and absent any showing of concrete injury—is a strong remedy that should not be undertaken lightly. Moreover, a city could hardly enact an ordinance in any way but "knowingly or intentionally," so accepting Plaintiffs' standard would effectively read that phrase out of the statute entirely. The court therefore should read section 6's knowing-or-intentional language to impose a mens rea requirement closer to specific intent before abandoning the traditional equitable factors for an injunction—i.e., showings of irreparable harm, a favorable balance of the equities, and that the public interest would not be disserved by granting an injunction. *See eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006).

Finally, the private Plaintiffs are eager to avoid any consideration of the equities because they have not asserted and are unable to assert any concrete, cognizable interests that would be protected by an injunction.[21] As noted in the City's summary judgment motion, Gary's Police

[21] Moreover, members of the Indiana Supreme Court recently have questioned whether the public-standing doctrine, on which Plaintiffs rely, is consistent with the "distribution-of-powers doctrine" of the Indiana constitution when it is interpreted to allow individuals to bypass the political process without any showing of harm. *See Horner v. Curry*, 125 N.E.3d 584 (Ind. 2019) (op. of Massa, J.).

Chief is unaware of any incident in which ICE has *ever* contacted the Gary Police Department for assistance, including by issuing detainer requests. *See* City Mot. 50–51; Allen Aff. ¶ 19. The private Plaintiffs do not dispute this and offer no evidence of irreparable harm. By contrast, the City of Gary and its residents would be severely harmed by an injunction, which would undermine Gary's efforts to build community trust, ensure public safety, and protect the integrity of the public fisc.

CONCLUSION

For the foregoing reasons, the Court should grant the City's motion for summary judgment and deny Plaintiffs' motion for summary judgment.

July 31, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on the 31st day of July, 2020, service of a true and complete copy of the above and foregoing pleading or paper was made upon each party or attorney of record by electronic service using the Indiana E-Filing System, email, or depositing the same in the United States Mail in envelopes properly addressed to each of them and with sufficient first-class postage affixed.

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