STATE OF INDIANA	)	IN THE LAKE COUNTY SUPERIOR COURT
	) SS	CIVIL DIVISION ROOM THREE
COUNTY OF LAKE	)	SITTING IN GARY, INDIANA

GREG SERBON and JOHN ALLEN,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	
	)	
CITY OF EAST CHICAGO, INDIANA; CITY OF EAST CHICAGO COMMON COUNCIL; MYRNA MALDONADO, LENNY FRANCISKI, BRENDA WALKER, CHRISTINE VASQUEZ, ROBERT GARCIA, GILDA ORANGE, ROBERT MEDINA, EMILIANO PEREZ, and KENNETH MONROE, in their official capacities as City of East Chicago Common Council Members; ANTHONY COPELAND, in his official capacity as City of East Chicago Mayor; CITY OF EAST CHICAGO POLICE DEPARTMENT; and FRANK SMITH, in his official capacity as City of East Chicago Chief of Police,	)	CAUSE NO: 45D03-1805-PL-000045
	)	
Defendants.	)	

DEFENDANTS' MEMORANDUM IN SUPPORT OF THEIR CROSS-MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutional Provisions

Statutes and Ordinances

Rules & Regulations

Legislative History

Other Authorities

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.

Relying on that authority, the City of East Chicago passed a "Welcoming City" Ordinance in June 2017. This enactment implements East Chicago'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 certain provisions of East Chicago's Ordinance. They claim that Indiana law—specifically, certain provisions of Indiana Code Chapter 5-2-18.2—prohibits municipalities from deciding whether and how to spend their own resources in response to federal requests for voluntary assistance in enforcing the federal government's own immigration laws. But East Chicago's Ordinance complies with the relevant parts of Chapter 18.2, as the Ordinance permits sharing the exact information that state law requires, and it does not restrict the federal enforcement of federal immigration law. That is all that is required.

Plaintiffs' theory—that state law forbids *any* local policy or decision that provides for less than maximum cooperation in federal immigration enforcement—depends on a statutory reading that is far too imprecise to wrest control of local affairs from communities like East Chicago, contrary to Indiana's Home Rule Act. This theory would imperil any ordinance, rule, policy, guideline, or budgetary decision—including those directed at public safety and fiscal responsibility—if it could conceivably reduce the City's cooperation in the enforcement of federal

immigration laws to any degree. Such a standardless dictate would pose intolerable compliance burdens and could not be administered in a principled or constitutional fashion.

Plaintiffs also err in claiming that certain provisions of East Chicago's Ordinance violate federal preemption, equal protection, and vagueness principles. Federal immigration law contemplates voluntary cooperation in immigration enforcement and recognizes that a city's decision not to cooperate in certain ways is a perfectly acceptable choice under federal law and the Tenth Amendment's anticommandeering doctrine. Plaintiffs' equal protection and vagueness claims—both of which target East Chicago's decision to discourage all unnecessary arrests—plainly fail to state a claim against a facially neutral policy guiding police discretion.

Plaintiffs misconstrue the applicable law; they provide no evidence of a concrete injury to themselves (or anyone); and they wrongly minimize the harms to local autonomy and community security that their untenable interpretations of Chapter 18.2 and the U.S. Constitution 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 not lawfully admitted or 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.

In 2011, the State of Indiana enacted Senate Enrolled Act 590 (SEA 590), which created a number of new immigration-related laws. 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 18.2-3, which bars governmental bodies and postsecondary educational institutions[1] from adopting policies that prohibit or restrict the maintenance or sharing of individuals' citizenship or immigration status information with other federal, state, or local governments, Ind. Code § 5-2-18.2-3; and section 18.2-4, which bars the same entities from limiting or restricting the enforcement of federal immigration laws, *id.* § 5-2-18.2-4.[2] In addition, section 18.2-5 provides a cause of action, stating that "a person lawfully domiciled in Indiana may bring an action to compel" the compliance of a governmental body that has violated Chapter 18.2, *id.* § 5-2-18.2-5; and section 18.2-6 allows for an injunction if the governmental body "knowingly or intentionally violated" section 18.2-3 or -4, *id.* § 5-2-18.2-6.

[1] Because Plaintiffs make no claim with respect to postsecondary educational institutions, Defendants refer only to "governmental bodies" throughout for the sake of brevity. "Governmental body" includes both state and local governmental entities. Ind. Code § 5-22-2-13 (incorporated into Chapter 18.2 through Ind. Code § 5-2-18.2-1).

[2] Each provision of Chapter 18.2 will be referred to simply by its section number throughout this brief.

Finally, section 18.2-7 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.[3]

In June 2017, the Common Council of the City of East Chicago, Indiana, approved its "Welcoming City Ordinance," Ordinance No. 17-0010. Compl. App. A ("Ordinance"). The Common Council adopted the Ordinance in order to "demonstrate the City of East Chicago's commitment to ensure public safety for all city residents," to "support immigration enforcement as a federal matter," and to "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 § 1. The Ordinance seeks to ensure that the immigration status of those who live, work, or pass through East Chicago will not affect how they are treated by East Chicago agencies and agents, including its police department and social services providers. Affidavit of Anthony Copeland, Mayor of City of East Chicago ("Copeland Aff.") ¶ 5, Ex. A to Defs.' Designation of Evidence.

In May 2018, Plaintiffs Greg Serbon and John Allen filed suit, seeking a finding that certain provisions of East Chicago's Ordinance violate sections 18.2-3, -4, and -7, as well as the U.S. Constitution, and an order enjoining the purported violations. Neither Mr. Serbon nor Mr. Allen live, own property, or pay taxes in East Chicago. Their suit named as defendants the City of East Chicago; its Common Council; all nine members of the Common Council in their official capacities; East Chicago's Mayor, Anthony Copeland, in his official capacity; East Chicago's

[3] Sections 2 and 2.2 are definitional, and section 8 prohibits discrimination in enforcement. Ind. Code §§ 5-2-18.2-2, -2.2, & -8.

Police Department; and the Chief of Police, Frank Smith, in his official capacity.[4] The majority of the provisions of the Ordinance are not challenged in this lawsuit.

Without awaiting discovery regarding East Chicago's interactions with ICE and other federal immigration authorities or the manner in which East Chicago has enforced its Ordinance, Plaintiffs filed for summary judgment on August 15, 2018. The State of Indiana then intervened, and Defendants removed the case to federal court in November 2018. The federal court stayed the summary-judgment briefing schedule pending resolution of Plaintiffs' and the State's motions to remand. In May 2020, the federal court remanded the case to this Court. This Court then lifted the stay of the briefing schedule and ordered that Defendants file this cross-motion for summary judgment and opposition to Plaintiffs' motion for summary judgment by December 11, 2020. *See* Order from Hearing Held Sept. 3, 2020.[5]

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. Trial Rule 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

[4] Since this case was filed, Monica Gonzalez, Terence Hill, Stacy Winfield, and Dwayne Rancifer Jr. have replaced Myrna Maldonado, Brenda Walker, Christine Vasquez, and Robert Medina as members of the East Chicago Common Council. Hector Rosario replaced Frank Smith as East Chicago Chief of Police. Pursuant to Indiana Trial Rule 25(f), these current officials are automatically substituted for the former officials named in this case in their official capacity.

[5] In *Nicholson v. City of Gary*, No. 45D05-1802-MI-000014, Plaintiff Greg Serbon also filed suit against the City of Gary regarding its similar welcoming city ordinance. On November 16, 2020, the court dismissed the claims against the City of Gary Common Council, its members, and Gary's Mayor, and granted judgment in plaintiffs' favor against the City without explanation of its reasons for doing so. The City of Gary intends to appeal that decision.

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 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.

As explained below, Plaintiffs lack standing to bring their claims; Plaintiffs are incorrect on the merits of this case so they cannot obtain either declaratory or injunctive relief; Plaintiffs fail to satisfy any of the other three elements of the injunction standard as a matter of law; and the East Chicago Common Council and its members are not proper defendants in this suit. The Court therefore should deny Plaintiffs' Motion for Summary Judgment in its entirety and grant the City's Cross-Motion for Summary Judgment.

I. Plaintiffs Lack Standing

The judicial doctrine of standing derives from Article 3, Section 1, of the Indiana Constitution, which establishes the distribution of powers among the "the Legislative, the Executive including the Administrative, and the Judicial" departments of the state government. *State ex rel. Cittadine v. Ind. Dep't of Transp.*, 790 N.E.2d 978, 979 & n.3 (Ind. 2003). "Standing is a key component in maintaining [Indiana's] state constitutional scheme of separation of

powers," *Pence v. State*, 652 N.E.2d 486, 488 (Ind. 1995), as it prevents courts from issuing "advisory opinions" based on "hypothetical situations," *Snyder v. King*, 958 N.E.2d 764, 786 (Ind. 2011). Therefore, ordinarily, "only those persons who have a personal stake in the outcome of the litigation and who show that they have suffered or were in immediate danger of suffering a direct injury as a result of the complained-of conduct will be found to have standing." *Cittadine*, 790 N.E.2d at 979. "It is generally insufficient that a plaintiff merely has a general interest common to all members of the public." *Id.*

Plaintiffs at no point contend that they satisfy the judicial standing test. They could not, as they do not allege the Ordinance has in any way caused them a direct injury. Instead, Plaintiffs assert two bases for standing: (1) statutory standing under § 18.2-5 for their state-law claims and (2) public standing, an exception to the ordinary rules of standing, for both their state law and federal constitutional claims. Both of these arguments fail.

A. Section 18.2-5 Grants a Cause of Action, Not Standing

Indiana Code § 5-2-18.2-5 states that "a person lawfully domiciled in Indiana may bring an action to compel [a] governmental body . . . to comply with" Chapter 18.2. Plaintiffs argue that this provision gives them "statutory standing" to assert their claims under Chapter 18.2, but this argument erroneously conflates the creation of a statutory *cause of action* with the judicial doctrine of *standing*. A statutory basis for a private right of action does not render a claim justiciable, and section 18.2-5 grants only a cause of action. *See, e.g.*, *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83 (1998) (clarifying that a statute created a cause of action but did not confer standing upon the plaintiffs).

Plaintiffs contend that, under Indiana law, the General Assembly may alter the ordinary rules of standing by statute and that, in section 18.2-5, it eliminated the need for plaintiffs to have

been personally affected at all. Pls.' Summ. J. Memo. 6–7. Plaintiffs rely particularly on the discussion of the Declaratory Judgment Act in *Cittadine,* but that example does not support their claim that the General Assembly may eliminate standing requirements such that they drop below the floor of the judicially recognized standing doctrine. In *Cittadine*, the court emphasized that the General Assembly imposed *additional* statutory requirements on plaintiffs raising claims under the Declaratory Judgment Act—the very opposite of what Plaintiffs claim that section 18.2-5 does. 790 N.E.2d at 984. Adding statutory requirements is entirely consistent with constitutional and prudential principles that caution against transforming Indiana courts into unlimited forums for advisory opinions. *See Snyder,* 958 N.E.2d at 786 ("[C]ourts . . . should decide cases only on the specific facts of the particular case and not on hypothetical situations."). Plaintiffs' citation to *Huffman v. Indiana Office of Environmental Adjudication*, 811 N.E.2d 806, 809 (Ind. 2004), also is inapposite because that decision addressed justiciability in administrative tribunals, not courts.[6]

Moreover, even if the General Assembly has the power to alter judicial standing limits, Plaintiffs give no reason to believe that the General Assembly in fact did so in section 18.2-5. As noted above, section 18.2-5 does not refer to standing at all and speaks only in terms of who "may bring an action"—the classic language of a cause of action. *See* Ind. Code § 4-21.5-5-3 (explicitly addressing standing for judicial review of agency actions). And Plaintiffs point to no other comparable provision that has been found to grant similarly broad standing by statute. Plaintiffs' reading therefore requires an assumption that the Indiana General Assembly intended, without saying so, to convey standing on all Indiana residents without any showing of harm whatsoever, and to do so uniquely for this statutory scheme. This evisceration of judicial standing would upset

[6] Similarly, Plaintiffs' citations to Indiana Code §§ 33-28-1-2 and 33-29-1-1.5, which concern the jurisdiction of Indiana's courts, are irrelevant to the question of whether plaintiffs have satisfied their requirements under the judicial doctrine of standing.

the constitutionally imposed separation of powers in Indiana and should not be lightly assumed. Plaintiffs therefore do not have "statutory standing" for their claims under Chapter 18.2.

B. Plaintiffs Do Not Fall Within the Public Standing Exception

Plaintiffs next argue that their claims may proceed under the public standing exception to general standing principles. This argument is similarly unavailing. Because Plaintiffs neither reside nor pay taxes in East Chicago, they are not members of the public who may assert public standing to challenge an East Chicago ordinance. Plaintiffs also fail to meet the Declaratory Judgment Act's standing requirements, so they have no standing to seek declaratory relief either.

For a case involving enforcement of a public rather than a private right, the public standing exception eliminates the requirement that the plaintiff "have an interest in the outcome of the litigation different from that of the general public." *Cittadine*, 790 N.E.2d at 980. However, the relevant members of the "public" for this exception are the residents, taxpayers, and voters of the local jurisdiction whose ordinance or measure is at issue. In all cases cited in *Cittadine* where a court found that the public standing exception applied, the plaintiffs were citizens, residents, or taxpayers of the local jurisdiction at issue. *See, e.g.*, *Higgins v. Hale*, 476 N.E.2d 95 (Ind. 1985) (Brown County residents and voters); *Graves v. City of Muncie*, 255 Ind. 360, 264 N.E.2d 607 (1970) (Muncie taxpayers); *Miller v. City of Evansville*, 244 Ind. 1, 189 N.E.2d 823 (1963) (Evansville resident taxpayers); *Mitsch v. City of Hammond*, 234 Ind. 285, 125 N.E.2d 21 (1955) (Lake County resident taxpayers whose taxes funded the Hammond public schools); *Hamer v. City of Huntington*, 215 Ind. 594, 21 N.E.2d 407 (1939) (Huntington taxpayer); *Zoercher v. Agler*, 202 Ind. 214, 172 N.E. 186 (1930) (South Bend taxpayers and citizens); *Davis Const. Co. v. Bd. of Comm'rs of Boone Cty.*, 192 Ind. 144, 132 N.E. 629 (1921) (Boone County resident and taxpayer).

Plaintiffs are not residents, taxpayers, or voters in East Chicago. Neither Plaintiff resides or owns property in East Chicago. Serbon Dep. 9:9–9:23, 29:6–30:16, Ex. C to Defs.' Designation of Evidence; Allen Dep. 7:11–10:13, 28:5–28:10, Ex. D to Defs.' Designation of Evidence. Neither Plaintiff has spent more than 24 hours at a time in East Chicago. Serbon Dep. 30:17–33:6, 52:8–52:14; Allen Dep. 28:14–36:6, 64:4–64:11, 76:20–77:17; Pl. Greg Serbon's Response to Defs.' Second Set of Interrogatories ("Serbon Interrogatories") 3, Ex. E to Defs.' Designation of Evidence; Pl. John Allen's Response to Defs.' Second Set of Interrogatories ("Allen Interrogatories") 3, Ex. F to Defs.' Designation of Evidence; *cf.* Compl. ¶¶ 11–12 (alleging only that Plaintiffs "often work[] in the City" and "often enters City limits"). Neither Plaintiff suffered any personal harms as a result of the Ordinance, nor do they know anyone who has. Serbon Dep. 47:8–48:24, 53:3–53:13; Allen Dep. 66:2–66:25.

Public standing would be stretched to the point of absurdity if any plaintiff who traveled to Notre Dame for a football game were to be granted standing to challenge its local laws. As justices of the Indiana Supreme Court recently noted, the public standing exception already "risks pushing the judiciary's role beyond the boundaries contemplated by our distribution-of-powers doctrine. . . . By permitting any person, without a showing of harm, to enforce a public right or duty, what limits are there? If all government action is subject to judicial review, what purpose does the political process serve?" *Horner v. Curry*, 125 N.E.3d 584, 595 (Ind. 2019) (op. of Massa, J.). The Court should reject Plaintiffs' invitation to stretch this doctrine even further to allow any Indiana resident to take it upon himself to police the actions of any town in the state.

Second, Plaintiffs' invocation of the public standing exception is misplaced as to their claims for declaratory relief. The *Cittadine* court made clear that "persons availing themselves of the public standing doctrine nevertheless remain subject to various limitations," including the

requirements of the Declaratory Judgment Act. 790 N.E.2d at 983–84. As the *Cittadine* court explained, "to the extent that persons claiming public standing may be seeking only declaratory relief, they must be persons 'whose rights, status, or other legal relations are affected by a statute, municipal ordinance, contract, or franchise . . . .'" 790 N.E.2d at 984 (quoting Ind. Code § 34–14-1–2); *see also Town of Munster v. Hluska*, 646 N.E.2d 1009, 1012 (Ind. Ct. App. 1995) ("In order to obtain declaratory relief, the person bringing the action must have a substantial present interest in the relief sought, not merely a theoretical question or controversy but a real or actual controversy . . . .") A person is "affected" if he has "some personal or property interest in the outcome of the appeal." *Lake Cty. Plan Comm'n v. Cty. Council*, 706 N.E.2d 601, 602–03 (Ind. Ct. App. 1999).

Here, as already noted, Plaintiffs have failed to show that they have any personal or property interest in the outcome of this litigation. Rather, Plaintiffs seek to adjudicate "merely a theoretical question" based on generalized concerns about illegal immigration. *Hluska*, 626 N.E.2d at 1012; *see Liberty Landowners Ass'n, Inc. v. Porter Cty. Comm'rs*, 913 N.E.2d 1245 (Ind. Ct. App. 2009) (affirming dismissal under Declaratory Judgment Act where plaintiffs did not own property or pay taxes that would be affected by new zoning regulations because, "even when public standing is asserted, [plaintiffs' must still have some . . . personal right" at issue). Therefore, Plaintiffs may not utilize the public standing exception to exempt themselves from the requirements of the Declaratory Judgment Act.[7]

[7] Plaintiffs claim that *Cittadine*'s discussion of declaratory judgment actions does not apply to them because they are not "seeking *only* declaratory relief." Pls.' Summ. J. Memo. 68. This makes little sense. Plaintiffs cannot evade the requirements of the Declaratory Judgment Act by seeking injunctive relief that is similarly foreclosed by the fact that they have suffered no harm that would entitle them to injunctive relief. *See infra* Part IV.

C. Plaintiffs Lack Standing To Bring Federal Constitutional Claims

Even if this court concludes that Plaintiffs have standing to bring their state-law claims, their federal constitutional claims nonetheless must be dismissed for lack of standing because the public standing exception does not apply to federal constitutional claims.

Indiana courts apply federal Article III standing requirements to federal claims. *See City of Evansville ex rel. Dep't of Redevelopment v. Reising*, 547 N.E.2d 1106, 1113 (Ind. Ct. App. 1989) (requiring plaintiff to meet "the constitutional requirement of Article III" in asserting a federal claim under 42 U.S.C. § 5309); *Hulse v. Ind. State Fair Bd.*, 94 N.E.3d 726, 732 (Ind. Ct. App. 2018) (applying federal justiciability standards to a First Amendment claim (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992))). To satisfy Article III standing, a plaintiff must show: "(1) [he] suffered an injury in fact; (2) there is a causal connection between the injury complained of and the defendant's behavior; and (3) the relief requested by the plaintiff will redress its injury." *City of Evansville*, 547 N.E.2d at 1113. To prove injury in fact, Plaintiffs must prove they experienced "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 560 (internal quotation marks and citations omitted).

Plaintiffs lack standing to assert their federal constitutional claims. Nowhere in their complaint do Plaintiffs allege any concrete, personal injury, and Plaintiffs have admitted they have not personally experienced *any* harm as a result of the Welcoming Ordinance at issue. *See* Serbon Dep. 47:8–48:24, 53:3–53:13; Allen Dep. 66:2–66:25. Indeed, Plaintiffs have never had any interactions with the East Chicago Police Department—which would be central to their vagueness and equal protection claims about the Ordinance's arrest policy—and they have not pointed to any applications of East Chicago's Ordinance that would demonstrate a conflict with federal law for

preemption purposes. *See infra* Part III. The only harm Plaintiffs claim is to their "public right" in the enforcement of federal immigration laws. Pls.' Summ. J. Memo. 68. Such a "generalized interest of all citizens in constitutional governance . . . is an inadequate basis" for Article III standing. *Whitmore v. Arkansas*, 495 U.S. 149, 160 (1990).

Tacitly acknowledging this lack of harm, Plaintiffs again invoke the public standing exception. In doing so, Plaintiffs rely singularly on the Indiana Supreme Court's statement in *dicta* that the exception applies to "claims that government action is unconstitutional." *Cittadine*, 790 N.E.2d at 983; *see* Pls.' Summ. J. Memo. 67–68. But the cases cited in *Cittadine* for this proposition involved only state constitutional challenges. *See, e.g.*, *Brooks v. State*, 162 Ind. 568, 70 N.E. 980, 982 (1904) (claims under Art. 4, §§ 2–6 of the Indiana Constitution); *Bd. of Comm'rs of Clay Cty. v. Markle*, 46 Ind. 96 (Ind. 1874) (claims that legislation was unconstitutionally enacted under the Indiana Constitution); *Davis Const. Co.*, 132 N.E. at 631 (claim under Art. 1, § 23 of the Indiana Constitution). Indeed, Defendants have found no case applying Indiana's public standing exception to federal claims.

The court should reject Plaintiffs' attempt to extend the public standing exception to federal constitutional claims. Applying Indiana's public standing exception in this way would risk violating core principles of federalism. *See Eunjoo Seo v. State*, 148 N.E.3d 952, 967 (Ind. 2020) ("[W]hen we decide issues of federal law by exercising a flexible exception that could divest a federal court of jurisdiction under its more-rigid Article III constraints, we usurp our role in this federal system. . . . .") (Slaughter, J., dissenting). And it risks expanding the public standing doctrine even farther into abstract, hypothetical controversies—like the constitutional claims at issue in this very case. *See Horner*, 125 N.E.3d at 595; *Pence*, 652 N.E.2d at 488 (public standing is available only "in extreme circumstances").

In sum, Plaintiffs do not have standing to assert either their state-law or federal constitutional claims because they have not suffered any cognizable injury; section 18.2-5 does not convey standing; the public standing exception to standing applies only to residents and taxpayers of the jurisdiction at issue; and the public standing exception does not apply to federal constitutional claims. The Court therefore should grant summary judgment to Defendants.

II. The Ordinance Does Not Violate Chapter 18.2

A. Chapter 18.2 Does Not Bar All Limitations on Local Cooperation in Federal Immigration Enforcement

Sections 3 and 4 of Chapter 18.2 provide the only substantive state-law prohibitions at issue in this case. These provisions impose limited and discrete legal requirements on Indiana governmental bodies: section 18.2-3 bars governmental bodies in Indiana only from restricting the maintenance and sharing of citizenship or immigration status information in the government's possession. It does not address the collection of information, and it does not extend to any information that would be useful in immigration enforcement, as Plaintiffs argue. Section 18.2-4 directs governmental bodies in Indiana not to interfere with *federal* immigration enforcement under *federal* law, and does not ever speak in terms of "cooperation" in federal immigration enforcement. Section 18.2-7, on which Plaintiffs also rely, includes no substantive prohibitions, instead imposing only a requirement that law enforcement agencies provide a "written notice" of officers' "duty to cooperate with state and federal agencies" on immigration matters. As Plaintiffs acknowledge, East Chicago already has provided that notice, so section 18.2-7 is irrelevant here.

By contrast, Plaintiffs' reading of Chapter 18.2 would create a boundless full-cooperation super-mandate that cherry picks their preferred language from each of sections 18.2-3, -4, and -7 and would, in effect, require cities in Indiana to do anything and everything they can to cooperate in immigration enforcement in any and all ways that federal agents might request. As explained

below, this mandate finds no support in the text of Chapter 18.2 or its surrounding context; conflicts with Indiana's Home Rule Act and imposes unworkable burdens on localities; and raises serious concerns under principles of federal preemption and the void-for-vagueness doctrine.

1. Section 18.2-3 bans policies that restrict governmental entities from sharing or maintaining citizenship or immigration status information in their possession.

Plaintiffs perceive in section 18.2-3 a broad "[i]nformation-[c]ooperation [m]andate" with respect to "any and all information related to the general topics of citizenship and immigration status"—or even all information that may be "useful to immigration-law enforcement." Pls.' Summ. J. Memo. 31, 55. However, the statute in fact imposes a much narrower limitation on the policies that Indiana governmental bodies may adopt: it applies only to (a) "citizenship or immigration status" information and (b) policies that restrict the sharing or maintaining (but not the gathering) of that information. Ind. Code § 5-2-18.2-3.

a. Section 18.2-3 pertains to "information of . . . citizenship or immigration status," not all information useful for immigration enforcement.

Section 18.2-3 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.[8] "Citizenship or immigration status" information is not

[8] 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.
>
> (3) Maintaining information.
>
> (4) Exchanging information with another federal, state, or local government entity.

defined in Chapter 18.2. However, as Plaintiffs agree, *see* Pls.' Summ. J. Memo. 27, a nearly identical phrase appears in 8 U.S.C. § 1373, and federal courts have construed § 1373 to apply only to "citizenship or immigration status" information.[9] Section 18.2-3 should be understood to share § 1373's limited scope.[10] *See Brownsburg Area Patrons Affecting Change 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.").

Federal courts have held that § 1373's information-sharing mandate is unambiguously limited to the categories of information stated in the statute: section 1373 applies "only to information specifically regarding an individual's immigration or citizenship status, i.e., whether the individual is a U.S. citizen, green card holder, or holds some other legal or unlawful status in the United States." *Cty. of Ocean v. Grewal*, No. CV 19-18083 (FLW), 2020 WL 4345317, at *13 (D.N.J. July 29, 2020); *see also United States v. California (California II)*, 921 F.3d 865, 890 (9th

[9] 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, 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.

[10] Although Plaintiffs also point to 8 U.S.C. § 1644, they do not argue that § 1644 is substantively different 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). Section 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."

Cir. 2019) ("[T]he 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 . . . ."); *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) (similar).

Courts have rejected arguments similar to Plaintiffs' claims here, *see* Pls.' Summ. J. Memo. 29–30, that § 1373 requires the sharing of information as far afield as noncitizens' home addresses, contact information for relatives or friends, and release dates from custody. *See, e.g.*, *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* (*California I*), "[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 II*, 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 (a materially identical provision to § 1373, *see supra* at 16, n.10) cited therein. *See* Pls.' Summ. J. Memo. 14–16, 20–21. In particular, Plaintiffs claim that the Second Circuit interpreted § 1373 broadly in the course of deciding that case. *See id.* at 16. But the Second Circuit did not have reason to define the range of information covered by § 1373, so any comments as to its scope were dicta. In that case, New York City had sought a declaratory judgment that § 1373

is unconstitutional under the Tenth Amendment's anticommandeering principle and therefore that the City's policy that restricted 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.[11] *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 statute's reach. *Id.*[12]

The brief paragraphs of legislative history in the committee reports accompanying §§ 1373 and 1644, cited in *City of New York* and relied on by Plaintiffs here, do 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 these committee reports, but also noting that the reports' phrasing "suggests that 'information regarding the immigration status' does *not* include 'the presence, whereabouts, or activities' of noncitizens"). Indiana courts should not "expand the plain meaning" of a statute in this way. *George P. Todd Funeral Home, Inc. v. Estate of Beckner*, 663 N.E.2d 786, 788 (Ind. Ct. App. 1996).

[11] The Second Circuit's Tenth Amendment analysis is no longer supportable after the Supreme Court's decision in *Murphy v. NCAA*, 138 S. Ct. 1461 (2018). *See infra* at 56–59.

[12] Recently, in *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 *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).

Plaintiffs also cite *Bologna v. City and County of San Francisco*, 192 Cal. App. 4th 429 (2011), and *Sturgeon v. Brattan*, 174 Cal. App. 4th 1407, 1423 (2009), two out-of-state intermediate appellate court decisions. *See* Pls.' Summ. J. Memo. 16–17. *Bologna* 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. 192 Cal. App. 4th at 439. *Sturgeon* involved a facial challenge to a policy prohibiting "the initiation of investigations" and arrests, a topic that the court concluded was not addressed by § 1373 at all. 174 Cal. App. 4th at 1423. Stray observations about § 1373's reach were unnecessary to both courts' holdings. And, regardless, the *Sturgeon* court merely described the information addressed by § 1373 as "immigration information." 174 Cal. App. 4th at 1423. It is therefore entirely speculative that the court meant to imbue that term with the broad meaning Plaintiffs read into it.

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. *See, e.g.*, Pls.' Summ. J. Memo. 12 n.16. 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)); *see also Cty. of Ocean*, 2020 WL 4345317, at *12 (agreeing with *California II*). "[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 narrowly. This is even *more* true of section 18.2-3, 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." Plaintiffs' unsupported conjecture that this was merely a "stylistic" choice does not provide reason to expand the word beyond its ordinary meaning. Pls.' Summ. J. Memo. 31.

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." *See* Pls.' Summ. J. Memo 12 n.16. 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 or third-party statements—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 II*, 921 F.3d at 892. Plaintiffs simply provide no good reason to read either § 1373 or section 18.2-3 beyond their plain text.

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 II*, 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 18.2-3 to have a similarly broad scope, it would have used more expansive language.

Finally, Plaintiffs attempt to draw support for their expansive definition from the fact that East Chicago's Ordinance includes different definitions of "citizenship or immigration status" information in separate provisions. *See, e.g.*, Pls.' Summ. J. Memo. 12–13 (citing sections 2 and 10 of East Chicago's Ordinance). Neither provision purports to define the term for purposes of section 18.2-3 or 8 U.S.C. § 1373, nor could it: city ordinances generally do not define the meaning of terms in state and federal law. Thus, the fact that Ordinance section 2 gives a broader definition (though by no means as broad a definition as Plaintiffs would read into it) has no bearing on the ordinary meaning of the statutory terms used in section 18.2-3 or § 1373. *See State v. Dugan*, 793 N.E.2d 1034, 1036 (Ind. 2003) ("[W]ords are to be given their plain, ordinary, and usual meaning, unless a contrary purpose is shown by the statute itself." (internal quotation marks omitted)). In any case, Ordinance section 10 allows the City to share the information covered by § 1373 and section 18.2-3. 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).

In sum, section 18.2-3'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 18.2-3 does not impose an obligation to collect information.

As is true with § 1373, section 18.2-3 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. Section 18.2-3 applies 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 18.2-3, the federal government's own understanding of § 1373, and the surrounding context of SEA 590. It is thus of no legal consequence that East Chicago does not currently take the additional step of collecting citizenship or immigration status information as a matter of course. *See* Affidavit of Hector Rosario, Chief of East Chicago Police Dep't ("Rosario Aff.") ¶ 14, Ex. B to Defs.' Designation of Evidence.

"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 *Dugan,* 793 N.E.2d at 1036).

The plain language of section 18.2-3 does not require the collection of citizenship or immigration status information. Section 18.2-3 bans policies that restrict "communicating or cooperating with federal officials," "sending to or receiving" from DHS, "maintaining," and "exchanging" citizenship or immigration status 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 "investigating," "gathering," or "inquiring," each of which would have called to mind the acquisition of information in the first instance.

Plaintiffs contend that the phrase "cooperating with federal officials" should be read broadly to encompass any information-related immigration-enforcement activities. *See* Pls.' Summ. J. Memo. 51, 55–56. But, under the principle of *noscitur a sociis*, "cooperating" must be understood to bear a meaning similar to its surrounding terms in section 18.2-3. *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 distinct act of acquiring information—conduct suggested nowhere else in section 18.2-3—would strain the statute's text by placing that phrase severely out of step with its neighboring provisions.

Moreover, Plaintiffs' reading would create a serious redundancy problem. Plaintiffs in effect argue that sections 18.2-3 and -4 require the very same cooperation with requests from federal immigration officials, making one or the other utterly superfluous, contrary to the surplusage canon of statutory interpretation. *ESPN, Inc.*, 62 N.E.3d at 1199 ("[W]hen engaging in statutory interpretation, we avoid an interpretation that renders any part of the statute meaningless or superfluous." (internal quotation marks omitted)).

Contrary to Plaintiffs' suggestions, §§ 1373 and 1644 do not require—or even authorize—state and local governments to collect citizenship and immigration information. Like section 18.2-3, § 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. These laws do not speak to the acquisition of information. *See Sturgeon*, 174 Cal. App. 4th at 1421.

"Clearly, if Congress had wanted to prohibit restrictions on local entities *obtaining* such information, it could have expressly so legislated." *Id.* Indeed, 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." Dep't 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://perma.cc/4W6C-2FG6, Ex. G to Defs.' Designation of Evidence. Section 1373, "by itself, [does not] provide the state or local officers with" 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 § 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://perma.cc/8R8M-XTL2, Ex. H to Defs.' Designation of Evidence. The very federal statutes on which section 18.2-3 is modeled do not support Plaintiffs' broad information-collection mandate.

Finally, the surrounding context of SEA 590, of which Chapter 18.2 is a part, demonstrates that section 18.2-3 addresses only what a government may do with citizenship and immigration status information already in its 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). Section 11-10-1-2(d) therefore envisions the communication of information beyond what the Department currently possesses, while 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 18.2-3.

In sum, section 18.2-3 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 18.2-4 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 educational institution may not limit or restrict the enforcement of federal immigration laws to less than the full extent permitted by federal law." Section 18.2-4 is best read as barring limitations on the *federal* enforcement of federal immigration laws because state and local governments are generally powerless to undertake such enforcement. For example, section 18.2-4 prevents Indiana governmental bodies enacting policies that seek to bar federal immigration officials from a locality's boundaries or from public government property. Although Plaintiffs claim that section 18.2-4 bars *any* limitations on a city's cooperation with federal immigration authorities, 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.

a. Section 18.2-4's plain language and statutory context demonstrate that it bars restrictions on federal immigration enforcement.

In reading section 18.2-4 to bar any limitations on a locality's participation in federal immigration enforcement, Plaintiffs pay little heed to the statutory language the General Assembly actually enacted, the structure of federal immigration enforcement, or SEA 590's surrounding

context. This context makes clear that section 18.2-4 forbids only restrictions on the federal government's enforcement of federal immigration laws.

First, section 18.2-4 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 18.2-3 and -7. Inferring a broad enforcement-cooperation mandate from section 18.2-4's text is strained and fails to give effect to the different terms used in Chapter 18.2's distinct provisions.

Plaintiffs suggest that this Court should look to *Texas's* enforcement-cooperation statute in understanding what the *Indiana* General Assembly intended in enacting 18.2-4. *See* Pls.' Summ. J. Memo. 40. In addition to post-dating the enactment of Chapter 18.2 by six years, Texas's law, unlike Indiana's, expressly forbids limitations on "*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). The Court should draw the opposite inference from the omission of similar language here. Indeed, when Indiana adopted SEA 590 in May 2011, other states already had enacted statutes that explicitly prohibited limitations on state and local assistance to federal immigration authorities. *See, e.g.*, 2011 Utah Laws Ch. 21, H.B. 497, § 6 (Mar. 15, 2011) (codified at Utah Code § 76-9-1006), Ex. I to Defs.' 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)); 2005 Ohio Laws File 61, Am. Sub. S.B. No. 9, § 1 (Jan. 11, 2006) (codified at Ohio Rev. Code § 9.63(A)), Ex. J to Defs.' 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"). The natural inference is that the Indiana General Assembly declined to write a similar statute precisely because it did not intend Plaintiffs' interpretation. *See 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 also contend (at 40) that sections 3, 4, and 7 of Chapter 18.2 must be read *in pari materia* to create an overarching mandate prohibiting any limitations on enforcement cooperation. 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. As noted above, section 18.2-3 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)—and so it does not support a broader enforcement-cooperation mandate. Although Plaintiffs claim (at 33) that "enforcement includes information-sharing," adopting this argument would, in effect, render section 18.2-3 wholly superfluous. *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]."). And, as explained below, section 18.2-7 merely requires that law enforcement officers be given a "written notice" of their duty to cooperate with federal officials imposed under section 18.2-3. *See infra* at 41. Sections 18.2-3 and -7 do not evince the General Assembly's intent to impose a general enforcement-cooperation mandate in section 18.2-4.

Second, section 18.2-4's focus on the enforcement of "federal immigration laws" is illuminated by the INA's design. 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 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"); *id.* § 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); *id.* § 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"); *id.* § 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).[13] But these are merely "specific, limited" exceptions to the default regime of federal enforcement. *Arizona*, 567 U.S. at 410. Thus, section 18.2-4's reference to the "enforcement of *federal* immigration laws" necessarily means enforcement *by federal officials*, not by state and local law enforcement officers.

Plaintiffs' argument that section 18.2-4 mandates cooperation turns in large part on their claim that "not cooperating with ICE is limiting/restricting enforcement of federal immigration laws." Pls.' Summ. J. Memo. 39–40. But reading section 18.2-4 in this way depends on an assumption that cooperation with any and all requests from ICE are lawful forms of cooperation under federal law. This misstates federal law. The Supreme Court has *not* characterized all forms of cooperation as permissible under federal law. In *Arizona*, the Court listed examples of what

[13] Neither the State of Indiana nor the City of East Chicago—nor any other municipality in Indiana—has such an agreement. *See* U.S. Immigration & Customs Enforcement, *Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act*, https://perma.cc/6CAC-Y5P8 (last updated Nov. 24, 2020).

DHS claimed "would constitute cooperation under federal law," but it did not include on that list, for example, complying with detainer requests. 567 U.S. at 410. Indeed, at no point did *Arizona* draw a clear-cut line that compliance with a federal request made state or local immigration enforcement permissible. Instead, the Court stated that "unilateral state action to detain" would go "far beyond" the cooperation authorized by § 1357(g)(10)(B), without specifying where the line of permissible cooperation would fall. *Id.* *Arizona* therefore suggests that reading section 18.2-4 to require any and all cooperation with federal immigration enforcement is a gross overreading of what federal law actually allows. It is doubtful that the General Assembly intended to impose such an uncertain prohibition.

Third, and finally, the limited goals of section 18.2-4 are confirmed by the drafting history of SEA 590. The final version of SEA 590 was a product of compromise responsive to the concerns of affected constituencies—including the deliberate deletion of provisions that would have required state and local law enforcement officers to participate in immigration enforcement. The compromise is reflected in two notable features of SEA 590. First, Chapter 19 of the original draft of SEA 590 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 an otherwise lawful stop or detention, had 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 *available at* https://perma.cc/VEC8-JAMT. 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 an 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 such an agreement. SEA 590, § 25, *available at* https://perma.cc/YU2N-FLX5. No such agreement has come into existence. *See supra* at 28, n.13.

Ample evidence suggests that the General Assembly, in deleting these provisions of Chapter 19, intended *not* to mandate a role for state and local officials in federal immigration enforcement. After SEA 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. K to Defs.' 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. L to Defs.' Designation of Evidence. Section 18.2-4'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 18.2-4 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 18.2-4, 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 18.2-4 ensures

that no part of Indiana can become a true *sanctuary* for undocumented immigrants, where they are shielded from all federal immigration enforcement.

b. Plaintiffs' expansive reading of section 18.2-4 violates the Home Rule Act.

The Indiana Home Rule Act 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 18.2-4 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 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 instead specifies 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).

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, Chi. & St. Louis Ry. Co. v. Hartford City*, 170 Ind. 674, 85 N.E. 362, 363 (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). *See also 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).

Indiana law expressly authorizes localities to manage their government, personnel, equipment, finances, operations, and police powers in sweeping terms. *See, e.g.*, Ind. Code § 36-8-2-4 (granting power to "regulate conduct, or use or possession of property, that might endanger the public health, safety, or welfare"); *id.* § 36-8-2-2 (granting power 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"). Each locality also enjoys the authority to "establish and operate a government," *id.* § 36-1-4-2, and to "pass ordinances" and other regulations "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 withholding the "power to condition or limit its civil liability, except as expressly granted by statute." *Id.* § 36-1-3-8.

East Chicago's ample statutory police-power authority, coupled with its broad residuum of authority under the Home Rule Act, allowed it to enact its Ordinance in the absence of a clear revocation of authority under state law—which section 18.2-4 does not provide. *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 Cty.*, 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). In fact, East Chicago's Ordinance explicitly invokes the City's public safety authority. *See* Ordinance § 1

(Ordinance seeks to further East Chicago's "commitment to ensure public safety for all city residents and specifically enable immigrants to report crimes"). East Chicago's concern is warranted, as public safety depends on full cooperation from all residents with reporting and assisting with the investigation and prosecution of crimes. *See* Rosario Aff. ¶¶ 3–4.

Home rule principles therefore require any ambiguity in section 18.2-4's scope to be resolved in favor of Defendants' reading, which harmonizes the state statute with cities' authority to place sensible parameters on their own role in immigration enforcement. *See Clint's Wrecker Serv.*, 440 N.E.2d at 740 ("all doubts are to be resolved against" the party challenging an ordinance's validity). For starters, section 18.2-4 is far too vague to "preempt[] the immigration-law field," as Plaintiffs claim (at 1).[14] Indiana courts have rejected field preemption claims predicated on significantly more exhaustive and detailed statutory schemes. In *Town of Cedar Lake v. Alessia*, 985 N.E.2d 55, 62 (Ind. App. 2013), for example, the court rejected an 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." State law 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 concluded that "conspicuously absent" from the state regulatory scheme was "any restriction on a municipal corporation's authority to dissolve a park board and parks department," so the town retained that authority. 985 N.E.2d at 62–63; *see also, e.g.*, *Allen v. City of Hammond*, 879 N.E.2d 644, 648–49 (Ind. App. Ct. 2008) (upholding an ordinance imposing business license requirements on law

[14] Section 18.2-4's lack of clarity distinguishes this case from *City of El Cenizo v. Texas*, 890 F.3d 164, 191 (5th Cir. 2018). Defendants do not contend that the state *cannot* direct its municipalities to assist in federal immigration enforcement under home-rule principles; they merely argue that the General Assembly did not do so here.

offices within city limits, despite the State's general regulation of attorney licensure). Much as in *Town of Cedar Lake* and *City of Hammond*, Chapter 18.2's statutory scheme is not sufficiently pervasive to occupy all aspects of the immigration law field not already regulated at the federal level. Section 18.2-4 simply has not created a "harmonious whole" of regulations. *Arizona*, 567 U.S. at 401.

Reading into section 18.2-4's general and imprecise terms a broad cooperation mandate would seriously—and improperly—undermine cities' express and implied powers. *Tippecanoe Cty. 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 18.2-4 to require full cooperation in federal immigration enforcement could infringe on East Chicago's local power in myriad unpredictable ways. If East Chicago 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 critical guidance and tools needed to ensure compliance with state and federal law. Moreover, 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.*, *Hernandez v. United States*, 939 F.3d 191, 206 (2d Cir. 2019) (denying a motion to dismiss a claim for municipal liability under 42 U.S.C. § 1983 based on a city's policy of complying with immigration detainers). Section 18.2-4 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 and statutory constraints. *See Arizona*, 567 U.S. at 408 (describing the "limited circumstances in which state officers may perform the functions of an immigration officer").

Moreover, a reading of Section 18.2-4 that required East Chicago to expend new and undefined resources would entail diminished expenditures for other priorities, and would deny East Chicago the ability to manage its liability and protect the public fisc by equipping its agencies with regulatory guidance. For their own fiscal protection, cities must be able to regulate to fill these sorts of gaps in state law. *See* Ind. Code § 36-1-3-8 (prohibiting cities from limiting civil liability); *id.* § 36-1-3-8(a)(4) (denying cities "[t]he power to impose a tax, except as expressly granted by statute"); *id*. §§ 36-1-3-8(a)(5)–(6) (limiting a city's ability to impose fees). East Chicago does not currently train its officers to help enforce federal immigration laws, nor can it presently afford to pay for such training. Rosario Aff. ¶ 8. In fact, significant budgetary shortfalls complicate East Chicago's efforts to manage its own public safety concerns. *Id.* ¶¶ 6–7, 13. If Plaintiffs' reading were adopted, East Chicago 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.

Finally, even when the state has chosen to regulate in an area, "local governments may 'impose additional, reasonable regulations, . . . provided the additional burdens are logically consistent with the statutory purpose.'" *Ind. Dep't of Nat. Res. v. Newton Cty.*, 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)). Reading section 18.2-4 to prohibit Indiana governmental bodies from restricting federal immigration enforcement preserves East Chicago's authority to fill in the substantial gaps left by section 18.2-4's indefinite pronouncement. Under this reading, the Ordinance is "logically consistent" with section 18.2-4 by defining the parameters of East Chicago's local role in immigration enforcement, while refraining from directly regulating federal enforcement of immigration law. This understanding thus best satisfies the Court's obligation to avoid

unnecessary clashes between two or more enactments and is therefore most consistent with Indiana's home-rule principles. *See Town of Avon v. W. Cent. Conservancy Dist.*, 957 N.E.2d 598, 606 (Ind. 2011) (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 18.2-4 would raise serious concerns under federal law.

Plaintiffs' understanding of section 18.2-4 would raise serious concerns under federal law—that the statute would be both federally preempted and unconstitutionally vague. "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). Therefore, "[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. Ind. 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)).

First, as the U.S. Supreme Court has counseled, state laws 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). Plaintiffs' interpretation of section 18.2-4 would needlessly clash with an important element of the federal design of immigration enforcement under the INA.

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)). Importantly, a state law need not work at cross-purposes with a federal regulatory scheme to be preempted; rather, even a state law that "attempts to achieve one of the

same goals as federal law" can be preempted because 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 state and local officials to support immigration enforcement in certain circumstances while preserving their authority to decide what kinds of enforcement cooperation are consistent with local public safety priorities, resources, and rights. In particular, where Congress has allowed local officers to participate in immigration enforcement, it 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"). Thus, under federal law, the decision whether to assist with any particular immigration enforcement activity is left to state and local officials and policy-makers, who are ultimately responsible for allocating their limited resources as they deem most appropriate to meet local needs.[15]

By removing local authorities' discretion in immigration matters, Plaintiffs' cooperation mandate 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). Plaintiffs' reading of section 18.2-4 effectively would turn localities' voluntary cooperation under

[15] In fact, the East Chicago Police Department *does* cooperate with federal authorities in ways not prohibited by the Ordinance, including by participating in federally sponsored task forces. *See* Rosario Aff. ¶ 18.

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 18.2-4 would raise serious federal preemption concerns. In turn, a state law mandating cooperation by localities could be preempted while a local ordinance setting the terms of that cooperation would not be. *Cf. Arizona*, 567 U.S. at 408 (states may not "achieve [their] own immigration policy" through laws that conflict with Congress's scheme).

As Plaintiffs note, the Fifth Circuit 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.' Summ. J. Memo. 111. 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 surely could regulate in their entirety. *See, e.g.*, *Hodel v. Va. Surface Mining & 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.").

Second, Plaintiffs' reading of section 18.2-4 might well run afoul of the Fourteenth Amendment's due process prohibition on excessively vague laws. 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)). Read Plaintiffs' way, section 18.2-4 would fail to provide sufficient

notice of what is prohibited, putting governmental entities in an impossible bind. If they were to adopt 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 18.2-4 would provide virtually *no* guidance to Indiana governments seeking to steer clear of its prohibition.

If section 18.2-4 were read to bar any local action that has the effect of limiting a locality's ability to cooperate in federal immigration enforcement, a wide variety of even tangentially related state and local policies could run afoul of it. Are local governments forbidden to shift resources from law enforcement to other priorities, such as education or wastewater treatment? Must East Chicago change its local jail protocols and incur the costs of constructing new facilities beyond its current, limited capacity, for the sake of complying with ICE detainer requests?[16] *See* Rosario Aff. ¶ 12. Must East Chicago refuse to transfer inmates in its local jail to any jurisdiction that does not assist federal immigration authorities as much as possible? *See id.* This Court should hesitate to conclude that every ordinance, rule, policy, guideline, or budgetary decision issued by any governmental body at the state or local level violates section 18.2-4 unless it somehow ensures the maximum amount of cooperation in immigration enforcement conceivably allowed under federal law. Surely local jurisdictions such as East Chicago need not "participate in a joint task force with

[16] As explained below, the Fourth Amendment prohibits the continuation of detention based only on an ICE detainer or administrative warrant. *See infra* at 48–53.

federal officers" or "provide operational support in executing a warrant," *Arizona*, 567 U.S. at 410, if their limited resources would be better spent protecting their communities in other ways—for example, in investigating violent criminal offenses.

Although Plaintiffs claim that there is a "core" of state and local immigration-related activities that are permitted under federal law that the City may not limit or prohibit, Pls.' Summ. J. Memo. 29–30, section 18.2-4 contains no guidance to delimit that "core." That Plaintiffs can self-servingly claim to divine what qualifies as the "core" hardly sets a clear boundary for cities to follow. Furthermore, this case is different in significant ways from *El Cenizo*, which Plaintiffs cite, and which rejected a vagueness challenge to the term "materially limit" in a Texas statute similar to section 18.2-4. *See* 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 statutory examples 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 18.2-4.[17]

In sum, Plaintiffs' reading of section 18.2-4 would raise serious vagueness concerns because it would impose a nearly limitless burden on governmental bodies that the General Assembly could not have intended. This Court should "presum[e] that [the Indiana General

[17] 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.

Assembly] did not intend the alternative which raises serious constitutional doubts." *Clark v. Martinez*, 543 U.S. 371, 381 (2005).

3. Section 18.2-7 does not impose a freestanding cooperation duty on law enforcement officers.

Plaintiffs argue that, while sections 18.2-3 and -4 ban certain immigration-related policies, section 18.2-7 "*requires* [law enforcement officer] cooperation by imposing a cooperation duty." Pls.' Summ. J. Memo. 37. But section 18.2-7 does nothing of the sort. Section 18.2-7 is a notice requirement: it 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 its own "duty to cooperate"; it instead merely obligates law enforcement agencies to provide *notice* of a duty located elsewhere.

The "duty to cooperate" referenced in section 18.2-7 is the obligation not to restrict the sharing of citizenship or immigration-status information included in section 18.2-3. Unlike section 18.2-4, section 18.2-3 references both "cooperating with federal officials" and policies specifically directed at "law enforcement officer[s]." Moreover, in the original draft bill of SEA 590, the "duty to cooperate" fell within a chapter called "Citizenship and Immigration Status Information," where it appeared alongside section 18.2-3. S.B. 590, Sec. 2, Ch. 18, § 5 (introduced Jan. 20, 2011), *available at* http://archive.iga.in.gov/2011/bills/PDF/IN/IN0590.1.pdf.[18] Thus, section 18.2-7 does not independently impose any substantive restrictions on local policy enactments beyond merely requiring a written notice to law enforcement officers.

[18] Section 18.2-4, by contrast, originally appeared in a subsequent chapter that bore a separate title. *See* S.B. 590, Sec. 3, Ch. 19, § 4.

B. The Challenged Provisions of the Ordinance Do Not Violate Chapter 18.2

As further detailed below, East Chicago's Ordinance does not restrict the sharing of citizenship or immigration-status information, and it does not limit the federal enforcement of federal immigration law. East Chicago also has already provided the notice required by section 18.2-7. East Chicago's Ordinance therefore does not run afoul of Chapter 18.2 in any way.

1. The Ordinance is consistent with section 18.2-3.

As set forth above, section 3 of Chapter 18.2 bars policies that prohibit or restrict the sharing and maintenance of an individual's citizenship or immigration-status information. Because East Chicago's Ordinance does not restrict the sharing of citizenship or immigration-status information, it does not violate section 18.2-3.

First, section 10 of the Ordinance authorizes East Chicago officials to share the very information addressed by section 18.2-3. Ordinance section 10 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 18.2-3's requirements. Moreover, Ordinance section 10 explicitly *authorizes* the sharing of information. It therefore cannot violate section 18.2-3 in any way.

Second, although Ordinance section 6(a) prohibits East Chicago 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 East Chicago

officials to share information with ICE "as may be required under [section 10] of this ordinance."[19] As noted above, section 10 allows East Chicago agencies to send and receive citizenship and immigration status information (as required by section 18.2-3). Thus, section 6(a) does not in fact prohibit or restrict the sharing of the information to which section 18.2-3 is directed. For the same reason, section 6(c)(4)—which restricts East Chicago agencies from permitting "ICE use of agency . . . information"—does not violate section 18.2-3 because it has the same carve-out for information covered by Ordinance section 10.[20] And although Plaintiffs also contend that other provisions of Ordinance section 6 violate section 18.2-3, *see, e.g.*, Pls.' Summ. J. Memo. 56, those provisions do not pertain to information-sharing, so they do not run afoul of section 18.2-3.

Third, Plaintiffs urge that Ordinance section 3 violates section 18.2-3. Pls.' Summ. J. Memo. 50–51. Ordinance section 3 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 of competent jurisdiction" (emphases added). But, as explained above, section 18.2-3 does not ban policies that limit the ability of local officials to *collect* citizenship or immigration status information, nor does section 3 of East Chicago's Ordinance restrict the maintenance or sharing of information in the possession of the City's agencies. Section 18.2-3 therefore does not bar this form of local regulation. *See Sturgeon*, 174 Cal. App. 4th at 1422 (reaching this conclusion with respect to an analogous local policy).

[19] 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 11 of East Chicago's Ordinance declares that, if any portion of the ordinance is declared invalid, the remainder of the ordinance is severable and remains in effect. Section 10, however, permits compliance with section 18.2-3. Plaintiffs agree with this assessment. *See* Pls.' Summ. J. Memo. 48 n.58.

[20] As above, the reference to section 11 in the text of section 6(c)(3) is a scrivener's error, and Plaintiffs do not dispute this. *See* Pls.' Summ. J. Memo. 48 n.59.

Nor does Ordinance section 3's prohibition on "assisting" in an investigation violate section 18.2-3's prohibition on restricting "cooperating with federal officials" with respect to citizenship and immigration-status information. Adopting Plaintiffs' broad reading would violate the principles underlying Indiana's Home Rule Act. Section 18.2-3's brief and undefined reference to "cooperating with federal officials" is far too ambiguous to "expressly deny" East Chicago 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 Cty. Planning Comm'n*, 614 N.E.2d 568, 575–77 (Ind. Ct. 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 18.2-3 must be read narrowly to preserve both the statute and the Ordinance. *See 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.").

Finally, Ordinance section 9(c) does not violate section 18.2-3. Section 9(c) requires the East Chicago Police Department to "consider the extreme potential negative consequences of an arrest," including a heightened risk of deportation, when exercising its discretion to arrest any individual. It then directs officers to make an arrest only if "less severe alternatives are unavailable or would be inadequate to effect a satisfactory resolution." *Id.* Plaintiffs contend that this section indirectly restricts the sharing of immigration-status information because the decision not to arrest

someone means that that individual's fingerprints will not be shared with the FBI—and ultimately with DHS through the "Secure Communities" program. *See* Pls.' Summ. J. Memo. 59–61. But, as already discussed, section 18.2-3 does not ban policies that restrict the collection of immigration-status information—and, *a fortiori*, it does not ban policies that restrict actions that may lead to the collection of information (here, arrestees' fingerprints) that may indirectly result in DHS's discovery of immigration-status information.

In sum, for all these reasons, no provision of East Chicago's Ordinance restricts the maintenance or sharing of citizenship or immigration-status information. The Ordinance does not violate section 18.2-3.

2. The Ordinance is consistent with section 18.2-4.

As explained above, section 18.2-4 bars governmental bodies only from limiting or restricting federal immigration officials from enforcing federal immigration laws. The challenged provisions of East Chicago's Ordinance present no conflict with section 18.2-4 because they merely specify what forms of enforcement cooperation East Chicago agencies and agents may render when federal immigration authorities request their assistance; they do not restrict federal authorities' own enforcement of federal immigration laws.

Section 3 of the Ordinance regulates the investigation of citizenship and immigration-status information by East Chicago agencies. It does not speak at all to federal authorities' ability to investigate such information. It therefore does not run afoul of section 18.2-4. And Ordinance section 10—which *permits* the sharing of immigration-status information—does not run afoul of section 18.2-4 because it does not "limit or restrict" anything, let alone the actions of federal immigration officials.

Section 6 regulates only the types of cooperation that localities may decline to furnish, not the separate enforcement efforts of federal immigration authorities. Subsections (1)–(3) 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.[21]

Section 6's subsections (a) and (b), respectively, direct East Chicago 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)(1) to enforce federal immigration laws. These provisions do not restrict ICE's own activities or limit what federal authorities may do to enforce federal immigration laws.

Next, section 6(c) limits East Chicago 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 East Chicago's facilities, information,[22] 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 with more proactive assistance. But that voluntary, affirmative assistance is not what section 18.2-4 requires. Section 6(c) targets not ICE's own activities, but the City's expenditure of its limited resources in supporting federal enforcement—something well within the City's authority to determine.

[21] In any case, the Fourth Amendment prohibits East Chicago officials from performing the acts identified in subsections (1)–(3). *See infra* at 48–53.

[22] "[E]xcept as may be required under section [10] of this Ordinance." *Id.* § 6(c)(3).

Finally, section 9(c) of East Chicago's Ordinance requires the East Chicago Police Department to "consider the extreme potential negative consequences of an arrest," including a heightened risk of deportation, when 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*. *Cf. B&S of Fort Wayne, Inc. v. City of Fort Wayne*, No. 20A-MI-466, 2020 WL 6326635, at *8 (Ind. Ct. App. Oct. 29, 2020) (concluding that a local ordinance regulating adult cabarets did not violate Ind. Code § 7.1-3-9-6, which prohibits cities from enacting ordinances that "in any way, directly or indirectly, regulate[], restrict[], enlarge[], or limit[] the operation or business" of a liquor licensee because the ordinance did not regulate their "permits to sell alcohol"). Section 9(c) merely provides guidance for local officers' exercise of discretion in conducting arrests for criminal offenses under state law. Plaintiffs' rationale for challenging section 9(c)—that, by discouraging arrests, it reduces the likelihood of immigration enforcement against a potentially removable individual, Pls.' Summ. J. Memo. 61—exposes the intolerable breadth of Plaintiffs' reading of section 18.2-4. Section 18.2-4 cannot fairly be interpreted to forbid efforts to minimize both ethnic profiling[23] 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' enforcement of federal immigration laws, the Ordinance does not violate section 18.2-4.

3. The Ordinance does not violate Section 18.2-7.

Plaintiffs admit that, on June 18, 2018, the East Chicago Chief of Police provided the East Chicago Police Department with a memorandum that satisfies section 18.2-7. Pls.' Summ. J.

[23] 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).

Memo. 4; *see* Ex. 2 to Pls.' Designation of Evidence. As explained above, that is all that section 18.2-7 requires. East Chicago's Ordinance therefore does not violate section 18.2-7.

C. Even If Section 18.2-4 Were to Require Cooperation with Federal Immigration Enforcement, Most of the Ordinance Would Remain Valid

Even if the Court were to accept Plaintiffs' reading of section 18.2-4—that it prevents Indiana governmental bodies from limiting or restricting their own cooperation in federal immigration enforcement—most provisions of East Chicago's Ordinance would nonetheless remain valid.

1. Ordinance Section 6(1)–(3) effectuates the Fourth Amendment's requirements.

Section 6(1)–(3) of East Chicago'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 the United States, or that the person has committed a civil immigration violation." Plaintiffs' reading of section 18.2-4 requires local cooperation to "the full extent permitted by federal law." But the state statute cannot mandate more than is permitted under federal law, which 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 East Chicago officials would violate if they did *not* abide by Ordinance section 6(1)–(3).

ICE issues detainers to advise another federal, state, or local law enforcement agency holding an individual in custody that DHS seeks custody of that individual so that DHS may detain and remove him. 8 C.F.R. § 287.7(a). Detainers specifically request that the agency advise DHS prior to the individual's release and ask the agency to "maintain custody" of the individual for up to 48 hours beyond when he otherwise would be released in order to allow ICE to take the

individual directly into its custody. *Id.* § 287.7(a), (d). In effect, then, 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*, 78 N.E.3d 1143, 1154 (Mass. 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 v. Szalczyk*, 745 F.3d 634, 636 (3d Cir. 2014).

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). Because an individual held pursuant to an ICE detainer or administrative warrant is "kept in custody for a new purpose after she [is] entitled to release," that detention is a "new seizure for Fourth Amendment purposes—one that must be supported by a new probable cause determination." *Morales v. Chadbourne*, 793 F. 3d 208, 217 (1st Cir. 2015); *see also, e.g.*, *Ramon v. Short*, 460 P.3d 867, 875 (Mont. 2020) ("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) (reaching the same conclusion); *Miranda-Olivares v. Clackamas Cty.*, 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.*

Federal law authorizes federal law enforcement officers to issue warrants of arrest for civil immigration violations. *See* 8 C.F.R. § 287.5(e)(2). But these administrative warrants are not criminal warrants: they do not state probable cause of a criminal offense, and they are issued by an ICE officer, not a detached, neutral magistrate. And, importantly, federal law authorizes only federal officials to make civil immigration arrests. *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).[24]

Federal law does not authorize state or local officers to detain or arrest individuals pursuant to ICE detainers. *Lunn*, 78 N.E.3d at 1146. Local officers, therefore, "generally lack authority to arrest individuals suspected of civil immigration violations." *Santos v. Frederick Cty. Bd. of Comm'rs*, 725 F.3d 451, 464 (4th Cir. 2013) (citing *Arizona*, 567 U.S. at 407). 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. Cty. of Los Angeles*, No. 2:12-cv-09012, 2018 WL 914773, at *23 (C.D. Cal. Feb. 7, 2018); *see also 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

[24] Defendants do not contest that federal officials may constitutionally engage in civil immigration arrests, so Plaintiffs' invocation of the special-needs doctrine is irrelevant to the issue of whether local officials, *without authority to do so*, may engage in separate detentions on the federal government's behalf. *See* Pls.' Summ. J. Memo. 101–05.

allowing them to do so"); *C.F.C. v. Miami-Dade Cty.*, 349 F. Supp. 3d 1236, 1259 (S.D. Fla. 2018) ("[T]he County violated [plaintiffs'] Fourth Amendment rights when it arrested [them] based on a detainer and without probable cause that either of them had committed a crime.").[25]

Indiana state law does not and could not authorize state and local officers to arrest or detain individuals for civil immigration offenses. State and local officers may detain individuals for civil immigration violations only if they are authorized to perform the functions of an immigration officer under § 1357(g)(1)—that is, only with a written agreement, training, and supervision by the Attorney General. *C.F.C.*, 349 F. Supp. 3d at 1258–59. Indeed, in *Arizona*, the Supreme Court made 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*, 460 P.3d at 879).

Plaintiffs first attempt to distinguish compliance with detainer requests as permissible "cooperation" with ICE under § 1357(g)(10)(B). Pls.' Summ. J. Memo. 105–08. But § 1357(g)(10)(B)'s savings clause does not provide law enforcement officers acting under state law the authority to arrest or detain individuals on suspicion of removability. *See Lunn*, 78 N.E.3d at 1158("[T]he 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*,

[25] 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.

460 P.3d at 879 (rejecting the argument that § 1357(g)(10) authorizes arrests as "cooperation" because this "would essentially render the purpose of [§ 1357](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).

Second, 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.' Summ. J. Memo. 108–09. But this argument fails to recognize that civil and criminal violations are different for purposes of the Fourth Amendment. If a local officer does not have the authority to detain an individual on suspicion of removability, then it does not matter *who* makes the probable-cause determination. 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 this argument 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).

Finally, 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, and with 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.[26]

In sum, because the listed bases in Ordinance section 6(1)–(3)—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. Ordinance section 6(1)–(3) therefore does not violate section 18.2-4 even under Plaintiffs' cooperation-focused reading.

2. Most other provisions of the Ordinance do not violate an "enforcement-cooperation" reading of section 18.2-4.

Just as section 6(1)–(3) of East Chicago's Ordinance would survive any reading of section 18.2-4, at least four other challenged provisions of East Chicago's Ordinance would be consistent with Plaintiffs' enforcement-cooperation theory, should the Court choose to adopt it.

Section 10 of the Ordinance does not violate this reading of section 18.2-4. Section 10 *authorizes* the sharing of information with federal authorities, so it is not a prohibition on cooperation.

Ordinance section 3 largely withstands Plaintiffs' broader reading, as well. Among other things, that provision directs East Chicago 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 3 falls outside the domain of whatever section 18.2-4 might prohibit under Plaintiffs' theory.

[26] *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.

The same is true of section 6(b) 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 . . . ." An agreement under § 1357(g) is not a form of cooperation; it instead grants localities the ability to enforce federal immigration law unilaterally. Thus, it does not fall within Plaintiffs' cooperation-based reading of section 18.2-4. Moreover, § 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." Consequently, what § 1357(g)(1) permits is itself limited by local laws like Ordinance section 6(b).

Finally, section 9(c) of the Ordinance does not regulate East Chicago officials' ability to comply with requests for assistance in the enforcement of federal immigration laws. Rather, section 9(c) merely cautions local police officers to exercise discretion in conducting arrests for state law criminal offenses. Taken to its logical extreme, Plaintiffs' argument would *require* local law enforcement agencies to mandate arrests whenever possible in order to better share information with DHS—thus unnecessarily impinging on localities' broad police powers.

In sum, even if the Court were to read section 18.2-4 to prevent localities from providing guidance to their officials on when and how to cooperate with federal immigration authorities, sections 6(1)–(3) and (b), 9(c), and 10 of the Ordinance, and much of section 3, would nonetheless be consistent with that reading.[27]

[27] Defendants acknowledge that Ordinance sections 6(a) and (c) and part of section 3 limit City agencies' cooperation in response to requests by ICE for assistance in immigration enforcement operations. As explained below in Part IV, however, these provisions should not be enjoined unless Plaintiffs satisfy all four requirements 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 § 11 (directing that any invalid portion of the ordinance be severed); *Hobble*, 575 N.E.2d at 699 ("[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.").

III. The Ordinance Does Not Violate the U.S. Constitution

Plaintiffs raise three claims under the federal Constitution: (1) that Ordinance sections 3, 6, 9(c), and 10 violate the Supremacy Clause, U.S. Const. art. VI, cl. 2, because they are preempted by federal immigration laws; (2) that section 9(c) violates the Equal Protection Clause, *id.* art. XIV, § 1; and (3) that section 9(c) is void for vagueness under the Due Process Clause, *id*. These claims are meritless under any standard. What is more, Plaintiffs' claims do not arise from any particular application of the Ordinance—and in fact, Plaintiffs have not, and cannot, point to any problematic application of the Ordinance—so Plaintiffs' challenge to East Chicago's Ordinance is a facial one. Plaintiffs therefore must satisfy a particularly "heavy burden." *United States v. Salerno*, 481 U.S. 739, 745 (1987). On a facial challenge, "the challenger must establish that no set of circumstances exists under which the Act would be valid." *Id.* Moreover, an ordinance is "clothed with the presumption of constitutionality until clearly overcome by a contrary showing." *Whistle Stop Inn, Inc. v. City of Indianapolis*, 51 N.E.3d 195, 199 (Ind. 2016) (internal quotation marks omitted). Plaintiffs' claims do not surpass these high bars.

A. The Ordinance Is Not Preempted by Federal Law.

Because federal law is "the supreme Law of the Land," U.S. Const. art. VI, cl. 2, Congress is empowered to preempt contrary state and local legislation. This can occur in three separate ways. First, Congress can enact "an express preemption provision." *Arizona v. United States*, 567 U.S. 387, 399 (2012). Second, state laws must give way "when they conflict with federal law." *Id.* This occurs when "compliance with both federal and state regulations is a physical impossibility," *id.* (quoting *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142–43 (1963)), as well as when "the challenged state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,'" *id.* (quoting *Hines v. Davidowitz*,

312 U.S. 52, 64 (1941)). Third, states and localities may not regulate "in a field that Congress . . . has determined must be regulated by its exclusive governance." *Id.*

Plaintiffs contend that three federal statutes—8 U.S.C. §§ 1357(g), 1373, and 1644—preempt the four sections of East Chicago's Ordinance at issue in this case—section 3, 6, 9(c), and 10. This argument fails for multiple reasons. First, the statutes at issue regulate governments, not private actors, so they do not carry preemptive force. To the extent that the statutes seek to dictate the legislative activities of state and local governments, those statutes are unconstitutional under the Tenth Amendment's anticommandeering principle. Second, to the extent that the statutes merely express support for *voluntary* state and local participation in federal immigration enforcement and information-sharing, consistent with the Tenth Amendment, they do not preempt a locality's choice not to participate. Third, Plaintiffs' argument that §§ 1373 and 1644 preempt the "definitional field" is belied by precedent and is incoherent as a matter of preemption doctrine. Fourth, Plaintiffs' claim that the Ordinance interferes with federal enforcement of immigration law is based on an erroneous understanding of federalism principles, is factually incorrect, and relies on wild speculation as to future conduct.

1. The federal statutes at issue do not carry preemptive force.

"[I]n order . . . to preempt state law," a federal statute must "regulate[] the conduct of private actors, not the States." *Murphy v. NCAA*, 138 S. Ct. 1461, 1479, 1481 (2018). "[A]ll [forms of preemption] work in the same way: Congress enacts a law that imposes restrictions or confers rights on private actors," and "a state law confers rights or imposes restrictions that conflict with the federal law" *Id.* at 1480. Because each of the federal laws cited by Plaintiffs regulates only state and local governments, not private actors, they lack preemptive force.

Section 1357(g)(1) specifies when "an officer or employee of [a] State or subdivision" may directly enforce federal immigration law, while § 1357(g)(10) speaks to the circumstances in

which "any officer or employee of a State or political subdivision of a State" may assist federal immigration authorities. Sections 1373 and 1644 directly regulates state and local governments—for example, by prohibiting any "State[] or local government entity" from passing certain types of legislation. *Id.* §§ 1373 (a), 1644; *see also* Pls.' Summ. J. Memo. ("8 U.S.C. 1373 says state/local entities may not prohibit/restrict [certain actions]"); *id.* at 81–82 (claiming that § 1644 eliminates "the ability of state and local governments" to take certain actions and "bar[s] [certain] state or local prohibitions"); *Oregon v. Trump*, 406 F. Supp. 3d 940, 972 (D. Or. 2019) ("Sections 1373 and 1644 are not only drafted as directives to states and localities, they also 'operate' as tools of federal control over state and local legislative bodies."). Because §§ 1373 and 1644 regulate "state and local government officials, and significantly, they do not regulate private actors in any way," they "do not constitute preemption provisions." *Cty. of Ocean*, 2020 WL 4345317, at *10.[28]

Sections 1373 and 1644 cannot preempt state or local law for yet another reason: they are facially unconstitutional. Under the anticommandeering doctrine, Congress lacks authority "to issue orders directly to the States." *Murphy*, 138 S. Ct. at 1475. Congress can neither require state and local legislatures to "enact and enforce a federal regulatory program," *id.* at 1477 (quoting *New York v. United States*, 505 U.S. 144, 161 (1992)), nor command state and local officials "to administer or enforce a federal regulatory program," *id.* (quoting *Printz v. United States*, 521 U.S. 898, 935 (1997)). The Supreme Court has clarified that the doctrine recognizes no distinction between compelling states to enact legislation and prohibiting them from passing new laws: "[t]he basic principle—that Congress cannot issue direct orders to state legislatures—applies in either event." *Id.* at 1478. As a result, Congress cannot "command[] state legislatures to . . . refrain from

[28] For this reason, *Reno v. Condon*, 528 U.S. 141 (2000), on which Plaintiffs heavily rely (at 99–100), is inapplicable. As explained in *Murphy*, the law in *Reno* "applied equally to state and private actors" and did not regulate governments' "authority to 'regulate their own citizens.'" 138 S. Ct. at 1479 (quoting *Reno*, 528 U.S. at 151).

enacting state law." *Id.* This is precisely what Sections 1373 and 1644 do—they directly command state and local governments not to issue certain instructions to their own officials. "A more direct affront to state sovereignty is not easy to imagine." *Id.*

Since the Supreme Court's decision in *Murphy*, multiple federal district courts have held that §§ 1373 and 1644 unconstitutionally commandeer state and local legislatures. *See Oregon*, 406 F. Supp. 3d at 972 ("Because Sections 1373 and 1644 require the states to govern according to the instructions of Congress, it necessarily follows that they violate the Tenth Amendment." (internal quotation marks and brackets omitted)); *Cty. of Ocean*, 202 WL 4345317, at *14 (finding it "clear," where state law allowed for sharing citizenship and immigration-status information, that "if sections 1373(a) and 1644 were broadly construed to cover all types of information possibly related to the enforcement of immigration law . . . , they would violate the Tenth Amendment under the anticommandeering doctrine" because they "unequivocally dictate[] what a state legislature may and may not do" (quoting *Murphy*, 138 S. Ct. at 1478); *see also Colorado v. U.S. Dep't of Justice*, 455 F. Supp. 3d 1034, 1057–60 (D. Colo. 2020) (explaining why §§ 1373 and 1644 "offend the policy considerations supporting the anticommandeering principle," while resolving the case on other grounds).[29]

As Plaintiffs point out, in *City of New York v. United States*, 179 F.3d 29 (2d Cir. 1999), the Second Circuit held that § 1373 and § 1644 do not violate the anticommandeering principle.

[29] Other federal district courts have reached the same conclusion. *See City of Philadelphia*, 309 F. Supp. 3d at 330 ("Because Section 1373 directly tells states and state actors that they must refrain from enacting certain state laws, it is unconstitutional under the Tenth Amendment."); *City of Chicago v. Sessions*, 321 F. Supp. 3d 855, 872 (N.D. Ill. 2018) (holding that § 1373 "impermissibly directs the functioning of local government in contravention of Tenth Amendment principles"); *City & Cty. of San Francisco v. Sessions*, 349 F. Supp. 3d 924, 953 (N.D. Cal. 2018) (finding § 1373 unconstitutional). On appeal, the Courts of Appeals decided these cases on other grounds and therefore did not reach the constitutionality of § 1373 or § 1644. *See City of Philadelphia v. Attorney Gen. of U.S.*, 916 F.3d 276, 291 (3d Cir. 2019); *City of Chicago v. Barr*, 961 F.3d 882, 931 (7th Cir. 2020); *City & Cty. of San Francisco v. Barr*, 965 F.3d 753, 764 (9th Cir. 2020). In *New York v. Dep't of Justice*, 951 F.3d 84, 116 (2d Cir. 2020), the Second Circuit concluded that § 1373 is not unconstitutional "as applied here to a federal funding requirement," a circumstance not relevant to Plaintiffs' claims in this case.

But *Murphy*'s holding undermines *City of New York*'s central logic. *City of New York* acknowledged that §§ 1373 and 1644 "are directed at state and local government entities (or officials) and not private parties," and that those provisions "forbid[] states and localities from enacting laws" on certain subjects. 179 F.3d at 33, 34. Both statutes therefore run afoul of the Tenth Amendment under *Murphy*, and *City of New York* is no longer persuasive.

In sum, because none of the federal statutes cited by Plaintiffs regulates private actors—and because §§ 1373 and 1644 are unconstitutional under the Supreme Court's anticommandeering doctrine—each of Plaintiffs' preemption challenges fails at the outset.

2. No part of the Ordinance is conflict-preempted.

Plaintiffs raise various arguments that Ordinance sections 3, 6, 9(c), and 10 are conflict-preempted by 8 U.S.C. §§ 1357(g), 1373, and 1644. *Compare* Pls.' Summ. J. Memo. 72–85 (arguing conflict-preemption as well as obstacle, frustration of purpose, and impossibility preemption), *with Arizona*, 567 U.S. at 399 (describing these arguments as forms of conflict-preemption). But Plaintiffs' claimed "conflict" is illusory.

First, even if § 1357(g) could have preemptive effect, no part of East Chicago's Ordinance conflicts with these provisions. Consistent with the Tenth Amendment's anticommandeering doctrine, § 1357(g) envisions *voluntary* cooperation by state and local governments in immigration enforcement. Section 1357(g)(1) authorizes states and localities to enter into written agreements with the Attorney General to enforce federal immigration law, if they so choose. It says nothing about how localities are to exercise the discretion afforded to them under federal law to make that choice. It therefore makes no sense to speak of "compliance" with § 1357(g)(1), *Arizona*, 567 U.S. at 399, because that provision contains no directive with which the City of East Chicago either

could or could not comply. *See Cty. of Ocean*, 2020 WL 4345317, at *18 (rejecting a similar challenge based on § 1357(g)(1)).

Likewise, § 1357(g)(10) merely clarifies that no written agreement is required for states and localities "to communicate with the Attorney General regarding the immigration status of any individual," or "otherwise to cooperate with the Attorney General in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States." Section 1357(g)(10) neither directs localities to cooperate with federal immigration authorities nor prohibits them from passing laws limiting their own cooperation. Therefore, nothing in § 1357(g)(10) prohibits those sections of East Chicago's Ordinance that instruct its own officials not to render certain types of assistance to federal immigration agents. *See Cty. of Ocean*, 2020 WL 4345317, at *18 n.23 ("[W]here federal law plainly allows states to decide whether to participate in a federal program, that same set of laws cannot have a preemptive effect on a state's regulation prohibiting such participation.").

Second, even if §§ 1373 and 1644 are not unconstitutional and could have some preemptive effect, they nonetheless do not preempt East Chicago's Ordinance. Plaintiffs' preemption arguments are entirely duplicative of their misguided interpretation of section 3 of Chapter 18.2. *See* Pls.' Summ. J. Memo. 11 (contending that, "since Chapter 18.2 intends . . . to implement §§ 1373 and 1644, the language in Chapter 18.2 must receive the same interpretation"). Thus, for the same reasons that the Ordinance does not conflict with section 18.2-3 of Indiana state law—that Ordinance section 10 permits the sharing of citizenship or immigration-status information contemplated by §§ 1373 and 1644—the Ordinance likewise does not conflict with the federal statutes. *See supra* at 15–22; *see also California II*, 921 F.3d at 890–91(rejecting preemption claim against a materially similar state policy); *Cty. of Ocean*, 2020 WL 4345317, at *10–13 (same).

Plaintiffs further argue that the challenged provisions of East Chicago's Ordinance are conflict-preempted because they "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Arizona*, 567 U.S. at 406 (quoting *Hines*, 312 U.S. at 67). As Plaintiffs see it, by enacting 8 U.S.C. §§ 1357(g), 1373, and 1644, Congress "intended to foster broad cooperation between federal, state, and local governments on immigration-law enforcement." Pls.' Summ. J. Memo. 80. Under this theory, any local law that either directly or incidentally limits a city's involvement with federal immigration enforcement would be preempted by federal law. *See id.* at 83–85.

The trouble with Plaintiffs' argument is that it ascribes to Congress an unconstitutional purpose. Under the anticommandeering doctrine, federal officials are not constitutionally entitled to the assistance of state and local officials in enforcing federal law. *Printz*, 521 U.S. at 926. To be sure, "[f]ederal schemes are inevitably frustrated when states opt not to participate in federal programs or enforcement efforts. But the choice of a state to refrain from participation cannot be invalid under the doctrine of obstacle preemption where, as here, it retains the right of refusal." *California II*, 921 F.3d at 890; *see also Oregon*, 406 F. Supp. 3d at 972–73. Indeed, that is the necessary consequence of a federal system that exempts state and local actors from "being pressed into federal service." *Printz*, 521 U.S. at 905; *see also Murphy*, 138 S. Ct. at 1477 (identifying three key values underlying "adherence to the anticommandeering principle").

Murphy makes clear that Congress lacks authority to command local legislative bodies not to enact particular laws. 138 S. Ct. at 1478. By Plaintiffs' logic, Congress could achieve the functional equivalent of commandeering by stopping just short of issuing a directive to local governments, while evincing a clear enough "purpose" to preempt enactments it could not prohibit outright. "Extending conflict or obstacle preemption" in this way would run afoul of *Murphy*,

however, "because it would imply that a state's otherwise lawful decision *not* to assist federal authorities is made unlawful when it is codified" as law. *California II*, 921 F.3d at 890. East Chicago's Ordinance is fully compatible with §§ 1357(g), 1373, and 1644 as written. This Court should not read into them an intent beyond Congress's power.

3. Section 10 of the Ordinance is not field-preempted.

Plaintiffs further argue that the definition of "information regarding an individual's citizenship or immigration status" in Ordinance section 10 is field-preempted because, according to Plaintiffs, "Congress chose specific language in 8 U.S.C. 1373 and 1644 and intended it to have a broad meaning." Pls.' Summ. J. Memo. 87. This challenge suffers from three flaws.

First, as explained earlier, §§ 1373 and 1644 are not entitled to preemptive effect. Both provisions purport to impose requirements directly on state and local governmental bodies, so they are not preemption provisions, and because they violate the Tenth Amendment, they are unenforceable. Second, even if §§ 1373 and 1644 could have preemptive effect, Ordinance section 10's definition is wholly consistent with the scope of those statutes, as federal courts have made clear. *See supra* at 15–22, 42.

Third, Plaintiffs have advanced an incoherent understanding of field preemption. A regulatory framework that preempts an entire field leaves "no room for the States to supplement it" and "preclude[s] enforcement of state laws on the same subject." *Arizona*, 567 U.S. at 399 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). In such circumstances, "even complementary state regulation is impermissible." *Id.* at 401. Yet Plaintiffs find no fault with a form of complementary regulation that they favor—section 3 of Chapter 18.2. This oversight demonstrates the hollowness of Plaintiffs' field-preemption claim. Moreover, Plaintiffs have offered no evidence that Congress carved out a "definitional field," Pls.' Summ. J. Memo. 87, that

could not be sufficiently protected by ordinary conflict preemption principles. The Court therefore should reject Plaintiffs' cursory—and wholly deficient—field-preemption claim.

4. The Ordinance does not impede federal officers' enforcement of federal law.

Finally, Plaintiffs assert that East Chicago's Ordinance violates the Supremacy Clause by "impeding federal officers in the performance of their duties" and "interfer[ing] with federal officers in their enforcement of federal immigration law." Pls.' Summ. J. Memo. 85.

These arguments are baseless. First, as explained above, the Ordinance does not affirmatively interfere with federal immigration enforcement in anyway; it merely restricts the City's own agents and agencies from participating in that enforcement. *See supra* at 45–47; *Cty. of Ocean*, 2020 WL 4345317, at *17 (reaching this conclusion). And, as just explained, East Chicago does not violate the Supremacy Clause simply by declining to facilitate the federal government's enforcement of its own laws. To hold otherwise would render the anticommandeering doctrine a nullity.

Second, Plaintiffs speculate that Ordinance section 6(c)(1) would cause the City to "prevent federal entry into its jails by force, or to arrest federal officers who attempt entry." Pls.' Summ. J. Memo. 86. This is an outlandish conjecture unsupported by the language of the Ordinance, which simply directs East Chicago's employees not to use City resources to "permit ICE agents access to a person being detained by, or in the custody of," the City unless presented with a criminal warrant. Indeed, the Ordinance explicitly disavows Plaintiffs' unfounded assumption: section 1 expresses "support" for "immigration enforcement *as a federal matter*" (emphasis added), and section 6 is entitled "Immigration enforcement actions—Federal responsibility." Moreover, Plaintiffs have offered no evidence that East Chicago officials have ever forcibly impeded, or intend to forcibly impede, federal enforcement efforts. Plaintiffs' wild speculation about how

Ordinance section 6(c)(1) *might* be applied is wholly insufficient on a facial challenge to the Ordinance. This Court accordingly should reject Plaintiffs' final Supremacy Clause challenge and the implausible reading of Section 6(c)(1) on which it is based.

B. Ordinance Section 9(c) Does Not Violate the Equal Protection Clause

Plaintiffs next challenge section 9(c) of East Chicago's Ordinance under the Equal Protection Clause. As set out above, that provision directs members of the East Chicago Police Department to "consider the extreme potential negative consequences of an arrest in exercising [their] discretion" whether to arrest an individual and to do so "only after determining that less severe alternatives are unavailable or would be inadequate to effect a satisfactory resolution."

Plaintiffs' equal-protection challenge relies on the unsubstantiated allegation that section 9(c) "disparately treats (i) individuals subject to risk of deportation and (ii) individuals not subject to risk of deportation." Pls.' Summ. J. Memo. 91. This assertion is untenable. Although the prefatory language of section 9(c) includes the observation that "the arrest of an individual increases that individual's risk of deportation," the same arrest policy expressly applies to "all individuals." Section 9(c)'s operative language therefore does not draw *any* classification, let alone an impermissible one. It explicitly mandates that everyone receive the same treatment: freedom from arrest except when necessary under the circumstances. In evenhandedly treating all persons, section 9(c) differs markedly from other policies adjudicated under the Equal Protection Clause. *See, e.g.*, *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1690 (2017) (federal statute "[p]rescrib[ed] one rule for mothers, another for fathers"); *Fisher v. Univ. of Tex.*, 136 S. Ct. 2198, 2206 (2016) (admissions policy explicitly considered "the applicant's race"); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 213 (1995) ("[T]his case concerns . . . classifications based explicitly on race . . . .").

Plaintiffs' claim boils down to sheer speculation that section 9(c) is, or will be, applied in a discriminatory manner. *See* Pls.' Summ. J. Memo. 90 (suggesting that, in practice, section 9(c) will cause officers to "steer clear of persons likely or possibly at deportation risk" at disproportionately high rates). But Plaintiffs bring only a *facial* challenge to section 9(c); and claims that an otherwise facially neutral ordinance *might* be applied in a discriminatory manner are insufficient to support a facial equal-protection challenge. *See Salerno*, 481 U.S. at 745. Moreover, Plaintiffs' argument amounts to a disparate-impact claim (and an entirely speculative one at that), and such a claim is not actionable under the Equal Protection Clause. *See, e.g.*, *Washington v. Davis*, 426 U.S. 229, 242 (1976) (rejecting the notion that "a law, neutral on its face and serving ends otherwise within the power of the government to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another."); *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 273 (1979) ("[T]he Fourteenth Amendment guarantees equal laws, not equal results.").

In sum, section 9(c) applies equally to all persons, and that fact precludes Plaintiffs' facial equal-protection challenge. Indeed, section 9(c) represents a commonsense policing strategy: that no one should be arrested if a less drastic option is available to resolve the problem. East Chicago believed that such an across-the-board policy would *eliminate* an existing "disproportionate impact" from law-enforcement operations. The City's effort to fight inequality with equality—to protect all persons equally—helps fulfill the promise of the Equal Protection Clause. This Court should reject Plaintiffs' backward challenge under that very provision.

C. Ordinance Section 9(c) Is Not Unconstitutionally Vague

Finally, Plaintiffs challenge Ordinance section 9(c) under the Due Process Clause, claiming that it contains "vague, standardless criteria" for when to engage in an arrest that provide insufficient notice to potential arrestees and afford police officers boundless discretion. Pls.'

Summ. J. Memo. 96. However, section 9(c) neither prohibits conduct nor sets the penalty for a violation, so the Due Process Clause's prohibition on vague laws does not apply. This Court therefore should reject Plaintiffs' misguided vagueness claim.

As the Supreme Court has explained, some types of laws "are not subject to vagueness challenges under the Due Process Clause." *Beckles v. United States*, 137 S. Ct. 886, 890 (2017). Vagueness challenges can be brought *only* against laws that either (1) "forbid[] or require[] the doing of an act," *FCC v. Fox*, 567 U.S. 239, 253 (2012), or (2) specify the range of authorized penalties for a violation, *see United States v. Batchelder*, 442 U.S. 114, 123 (1979). Thus, a plaintiff fails to state a void-for-vagueness claim where the regulation at issue "does not attempt to regulate conduct." *Woodruff v. U.S. Dep't of Labor, Office of Workers Comp. Program*, 954 F.2d 634, 642 (11th Cir. 1992) (rejecting a vagueness claim against an administrative rule); *see also U.S. ex rel. Fitzgerald v. Jordan*, 747 F.2d 1120, 1130 (7th Cir. 1984) (rejecting a vagueness claim to Illinois's statute regarding release on bail on appeal because the statute is "directed to judges who must ascertain whether compelling reasons exist which justify holding a person to bail under the statute," "not at any sort of conduct in which the petitioner may engage"); *Matter of S.G. v. Ind. Dep't of Child Servs.*, 67 N.E.3d 1138, 1146–47 (Ind. Ct. App. 2017) (void-for-vagueness doctrine does not apply to statute regulating agency actions).

Section 9(c) of East Chicago's Ordinance does not prohibit any conduct, nor does it specify the allowable penalties for a civil or criminal violation. That section instead channels police discretion in the enforcement of all existing laws, instructing East Chicago officials to conduct arrests "only after determining that less severe alternatives are unavailable or would be inadequate to effect a satisfactory resolution." Put another way, Section 9(c) functions to *reduce* the amount of discretion enjoyed by East Chicago police officers.

Plaintiffs attempt to analogize section 9(c) to the loitering ordinance at issue in *City of Chicago v. Morales*, 527 U.S. 41 (1999). But the *Morales* Court struck down an ordinance that "create[d] a criminal offense," and it did so because the "definition of the forbidden conduct" was insufficiently clear. *Id.* at 47, 60. In fact, the element in *Morales* that is most analogous to section 9(c) was the enforcement guidance issued by the City of Chicago—which itself was *not* challenged as vague and was considered only as to whether it sufficiently reduced officers' discretion under the penal ordinance. *See id.* at 63–64. Section 9(c) is therefore wholly unlike the ordinance at issue in *Morales*.

Moreover, it would make little sense to subject police enforcement guidelines to vagueness challenges. Policing, like the decision whether to prosecute, is inherently discretion-laden and context-specific. *See W.C.B. v. State*, 855 N.E.2d 1057, 1062 (Ind. Ct. App. 2006) ("Prosecutors always have broad discretion in deciding what crimes to prosecute."). Police must have some discretion to determine whether an arrest is appropriate in a given circumstance. Section 9(c) *channels* police officers' inherent discretion, and insisting on perfect specificity would hamper responsible policing practices that permit flexibility in the face of unforeseen circumstances.

Moreover, countless other jurisdictions have similarly guided their police officers' discretion when deciding whether to pursue alternatives to arrest. If successful, Plaintiffs' novel claim would portend a torrent of litigation elsewhere and would perversely discourage police departments from publishing their internal manuals, thereby reducing democratic accountability in law enforcement. The following are a sampling of provisions that could be newly vulnerable to constitutional attack under Plaintiffs' theory:

- Kirkland, Washington: "It is imperative that officers take into consideration, when exercising discretionary power, the goals and objectives of the Department, the best

interests of the public they serve, any mitigating circumstances and the severity of the situation at hand."[30]

- Lansing, Illinois: "Enforcement of minor violations is discretionary with officers. Enforcement may range from a verbal or written warning to formal complaint and arrest."[31]

- Port Washington, Wisconsin: "With each situation, reasonable and appropriate police action varies. Different facts or circumstances may justify an investigation, a detention, a search, an arrest or no action at all."[32]

- Salt Lake City, Utah: "The principle of reasonableness will guide the officer's determinations and the officer will consider all surrounding circumstances in determining whether any legal action shall be taken."[33]

Established "principles for defining vagueness cannot be transported uncritically" to dissimilar contexts, *Beckles*, 137 S. Ct. at 897 (Kennedy, J., concurring)—policing among them. Because Plaintiffs' vagueness challenge has no foundation in case law or logic, this Court should reject their due-process claim.

IV. Plaintiffs Fail to Satisfy the Remaining Elements of the Permanent Injunction Standard

As explained in Parts III and IV, the City of East Chicago is entitled to summary judgment in its favor on Plaintiffs' claims for declaratory and injunctive relief because no provision of its Ordinance violates any part of Chapter 18.2 or the U.S. Constitution. However, even if the Court were to conclude that some provisions of the Ordinance were inconsistent with either of these sources of law, 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

[30] Kirkland, Wash., Police, *General Orders* § 1.2.7(II) (last updated Apr. 19, 2010), *available at* https://perma.cc/X7AL-U5XE.

[31] Village of Lansing, IL, Police Dep't, *Standard Operating Procedures and Rules and Regulations* § 1.2.6(A) (2020), *available at* https://perma.cc/LLF3-UJSJ.

[32] Port Washington Police Dep't, *General Order* § II(A) (May 5, 2009), *available at* https://perma.cc/WT94-B4YX.

[33] Salt Lake City Police Dep't, *SLCPD Policy Manual* 1 (Feb. 12, 2019), *available at* https://perma.cc/7L47-L8G7.

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

A. Plaintiffs Must Satisfy All Elements of the Traditional Test for Injunctive Relief

Under Indiana law, the party seeking an injunction "carries the burden of demonstrating an injury which is certain and irreparable if the injunction is denied." *Ferrell*, 751 N.E.2d at 713. As discussed below, Plaintiffs have made no showing at all of irreparable injury. But Plaintiffs contend that they need not satisfy this requirement for two reasons: (1) section 18.2-6 authorizes courts to issue an injunction based solely on a finding of a violation of section 18.2-3 or -4; and (2) Indiana's "per se" rule excuses their failure to demonstrate any irreparable harm. Both contentions are incorrect.

1. Section 18.2-6 does not excuse Plaintiffs from the need to satisfy all four elements of the injunction analysis.

Plaintiffs claim that they need only demonstrate success on the merits to obtain an injunction under section 18.2-6, which provides that, "[i]f a court find that a governmental body . . . knowingly or intentionally violated section 3 or 4 of this chapter, the court shall enjoin the violation." 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). To the extent that section 6 might eliminate the other injunction

requirements, it does so only for "knowing[] or intentional[]" violations of sections 18.2-3 and -4. Here, even if the Court were to conclude that East Chicago's Ordinance violates sections 18.2-3 or -4 in some respects, any violation could not have been knowing or intentional.

First, Plaintiffs adduce no affirmative evidence concerning what section 6 actually requires: proof that any violation of Chapter 18.2 was 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 § 1. Plaintiffs have offered no reason to impugn the Common Council's good faith in articulating the reasons for its enactment of the Ordinance. Although, as Plaintiffs note, the Ordinance does not expressly reference Chapter 18.2, *see* Pls.' Summ. J. Memo. at 46, this absence does not in any way demonstrate the City's knowing or intentional disregard of sections 18.2-3 and -4. Furthermore, 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 18.2-3 does not prohibit any part of East Chicago's Ordinance. The fact that the Ordinance is wholly consistent with the most reasonable reading of section 18.2-4—and that only a limited portion of the Ordinance could possibly violate section 18.2-4 even on a broader reading—indicates that any purported violation was not knowing or intentional.

Absent such evidence, Plaintiffs wrongly attempt to undermine the stringent "knowing and intentional" standard actually prescribed by section 6. Plaintiffs claim that the phrase "knowingly or intentionally" 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.' Summ. J. Memo. 4, 45–46. 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 personal harm—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 and deny section 18.2-6 any separate meaning from section 18.2-5's authorization of an "action to compel." The court therefore should read section 18.2-6'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) ("[A] major departure from the long tradition of equity practice should not be lightly implied." (internal quotation marks omitted)).[34]

Third, Plaintiffs assert that section 18.2-6 also permits injunctions without a showing of harm for violations of section 18.2-7. Pls.' Summ. J. Memo. 43–44. This is incorrect on the face of section 18.2-6, which explicitly is limited to knowing and intentional violations of "section 3 or 4." Ind. Code § 5-2-18.2-6; *see also Cobblestone II Homeowners Ass'n, Inc*, 545 N.E.2d at 1129

[34] It should also be noted that the public standing exception 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").

(General Assembly may alter the standards governing equitable relief only "expressly"). Section 18.2-5, moreover, grants a cause of action for violations of "this chapter," suggesting that the General Assembly could have drafted section 18.2-6 more broadly if it had wanted to extend that provision to section 18.2-7.

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

2. Plaintiffs must satisfy all elements of the injunction standard for their federal constitutional claims and their section 18.2-7 claim.

Even if the Court concludes that Plaintiffs need not satisfy all elements of the injunction standard with respect to violations of sections 18.2-3 and -4, Plaintiffs nonetheless must satisfy each element of the equitable injunction standard to succeed on their constitutional claims and their claim under section 18.2-7.

First, any statutory injunction standard under Chapter 18.2 does not apply to federal constitutional claims. Plaintiffs do not dispute this. *See* Pls.' Summ. J. Memo. 68–69. However, Plaintiffs contend that Indiana's "per se" rule applies to excuse their failure to demonstrate irreparable harm. Under the "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).

The per se rule is inapplicable to Plaintiffs' constitutional claims, as it applies only to *statutory* violations. Plaintiffs do not cite any case applying the doctrine in the context of a claimed federal constitutional violation. This Court should not extend the per se rule beyond its currently

recognized boundaries, as the Indiana Supreme Court in recent years has suggested that the per se rule "may not reflect sound injunction law." *Leone*, 933 N.E.2d at 1248 n.6.

Moreover, invocation of the per se rule "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) (emphasis added). For the reasons stated in Part III, even if the per se rule applies to constitutional violations, Plaintiffs have not demonstrated that East Chicago's Ordinance clearly violates the U.S. Constitution. *Cf. Curley v. Lake Cty. Bd. of Elections & Registration*, 896 N.E.2d 24, 39 (Ind. Ct. App. 2008) (refusing to apply the per se rule to a statutory challenge where the statute was ambiguous and the Board of Election's decision was not "clearly unlawful"). Although Plaintiffs suggest that failure to grant them an injunction would allow alleged constitutional violations to occur "without a remedy at law," Pls.' Summ. J. Memo., that is simply incorrect—it is just that they, as individuals who have suffered no concrete, cognizable harm, may not obtain the overly broad remedy they seek.

Nor does the per se rule apply to Plaintiffs' claims under Chapter 18.2. As to section 18.2-7, the per se rule does not apply because East Chicago *already has complied* with the only requirement that the statute clearly imposes: providing "each law enforcement officer with a written notice." Plaintiffs also appear to argue, as a fallback position, that the per se rule excuses their lack of any cognizable harm for their claims under 18.2-3 and -4. *See* Pls.' Summ. J. Memo. 69. But that argument fails as well because the challenged provisions of East Chicago's Ordinance are not "clearly unlawful." *Curley*, 896 N.E.2d at 39. Ordinance section 10 explicitly ensures compliance with section 18.2-3, and section 18.2-4 is far too imprecise to have been plainly breached by East Chicago's regulation of its officials' responses to federal requests for voluntary cooperation.

Finally, 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. Thus, as set forth below, Plaintiffs would not be entitled to an injunction even if the per se rule were to apply.

B. Plaintiffs Have Failed to Demonstrate that They Are Suffering 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 East Chicago's Ordinance. Plaintiffs cannot prevail in any respect, then, unless they identify an irreparable injury flowing from 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 rights . . . as a result of the enactment, implementation, and enforcement of the Ordinance, along with Defendants' noncompliance with the public duty established by Chapter 18.2 and cited constitutional provisions," and that they "have no adequate remedy at law." Pls.' Summ. J. Memo. 3 (citing Compl. ¶ 75). 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 Fort Wayne*, 423 N.E.2d 647, 651 (Ind. Ct. App. 1981) (internal quotation marks omitted); *see also Old Utica Sch. Pres., Inc. v. Utica Twp.*, 46 N.E.3d 1252, 1256, 1258 (Ind. Ct. App. 2015) (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 to these Plaintiffs.

Beyond this bare assertion, Plaintiffs point to no evidence that the existence of East Chicago's Ordinance has harmed them—or anyone else. Plaintiffs do not claim that East Chicago

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 evidentiary record also contains no indication that East Chicago 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: East Chicago's Police Chief is unaware of any incident in which ICE has *ever* contacted the East Chicago Police Department for assistance, including by issuing detainer requests. Rosario Aff. ¶ 16. Moreover, Plaintiffs have suffered no harm from Ordinance section 9(c), as they admit that they have had no interactions with the East Chicago Police Department and have never been arrested in East Chicago. Serbon Dep. 41:8–41:14; Allen Dep. 36:7–36:18; Serbon Interrogatories 4; Allen Interrogatories 4.

Accordingly, Plaintiffs have offered no evidence from which the Court might conclude that they have suffered irreparable harm due to any of their purported statutory or constitutional violations—a prerequisite for enjoining those provisions under Indiana law.

C. Any Threatened Injury to Plaintiffs Does Not Outweigh the Harm to Defendants, 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, concrete harm, while the City of East Chicago and its residents would be severely harmed by an injunction against the challenged provisions of its Ordinance.

In enacting its Ordinance, East Chicago sought to convey to the local community—and to those who might come to East Chicago to work, live, or visit—that East Chicago is a "Welcoming City." Section 1 of the Ordinance sets out this objective, reciting its purposes of "recogniz[ing]

the present and historic importance of immigrants to our community" and "demonstrate[ing] the City of East Chicago's commitment to ensure public safety for all city residents and specifically enable immigrants to report crime." Ordinance § 1; *see also* Copeland Aff. ¶ 6 (recounting East Chicago's history of welcoming immigrants).

Enjoining the challenged provisions of the Ordinance would undermine these important goals. First, barring East Chicago 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. Rosario Aff. ¶¶ 3–4. But undocumented immigrants—and their U.S. citizen relatives—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. Copeland 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 East Chicago residents would suffer—including U.S. citizens.

Additionally, enjoining East Chicago's enforcement of its Ordinance—especially without clear guidance as to exactly what Chapter 18.2 prohibits—would severely curtail East Chicago'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 East Chicago currently faces, Copeland Aff. ¶ 10; Rosario Aff. ¶ 9, as well as Indiana's restrictions on local funding. Moreover, a prohibition on policies that *could* lead to less-than-maximal cooperation in

immigration enforcement would severely curb East Chicago's ability to guide and supervise its employees. Aside from the harm to East Chicago's governance interests, this scenario also could lead to civil liability, which would fall squarely on the City's shoulders. *See* Copeland Aff. ¶ 11.

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

V. Plaintiffs' Requests for Additional Forms of Relief Are Utterly Unjustified

In their Complaint, Plaintiffs seek the posting of a series of notices on the City's website, including a notice "that this Court has compelled compliance." Pls.' Summ. J. Memo. 45; Compl. Prayer for Relief ¶ 8. Any 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 Plaintiffs asserted is their interest in the City's compliance with the law, and 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.

VI. The Common Council and Its Members Are Not Proper Defendants in this Suit

Finally, Plaintiffs assert their claims against, *inter alia*, the East Chicago Common Council and its members as "governmental bod[ies]" subject to an action to compel under section 18.2-5. Because these Defendants were sued solely in their legislative capacity, they are entitled to summary judgment on all claims.

First, Indiana Code § 34-13-3-5(a) expressly prohibits suits against the members of the Common Council. According to that provision,

> A member of a board, a committee, a commission, an authority, or another instrumentality of a governmental entity may not be named as a party in a civil suit that concerns the acts taken by . . . [the] instrumentality of a governmental entity where the member was acting within the scope of the member's employment.

The East Chicago Common Council is an "instrumentality a governmental entity," and each Common Council member is a "member" of that instrumentality. Plaintiffs do not contest that all individuals named as Defendants in this case acted within the scope of their employment when they cast their votes for the Ordinance. All nine Common Council members therefore were improperly named as Defendants in this case.

Furthermore, the Common Council and its members are entitled to summary judgment under the doctrine of absolute immunity for acts undertaken in a legislative capacity. As the U.S. Supreme Court has recognized, "local officials performing legislative functions" are "absolutely immun[e] from civil liability for their legislative activities." *Bogan v. Scott-Harris*, 523 U.S. 44, 46 (1998); *see also Kellogg v. City of Gary*, 562 N.E.2d 685, 702 (Ind. 1990) ("Courts have extended absolute immunity to . . . legislators . . . ."); *Malone v. Becher*, No. NA 01-101-C H/H, 2003 WL 22080737, at *6 (S.D. Ind. Aug. 29, 2003) (applying *Bogan* legislative immunity to county council members "under Indiana law," citing Ind. Code § 34-13-3-5). Here, the complaint names the Common Council and its members for no other reason than that they performed certain actions "in [a] legislative capacity." *Supreme Court of Va. v. Consumers Union of U.S.*, 446 U.S. 719, 731 (1980); *see also* Compl. ¶¶ 14–23. Indeed, the act of "voting for an ordinance" is "quintessentially legislative." *Bogan*, 523 U.S. at 55. Defendants are aware of no decision by any court permitting a government official to be personally sued for having participated in the lawmaking process, and this Court likewise should enter judgment for these Defendants.

Finally, Plaintiffs' requested remedy—an injunction—would not remedy the harm Plaintiffs allege. There is simply nothing to enjoin: the legislative act is done, and Plaintiffs do not allege any impending future action by the Common Council. The proper course is to seek to enjoin the City's *enforcement* of the enacted Ordinance, so the Common Council and its members are entitled to summary judgment for this reason as well.

CONCLUSION

Plaintiffs lack standing to bring this case; East Chicago's Ordinance does not violate Chapter 18.2 or the U.S. Constitution; and Plaintiffs have not shown that they are entitled to an injunction. This Court therefore should deny Plaintiffs' Motion for Summary Judgment and grant the City of East Chicago's Cross-Motion for Summary Judgment on all counts.

December 11, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on the 11th day of December 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 herein by electronic service using the Indiana E-Filing System, email, or depositing the same in the United States Mail via certified mail in envelopes properly addressed to each of them and with sufficient first-class postage affixed.

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