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IN THE
INDIANA COURT OF APPEALS

Appellate Case No. 20A-MI-2317

CITY OF GARY,

Appellant,

v.

JEFF NICHOLSON, et al.,

Appellees.

STATE OF INDIANA,

Intervenor.

On Appeal from Lake County Superior Court, Civil Division

Cause No. 45D05-1802-MI-000014

Hon. Stephen E. Scheele, Judge

REPLY BRIEF OF APPELLANT

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SUMMARY OF ARGUMENT

Plaintiffs-Appellees' and Appellee-Intervenor the State of Indiana's arguments in this appeal highlight the confusion inherent in an expansive and overbroad reading of Chapter 18.2.[1] For example, the State does not contend that section 26-58(c) of the City of Gary's Ordinance violates Chapter 18.2; whereas Plaintiffs do. The State argues that the Ordinance's prohibition on honoring federal civil immigration detainers issued by Immigration and Customs Enforcement (ICE) is barred by sections 3 and 4 of Chapter 18.2; whereas Plaintiffs argue only that it is barred by section 4. Plaintiffs and the State argue that section 7 of Chapter 18.2 imposes a broad duty of cooperation on law enforcement; whereas the trial court's order did not rely on or find any violations of section 7. This kind of uncertainty is exactly what home-rule principles are intended to avoid: Cities in Indiana need better guidance than this to understand how they may devote their own budgets, direct city resources, and ensure safety within their own communities.

[1] For ease of reference, Appellant City of Gary will use "Plaintiffs" for Plaintiffs-Appellees, "the State" for Appellee-Intervenor State of Indiana, and "the City" for Appellant City of Gary. The City will refer to each party's already-filed briefs according to the same naming system ("Pls. Br.," "State Br.," and "City Br.," respectively).

I. The City's reading of Chapter 18.2 hews most closely to the statutory text and context and draws readily understood distinctions consistent with legislative intent. Indiana Code § 5-2-18.2-3 bars cities in Indiana from restricting the maintenance and sharing of citizenship and immigration-status information with federal, state, and local authorities. Indiana Code § 5-2-18.2-4 directs localities in Indiana not to interfere with *federal* immigration enforcement under *federal* law. The challenged provisions of the City's Ordinance comply with these directives: They permit city agencies to share citizenship and immigration-status information in their possession, and they concern only the City's own role in support of federal immigration enforcement. And, despite Plaintiffs' assertions to the contrary, Indiana Code § 5-2-18.2-7 is not at issue here. It requires only that law enforcement officers receive a written notice of "a duty to cooperate . . . on matters pertaining" to immigration enforcement, which Plaintiffs have not challenged. The trial court's injunction therefore should be vacated and summary judgment granted to the City.

II. Alternatively, the trial court's injunction is unenforceable because it does not make clear what the City of Gary is prohibited from doing. The Court could vacate the injunction without reaching the merits of the case and remand for entry of an injunction that clearly specifies which parts of

which provisions of the Ordinance violate which provisions of Chapter 18.2, and that specifies what the City of Gary may not do.

ARGUMENT

I. The Ordinance does not violate Chapter 18.2.

A. The Ordinance does not violate section 3 of Chapter 18.2.

1. The Ordinance expressly authorizes the type of information sharing described in section 3.

As explained in the City's opening brief, section 26.59 of Gary's Ordinance expressly allows the exchange of "information regarding an individual's citizenship or immigration status"—the exact same category of information on which section 3 of Chapter 18.2 focuses—so it fully complies with section 3. City Br. 24–30. Federal courts have resoundingly rejected Plaintiffs' and the State's overbroad and atextual reading of the analogous language in 8 U.S.C. § 1373, concluding that § 1373's information-sharing mandate is unambiguously limited to the categories of information named in the statute.[2] *See, e.g.*, *United States v. California*,

[2] 8 U.S.C. § 1373 (a) provides, in relevant part: "[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." Section 1373(b) is similar in scope.

921 F.3d 865, 891 (9th Cir. 2019); *United States v. New Jersey*, No. 20-CV-1364, 2021 WL 252270, at *12 (D.N.J. Jan. 26, 2021) ("[P]lainly, the phrase 'regarding the citizenship or immigration lawful or unlawful of any individual' means just that—information relating to the immigration status of an alien, including his/her citizenship." (quoting *County of Ocean v. Grewal*, 475 F. Supp. 3d 355, 376 (D.N.J. 2020))). Plaintiffs and the State now ask this Court to reject the uniform consensus of the federal courts that have squarely addressed this issue. Their arguments are unpersuasive.

Plaintiffs first assert that the phrase "information regarding" in § 1373—and, similarly, "information of" in section 3—broadens the category of "citizenship and immigration status" information to encompass any information relevant to immigration enforcement in any way. Pls. Br. 19; State Br. 17–19 (making a similar argument with respect to the phrase "with regard to information of"). But courts have cautioned against reading words like "regarding" too broadly in the context of preemptive statutes in order to give effect to the presumption against preemption.[3] As the Ninth Circuit explained in rejecting this argument, "if the term

[3] *Lamar, Archer & Cofrin, LLP v. Appling*, 138 S. Ct. 1752 (2018), on which the State relies, State Br. 17–18, is inapposite because it did not involve a preemption statute.

'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*, 921 F.3d at 892 (quoting *N.Y. State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995)). Because § 1373 seeks to preempt state and local law, its use of "regarding" should be read narrowly. This is even *more* true of section 3, which uses the word "of," not "regarding." *See* Ind. Code § 5-2-18.2-3 ("information *of* the citizenship or immigration status . . . of an individual" (emphasis added)). "Of" simply does not mean "in any way relating to."[4] Plaintiffs' unsupported conjecture that this was merely a "stylistic" choice, Pls. Br. 24, is not a reason to expand the word beyond its ordinary meaning, especially in light of home-rule principles.

Moreover, if Congress had intended § 1373 to sweep as broadly as Plaintiffs and the State claim, it would have used much more direct language to define the statute's scope, as it did in other immigration statutes. *California*, 921 F.3d at 892 (drawing this conclusion); *see, e.g.*, 8 U.S.C. § 1360(b) (information "as to the *identity and location* of aliens in

[4] Nor is the phrase "with regard to information of" synonymous with "information regarding," as the State claims. In section 3, "with regard to" modifies "the following actions," not "information."

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 General Assembly intended section 3 to have a similarly broad scope, it would have used more expansive language.

Failing on plain language, Plaintiffs next claim that section 3 is ambiguous because some courts have used imprecise language to describe § 1373's scope, requiring recourse to legislative history. The Court should decline Plaintiffs' "invitation to find ambiguity where none exists." *Wayne Metal Prods. Co. v. Ind. Dep't of Env't Mgmt.*, 721 N.E.2d 316, 319 (Ind. Ct. App. 1999). Where "a statute is clear and unambiguous on its face, this court need not, and indeed may not, interpret the statute. Instead [courts] must hold the statute to its clear and plain meaning." *S. Bend Trib. v. S. Bend Cmty. Sch. Corp.*, 740 N.E.2d 937, 938 (Ind. Ct. App. 2000). Whether legislative history may suggest a broader meaning is irrelevant in the face of an unambiguous meaning. *See California*, 921 F.3d at 892 n.18

(rejecting the relevance of § 1373's and 8 U.S.C. § 1644's committee reports to the interpretation of § 1373).[5]

The cases on which Plaintiffs rely do not support a conclusion that § 1373 and section 3 are ambiguous. Stray observations about § 1373's reach were wholly unnecessary to the courts' holdings in both *Bologna v. City and County of San Francisco* and *Sturgeon v. Brattan*, which Plaintiffs cite. Pls. Br. 22–23; *see Bologna*, 192 Cal. App. 4th 429, 439–40 (2011) (holding that § 1373 was not "designed to protect the public from violent crimes," such that it could form the basis for a negligence per se claim); *Sturgeon*, 174 Cal. App. 4th 1407 (2009) (rejecting a preemption challenge to a local policy prohibiting "the initiation of investigations" of immigration status because § 1373 does not regulate information-gathering). Because these cases did not purport to interpret § 1373's scope, it is far from clear that they intended Plaintiffs' broad reading of § 1373 when they used the phrase "immigration information" as shorthand. *See, e.g.*, *Sturgeon*, 174 Cal. App. 4th at 1423 (using the phrase

[5] The Ninth Circuit also commented that the language of the committee reports at issue does not actually support a broader reading of the operative statutory language. *See California*, 921 F.3d at 892 n.18 (noting that the reports' phrasing "suggests that 'information regarding the immigration status' does *not* include 'the presence, whereabouts, or activities' of noncitizens").

"immigration information" in a context where only immigration-status information was at issue). Likewise, as the City has explained, the discussions of § 1373 in *City of New York v. United States*, 179 F.3d 29 (2d Cir. 1999), was wholly unnecessary to the court's resolution of the facial challenge at issue in that case. City Br. 29–30.

These cases' brief comments on § 1373 do not carry sufficient weight to undermine the carefully considered conclusions of the Ninth Circuit and numerous district courts that § 1373 plainly precludes the meaning that Plaintiffs ascribe to it. *See Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 399–400 (1821) (distinguishing between "[t]he question actually before the Court," which is "investigated with care, and considered in its full extent," and dictum, where its "possible bearing on all other cases is seldom completely investigated"). The same conclusion follows for section 3.

Plaintiffs also claim that the City has "conceded" that the meaning of section 3 is ambiguous because the City's Ordinance includes a broader statutory definition of "citizenship or immigration status" information in one provision. *See* Pls. Br. 19–20 (citing Ordinance § 26-51). But Gary's Ordinance does not define the terms of section 3, much less 8 U.S.C. § 1373. The Ordinance provides a specialized definition for purposes of

some provisions of the Ordinance, and nothing more.[6] Ordinance section 26-51 therefore has no bearing on the *ordinary* meaning of the terms used in section 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*." (emphasis added) (internal quotation marks omitted)).

Finally, Plaintiffs concoct a theory that all of the recent decisions that have found § 1373 unambiguous and rejected Plaintiffs' preferred construction may be disregarded because they post-date the enactment of section 3 in 2011. According to this argument, regardless of the actual scope of § 1373, all that matters is what the Indiana General Assembly *thought* § 1373 covered when it enacted section 3 in 2011. *See* Pls. Br. 19–23. This argument requires two difficult logical leaps. First, it assumes that the General Assembly did not intend the plain and unambiguous meaning of the words it chose. Second, it assumes that the General Assembly was aware of the legislative history of §§ 1373 and 1644 and dicta from out-of-jurisdiction decisions discussing the scope of these laws, despite Plaintiffs' failure to put forth any evidence supporting this

[6] By contrast, section 26.59 of the Ordinance supplies the ordinary definition of the term in compliance with section 3 of Chapter 18.2 and with 8 U.S.C. § 1373.

theory. The better assumption—one reflected in the ordinary rules of statutory interpretation—is that the General Assembly meant exactly what it said: that section 3 applies solely to citizenship and immigration-status information. *See S. Bend Trib.*, 740 N.E.2d at 938 (refusing to look to legislative intent where a statute is unambiguous).

2. Section 3 addresses only information sharing and maintenance, not cooperation in immigration enforcement.

The State next asks this Court to stretch the phrase "cooperating with federal officials" beyond any reasonable meaning, contending that it bars any policies that limit cooperation with any federal request for assistance in immigration *enforcement*. To put a finer point on it, the State would read section 3's reference to "cooperating" to bar local policies that prevent a city's employees from "gathering information at the request of a federal official, honoring a detainer request, aiding the execution of a warrant, and allowing federal immigration authorities access to individuals detained in a state or local facility."[7] State Br. 21. This overbroad interpretation suffers from two critical flaws.

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[7] The State also appears to read the phrase "actions with regard to information of the citizenship or immigration status . . . of an individual" to imply that section 3 regulates "all actions that are 'with regard to' an individual's immigration status." State Br. 17. This is plainly incorrect.

Continued on next page.

First, reading section 3's reference to "cooperating with federal officials" to cover all types of enforcement-cooperation creates a serious redundancy problem with section 4. Section 3 is about information; section 4 is about enforcement. But under the State's reading, section 3 would cover all "cooperation" in immigration enforcement, as would section 4. This would render section 4 entirely superfluous, contrary to the ordinary rules of statutory interpretation. *ESPN, Inc. v. Univ. of Notre Dame Police Dep't*, 62 N.E.3d 1192, 1199 (Ind. 2016) ("[W]hen engaging in statutory interpretation, we avoid an interpretation that renders any part of the statute meaningless or superfluous." (internal quotation marks omitted)). The State's notion that section 4 merely "further confirms" what the General Assembly did in section 3 is contrary to this fundamental principle. State Br. 21.

Second, this overbroad reading of "cooperating" completely writes out of section 3 its core limiting language. Section 3 bars only policies that restrict government employees from taking an enumerated list of actions "*with regard to information* of the citizenship or immigration status . . . of

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First, the State fails to acknowledge that the word "actions" is in fact limited to the enumerated list in the statute ("the following actions"). Second, the State simply drops the words "information of" from section 3 in order to rewrite the statute beyond its information-sharing context into immigration enforcement writ large.

an individual." Ind. Code § 5-2-18.2-3 (emphasis added). But the actions the State lists, like detaining people and aiding the execution of a warrant, have nothing at all to do with sharing and maintaining immigration-status information. It would be surprising for the General Assembly to tuck away a requirement as consequential as demanding detentions in response to detainer requests in a cryptic reference to "cooperating with federal officials" in a provision that otherwise *entirely* focuses on information-sharing. Even Plaintiffs refuse to go that far. *See* Pls. Br. 46 (chart indicating that restricting compliance with detainers and certain forms of "enforcement cooperation" would not violate section 3).

Under the City's reading, "communicating" and "cooperating" would still have distinct meanings, contrary to the State's assertions. *See* City Br. 30–34; State Br. 19–20. The General Assembly could have understood "communicating" to encompass affirmatively offering citizenship or immigration-status information, while "cooperating" requires local officers to respond to federal requests for such information, rendering both words meaningful yet keeping them both within section 3's overall focus on information-sharing and maintenance. *Day v. State*, 57 N.E.3d 809, 814 (Ind. 2016) (applying the *noscitur a sociis* statutory canon).

3. No provision of the Ordinance violates section 3.

Plaintiffs do not read section 3 to reach as broad a swath of conduct as the State, but their interpretation of section 3's coverage nonetheless errs. Some of Plaintiffs' arguments that the Ordinance violates section 3 fail on the scope of information covered by section 3. As already noted, section 26.59 of Gary's Ordinance expressly *allows* the sharing of citizenship and immigration-status information, as required by section 3. Section 26.59 is incorporated into sections 26-55(d) and (f)(3) of the Ordinance as an exception to those provisions' restrictions on information-sharing in the course of immigration enforcement.[8] Therefore, citizenship and immigration-status information may be shared with federal immigration authorities, while other information—that not addressed by section 3, like a person's custody status, release date, and contact information—may not be. That balance is wholly consistent with state law. *Cf. California*, 921 F.3d at 891 (where state law "expressly *permit[ted]* the sharing of" information covered by § 1373, it did not conflict with § 1373 even though it restricted sharing other information).

[8] Section 26.59 is mistakenly cited as "section 11" in these cross-references, but this is a scrivener's error.

Moreover, despite acknowledging that section 3 "nowhere requires *collection* of" immigration-status information, Pls. Br. 17, Plaintiffs nonetheless essentially argue that certain provisions of the Ordinance violate section 3 because they reduce information collection. *See, e.g.*, Pls. Br. 37, 43. But that is outside the scope of section 3 for the reasons the City set forth in its opening brief. City Br. 30–34. Three additional comments are in order.[9]

First, Ordinance § 26-52 bars city agencies and agents from "request[ing] information about or otherwise investigat[ing] or assist[ing] in the investigation of the citizenship or immigration status of any person unless such inquiry or investigation is required by an order issued by a court of competent jurisdiction." As explained, section 3 of Chapter 18.2 does not ban policies that limit the ability of local officials to *collect* information—the subject of section 26-52—nor does section 26-52 restrict the maintenance or sharing of information in the possession of the City's agencies. Section 3 therefore does not bar this form of local regulation. *See Sturgeon*, 174 Cal.

[9] In *Serbon v. City of East Chicago*, the trial court concluded that certain limited portions of East Chicago's ordinance violated section 3 of Chapter 18.2. *See* Order, No. 45D03-1805-PL-000045 (Lake Cnty. Sup. Ct. Apr. 29, 2021) (concluding that the equivalents of sections 26-52 and 26-55(d) and (f) violate section 3 but otherwise granting summary judgment to East Chicago). The court did not explain its reasoning for that determination, and the City of Gary disagrees with that conclusion.

App. 4th at 1422 (reaching this conclusion under § 1373 with respect to an analogous local policy).

Second, Plaintiffs contend that Ordinance section 26.58(c) violates section 3 because it restricts the collection of information. Pls. Br. 43–44. Section 26.58(c) requires the Gary Police Department to "consider the extreme potential negative consequences of an arrest," including a heightened risk of deportation, when 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."[10] 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

[10] Plaintiffs seriously misread the City's policy in section 26.58(c). Plaintiffs claim the policy is based on the idea that a police officer "*knows* that the person otherwise subject to arrest is (or likely is) an illegal alien" and that it applies only to potential arrests of undocumented immigrants. Pls. Br. 43–44. Although the prefatory language of section 26.58(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." And this makes sense in practice. Rarely, if ever, would a Gary police officer know ahead of time whether an individual potentially subject to arrest is also at risk of deportation, so the policy only achieves its goal of reducing an existing disparate impact on certain communities if it applies to everyone. In that context, section 26.58(c) is merely a commonsense policing strategy—that no one should be arrested if a less drastic option is available to resolve the problem.

with the FBI—and ultimately with the Department of Homeland Security (DHS) through the "Secure Communities" program. But section 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. Section 26.58(c) therefore does not violate section 3. Indeed, despite otherwise reading section 3 extremely broadly, *see* Part I.A.2 *supra*, the State does not contend that section 26.58(c) violates *either* section 3 or section 4.

Third, Plaintiffs' arguments about section 26-55(e) are even more farfetched. Section 26-55(e) directs Gary agencies not to seek to enter into voluntary agreements under 8 U.S.C. § 1357(g) to directly enforce federal immigration law (so-called "287(g) agreements"). *See* City Br. 57. Plaintiffs claim that this restriction violates section 3 because Gary is restricting the eventual "information-cooperation" that would be needed to effectively enforce immigration law, if such an agreement were to come into being and Gary employees were to be engaged in immigration enforcement. Pls. Br. 40. That chain of reasoning is far too attenuated to fall within section 3's

ambit. And again, the State agrees: it expressly disclaims the notion that Chapter 18.2 addresses section 287(g) agreements at all. State Br. 23.

In sum, no part of Gary's Ordinance violates section 3 because section 26.59 allows the sharing of citizenship and immigration-status information with federal officials. That is all that section 3 requires.

B. The Ordinance does not violate section 4 of Chapter 18.2.

1. Section 4 bars cities from restricting federal immigration enforcement efforts.

The crux of the dispute over the meaning of section 18.2-4 is whether it should be understood to incorporate the concept of "cooperation" with federal immigration enforcement within its terms, even though that word does not appear in the text of the statute. The City's opening brief explains why this would be a strained reading: Section 4's text and context, its legislative history, and Indiana's home-rule presumptions all indicate that the General Assembly intended to prohibit only efforts to limit *federal* enforcement of federal immigration law. *See* City Br. 37–51. Importantly, the trial court in *Serbon v. City of East Chicago* agreed that East Chicago's materially identical ordinance does not violate section 4 of Chapter 18.2. *See* Order, No. 45D03-1805-PL-000045 (Lake Cnty Sup. Ct. Apr. 29, 2021).

Plaintiffs' and the State's primary textual argument is that the word "federal" in section 4 modifies "immigration laws," not "enforcement." Pls. Br. 37–38; State Br. 22. But that begs the question of *who* enforces "federal immigration law," and the answer is simple: the federal government. Beyond the limited information-sharing context of 8 U.S.C. §§ 1373 and 1644, federal law does not require state and local officials to support federal immigration enforcement. And with very limited exceptions in the criminal context, federal law does not generally authorize state or local officials to engage in immigration enforcement outside the context of 287(g) agreements, in which state and local officials are certified, trained, and supervised as if they are federal immigration officials. *See* 8 U.S.C. § 1357 (g)(1)–(3); City Br. 38 & n.9.

Plaintiffs' and the State's arguments boil down to an assertion that section 4 implicitly includes cooperation because 8 U.S.C. § 1357 (g)(10) allows for voluntary state and local cooperation with federal immigration enforcement in certain, limited respects outside a 287(g) agreement. *See* 8 U.S.C. § 1357(g)(10)(B) (allowing, without an agreement, cooperation "in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States"); Pls. Br. 25; State Br. 22. Plaintiffs and the State appear to take the position that everything done at the

request of a federal official is permissible cooperation that cannot be limited under section 4. But that position goes too far. The supervision, training, and certification regime for 287(g) agreements would make little sense if all that were required to transform impermissible local enforcement into permissible cooperation were a request from federal immigration officials to do it. This is especially a concern in an area like immigration enforcement where foreign affairs are implicated, federal law is preeminent, and "[f]ederal governance of immigration and alien status is extensive and complex." *Arizona v. United States*, 567 U.S. 387, 395 (2012). In these circumstances, enforcement only by trained federal officers is and should be the norm.

The complexity and uncertainty inherent in the scope of permissible immigration enforcement cooperation cautions hesitation in assuming that the General Assembly intended to import that concept into section 4. Adopting an expansive reading of section 4 would leave cities in Indiana without guidance as to whether any policies that might have the effect of limiting a city's ability to support immigration enforcement would violate section 4. A preemption provision should not be this inscrutable to the average reader where a more comprehensible construction is available. This is especially true where the available legislative history makes clear

that Chapter 18.2 was *not* intended to make state and local officers enforce federal immigration law. *See* City Br. 43.[11]

Plaintiffs and the State next make sweeping assertions that section 4 overcomes any home-rule presumptions because it "clearly preempts" any restrictions on local cooperation in immigration enforcement. Pls. Br. 34; State Br. 16. But section 4 is far from clear on this point, and under home-rule principles, any ambiguity as to whether section 4 mandates cooperation should be resolved in favor of the City's less intrusive reading—that the statute commands localities not to interfere with federal immigration enforcement, but does not affirmatively mandate local assistance.[12] Reading into section 4 a broad ban on any policies that might limit cooperation would seriously—and unnecessarily—undermine cities' express police powers and authority to manage their

[11] Plaintiffs' contrary assertion that the General Assembly's "intent was to ban sanctuary-city-type provisions" should be ignored as wholly without support. Pls. Br. 30.

[12] This reading would not render section 4 "a nullity," as the State claims. State Br. 22. As the City has noted, some states and cities *have* taken steps to restrict federal immigration enforcement within their jurisdictions. City Br. 39–40 & n.10.

finances, operations, and employees. *See, e.g.*, Ind. Code §§ 36-8-2-4, 36-4-6-18; *see also* City Br. 45–51.[13]

The home-rule analysis in *City of El Cenizo v. Texas*, 890 F.3d 164 (5th Cir. 2018), is not to the contrary. The Texas statute at issue made clear that its ban on "prohibit[ing] or materially limit[ing] the enforcement of immigration laws" included "*assisting or cooperating* with a federal immigration officer as reasonable or necessary, including providing *enforcement assistance*." Tex. Gov't Code Ann. § 752.053(a), (b)(3) (emphasis added). Indiana's law does not include similar language, a difference that should be understood to be meaningful. City Br. 44–45. Thus, although the court in *El Cenizo* concluded that Texas did in fact preempt its cities' decisions whether to provide enforcement assistance, 890 F.3d at 191, the same conclusion does not follow here.

In short, section 4 bans only local policies that restrict the federal government's enforcement of federal immigration law. Because Gary's Ordinance solely limits its own agencies' participation in immigration

[13] Plaintiffs address at length whether section 4 is unconstitutionally vague. Pls. Br. 29–32. The City has not made that argument on appeal. Rather, the City's central point is that reading section 4 to bar any policy that could limit the City's ability to participate in immigration enforcement could impose a nearly boundless constriction on local policy-making, and home-rule principles require courts to assume that this was *not* the General Assembly's intent.

enforcement and does not seek to interfere with federal enforcement, it is consistent with section 4.

2. Even if section 4 bans policies that limit local cooperation in immigration enforcement, the Fourth Amendment prohibits seizing individuals pursuant to a detainer request.

Even if the Court were to accept Plaintiffs' reading of section 4—that it prevents cities in Indiana from limiting or restricting their own cooperation in federal immigration enforcement—most provisions of the Ordinance nonetheless would remain valid for the reasons stated in the City's opening brief. *See* City Br. 51–57.

With respect to the Fourth Amendment, Plaintiffs suggest that no Fourth Amendment "claim" is before the Court. Pls. Br. 47. To be clear, the City does not claim that section 4 is unconstitutional. Rather, even under Plaintiffs' reading, section 4's prohibition extends only so far as "what is permitted by federal law." The Fourth Amendment's restrictions therefore are incorporated into the scope of what section 4 may demand of cities. Because the Fourth Amendment does not generally permit local officers to arrest and detain individuals solely on the basis of a civil immigration violation, section 4 does not invalidate the City's restrictions

on holding individuals pursuant to an ICE detainer or administrative warrant. *See* Ordinance § 26-55(a)–(c).

Plaintiffs and the State make three critical errors in their claim that Chapter 18.2 requires cooperation in detainer requests. First, contrary to the State's assertion, State Br. 27, federal law does *not* authorize state or local officers to detain or arrest individuals pursuant to ICE detainers. In particular, 8 U.S.C. § 1357(g)(10)(B)—a savings clause that clarifies that a 287(g) agreement is not required for certain types of cooperation with federal immigration officials—does not authorize state and local officials to engage in civil immigration detentions. *See, e.g.*, *Lunn v. Commonwealth*, 78 N.E.3d 1143, 1158 (Mass. 2017) ("[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 v. Short*, 460 P.3d 867, 879 (Mont. 2020) (rejecting the argument that § 1357 (g)(10) authorizes arrests as "cooperation" because this "would essentially render the purpose of 287(g) agreements meaningless"); *Esparza v. Nobles County*, No. A18-2011, 2019 WL 4594512, at *10 (Minn. Ct. App. Sept. 23, 2019) (same). Law enforcement officers in Indiana have no authority under federal or state law to detain individuals for civil immigration offenses, and continuing to hold someone without authority

after he otherwise would be released from custody is unreasonable under the Fourth Amendment. *See* City Br. 53–56.

Second, the City does not contest that federal officials may constitutionally engage in civil immigration arrests, so Plaintiffs' invocation of the special-needs doctrine, Pls. Br. 48–51, is irrelevant to whether local officials, *without authority to do so*, may engage in separate detentions on the federal government's behalf. Plaintiffs' invocation of the collective-knowledge doctrine, *id.* at 51–53, likewise fails: 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. *See People ex rel. Wells v. DeMarco*, 168 A.D.3d 31, 47 (N.Y. App. Div. 2018) (rejecting application of the collective-knowledge doctrine because, if the local officer does not have "authority to arrest for a civil matter," the officer cannot "make a 'lawful' arrest"); *see also Lopez-Flores v. Douglas County*, No. 6:19-CV-00904-AA, 2020 WL 2820143, at *6 (D. Or. May 30, 2020) (declining to extend the collective-knowledge doctrine to the civil immigration context).

Finally, compliance with a detainer request is not permissible "cooperation" with ICE under § 1357 (g)(10)(B). *See* Pls. Br. 51. The assistance that § 1357(g)(10) contemplates assumes close supervision by

federal officials. *See* 8 U.S.C. § 1357(g)(1)–(3) (allowing direct immigration enforcement by state and local law enforcement only with federal training, certification, and supervision); *Arizona*, 567 U.S. at 410 (excluding compliance with detainer requests from a list of examples of cooperation). In fulfilling a detainer request, by contrast, state and local officials keep an individual in custody under their own power, independent of direct supervision by federal officials—and despite a total lack of authority to engage in civil immigration seizures on their own.

Thus, regardless of what interpretation of section 4 this Court adopts, section 26-55(a)–(c) of the City's Ordinance is necessary to comply with the Fourth Amendment and therefore does not violate section 4 of Chapter 18.2.

C. Section 7 of Chapter 18.2 does not impose a cooperation mandate on law enforcement and is not properly asserted as a basis for injunctive relief.

Finally, Plaintiffs claim that Gary's Ordinance violates section 7 of Chapter 18.2 on the ground that section 7 of Chapter 18.2 supposedly imposes a "broad duty" on law enforcement officers to cooperate in any and all immigration enforcement. Pls. Br. 16–17; *see also* State Br. 20 (suggesting such a duty in the context of interpreting section 3). But that is a gross overreading of section 7's actual text. Moreover, Plaintiffs did

not seek any relief for violations of section 7 in their complaint, and the State now does not contend that the Ordinance violates section 7. State Br. 14. The trial court therefore correctly rejected the claim that Gary's Ordinance violates section 7. *See* App. Appx. 3 (Summary Judgment Order) (citing sections 3 and 4 but declining to mention or cite section 7).

Plaintiffs argue that section 7 "imposes a broad [law enforcement officer] duty to cooperate in immigration-law enforcement," with which localities may not interfere. Pls. Br. 16. But section 7 does nothing of the sort. It is a notice requirement: it merely requires that every "law enforcement agency . . . 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 (emphasis added). The statute does not purport to create its own "duty to cooperate," nor does it explain what "matters" are covered by its terms, and Plaintiffs fail to explain the content or scope of the "broad duty" they perceive in section 7.

Instead, section 7 obligates law enforcement agencies to provide notice of a duty located elsewhere—namely, in section 3 of Chapter 18.2. Although section 3 is phrased as a restriction on certain policies, its logic

requires that "a law enforcement officer" must be permitted to "communicat[e] or cooperat[e] with federal officials" with respect to "information of the citizenship or immigration status, lawful or unlawful, of an individual." Ind. Code § 5-2-18.2-3. Evidencing this relationship between the two provisions, section 7 fell within a chapter called "Citizenship and Immigration Status Information" in the original draft bill of Senate Bill 590, where it appeared alongside section 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.[14] Thus, section 7 requires that law enforcement agencies provide notice of the duty underlying section 3 and does not create any additional freestanding duty.

Furthermore, although Plaintiffs repeatedly assert on appeal that the challenged provisions of Gary's Ordinance violate section 7 of Chapter 18.2, Plaintiffs' complaint sought no relief based on section 7, and no law enforcement agency—the only actors bound by section 7—has been named as a defendant in this suit. App. Appx. 36–37 (Complaint) (prayer for relief seeking declarations only of violations of sections 3 and 4). In any

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

case, the only claim available under section 7 is for failure to provide the required notice, which Plaintiffs do not assert.

In *Serbon v. City of East Chicago*, plaintiffs (including one of the plaintiffs in this case) challenged East Chicago's materially identical "welcoming city" ordinance under Chapter 18.2. Unlike in this case, plaintiffs stated claims under section 7, asserting a similarly expansive view of section 7. The trial court denied summary judgment as to those claims because "[a]fter Plaintiffs commenced this action, the East Chicago Police Department issued its notice in compliance with Ind. Code § 5-2-18.2-7." Order, *Serbon v. City of East Chicago*, No. 45D03-1805-PL-000045 (Lake Cnty. Sup. Ct. Apr. 29, 2021). The court therefore correctly rejected Plaintiffs' arguments that section 7 imposed any duty beyond its notice requirement.

II. The trial court's injunction is unenforceable.

The City demonstrated in its opening brief that the trial court's injunction is too vague to be enforceable. City Br. 19–24. Although the order lists the specific Ordinance sections at issue, that is as far as the order goes in providing clear notice to the City as to what actions would violate the injunction. That is not enough.

In arguing to the contrary, Plaintiffs seek to replace the actual text of the injunction with one they wish the trial court had written.[15] Supported by nothing but their say-so, Plaintiffs put their own spin on what the trial court meant: (1) that "those provisions" of Gary's Ordinance "that are violative" of state and federal law means that all the enumerated sections *in their entirety* violate some provision of state or federal law, even though the order does not say that; (2) that "and/or other applicable state or federal law" means that the trial court sub silentio concluded that the listed provisions also violate section 7 of Chapter 18.2 and 8 U.S.C. § 1373, even though the trial court did not list section 7 alongside sections 3 and 4,[16] and Plaintiffs never sought any relief for violations of federal law (a discrepancy which Plaintiffs write off as simply being "not operative" language); and (3) by granting Plaintiffs' motion for summary judgment and denying the City's, the trial court implicitly adopted the "reasons stated in the Verified Complaint," which the trial court never actually endorsed—and with which the State does not even agree. Pls. Br. 53–54.

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[15] The State does not address the terms of the trial court's injunction. State Br. 13.

[16] Although Plaintiffs did not seek any relief in their complaint for violations of section 7, they argued on summary judgment, as they do on appeal, that the Ordinance violates section 7.

The problem is that Plaintiffs' preferred approach is not the only way to read the court's injunction, in violation of the principle that there should be "no question as to what the" subject of an injunction "is restrained from doing." *Martinal v. Lake O' the Woods Club, Inc.*, 248 Ind. 252, 254, 225 N.E.2d 183, 185 (1967). Assuming that the injunction invalidates at least *some* portion of each of the listed sections of the Ordinance, even the State and Plaintiffs disagree on whether certain Ordinance sub-provisions in fact violate sections 3 and 4, and why. For example, as noted above, the State argues that section 26-55(e) of the Ordinance does not violate Chapter 18.2 because "[m]erely declining to request agreed 287(g) authority from the federal government"—the subject of section 26-55(e)—"does not thwart immigration enforcement efforts." State Br. 23. Plaintiffs claim that it does. Pls. Br. 40–41. The trial court's order says only that that the City is "prohibited from . . . enforcing those provisions of . . . Section 26-55 . . . that are violative of" state or federal law. App. Appx. 3. The court's order can be read to be consistent with both the Plaintiffs' view and the State's view, offering no guidance for the City, which faces dire consequences—the threat of contempt and the expense of possible follow-on lawsuits—if it is found to violate the injunction.

Plaintiffs also dismiss the cases the City cited in its opening brief based on irrelevant distinctions. Pls. Br. 55–57. First, Plaintiffs fault the City for not filing a motion in the trial court to modify the injunction. But a motion to correct error is not a prerequisite for appealing an injunction on these grounds, *see* Ind. R. Trial Proc. 59(A), so there is no reason the legal principles stated in *Martinal* and *Uservo, Inc. v. Selking*, 217 Ind. 567, 28 N.E. 2d 61, 63 (1940), should not apply here. Second, Plaintiffs suggest that, because they sought a statutory injunction under section 6 of Chapter 18.2, cases relying on equitable principles are irrelevant. But whether the trial court granted this injunction pursuant to statutory authority, rather than as a matter of equity, does not make it any less important to identify exactly what the City is prohibited from doing. Clarity is a matter of due process as well as equity. *See H.K. Porter Co. v. Nat'l Friction Prod. Corp.*, 568 F.2d 24, 27 (7th Cir. 1977).

In sum, if the Court is not inclined to address the scope of Chapter 18.2 at this time, it nonetheless should direct the trial court to correct its injunction to provide clearer guidance as to exactly what the City is forbidden from doing and why.

CONCLUSION

For the foregoing reasons and those stated in the City's opening brief, the judgment of the district court should be reversed. The matter should be remanded with instructions to enter summary judgment in the City's favor.

Respectfully submitted,

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DATED: July 16, 2021

CERTIFICATE OF COMPLIANCE

I, Rodney Pol, Jr., verify that this brief complies with Rule of Appellate Procedure 44 and contains no more than 7,000 words. I verify that this brief contains 6,840 words.

/s/ Rodney Pol, Jr.
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CERTIFICATE OF SERVICE

I, Rodney Pol, Jr., certify that on July 16, 2021, service of a true and complete copy of the above and foregoing pleading or paper was served electronically through the Indiana E-Filing System upon the following persons:

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