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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

APPELLANTS' BRIEF IN OPPOSITION TO STATE'S PETITION TO TRANSFER

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Appellant City of Gary respectfully opposes Appellee-Intervenor State of Indiana's petition to transfer jurisdiction to this Court. The State disagrees with a single aspect of the Court of Appeals' decision but seeks transfer of a dispute challenging multiple provisions of a City ordinance under multiple state statutes based. That disagreement affects only a few subparagraphs of a single section of the ordinance—and, what is more, the City has never had to apply those subparagraphs in practice. Contrary to the State's claims, the Court of Appeals did not declare *any* aspect of Indiana law to be unconstitutional but simply determined how state law applies to Gary's law.

The Court of Appeals correctly analyzed the legal questions presented in the State's petition, and this case does not warrant transfer.

BACKGROUND AND PRIOR TREATMENT OF ISSUES ON TRANSFER

In 2017, the City of Gary enacted a "Welcoming City" ordinance that sought to safeguard its own policing priorities while supporting the federal government's immigration-enforcement efforts. App. Appx. 63–64; *see* Op. 4 (recognizing that "Gary did not intend to hinder federal immigration enforcement" through the Ordinance (internal quotation marks omitted)). The Ordinance allows City agencies to exchange information with federal authorities regarding individuals' "citizenship or immigration status," App. Appx. 57 (§ 26.59), but directs those agencies not to expend resources seeking

such information, App. Appx. 56 (§ 26-57). Similarly, the Ordinance permits City agencies to transfer individuals into the custody of Immigration and Customs Enforcement (ICE) pursuant to a criminal warrant, App. Appx. 55 (§ 26-55(f)), but not an administrative warrant, App. Appx. 55 (§ 26-55(b)). In short, the Ordinance reflects the City's efforts to carefully delineate its role within the Nation's broader immigration-enforcement regime.

Plaintiffs filed this lawsuit challenging the Ordinance's validity under Indiana Code §§ 5-2-18.2-3 and -4. App. Appx. 4–50. Plaintiffs did not claim that they were injured by the Ordinance in any way: half of them do not even live in Gary, and all of them concede that they have not been harmed by the Ordinance's enforcement. Indeed, Plaintiffs have never identified a single occasion when the challenged provisions of the Ordinance have been enforced. As the City's then-police chief attested, in his two decades on the force, ICE "has never contacted the Gary Police Department for assistance." App. Appx. 62.[1]

The parties filed cross-motions for summary judgment, and the trial court granted summary judgment to Plaintiffs.[2] App. Appx. 2–3. The City appealed. Appellee-Intervenor the State of Indiana participated in summary

[1] Gary's lone jail has very limited capacity and does not have facilities to hold individuals for more than a few hours. App. Appx. 61.

[2] The order also dismissed all of the Plaintiffs' claims against the Gary Common Council and the Mayor.

judgment proceedings in the trial court and Court of Appeals to weigh in on the interpretation of Chapter 18.2, but it did not join the case as a party.

The Court of Appeals reversed in significant part and affirmed in part. The court first construed section 18.2-3, which prohibits governmental bodies from "prohibit[ing] or in any way restrict[ing] another governmental body," including city employees, from taking a set of enumerated actions "with regard to information of the citizenship or immigration status, lawful or unlawful, of an individual." Ind. Code § 5-2-18.2-3. The court found the statute "unambiguous," concluding that it barred the City only from restricting its officials from taking the listed actions "with regard to information of the citizenship or immigration status of an individual, *and nothing more."* Op. 17–18 (emphasis added). The court therefore held that only a portion of Ordinance § 26-52 violates section 18.2-3, namely, the portion which provides that "[n]o agent or agency shall . . . assist in the investigation of the citizenship or immigration status of any person . . . ." The court concluded that the remainder of section 26-52 and the rest of the Ordinance—which expressly allows the sharing of citizenship and immigration-status information, *see* Ordinance § 26.59—are consistent with section 18.2-3 and severable from the offending portion. Op. 18–19.

The Court of Appeals then considered section 18.2-4, which provides that "[a] governmental body . . . may not limit or restrict the enforcement of

federal immigration laws to less than the full extent permitted by federal law." Ind. Code § 5-2-18.2-4. The court rejected the City's construction of that language, holding that section 18.2-4 prohibits cities from restricting their "agents or agencies, including law enforcement officers, *from cooperating with the federal government*, to less than the full extent permitted by federal law." Op. 22 (emphasis added). The Court clarified that state law does not *require* cities to agree to any given request by federal immigration officials; rather, city employees must only "be given the opportunity to decide whether to cooperate when a request is made." *Id.* The court therefore upheld Ordinance §§ 26-52 (as amended above), 26.58(c), and 26.59, and struck down subsections 26-55(d)–(f). Op. 44–45. In considering what is "permitted by federal law" and therefore covered by section 18.2-4, the Court of Appeals further concluded that "federal law does not permit detentions by state and local officers based solely on civil immigration detainers or administrative warrants," and that engaging in such detentions would violate the Fourth Amendment.[3] Op. 30, 31. Accordingly, the court upheld Ordinance subsections 26-55(a)–(c), which direct Gary agencies not to detain individuals solely on the basis of suspicion of civil immigration violations.[4]

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[3] One judge dissented from this portion of the court's analysis. Op. 46–49.

[4] The Court of Appeals also rejected Plaintiffs' argument that the Ordinance violates Indiana Code § 5-2-18.2-7, a provision that imposes a

Continued on next page.

Plaintiffs and the State separately petitioned to transfer jurisdiction to this Court. Plaintiffs raise a smattering of issues in their transfer petition, while the State's petition concerns only the Court of Appeals' detention-authority and Fourth Amendment analysis.

ARGUMENT

This case does not warrant transfer under Rule 57 of the Rules of Appellate Procedure. The State seeks transfer solely based on a single aspect of the Court's opinion: its holding that there is no conflict between section 18.2-4 and a few sub-paragraphs of one section of Gary's ordinance, 26-55(a)–(c). These subsections have never come up in practice, as the federal government has never requested that Gary detain someone based on their immigration status. Indeed, Gary does not even have the facilities to hold anyone for extended periods of time. And contrary to the State's claims that the Court of Appeals "effectively" declared an "application" of section 18.2-4 unconstitutional, it did not: the appellate court simply interpreted the scope of section 18.2-4, which by its plain terms does not require anything beyond what is "permitted by federal law." I.C. § 5-2-18.2-4. And there are still many

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notice-giving requirement on law enforcement agencies, holding that section 18.2-7 "does not add any duties or prohibitions relevant to this appeal that are not already required by" section 18.2-4. Op. 20 n.9. Finally, the court concluded that the trial court's injunction was "not sufficiently definite," but that question is not at issue in light of the court's other holdings. Op. 13, 45.

ways in which state and local governments in Indiana may support immigration enforcement outside of honoring detainer requests. At its core, this case is a dispute over statutory interpretation that concerns two state laws that have been cited in only one case outside of the challenges to Gary's ordinance and a companion challenge to an identical ordinance enacted by its neighbor, East Chicago.[5]

In any event, the Court of Appeals correctly analyzed the detention-authority and Fourth Amendment issues that the State raises, and its analysis of the legal questions is consistent with those of multiple federal and state courts.

However, as explained in the City's opposition to Plaintiffs' transfer petition, if this Court were to grant transfer, it should address whether Plaintiffs, who have suffered no injury, have standing to bring this largely abstract dispute, and it should adopt the City's construction of section 18.2-4, under which that section applies only to state and local efforts to limit federal enforcement of federal immigration law. Either of these courses of action would obviate any need to address the Fourth Amendment questions that concern the State.

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[5] *See Lopez-Aguilar v. Marion Cnty. Sheriff's Dep't*, 296. F. Supp. 3d 959 (S.D. Ind. 2017), *vacated for lack of jurisdiction*, 924 F.3d 375 (7th Cir. 2019). That case ultimately settled.

I. The Court of Appeals' analysis of section 18.2-4 does not warrant transfer.

The Court of Appeals' interpretation of section 18.2-4 does not warrant transfer to this Court. The court appropriately construed the limits of what is "permitted by federal law," as required by the text of section 18.2-4. The Court of Appeals correctly held that federal law does not "permit detentions by state and local law enforcement officers based solely on civil immigration detainers [and] administrative warrants" and that such detentions would violate "the Fourth Amendment when conducted under color of state law." Op. 30, 38. This decision is consistent with those of multiple federal courts of appeals' decisions, state supreme courts, and the federal district court for the Southern District of Indiana. Neither Plaintiffs' and the State's disagreement with the Court of Appeals' decision nor the Court of Appeals' decision not to follow *City of El Cenizo v. Texas*, 890 F.3d 164 (5th Cir. 2018)—which was based on a materially different state law—warrants transfer.

A. The Court of Appeals did not "invalidate" section 18.2-4 in any way.

The State's petition ominously suggests that the Court of Appeals' decision "effectively invalidates a state statute in application." State Pet. 6. That is incorrect. Section 18.2-4, by its plain terms, applies only so far as "permitted by federal law," and federal law includes federal statutory and constitutional *limitations* as well as federal authorities. *See* Op. 40

(recognizing that "federal immigration laws are subject to the Fourth Amendment"). The Court of Appeals engaged in the ordinary business of statutory interpretation—defining the contours of what a statute covers, and what it does not, in the context of the dispute at hand. It did not declare any part of section 18.2-4 constitutionally invalid; it did not suggest that the statute would be invalid in any context; and it did not excise any statutory language (as there is no mention of detainer requests to excise). The State's suggestions to the contrary are hyperbolic.

Likewise, the State's characterization of what occurred in *Lopez-Aguilar v. Marion County Sheriff's Department* is overwrought. *See* State Pet. 17. The Seventh Circuit did not address the proper interpretation of section 18.2-4 or its constitutionality in the context of cooperation with ICE detainer requests. Its ruling was far more limited: it granted the State intervention, and it vacated the district court's stipulated judgment that permanently enjoined the sheriff's department from engaging in civil immigration detentions because the plaintiff's single instance of detention did not establish standing to obtain injunctive relief. 924 F.3d 375, 382, 393, 396 (7th Cir. 2019). The Seventh Circuit's comment highlighted by the State (State Pet. 17)—that the injunction "restrict[ed] significantly the vitality of the statute and the capacity of the State to cooperate with the federal government"—was a description of the State's asserted interest in

intervening, and not a ruling on the interpretation of section 18.2-4 or its constitutionality. *Id.* at 385.

B. The Court of Appeals' Fourth Amendment analysis is correct.

Plaintiffs and the State are also incorrect on the merits. The Court of Appeals' detainer-authority and Fourth Amendment analysis is straightforward and well supported. "[A]n immigration detainer constitutes a new arrest," *Ramon v. Short*, 460 P.3d 867, 875 (Mont. 2020), for which a law enforcement officer must have authority to detain, probable cause, and a warrant. *See Morales v. Chadbourne*, 793 F.3d 208, 217 (1st Cir. 2015). The State does not contest that *Morales* supports this well-established principle. State Pet. 12–13.

Although federal law authorizes *federal* immigration officers to engage in civil immigration detentions, it does *not* authorize state and local officers to do so. *Melendres v. Arpaio*, 695 F.3d 990, 1001 (9th Cir. 2012). Specifically, 8 U.S.C. § 1357(g)(10)(B) does not "affirmatively grant[] authority to all State and local officers to make arrests that are not otherwise authorized by State law." *Lunn v. Commonwealth*, 78 N.E.3d 1143, 1159 (Mass. 2017). And "Indiana law likewise does not authorize state or local officers to arrest or detain an individual based solely on a civil immigration detainer." Op. 30 (citing *Buquer v. City of Indianapolis*, No.

1:11-CV-00708-SEB, 2013 WL 1332158, at *11 (S.D. Ind. Mar. 28, 2013)). Because state and local officials may only make arrests for criminal immigration violations, the Fourth Amendment demands probable cause of a crime and a warrant issued by a detached and neutral magistrate. ICE detainers and administrative warrants do not satisfy those requirements, so "the arrest and detention of a person conducted solely on the basis of known or suspected civil immigration violations violate the Fourth Amendment when conducted under color of state law." Op. 38; *see also, e.g.*, *Lopez-Flores v. Douglas County*, No. 6:19-CV-00904-AA, 2020 WL 2820143 (D. Or. May 30, 2020) (reaching this conclusion).

The State challenges the Court of Appeals' conclusion that neither federal nor state law authorizes state and local law enforcement to detain individuals for civil immigration violations. As to state law, the State suggests that section 18.2-4 itself authorizes state and local law enforcement to engage in civil immigration detentions. *See* State Pet. 15 (claiming that "[t]he current Indiana statute, enacted in the wake of *Arizona* and *Buquer*, requires only cooperative enforcement, which means honoring federal detainers and administrative warrants"). But this is inaccurate. Section 18.2-4 does not "require" anything or authorize anything at all. It is a *prohibition* on policies that restrict voluntary cooperation to the extent permitted under

federal law. It nowhere mentions compliance with detainer requests and does not provide any new authority to engage in immigration enforcement.[6]

As to federal law, the State argues that 8 U.S.C. § 1357(g)(10) authorizes state and local officers to engage in civil immigration detentions. According to the State, the Court of Appeals failed to recognize a distinction between unilateral state and local civil immigration enforcement—which the State agrees is constitutionally forbidden—and cooperation in federal immigration enforcement. Pet. 11–12, 15–16. According to the State's dichotomy, unilateral state or local enforcement requires a "287(g) agreement" under which state and local officers are trained, certified, and supervised to operate as federal immigration officers. *see* 8 U.S.C. § 1357(g)(1)–(3). But, the State's argument goes, cooperation is authorized by § 1357(g)(10) and therefore permissible so long as it is in response to a federal request. *See id.* § 1357(g)(10). This simplistic distinction is illusory for at least three reasons.

First, § 1357(g)(10) is a savings clause, not an affirmative authorization. It merely clarifies that a 287(g) agreement is not required to communicate or "otherwise . . . cooperate" with federal immigration officials.

[6] The State also mistakes the timeline of section 18.2-4's enactment. The statute was enacted in 2011, before both *Arizona* and *Buquer* were decided (in 2012 and 2013, respectively), so it cannot be assumed to bear any gloss from either of those decisions.

Cf. New England Power Co. v. New Hampshire, 455 U.S. 331, 341 (1982) (savings clause in the Federal Power Act was "in no sense an affirmative grant of power to the states" to exercise authority they did not already possess). It does not confer any authority on state and local officials to engage in civil immigration enforcement, as the Court of Appeals recognized. Op. 29; *see also, e.g.*, *Ramon*, 460 P.3d at 879 (reaching this conclusion); *Lunn*, 78 N.E.3d at 1158 (noting that "the United States does not contend that § 1357(g)(10) affirmatively confers authority on State and local officers to make arrests pursuant to civil immigration detainers, where none otherwise exists." (emphasis in original)).

Second, the Supreme Court did *not* draw a clear-cut distinction in *Arizona v. United States*, 567 U.S. 387 (2012), between unilateral state and local enforcement and compliance with federal requests. Instead, the Court stated that "unilateral state action to detain" went "*far beyond*" the cooperation authorized by § 1373(g)(10), without specifying where the line of permissible cooperation would fall. *Id.* at 410 (emphasis added). When the Court listed examples of what might "constitute cooperation under federal law"—e.g., "participat[ing] in a joint task force with federal officers, provid[ing] operational support in executing a warrant, or allow[ing] federal immigration officials to gain access to detainees held in state facilities"—it

did *not* include complying with detainer requests on that list.[7] *Id.* at 410, 413-14. The line that the State seeks to draw simply does not exist in the law. And it would make little sense: the supervision, training, and certification regime for 287(g) agreements would be pointless if all that were required to transform impermissible local enforcement into permissible cooperation were a request from federal immigration officials to do it. *See Ramon*, 460 P.3d at 879 ("If performing the arrest authority of an immigration officer, which arguably is the highest authority granted to an immigration officer, can be done on an ad hoc basis by state and local officers, regardless of state and local law, there would be no need for states to enter into 287(g) agreements."); *Esparza v. Nobles County*, No. A18-2011, 2019 WL 4594512, at *10 (Minn. Ct. App. Sept. 23, 2019) (reaching this conclusion).

Third, as the Court of Appeals recognized, honoring a detainer request is wholly unlike cooperation in which federal immigration authorities supervise state and local officials who seek to support federal immigration enforcement. Op. 28. In drawing this distinction, the Court of Appeals relied

[7] Arizona's list of possible cooperative measures belies the State's assertion that honoring detainer requests is "the most critical" form of cooperation with federal immigration enforcement. State Pet. 6. Indeed, the Department of Homeland Security does not even mention complying with detainer requests on its extensive list of permissible cooperative activities. *See* Dep't of Homeland Security, Guidance on State and Local Governments' Assistance in Immigration Enforcement and Related Matters 13 (Nov. 12, 2021), https://perma.cc/X9YX-N4FP.

on *Arizona*, which explained that "it would disrupt the federal framework to put state officers in the position of *holding aliens in custody* for possible unlawful presence without federal direction *and* supervision. *Id.* (quoting 567 U.S. at 413 (emphasis in Court of Appeals' opinion)). With a detainer, there is a federal request, but no federal supervision—i.e., local officials choose to detain an individual under their own authority past when the individual otherwise would be free to go. Thus, although the State attempts to distinguish *Melendres* as addressing only "unilateral" state immigration enforcement, State Pet. at 16, this distinction is meaningless in the context of state and local civil immigration detention. The Court of Appeals was correct that detentions do not fall within the purview of permissible cooperation under § 1357(g)(10)(B).

In sum, because federal law and the Fourth Amendment do not generally permit local officers to arrest and detain individuals solely on the basis of a civil immigration violation, the Court of Appeals was correct that section 18.2-4 does not invalidate the City's restrictions on holding individuals pursuant to an ICE detainer or administrative warrant, and transfer is unwarranted.

C. The conflict with *City of El Cenizo v. Texas is illusory.*

Finally, the State highlights that the Court of Appeals declined to follow the Fifth Circuit's decision in *El Cenizo,* but the perceived conflict is illusory.

Unlike Indiana, Texas adopted a law that expressly authorized detentions based on ICE detainer requests. *El Cenizo*, 890 F.3d at 185, 188 (discussing Tex. Code Crim. Proc. Art. 2.251(a)(1)–(2)). Therefore, the Fifth Circuit was faced with a different question than the one here, where Indiana law does *not* authorize Fourth Amendment seizures based on detainer requests. Based on the authorization in Texas law, the Fifth Circuit applied the collective-knowledge doctrine, concluding that honoring detainer requests does not necessarily violate the Fourth Amendment when local officials rely on ICE's probable-cause determination in an administrative warrant. 890 F.3d at 187–88. On Indiana's facts, the collective-knowledge doctrine simply does not apply: 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.[8] *See Lopez-Flores*, 2020 WL 2820143, at *6.

[8] This case therefore is also distinguishable from the primary district court decision relied on by the dissent, where the court assumed state law authorized the continued detention. *Tenorio-Serrano v. Driscoll*, 324 F. Supp. 3d 1053, 1064 (D. Ariz. 2018).

Furthermore, even though the *El Cenizo* court concluded that the Texas laws at issue did not facially violate the Fourth Amendment, it recognized that complying with detainer requests *could* violate the Fourth Amendment in practice. 890 F.3d at 189–90. There are many instances where, even under the State's view, detention on an immigration detainer would be unconstitutional: for example, if ICE issued the detainer without probable cause or a local officer was aware of information that negated probable cause, or the City lacked a facility with constitutionally appropriate conditions in which to detain someone. *See, e.g.*, *Hernandez v. United States*, 939 F.3d 191, 206-09 (2d Cir. 2019) (denying dismissal of a claim under 42 U.S.C. § 1983 where plaintiff alleged a policy of honoring ICE detainers without engaging in any independent inquiry).[9]

II. If the Court grants transfer, additional issues should be addressed before reaching the Fourth Amendment questions.

Should the Court grant transfer, it should address two key issues before reaching the Fourth Amendment questions presented in the State's petition: whether Plaintiffs, who admit they have suffered no cognizable harm, have standing to bring this suit; and whether the Court of Appeals' overall interpretation of section 18.2-4 is overly broad. Either of these courses

[9] Moreover, Article I, section 11 of Indiana's Constitution tracks the Fourth Amendment but provides additional protection. *Litchfield v. State*, 824 N.E.2d 356, 359 (Ind. 2005).

of action would obviate any need to address the Fourth Amendment questions that concern the State.

First, the Court should dismiss this case for lack of standing. Plaintiffs asserted standing under two theories: the public-standing exception to judicial standing limitations, *see State ex rel. Cittadine v. Ind. Dep't of Transp.*, 790 N.E.2d 978 (Ind. 2003), and "statutory standing" under I.C. § 5-2-18.2-5. The City did not previously dispute Plaintiffs' standing based on binding precedent from this Court. For the reasons stated in the City's opposition to Plaintiffs' transfer petition, should this Court grant transfer, it should reconsider the continuing vitality and scope of the public-standing doctrine and reject Plaintiffs' claim to broad statutory standing to avoid troubling consequences for the distribution of powers in Indiana.

Second, although the Court of Appeals correctly held that the Fourth Amendment prohibits Gary police officers from complying with civil immigration detainer requests, it erred in its construction of section 18.2-4 more broadly. Thus, if this Court does not dismiss for lack of standing, it should adopt the City's construction of section 18.2-4—namely, that it applies only to efforts to limit federal enforcement of federal immigration law. The Court of Appeals held that section 18.2-4 incorporates state and local cooperation in immigration enforcement and thus prohibits cities from restricting their agents from cooperating with federal requests for assistance

in immigration enforcement to the extent permitted by federal law. The court's analysis failed to look to the broader statutory and enactment context of section 18.2-4, both of which demonstrate that the statute should be understood to prohibit cities only from affirmatively interfering with *federal* immigration enforcement. *See, e.g.*, *ESPN, Inc. v. Univ. of Notre Dame Police Dep't*, 62 N.E.3d 1192, 1195 (Ind. 2016) (directing courts to read statutes as a whole); *Siwinski v. Town of Ogden Dunes*, 949 N.E.2d 825, 828 (Ind. 2011) (directing courts not to render any statutory provisions superfluous).

For the reasons stated in the City's opposition to Plaintiffs' transfer petition, if the Court grants transfer and reaches the merits, it should correct the Court of Appeals' interpretation of section 18.2-4. Under a proper reading, no part of the Ordinance violates section 18.2-4 because the Ordinance does not restrict federal efforts to enforce federal immigration laws. If the Court were to adopt this interpretation, it need not reach the question of whether the Fourth Amendment restricts civil immigration detention by local law enforcement.

CONCLUSION

For the foregoing reasons, the City respectfully requests that the State's transfer petition be denied.

Respectfully submitted,

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DATED: February 14, 2022

CERTIFICATE OF COMPLIANCE

I, Angela Lockett, verify that this brief complies with Rule of Appellate Procedure 44 and contains no more than 4,200 words. I verify that this brief contains 4,082 words.

/s/ Angela Lockett
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CERTIFICATE OF SERVICE

I, Angela Lockett, certify that on February 14, 2022, 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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