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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

APPELLANT'S BRIEF IN OPPOSITION TO PLAINTIFFS-APPELLEES' PETITION TO TRANSFER

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Appellant City of Gary's Opposition to Plaintiffs' Petition to Transfer

Appellant City of Gary respectfully opposes Plaintiffs-Appellees' petition to transfer jurisdiction to this Court. In a thorough opinion, the Court of Appeals applied settled rules of statutory construction and issued a fair analysis of how multiple provisions of a Gary ordinance interact with multiple state statutes. The Court's interpretation is aligned with the decisions of federal courts addressing similar issues of federal law. And far from addressing an issue of national import, this case involves an abstract dispute over state statutes rarely invoked. Transfer should be denied.

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. 54 (§ 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 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.

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[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 Plaintiffs' claims against the Gary Common Council and the Mayor.

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]

Finally, the Court of Appeals rejected Plaintiffs' argument that the Ordinance violates Indiana Code § 5-2-18.2-7, which requires that law

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

[4] The Court of Appeals also 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.

enforcement officers be "provided . . . a written notice" of their "duty to cooperate with state and federal agencies and officials on matters pertaining to enforcement of state and federal laws governing immigration." The court held 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.

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 analyses.

Shortly after filing this suit, one of the plaintiffs here, represented by the same counsel, filed a companion case challenging the City of East Chicago's materially identical "welcoming city" ordinance under Chapter 18.2. The trial court upheld East Chicago's ordinance in significant part. *See* Order, *Serbon v. City of East Chicago*, No. 45D03-1805-PL-000045 (Lake Cnty. Sup. Ct. Apr. 29, 2021). The *Serbon* plaintiffs' appeal is currently before the Court of Appeals, with the State participating.

ARGUMENT

This case does not warrant transfer under Rule 57. The Court of Appeals correctly analyzed the two primary questions Plaintiffs raise, and its analyses are consistent with those of multiple federal courts and with this Court's precedents. Moreover, the issues here are not of nationwide concern,

as Plaintiffs claim. 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 Plaintiffs' challenges to Gary's and East Chicago's ordinances.[5]

However, 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 correct the Court of Appeals' erroneous interpretation of section 18.2-4.

I. The Court of Appeals' interpretation of section 18.2-3 does not warrant transfer.

The Court of Appeals correctly held that section 18.2-3 is "unambiguous" and interpreted it according to its plain meaning. In their petition, Plaintiffs argue that the Court of Appeals erred and that it failed to apply a statutory-construction principle stated in *Brownsburg Area Patrons Affecting Change v. Baldwin* (*BAPAC*), 714 N.E.2d 135 (Ind. 1999).[6] Pet. 16–18. Plaintiffs are wrong on both counts.

First, the Court of Appeals correctly held that section 18.2-3's prohibition on restricting information-sharing is limited to "information of

[5] *See Lopez-Aguilar v. Marion County 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.

[6] As noted above, the State has not contested the Court of Appeals' analysis of section 18.2-3 in its petition.

the citizenship or immigration status of an individual, and nothing more." Op. 17–18. As the court recognized, federal courts have resoundingly rejected Plaintiffs' overbroad and atextual reading of the analogous language in 8 U.S.C. § 1373.[7] Like the Court of Appeals did here, those courts have concluded that § 1373's information-sharing directive is unambiguously limited to the categories of information explicitly named there and does not reach information like release dates from custody, vehicle information, home addresses, and the like. *See, e.g.*, *United States v. California*, 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); *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).

In drawing this conclusion, the Court of Appeals applied settled law: "When a statute is clear and unambiguous, we must apply the plain and ordinary meaning of the language." *Adams v. State*, 960 N.E.2d 793, 798 (Ind. 2012) (cited at Op. 18 n.8); *see also Day v. State*, 57 N.E.3d 809, 812 (Ind. 2016); *BAPAC*, 714 N.E.2d at 139 (stating same rule). It therefore correctly

[7] 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."

rejected Plaintiffs' attempt to expand section 18.2-3's clear and plain scope by resort to federal legislative history and inferences of legislative intent. *See* Op. 18 n.8.

Second, Plaintiffs claim that the Court of Appeals failed to follow this Court's guidance in *BAPAC*, 714 N.E.2d 135, but *BAPAC*'s analysis is inapposite. *BAPAC* involved an Indiana election law that mirrored the Federal Election Campaign Act of 1971, which was the subject of the U.S. Supreme Court's touchstone decision in *Buckley v. Valeo*, 424 U.S. 1 (1976). The relevant state law was passed shortly after *Buckley*, *see BAPAC*, 714 N.E.2d at 140, so this Court concluded that the General Assembly intended to incorporate *Buckley*'s limiting interpretation as a matter of state law, requiring a narrow reading of the generally broad word, "influence." *Id.* at 141–42.

The situation here is nowhere near analogous. Plaintiffs have argued that the General Assembly intended to expand the unambiguous language of section 18.2-3 based on imprecise dicta from a single out-of-circuit appellate decision and a few trial court decisions from California that commented on the scope of § 1373 and its legislative history. These lower court opinions did not even purport to determine § 1373's scope. This is quite far from the on-point Supreme Court opinion issued just before the state law at issue in *BAPAC* was passed. Moreover, since the passage of section 18.2-3, multiple

federal courts have concluded that the relevant language in § 1373 *unambiguously precludes* the very construction Plaintiffs advance here.

In sum, the Court of Appeals' interpretation of section 18.2-3 is correct, it does not conflict with any decision of this Court, and it is consistent with every federal court to have directly addressed the question. The issue does not warrant transfer to this Court.

II. The Court of Appeals' Fourth Amendment analysis does not warrant transfer.

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 violate "the Fourth Amendment when conducted under color of state law." Op. 30, 38. This decision aligns with those of numerous federal courts of appeals, state supreme courts, and the federal district court for the Southern District of Indiana, among others. Neither Plaintiffs' and the State's disagreement with the Court of Appeals' decision nor that court's decision not to follow the analysis in *City of El Cenizo v. Texas*, 890 F.3d 164 (5th Cir. 2018)—which was based on a materially different state law—warrants transfer. The City addresses this issue at length in its opposition to the State's transfer petition. It incorporates that analysis here and addresses only Plaintiffs' additional arguments.

The Court of Appeals' analysis is correct, straightforward, and well supported, and Plaintiffs' objections lack merit. First, Plaintiffs suggest that extending custody after a person otherwise would be released is not a new Fourth Amendment seizure, Pls. Pet. 12, but that is widely discredited. *See Ramon v. Short*, 460 P.3d 867, 875 (Mont. 2020) (noting consensus that "[a]n immigration detainer constitutes a new arrest").

Second, as the Court of Appeals concluded, in order to lawfully enact a seizure, an officer must have authority to detain, probable cause, and a warrant. *Morales v. Chadbourne*, 793 F.3d 208 (1st Cir. 2015). Although federal law authorizes *federal* immigration officers to engage in civil immigration detentions, it does not authorize state and local officers to do the same. *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).

Plaintiffs argue that § 1357(g)(10) authorizes local officers to honor detainer requests—and contend the Supreme Court recognized as much in *Arizona v. United States*, 567 U.S. 387 (2012). Pls. Pet. 8–9 (suggesting that *Arizona*'s list of permissible "cooperation" implicitly covers detainer requests). But, as the Court of Appeals noted, *Arizona* "does not mention either detainers or administrative warrants," Op. 42 n.14, and *Arizona*

suggests that "put[ting] state officers in the position of holding aliens in custody . . . without federal direction *and* supervision" would be problematic. 567 U.S. 413 (emphasis added) (quoted at Op. 28). The Department of Homeland Security's guidance clarifies *Arizona*'s language on which Plaintiffs rely: "operational support in executing a warrant," 567 U.S. at 410, means things like "providing perimeter security for [an] operation (*e.g.*, blocking off public streets)" and that allowing "federal immigration officials to gain access to detainees" is for the purpose of "identifying detained aliens" who are held under state authority, not holding them for ICE. 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.

Third, Plaintiffs disagree that "Indiana law . . . 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)). Plaintiffs suggest that section 18.2-7 authorizes detentions pursuant to ICE detainers. Pet. 12, 14. But the Court of Appeals was correct that section 18.2-7 "does not add any" independent "duties or prohibitions" Op. 20 n.9. Section 18.2-7 merely requires that law enforcement officers receive a written notice.

Absent any such authority, 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 suffice, 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. Plaintiffs attempt to distinguish the many cases on which the Court of Appeals relied based on the factual circumstances in each case. Pls. Pet. 10-13. But those distinctions are irrelevant: their legal analyses support the Court of Appeals' conclusions.

Finally, Plaintiffs argue that the Court of Appeals' decision not to follow the Fifth Circuit's analysis in *El Cenizo* warrants transfer. As explained in response to the State's petition, this conflict is illusory. *El Cenizo*'s analysis was based on a Texas law that expressly authorized detentions based on ICE detainer requests. 890 F.3d at 185, 188 (discussing Tex. Code Crim. Proc. art. 2.251(a)(1)–(2)). Indiana does not have a similar law, making the analysis inapposite.

III. If the Court grants transfer, it should consider additional issues.

A. Plaintiffs lack standing

Should the Court grant transfer, it 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 Indiana Code § 5-2-18.2-5. The City did not previously dispute Plaintiffs' standing based on binding precedent from this Court. Should this Court grant transfer, however, 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.[8]

1. This Court should reconsider its public-standing exception.

"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). 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.* However, this

[8] The State's participation in this case does not resolve Plaintiffs' standing problems, as the State has disavowed that it is acting as a plaintiff. *See, e.g.*, Br. of Appellee-Intervenor State of Indiana 13 (filed July 1, 2021) (noting intervention solely to "offer [the State's] view of the meaning of the relevant statutory provisions").

Court recognizes a public-standing exception to that rule, which allows a plaintiff to enforce a public right even though she does not "have an interest in the outcome of the litigation different from that of the general public." *Id.* at 980 (citation omitted).

A majority of the Justices of this Court have questioned whether continuing recognition of the public-standing exception, at least in its current articulation, is consistent with the Indiana Constitution. *See Horner v. Curry*, 125 N.E.3d 584, 595 & n.14 (Ind. 2019) (Massa, J., joined by Goff, J.) (questioning public standing because it risks expanding the judiciary at the expense of the political branches); *id.* at 616 (Slaughter, J., concurring in part) (finding public standing irreconcilable with Indiana's "system of divided governmental powers").

This case exemplifies the problem the public-standing doctrine creates: Plaintiffs, only two of whom are even residents of Gary, acknowledge that they have suffered *no harm at all* except for their abstract claim that the Ordinance violates state law. They can point to no time that the City has refused a request from ICE, and their transfer petition lays bare that this case seeks to shift complex public policy questions to the courts. Pls. Pet. 15 (claiming the case's importance because of "the national illegal-immigration issue"); *see also* State Pet. 17 (recognizing that the case raises a matter of "highly debated policy, where the need for electoral accountability is

critical"). In other words, this case is largely an abstract debate over the boundaries of local policy—exactly what standing doctrine is meant to avoid.

2. Section 18.2-5 does not confer statutory standing.

In addition to the public-standing exception, Plaintiffs have claimed that Indiana Code § 5-2-18.2-5 confers "statutory standing" on any "person lawfully domiciled in Indiana" to sue to enforce Chapter 18.2, regardless of whether they have suffered any injury. But section 18.2-5 merely creates a private right of action, setting forth the *form* of permissible action—an "action to compel" compliance with sections 18.2-3 and -4—and *who* may assert that action—"a person lawfully domiciled in Indiana." Neither of those elements conveys standing.

Under well-established federal justiciability rules, a plaintiff does not "automatically satisf[y] the injury-in-fact requirement [of Article III] whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right." *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2205 (2021) (citation omitted).[9] The same rule should apply here: Just because "a person lawfully domiciled in Indiana" has a statutory right to sue does not mean that person *also* has satisfied the

[9] Although Indiana's Constitution does not have a "case or controversy" requirement like Article III, "the distribution of powers provision in Article 3, Section 1, of the Indiana Constitution" fulfills "an analogous function." *Cittadine*, 790 N.E.2d at 979.

requirement of a sufficient injury to justify judicial intervention. And Plaintiffs have pointed to no other Indiana statute that similarly conveys broad, injury-free standing.

Just as with the public-standing exception, this evisceration of standing principles would upset the constitutionally imposed distribution of powers in Indiana, creating a roving mandate to weigh in on abstract questions and interfere with political processes throughout the state. *Cf. Horner*, 125 N.E.3d at 595 (Massa, J.) ("By permitting **any** person, **without** a showing of harm, to enforce a public right or duty, what limits are there?"). If the Court grants transfer, it should reject Plaintiffs' reading of section 18.2-5 and their invocation of public standing, and it should dismiss the case for lack of standing.

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

If this Court does not dismiss for lack of standing, it should reconsider the Court of Appeals' analysis of section 18.2-4. The court concluded that section 18.2-4 prohibits cities from restricting their agents from cooperating with federal requests for assistance in immigration enforcement "to less than the full extent permitted by federal law," Op. 22. In doing so, it rejected the City's reading of the statute, which would have prohibited cities only from affirmatively interfering with *federal* immigration enforcement. The crux of

the dispute is whether section 18.2-4 incorporates the concept of "cooperation" with federal immigration enforcement within its terms. In reading that word into section 18.2-4, the Court of Appeals failed to properly apply two key canons of statutory construction endorsed by this Court.

First, the Court of Appeals ignored that "cooperate" does *not* appear in the text of section 18.2-4, even though it does in section 18.2-3. This reading also makes section 18.2-3's command—not to limit "cooperat[ion] with federal officials" with respect to citizenship or immigration-status information only—entirely superfluous in light of section 18.2-4's broader command. This result runs directly contrary to this Court's admonition to give "every word" of a statute "effect and meaning," whenever possible, and to ensure that "no part" is "held to be meaningless." *Siwinski v. Town of Ogden Dunes*, 949 N.E.2d 825, 828 (Ind. 2011).

Second, the Court of Appeals' analysis failed to appreciate the broader context of other states' laws, enacted close in time to section 18.2-4, which *do* bar restrictions on "cooperation" or "assistance" in immigration enforcement. *See, e.g.*, Ohio Rev. Code § 9.63(A) (enacted Jan. 11, 2006) ("[N]o state or local employee shall unreasonably fail to comply with any lawful request for assistance made by any federal authorities carrying out . . . any federal immigration . . . investigation"). Together, these omissions fail to heed this Court's direction to "consider the structure of the statute as a whole" and to

pay particular mind to "both 'what it does say and what it does not say.'" *ESPN, Inc. v. Univ. of Notre Dame Police Dep't*, 62 N.E.3d 1192, 1195 (Ind. 2016) (quoting *Day*, 57 N.E.3d at 812).

Under the City's reading, no part of the Ordinance violates section 18.2-4 because the Ordinance does not restrict federal efforts to enforce federal immigration laws.[10] This construction would provide clearer guidance to cities in Indiana about how they may direct their law enforcement officers without running afoul of section 18.2-4. For example, the Court of Appeals held that Ordinance § 26-55(e), which bars the City from seeking an agreement under 8 U.S.C. § 1357(g) (which would allow its officers to be trained and supervised to function as immigration officers) violates section 18.2-4, even though section 26-55(e) does not involve responding to a federal request for assistance. Op. 45; *see also id.* at 23-24 (limiting section 18.2-4 to cooperation "at the request of a federal immigration official"). Even the State agrees that section 26-55(e) should not violate section 18.2-4. *See* Br. of Appellee-Intervenor State of Indiana 23 (filed July 1, 2021). If this Court were to grant transfer, it should revisit the Court of Appeals' interpretation of section 18.2-4 and correct this kind of inconsistency.

[10] If the Court were to adopt this construction, it need not reach the question of whether the Fourth Amendment restricts civil immigration detention by local law enforcement.

CONCLUSION

For the foregoing reasons and those stated in opposition to the State's petition, the City respectfully requests that Plaintiffs' transfer petition be denied.

Respectfully submitted,

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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 4,168 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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