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IN THE
INDIANA COURT OF APPEALS

Appellate Case No. 21A-PL-1046

GREG SERBON and JOHN ALLEN,

Appellants/Cross-Appellees,

v.

CITY OF EAST CHICAGO, et al.,

Appellees/Cross-Appellants.

STATE OF INDIANA,

Intervenor.

On Appeal from Lake County Superior Court, Civil Division Room No. 3

Cause No. 45D03-1805-PL-000045

Hon. Thomas P. Hallett, Judge

REPLY BRIEF OF APPELLEES-CROSS-APPELLANTS

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SUMMARY OF ARGUMENT

Despite neither living nor paying taxes in East Chicago—or being harmed in any other way—Plaintiffs-Appellants and Cross-Appellees (Plaintiffs) ask this Court to displace an ordinance duly enacted by the elected representatives of East Chicago's citizens. On the merits, Plaintiffs' claims depend on an untenable construction of Chapter 18.2 of state law, which has now largely been rejected by this Court in *City of Gary v. Nicholson*, No. 20A-MI-2317, --- N.E.3d ----, 2021 WL 5858601 (Ind. Ct. App. Dec. 10, 2021), when it reviewed an identical ordinance enacted by the City of Gary. Plaintiffs' claims against the City of East Chicago likewise should be rejected on either of two theories.

First, Plaintiffs lack standing. The most significant connection that Plaintiffs have with the City of East Chicago is that they sued it. They do not live in or pay taxes to East Chicago, and they concede they have suffered no injury or had no interest impaired whatsoever because of East Chicago's Ordinance. Nor have they pointed to any time when, even under their interpretation of state law, the Ordinance in practice resulted in a violation of that law. Indeed, although East Chicago police engage in cooperation with federal authorities, they have not been asked to assist in federal immigration enforcement. The Court should reject Plaintiffs' efforts either to expand or to

entirely dispense with standing principles to have this Court resolve abstract legal issues that do not affect them in any way.

Second, Plaintiffs' claims fail on the merits, as the *Nicholson* panel largely concluded. Section 18.2-3's language is "unambiguous": It bars cities from restricting specific "actions with regard to information of the citizenship or immigration status of an individual, and nothing more." *Nicholson*, slip op. at 7; *see also* Ind. Code § 5-2-18.2-3 (banning restrictions on listed "actions with regard to information of the citizenship or immigration status, lawful or unlawful, of an individual"). Rejecting the *Nicholson* panel's analysis, Plaintiffs contend that the Court should depart from the statute's plain language because, under their view, the legislature must have intended to incorporate imprecise summaries of federal law in lower court decisions and a Congressional committee report. *Nicholson* rejected this argument in a footnote, slip op. at 18 n. 8, and it has not gained merit since.

Moreover, as the trial court correctly held, East Chicago's ordinance does not conflict with Ind. Code § 5-2-18.2-4. Although the *Nicholson* panel adopted a reading of section 18.2-4 that bans cities from restricting cooperation with federal immigration enforcement (and that we argue is incorrect), the *Nicholson* panel correctly concluded that the vast majority of Gary's (and by extension, East Chicago's) ordinance remains valid. Some Ordinance sections Plaintiffs challenge—like the use of law enforcement

discretion in East Chicago Ordinance § 9(c)—do not conflict with any plausible interpretation of Chapter 18.2. *Nicholson*, Op. at 43.

Finally, as the *Nicholson* panel also recognized, section 18.2-4 applies only to the "extent permitted by federal law." *Id.* East Chicago's Ordinance § 6(1)-(3) prohibits its police officers from detaining someone for a suspected immigration violation. Those provisions must be upheld, as no federal or state statute authorizes such detention. *Nicholson*, Op. at 27-34 (collecting cases). Although Plaintiffs and the State rely heavily on *City of El Cenizo v. Texas*, 890 F.3d 164 (5th Cir. 2018), that case dealt with a Texas law that *did* authorize immigration detentions, making it inapplicable here, where Indiana does not have such a law.

The Court should reject Plaintiffs' attempt to litigate a case in which they have no interest, and, if it reaches the merits, it should largely follow the *Nicholson* panel and reject Plaintiffs' atextual interpretation of state law.

ARGUMENT

I. Plaintiffs lack standing.

Plaintiffs concede that they have suffered no injury from East Chicago's Ordinance, and they do not live, vote, or pay taxes in East Chicago. Yet they maintain that they—and every other person who lives anywhere in Indiana—can ask a court to review and reject a duly enacted city ordinance under two theories: statutory standing under Ind. Code § 5-2-18.2-5 and the judicially

created public-standing exception. As explained in the City's cross-appeal brief, the Court should grant judgment to the City because Plaintiffs lack standing under any existing doctrine. Appellees/Cross-Appellants' ("City") Br. 19-27.

A. The General Assembly did not abrogate judicial standing requirements in section 18.2-5.

Plaintiffs' theory of statutory standing (what they call "domicile standing") posits both (1) that the legislature has unlimited authority to give anyone standing to bring any case, and (2) that the legislature intended to abrogate traditional standing rules by enacting section 18.2-5. Appellants/Cross-Appellees' ("Pls.") Br. 10-14. Plaintiffs fail to carry their burden in establishing either of these steps.

First, Plaintiffs have never pointed to any authority for the proposition that the General Assembly has boundless power to give standing to anyone. The cases on which Plaintiffs rely (Pls.' Br. 12-13) recognize that the legislature may *limit* who can sue, not that the General Assembly may dispense with standing's injury requirement entirely. *See Huffman v. Off. of Env't Adjudication*, 811 N.E.2d 806, 812 (Ind. 2004) (recognizing that, even in the context of administrative review in administrative tribunals, "[t]he statute says 'aggrieved or adversely affected' and this contemplates some sort of personalized harm."); *State ex rel. Cittadine v. Ind. Dep't of Transp.*, 790

N.E.2d 978, 984 (Ind. 2003) (holding that even when the judicially created public-standing exception applies, plaintiffs still must meet statutory requirements of Indiana Declaratory Judgment Act, including that their "rights, status, or other legal relations are affected").

This distinction tracks standing's foundational concern with the distribution of powers. Plaintiffs argue "the legislature has authority to establish standing, so there is no separation-of-powers problem with doing so." Pls. Br. 13. But separation of powers does not mean that "whatever the legislature does is okay." Indeed, federal courts have "rejected the proposition that 'a plaintiff automatically satisfies the injury-in-fact requirement 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); *see also* City Br. 20-22. These "federal limits on justiciability are instructive, because the standing requirement under both federal and state constitutional law fulfills the same purpose." *Alexander v. PSB Lending Corp.*, 800 N.E.2d 984, 989 (Ind. Ct. App. 2003) (quotation omitted). That is why Plaintiffs' attempt to distinguish this case from a claim for personal injury damages fails, *see* Pls. Br. 11: The distribution of powers particularly requires vigilance where, as here, a lawsuit seeks to interfere with the responsibilities of the political branches. *Cf. Horner v. Curry*, 125 N.E.3d 584, 595 (Ind. 2019) (Massa, J.) (arguing that

standing requirements protect the separation of powers and asking, "If all government action is subject to judicial review, what purpose does the political process serve?").

Second, section 18.2-5 does not reveal that the General Assembly intended to abrogate all traditional limits on justiciability without even using the word "standing." This Court correctly requires plaintiffs to show they meet traditional standing requirements even when the statute they are suing under does not expressly require it. *See, e.g.*, *State ex rel. Steinke v. Coriden*, 831 N.E.2d 751, 756 (Ind. Ct. App. 2005) (rejecting plaintiffs' argument that anyone in Indiana has standing, and instead requiring that they show "a stake in the outcome").[1] Plaintiffs emphasize that "§ 18.2-5 says *who* may *bring*, not *assert*, actions to compel," Br. 10 (emphasis in original), concluding that the use of the word "bring" establishes an intent to disregard traditional standing limits. They cite no authority confirming that this word choice makes any difference. In contrast, federal courts regularly reject claims brought by people under similar statutes if those litigants lack any personal stake in the case. *See, e.g.*, *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83,

[1] Plaintiffs misconstrue a footnote in the City's cross-appeal brief to suggest that the City would approve of domicile-only standing based on city residence. Pls. Br. 14. That is incorrect: The point was that *Nicholson* involves plaintiffs who are residents of the City of Gary, thereby presenting a closer issue on the *public-standing* exception (discussed next), not statutory standing.

87 (1998) (distinguishing between standing and cause of action, holding statute providing "any person may commence a civil action on his own behalf" created a cause of action but plaintiff lacked standing); *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 571–72 (1992) (rejecting standing of plaintiffs who brought suit under a statute providing "any person may commence a civil suit on his own behalf"). The same should happen here as well.

B. Plaintiffs do not satisfy public standing's requirements.

Plaintiffs also argue that they have standing under the public-standing exception to judicial standing principles. Even assuming this exception is still good law in Indiana, *but see Horner*, 125 N.E.3d at 595, Plaintiffs do not fall within the relevant "public" to invoke this exception because the public-standing exception applies only to the residents, taxpayers, and voters of the government unit against whom suit is brought. Citizenship in a jurisdiction "has been a critical aspect of the public standing doctrine since its inception in this State, because only a *member* of the public has standing to enforce rights *granted* to the public." *Bd. of Comm'rs of Union Cty. v. McGuinness*, 80 N.E.3d 164, 169 (Ind. 2017) (emphasis in original).

Plaintiffs rely entirely on *Cittadine* to support their contention that even the most fleeting and tenuous connection to a city is enough to support public standing. Pls.' Br. 15-17. But *Cittadine* involved "a member of the motoring public" of Indiana in a suit against a *state* agency, so it fits the

principle that a plaintiff must be "a member of the public" by being a resident, taxpayer, or voter of the relevant jurisdiction. 790 N.E.2d at 981. And in all the cases cited in *Cittadine* when a court found that the public-standing exception applied, the plaintiffs were citizens, residents, or taxpayers of the local jurisdiction at issue. *See, e.g.*, *Higgins v. Hale*, 476 N.E.2d 95 (Ind. 1985) (Brown County residents and voters); *Graves v. City of Muncie*, 255 Ind. 360, 264 N.E.2d 607 (1970) (Muncie taxpayers); *Miller v. City of Evansville*, 244 Ind. 1, 189 N.E.2d 823 (1963) (Evansville resident taxpayers); *Mitsch v. City of Hammond*, 234 Ind. 285, 125 N.E.2d 21 (1955) (Lake County resident taxpayers whose taxes funded the Hammond public schools); *Hamer v. City of Huntington*, 215 Ind. 594, 21 N.E.2d 407 (1939) (Huntington taxpayer); *Zoercher v. Agler*, 202 Ind. 214, 172 N.E. 186 (1930) (South Bend taxpayers and citizens); *Davis Const. Co. v. Bd. of Comm'rs of Boone Cty.*, 192 Ind. 144, 132 N.E. 629 (1921) (Boone County resident and taxpayer).

Moreover, the public-standing exception exists only for "extreme circumstances" and "will rarely be sufficient." *Pence v. State*, 652 N.E.2d 486, 488 (Ind. 1995). Plaintiffs point to no such extreme circumstances here, where they merely disagree with the City's assessment that the Ordinance promotes public safety. Pls.' Br. 15-16. The considered judgment of the City is that the ordinance furthers public safety by helping "to promote trust

between law enforcement and the community," Appellee App. Vol. II 12-13 (Police Chief Rosario Aff.), and ensuring that "all members of [the East Chicago] community feel comfortable cooperating with law enforcement to keep [East Chicago] safe," *id.* at 8 (Mayor Copeland Aff.). Plaintiffs' policy disagreement is hardly an "extreme circumstance[]" that justifies bending the usual standing rules.

C. Plaintiffs' lawsuit presents a purely hypothetical controversy.

Plaintiffs' lawsuit illustrates why standing is a vital prerequisite to the exercise of judicial power. Plaintiffs' view of standing would let non-residents second-guess the policy choices made by the citizens of East Chicago and their elected representatives. But "[b]y requiring a party to show a specific injury, the doctrine limits the judiciary to resolving concrete disputes between private litigants while leaving questions of public policy" to elected representatives and avoids "overjudicialization of the processes of self-governance." *Horner*, 125 N.E.3d at 589 (citation omitted). Further, "[t]he purpose of standing . . . is to ensure the resolution of real issues through vigorous litigation, not to engage in academic debate or mere abstract speculation," *id.*, yet abstract academic debate is all this case offers. The City has never received a request for cooperation from U.S. Immigration and Customs Enforcement (ICE), Appellee App. Vol. II 14, and Plaintiffs point to

no instance when the Ordinance was enforced in a way they believe conflicts with state law. The Court's resources are better spent resolving genuine disputes brought by parties facing a real injury needing judicial resolution. *Ind. Fam. Inst. Inc. v. City of Carmel*, 155 N.E.3d 1209, 1218 (Ind. Ct. App. 2020) ("[J]udicial 'machinery should be conserved for problems that are real and present or imminent, not squandered on problems that are abstract or hypothetical or remote.'") (quotation omitted). Plaintiffs lack standing, and judgment should be granted to the City because Plaintiffs have failed to show any injury from East Chicago's Ordinance.

II. The Ordinance does not violate Chapter 18.2.

A. The Ordinance does not violate section 18.2-3.

1. Section 18.2-3's language unambiguously forecloses Plaintiffs' interpretation.

In its recent decision in *Nicholson*, this Court squarely rejected Plaintiffs' interpretation of section 18.2-3. Finding the plain language to be "unambiguous," the Court of Appeals correctly held that under section 18.2-3's "plain meaning," cities in Indiana are barred from restricting certain actions "with regard to information of the citizenship or immigration status of an individual, and nothing more." Slip op. at 17-18. This Court's rejection of Plaintiffs' atextual interpretation tracks the view of federal courts, which have recognized that the similar language in 8 U.S.C. § 1373 (section 18.2-3's

federal analog) is unambiguously limited to the categories of information named in that statute.[2] *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) ("[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))); *see also* City Br. 31-33.

Plaintiffs (but not the State) ask this Court to reject the holding of *Nicholson* and the uniform consensus of the federal courts that have squarely interpreted this language. Instead, Plaintiffs argue that the Court should attempt to divine what the legislature might have intended when it enacted section 18.2-3 by considering "what *federal* legislative reports and cases at that time said the language" of *federal* statutes "were *then* understood to mean." Pls. Br. 22 (last emphasis in original). Plaintiffs' argument was easily rejected by the *Nicholson* court in favor of the unambiguous language of the statute. *Nicholson*, slip op. at 18 n. 8.

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[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.

The panel's analysis in *Nicholson* follows the first rule of statutory interpretation: "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 in *Nicholson*, slip op. at 18 n.8). Plaintiffs resist this principle on the authority of *Brownsburg Area Patrons Affecting Change v. Baldwin*, 714 N.E.2d 135 (Ind. 1999) (*BAPAC*). Although *BAPAC* confirms the foundational rule that unambiguous text controls, it also explains that a court facing ambiguous language can consider the "principle that when a legislature adopts language from another jurisdiction, it presumably also adopts the judicial interpretation of that language." *Id.* at 140. Thus, when, as in *BAPAC*, the state legislature copied language from a federal law that had been recently and authoritatively construed by the U.S. Supreme Court, a court could infer that the legislature intended to follow that narrowing interpretation.

BAPAC does not apply here. When the General Assembly enacted section 18.2-3, there was no authoritative construction of disputed language by the Supreme Court, as was true in *BAPAC*. The language in the lower court decisions on which Plaintiffs rely do not purport to determine the meaning of federal law, but simply contain imprecise dicta summarizing the federal statutes. Plaintiffs argue that even if the language "were technically dicta, they would still be contemporary court interpretations" that the

legislature should be presumed to know and rely on when drafting.[3] Pls.' Br. 23. This logic assumes an implausible mix of both legislative omniscience and mistake: that the legislature somehow knew of language tucked away in lower court decisions from New York and California, and also mistakenly believed that these comments offered a definitive interpretation of federal law's scope. The better assumption—one reflected in the ordinary rules of statutory interpretation—is that the General Assembly meant the ordinary and plain meaning of the words it enacted: that Section 18.2-3 applies solely to citizenship and immigration-status information. *State v. Oddi-Smith*, 878 N.E.2d 1245, 1248 (Ind. 2008) ("The best evidence of that intent is the language of the statute itself . . . ") (quotation omitted). The fact that multiple federal courts have since concluded that the relevant federal language *unambiguously precludes* the very construction Plaintiffs advance here reaffirms that *BAPAC*'s analysis does not apply.[4]

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[3] Plaintiffs' further suggestion that the logic of *BAPAC* extends to legislative history of the borrowed statute—in addition to judicial interpretations of the statutory language—is wholly unsupported by any caselaw. Pls. Br. 23. The *Nicholson* panel therefore correctly "reject[ed] [plaintiffs'] contention that the meaning of this provision in Section 3 is dictated by congressional committee reports issued in connection with" the earlier federal laws. Slip op. at 18 n.8.

[4] Plaintiffs also err in claiming that the Second Circuit's comments regarding the scope of 8 U.S.C. § 1373 in the background section in *New York v. U.S. Dep't of Justice*, 951 F.3d 84, 97 (2d Cir. 2020), were integral to that court's holding. Pls. Br. 24. As in *City of New York v. United States*, 179 F.3d

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2. No provision of the Ordinance violates section 18.2-3.

No provision of the Ordinance violates the plain and unambiguous language of Section 18.2-3. Section 10 of the City's Ordinance expressly *allows* the sharing of citizenship and immigration-status information, as required by section 18.2-3. Ordinance 17-0010, § 10 ("Nothing in this chapter prohibits any municipal agency from sending to, or receiving from, any local, state, federal agency, information regarding an individual's citizenship or immigration status."); *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).

Plaintiffs maintain that several sections of the Ordinance—namely, sections 3, 6, 9(c), and 10—all violate section 18.2-3, but their argument highlights how untenable their interpretation of Section 18.2-3 is. For example, section 9(c) directs East Chicago police officers to "consider the extreme potential negative consequences of an arrest," including a heightened risk of deportation, when exercising their discretion to arrest any

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29 (2d Cir. 1999), *see* City Br. 35-36, the *New York* court had no reason to define the information to which § 1373 applies: The decision addressed the State's challenge to whether the federal government could require compliance with § 1373 as a condition of a federal grant, not whether New York in fact complied with § 1373. Moreover, the court later characterized § 1373 as addressing only "voluntary communication *about citizenship or immigration status*." *Id.* at 109 (emphasis added).

individual. This simply reflects "the traditional, well-established exercise of law enforcement discretion." *Nicholson*, slip. Op. 43. Yet Plaintiffs complain that, if an officer decides that an arrest is unwarranted, that will "avoid[] having fingerprints sent to federal authorities." Pls.' Br. 36. But nothing in section 18.2-3 prohibits policies that ban unilaterally *collecting* information, the section only restricts what limits a city can place on *sharing* that information with others. Even more to the point, it strains the words of section 18.2-3 beyond recognition to view a fingerprint as "information of the citizenship or immigration status, lawful or unlawful, of an individual." 18.2-3. The better approach is to follow the plain, unambiguous language of section 18.2-3. Because section 10 of the Ordinance expressly allows the sharing of citizenship and immigration-status information with federal officials, the Ordinance should be upheld in full against Plaintiffs' section 18.2-3 challenge.

Although largely agreeing with the city's position, this Court in *Nicholson* concluded that section 18.2-3 prohibits cities from limiting an officer's ability to "assist in the investigation" of citizenship or immigration status. *Nicholson*, slip op. at 19; *see also* East Chicago Ord. § 3. But section 18.2-3's use of the phrase "communicating or cooperating with federal officials" is best understood as restricting the *sharing* of relevant information, not about taking steps to affirmatively gather new information. *See Day v.*

State, 57 N.E.3d 809, 814 (Ind. 2016) ("[U]nder noscitur a sociis, if a statute contains a list, each word in that list should be understood in the same general sense." (internal quotation marks and footnote omitted)). Discussing section 18.2-3's federal analog, the Department of Justice has observed that § 1373 "does not impose on states and localities the affirmative obligation to collect information from private individuals regarding their immigration status." Appellees' App. Vol. II 96 (Office of Justice Programs Guidance Regarding Compliance with 8 U.S.C. § 1373), *available at* https://perma.cc/8R8M-XTL2. Thus, the ordinance is fully consistent with section 18.2-3.

C. The Ordinance does not violate section 18.2-4.

1. Section 18.2-4 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.[5] The City's cross-appeal brief explains why this would be a strained reading: Section 18.2-4's text and context, its legislative history, and Indiana's home-rule presumptions all confirm that

[5] Appellees/Cross-Appellants limit their argument here to new arguments based on the *Nicholson* decision. For a full discussion of the scope of section 18.2-4, *see* Appellees/Cross-Appellants' Br. 44-64.

the General Assembly intended to prohibit only efforts to limit *federal* enforcement of federal immigration law. *See* City Br. 37–51. The trial court agreed that no aspect of East Chicago's Ordinance violates section 18.2-4. Summary Judgment Order, *Serbon v. City of East Chicago*, No. 45D03-1805-PL-000045 (Lake Cty. Sup. Ct. Apr. 29, 2021). That conclusion should be affirmed.

The *Nicholson* panel recently held that section 18.2-4 prohibits cities from restricting their agents from "cooperat[ing]" with federal requests for assistance in immigration enforcement "to less than the full extent permitted by federal law." *Nicholson,* slip op. at 22. This is in error, as the word "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—that local jurisdictions not limit "cooperat[ion] with federal officials" with respect to citizenship or immigration-status information *only*—superfluous under section 18.2-4's broader command. This result runs directly contrary to the admonition that courts must 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). Indeed, section 18.2-4 contrasts with 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 failed 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).

The *Nicholson* panel's overly broad interpretation of section 18.2-4 leads to problematic results. For example, the panel held that the equivalent to East Chicago's Ordinance § 6(b) (Gary Ordinance § 26-55(e))—which prohibits the City from seeking to enter into an agreement under 8 U.S.C. § 1357(g) that would allow its law enforcement officers to act unilaterally as immigration officers—violates section 18.2-4, even though the provision does not involve responding to a federal request for assistance. *Nicholson*, slip 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 agreed that this provision should not violate section 18.2-4. *See Nicholson v. Gary,* Appellee-Intervenor State of Indiana Br. 23 (filed July 1, 2021). In fact, not one law enforcement agency in Indiana (including the State) has such an agreement. *See* U.S. Immigration & Customs Enforcement, *Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act*, https://www.ice.gov/identify-

and-arrest/287g (last updated Feb. 23, 2022). The better interpretation of Section 18.2-4 is the narrower one: that it prohibits municipalities from in any way restricting *federal* law enforcement as they enforce federal immigration laws. *See also Lopez-Aguilar v. Marion Cty. Sheriff's Dep't*, 296 F. Supp. 3d 959, 972 & n.8 (S.D. Ind. 2017), *vacated for lack of jurisdiction*, 924 F.3d 375 (7th Cir. 2019).

Even under its misinterpretation, the *Nicholson* panel still largely rejected the arguments advanced by Plaintiffs here, concluding that the equivalents of Ordinance § 3 (as modified by the Court to comply with its understanding of section 18.2-3), 6(1)-(3), 9(c), and 10 do not violate section 18.2-4. *Nicholson*, slip op. at 45. If the Court were to follow the *Nicholson* panel's analysis of section 18.2-4, it should uphold these provisions of East Chicago's Ordinance as well.

2. Detaining someone based solely on an administrative warrant or immigration detainer is not "permitted by federal law."

The *Nicholson* panel was also correct to conclude that section 18.2-4's ban on restrictions only applies to "the full extent permitted by federal law." Ind. Code § 5-2-18.2-4. Following most courts, the Court correctly concluded that the federal law does not permit local law enforcement agencies in Indiana to continue to detain someone after they otherwise would be released solely based on a civil immigration detainer request or an administrative

warrant. *Nicholson*, slip op. at 30-40. Based on this conclusion, the Court upheld the provisions of the City of Gary's ordinance, identical to Ordinance § 6(1)-(3), that prohibit prolonging the detention of someone solely based on an immigration detainer, an administrative warrant, or "any other basis that is based solely on the belief" that the person is not present legally in the United States" or has committed a civil immigration violation.[6]

The panel's 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). Plaintiffs suggest that extending custody after a person otherwise would be released is not a new Fourth Amendment seizure, Pls.' Br. 44, but that view is widely discredited. *See Ramon*, 460 P.3d at 875 (noting consensus that "[a]n immigration detainer constitutes a new arrest").

Although federal law authorizes *federal* immigration officers to engage in civil immigration detentions, it does *not* authorize state and local officers

[6] The State errs when it says "[t]he trial court correctly enjoined enforcement of Ordinance Section 6(c), which prohibits compliance with detainer requests." State Br. 11. Section 6(c) deals with providing access to people in detention, while Section 6(1) deals with compliance with a detainer request. The trial court did *not* enjoin enforcement of the detainer provision.

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." *Nicholson*, slip op. at 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 and the State challenge this conclusion, arguing that 8 U.S.C. § 1357(g)(10)(B) authorizes local officers to hold someone in custody based on a detainer request. Pls. Br. 45; State Br. 12. The majority of § 1357(g) is directed to the performance of state officials under 287(g) agreements—written agreements between the federal government and state or local law enforcement agencies where the federal government provides training and supervision and local officers may enforce immigration laws.[7] Section 1357(g)(10) merely clarifies that "[n]othing in this subsection shall be construed to require [such] an agreement . . . otherwise to cooperate with the Attorney General in the identification, apprehension, detention, or removal" of aliens.

[7] As noted above, no law enforcement agency in Indiana has such an agreement.

To begin, § 1357(g)(10) is a savings clause, not an affirmative authorization. *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 confers no authority on state and local officials to engage in civil immigration enforcement, as this Court recognized in *Nicholson*. Slip op. at 29; *see also, e.g.*, *Ramon*, 460 P.3d at 879 (reaching this conclusion); *Lunn*, 78 N.E.3d at 1158 ("[T]he United States does *not* contend that § 1357(g)(10) affirmatively confers authority on State and local officers to make arrests pursuant to civil immigration detainers, where none otherwise exists.") (emphasis in original).

Nor did *Arizona v. United States*, 567 U.S. 387 (2012), determine that compliance with detainer requests qualifies as permissible cooperation under § 1357(g)(10)(B). *Compare* Pls. Br. 41 (suggesting that *Arizona*'s list of permissible "cooperation" implicitly covers detainer requests).[8] As this Court

[8] As the State points out, *Arizona* "is a preemption case, not a Fourth Amendment case." State Br. 16-17. But its lessons about the limited scope of state and local power to engage in immigration enforcement are directly relevant to whether state or local law enforcement has the authority to detain someone. *See, e.g., Santos v. Frederick Cty. Bd. of Comm'rs*, 725 F.3d 451, 464 (4th Cir. 2013) ("Lower federal courts have universally—and we think correctly—interpreted *Arizona v. United States* as precluding local law enforcement officers from arresting individuals solely based on known or suspected civil immigration violations.").

noted in *Nicholson*, *Arizona* "does not mention either detainers or administrative warrants." *Nicholson*, slip op. at 42 n.14. Nor does *Arizona* draw a clear-cut distinction between unilateral state and local enforcement and compliance with federal requests. Instead, *Arizona* 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. *Arizona,* 567 U.S. at 410 (emphasis added). *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 in *Nicholson*, slip op. at 28). With a detainer request, there is a federal request, but no federal supervision—i.e., local officers choose to detain an individual under their own authority past when the individual otherwise would be free to go.[9]

Drawing a clear line between unilateral enforcement and compliance with federal requests 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*

[9] Thus, although Plaintiffs attempts to distinguish both *Melendres* and *Buquer* as addressing only "unilateral" state and local immigration enforcement, Pls. Br. 42, 44, that distinction is meaningless in the context of state and local civil immigration detention.

C.F.C. v. Miami-Dade Cty., 349 F. Supp. 3d 1236, 1259 (S.D. Fla. 2018) ("[I]f "otherwise cooperate" under Section 1357(g)(10), a catch-all provision, were read to allow local law enforcement to arrest individuals for alleged civil immigration violations at the request of ICE, the training, supervision and certification pursuant to a formal agreement between DHS and state officers described in the remaining provisions of Section 1357(g) would be rendered meaningless."); *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 Cty.*, No. A18-2011, 2019 WL 4594512, at *10 (Minn. Ct. App. Sept. 23, 2019) (reaching this conclusion). Indeed, 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.

Plaintiffs next argue that state law—namely, Chapter 18.2—authorizes compliance with detainer requests. Pls. Br. 44. Plaintiffs first look to Indiana Code § 5-2-18.2-7, but the *Nicholson* panel was correct that section 18.2-7 "does not add any" independent "duties or prohibitions" outside of sections 18.2-3 and -4. Slip op. at 20 n.9. Section 18.2-7 merely requires that law enforcement officers receive written notice of any preexisting duties. And, as Plaintiffs elsewhere recognize, sections 18.2-3 and -4 are prohibitions and do not affirmatively authorize anything. *See, e.g.,* Pls. Br. 27-28 (emphasizing that section 18.2-4 is a "*ban* on restricting enforcement . . . not an affirmative mandate") (emphasis in original).

By contrast, the State does not argue that state law authorizes state and local officials to hold individuals in custody for civil immigration violations. Rather, the State argues (1) federal law permits *federal* officers to detain aliens, and (2) state and local officers can rely on federal probable cause determinations to support a seizure. State Br. 14-16. This erroneously assumes that state and local officers may detain someone simply because *federal* officers can, which "is not the system Congress created." *Arizona*, 567 U.S. at 408 (emphasizing that federal law authorizes *federal* officers to detain for immigration violations, but limits the role of state and local officers). Instead, there must be some specific authority that authorizes state and local officers to detain someone for violating immigration laws. *E.g.*, *Melendres*,

695 F.3d at 1001. If a local officer lacks 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 Cty.*, 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).[10]

Both Plaintiffs and the State rely heavily on *City of El Cenizo v. Texas*, 890 F.3d 164, 177 (5th Cir. 2018), but the case underscores the limits of Indiana law. 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)).[11] It is wrong to say, as the State does, Br. 16, that the Texas law is "materially identical": the

[10] The State quotes from *Thomas v. City of Peoria*, 580 F.3d 633, 638 (7th Cir. 2009), a case involving an arrest for a traffic ticket. State Br. 14. Whether local officers could arrest someone for suspected violation of civil immigration laws was not a question before the court. In any event, *Thomas* pre-dates *Arizona*, which squarely forecloses any suggestion that local law enforcement may make arrests for civil immigration violations.

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

Texas law "itself authorizes and requires state officers to carry out federal detention requests," *El Cenizo*, 890 F.3d at 188, whereas Chapter 18.2 does not affirmatively authorize or require anything.

Thus, 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 need not violate the Fourth Amendment when local officials rely on ICE's probable-cause determination in an administrative warrant. 890 F.3d at 187–88. This analysis does not apply to states like Indiana where officers lack authority to detain under state law.

Furthermore, even though the *El Cenizo* court found 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. Even if authorized by state law (unlike in Indiana), in many cases 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).

* * *

In sum, section 18.2-4 prohibits cities from interfering with federal law enforcement, but it does not require cooperation. Thus, the Court below correctly concluded that no part of East Chicago's ordinance violates Section 18.2-4.

Even if this Court were to follow the *Nicholson* decision and conclude that section 18.2-4 prevents cities from limiting cooperation, it should follow the rest of *Nicholson*'s analysis as well and find that nothing in East Chicago Ordinance §§ 3, 9(c), and 10 are preempted by section 18.2-4. And it should follow *Nicholson*'s nuanced analysis of what federal law permits, and conclude that because there is no authorization for the city to detain someone based only on suspected immigration violation, Ordinance § 6(1)-(3) are valid.

Ultimately, this debate over the interactions between the U.S. Constitution and federal, state, and local law is hypothetical. It simply does not come up in practice, as ICE has never requested East Chicago's assistance with immigration enforcement. And even if it had, Plaintiffs have no recognized interest that would justify second-guessing the City's effort to navigate its obligations under federal and state law. As noted above,

Plaintiffs lack standing to sue, and the Court need not resolve these hypothetical questions now.

CONCLUSION

For all these reasons and those stated in the City's cross-appeal brief, the judgment of the district court should be affirmed in part and reversed in part, and judgment entered in the City's favor.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, Angela Jones, 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 6,655 words.

/s/ Angela Jones
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CERTIFICATE OF SERVICE

I certify that on the 28th day of February, 2022, service of a true and complete copy of the above and foregoing Reply Brief of Cross-Appellants City of East Chicago, et al, was e-filed with the Clerk of the Court through the Indiana E-Filing System.

I further certify that on February 28, 2022, a copy of the foregoing Reply Brief of Cross-Appellants City of East Chicago, et al, was served upon the following though the Indiana E-Filing System:

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