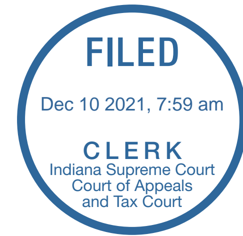

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IN THE
COURT OF APPEALS OF INDIANA

City of Gary, *Appellant-Defendant,* v. Jeff Nicholson, Douglas Grimes, Greg Serbon, and Cheree Calabro, *Appellees-Plaintiffs,* and State of Indiana, *Appellee-Intervenor.*	December 10, 2021 Court of Appeals Case No. 20A-MI-2317 Appeal from the Lake Superior Court The Honorable Stephen E. Scheele, Judge Trial Court Cause No. 45D05-1802-MI-14

Najam, Judge.

Statement of the Case

[1] In this appeal, we consider whether certain provisions of the City of Gary's "Welcoming City" ordinance violate Indiana Code Section 5-2-18.2-3, which prohibits governmental bodies from restricting the sharing of information of the citizenship or immigration status of a person, and Indiana Code Section 5-2-18.2-4, which prohibits governmental bodies from limiting or restricting the enforcement of federal immigration laws. Jeff Nicholson, Douglas Grimes, Greg Serbon, and Cheree Calabro (collectively "Nicholson") filed a complaint against the City of Gary ("Gary") seeking a declaratory judgment and an injunction after Gary passed Ordinance No. 9100 ("the Ordinance"). The parties filed cross-motions for summary judgment, and the State intervened.

Following a hearing, the trial court granted Nicholson's summary judgment motion, denied Gary's summary judgment motion, and issued an injunction that purported to prohibit Gary from enforcing certain provisions of the Ordinance. Gary appeals and raises three issues for our review:

1. Whether the injunction order is unenforceable because it is not sufficiently definite and certain to bind Gary.
2. Whether the Ordinance violates Indiana Code Section 5-2-18.2-3.
3. Whether the Ordinance violates Indiana Code Section 5-2-18.2-4.

[2] We affirm in part, reverse in part, and remand with instructions.[1]

Facts and Procedural History

[3] In 2017, Gary passed the Ordinance, which sought "to make everyone in the community feel welcome" and "to ensure that the immigration status of those who live, work, or pass through Gary will not affect how they are treated by Gary agencies and agents, including its police department and social services providers." Appellant's App. Vol. 2 at 63. In relevant part, the Ordinance generally prohibits local officials from requesting information or otherwise investigating or assisting in the investigation of the citizenship or immigration status of a person unless required by court order, or stopping, arresting,

[1] We held oral argument on September 13, 2021.

detaining, or continuing to detain a person "after that person becomes eligible for release from custody or is free to leave an encounter" with an official. *Id.* at 54. The Ordinance requires local officials to "consider the extreme potential negative consequences of an arrest in exercising discretion whether to" arrest an individual. *Id.* at 57. And the Ordinance states that "nothing . . . prohibits any municipal agency from sending to, or receiving from, any local, state, [or] federal agency, information regarding an individual's citizenship or immigration status." *Id.*

[4] In passing the Ordinance, Gary did not intend "to hinder federal immigration enforcement." *Id.* at 64. To that end, Gary "signed a Declaration with the United States Department of Justice stating that the City will comply with 8 U.S.C. § 1373," which provides that a local government may not prohibit or restrict any government entity or official from sending to, or receiving from, the Immigration and Naturalization Service information regarding the citizenship or immigration status of any individual. *Id.*

[5] In December 2017, Nicholson filed a verified complaint[2] against Gary seeking a declaratory judgment and injunction.[3] Nicholson alleged in relevant part that

---

[2] Nicholson also named as defendants Gary's mayor and Gary's Common Council members, but the trial court dismissed them as parties.

[3] Gary does not dispute that Nicholson has standing to bring this action under Indiana Code Section 5-2-18.2-5, which provides that, "[i]f a governmental body . . . violates this chapter, a person lawfully domiciled in Indiana may bring an action to compel the governmental body . . . to comply with this chapter."

four provisions of the Ordinance violate Indiana Code Sections 5-2-18.2-3 and -4, specifically:

> **Section 26-52. Requesting information prohibited.**
>
> No agent or agency shall request information about or otherwise investigate or assist in the investigation of the citizenship or immigration status of any person unless such inquiry or investigation is required by an order issued by a court of competent jurisdiction. Notwithstanding this provision, the Corporation Counsel may investigate and inquire about citizenship or immigration status when relevant to potential or actual litigation or an administrative proceeding in which the City is or may be a party.
>
> **Section 26-55. Immigration enforcement actions—Federal responsibility.**
>
> No agency or agent shall stop, arrest, detain, or continue to detain a person after that person becomes eligible for release from custody or is free to leave an encounter with an agent or agency, based on any of the following:
>
> > (a) an immigration detainer;
> >
> > (b) an administrative warrant (including but not limited to entered into the Federal Bureau of Investigation's National Crime Information Center database); or
> >
> > (c) any other basis that is based solely on the belief that the person is not present legally in the United States, or that the person has committed a civil immigration violation.
> >
> > (d) No agency or agent shall be permitted to accept requests by ICE or other agencies to support or assist in

any capacity with immigration enforcement operations, including but not limited to requests to provide information on persons who may be the subject of immigration enforcement operations (except as may be required under section 11 of this ordinance), to establish traffic perimeters, or to otherwise be present to assist or support an operation. In the event an agent receives a request to support or assist in an immigration enforcement operation, he or she shall report the request to his or her supervisor, who shall decline the request and document the declination in an interoffice memorandum to the agency director through the chain of command.

(e) No agency or agent shall enter into an agreement under Section 1357(g) of Title 8 of the United States Code or any other federal law that permits state or local governmental entities to enforce federal civil immigration laws.

(f) Unless presented with a valid and properly issued criminal warrant, no agency or agent shall:

> (1) permit ICE agents access to a person being detained by, or in the custody of, the agency or agent;
>
> (2) transfer any person into ICE custody;
>
> (3) permit ICE agents use of agency facilities, information (except as may be required under Section 11 of this ordinance), or equipment, including any agency electronic databases, for investigative interviews or other investigative purpose or for purposes of executing an immigration enforcement operation; or

(4) expend the time of the agency or agent in responding to ICE inquiries or communicating with ICE regarding a person's custody status, release date, or contact information.

Section 26.58.[4] **Commitments.**

* * *

(c) The City recognizes the arrest of an individual increases that individual's risk of deportation even in cases where the individual is found to be not guilty, creating a disproportionate impact from law enforcement operations. Therefore, for all individuals, the Gary Police Department will recognize and consider the extreme potential negative consequences of an arrest in exercising its discretion regarding whether to take such an action and will arrest an individual only after determining that less severe alternatives are unavailable or would be inadequate to effect a satisfactory resolution.

Section 26.59. Information regarding citizenship or immigration status.

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. All municipal agents shall be instructed that federal law does not allow any such prohibition. "Information regarding an individual's citizenship or immigration status," for purposes of

[4] As the trial court noted, the Ordinance section numbers use both hyphens and periods. These are not typographical errors.

> this section, means a statement of the individual's country of citizenship or a statement of the individual's immigration status.

Id. at 53-57.

[6] Gary and Nicholson filed cross-motions for summary judgment, and the State intervened. Following a hearing, the trial court issued an order granting Nicholson's summary judgment motion and denying Gary's summary judgment motion. The order did not include findings and conclusions but simply held that:

> [Nicholson's] Summary-Judgment Motion as filed on 12/27/2017 is GRANTED as to its claims against the sole remaining party-defendant, [Gary], such that [Gary] is hereby prohibited from enforcing those provisions of its City of Gary Ordinance 9100 Section 26-52, Section 26-55, Section 26.58(c) and Section 26.59 that are violative of Indiana Code §§ 5-2-18.2-3, 5-2-18.2-4 and/or other applicable state or federal law.

Id. at 3. In its order the trial court did not enumerate which of "those provisions" contained within the challenged sections of the Ordinance identified violate the statutes, but the order appears to categorically prohibit the enforcement of those entire sections. This appeal ensued.

Discussion and Decision

Overview

[7] We are asked to interpret two Indiana statutes, Indiana Code Section 5-2-18.2-3 ("Section 3") and Indiana Code Section 5-2-18.2-4 ("Section 4"). In his verified

complaint, Nicholson describes these statutes as the "Information-Cooperation Mandate" and the "Full-Extent-Enforcement-Cooperation Mandate." Appellant's App. Vol. 2 at 17-18. Nicholson maintains that these statutes "preempt[] local government from enacting contrary ordinances, rules, and policies with the clear intent to ban sanctuary cities and welcoming cities[.]" *Id.* at 20. The State generally agrees and describes the statutes as "prohibit[ing] a locality from frustrating the efforts of federal immigration officials by enacting policies that limit their employees' ability to share information or cooperate with federal officials in the enforcement of federal immigration laws." State's Br. at 23.

[8] The federal government has "'broad, undoubted power over the subject of immigration and the status of aliens[.]'" *City of Philadelphia v. Att'y Gen. of United States*, 916 F.3d 276, 281 (3d Cir. 2019) (quoting *Arizona v. United States*, 567 U.S. 387, 381 (2012)). "Consistent with that sovereign power, the Immigration and Nationality Act ('INA') contemplates states' participation in the enforcement of immigration law since '[c]onsultation between federal and state officials is an important feature of the immigration system.'" *Cnty. of Ocean v. Grewal*, 475 F. Supp. 3d 355, 362 (D.N.J. 2020) (quoting *Arizona*, 567 U.S. at 411-12), *aff'd sub nom. Ocean Cnty. Bd. of Comm'rs v. Att'y Gen. of the State of N.J.*, 8 F.4th 176 (3d. Cir. 2021). As the Supreme Court of the United States explained in *Arizona*,

> *[f]ederal law specifies limited circumstances in which state officers may perform the functions of an immigration officer*. A principal example

> is when the Attorney General has granted that authority to specific officers in a formal agreement with a state or local government. *See* § 1357(g)(1); *see also* § 1103(a)(10) (authority may be extended in the event of an "imminent mass influx of aliens arriving off the coast of the United States"); § 1252(c) (authority to arrest in specific circumstance after consultation with the Federal Government); § 1324(c) (authority to arrest for bringing in and harboring certain aliens). Officers covered by these agreements are subject to the Attorney General's direction and supervision. § 1357(g)(3). *There are significant complexities involved in enforcing federal immigration law, including the determination whether a person is removable*. *See Padilla v. Kentucky*, 559 U.S. 356, 379-380, 130 S. Ct. 1473, 1488-1490, 176 L.Ed.2d 284 (2010) (ALITO, J., concurring in judgment). As a result, the agreements reached with the Attorney General must contain written certification that officers have received adequate training to carry out the duties of an immigration officer. *See* § 1357(g)(2); *cf.* 8 CFR §§ 287.5(c) (arrest power contingent on training), 287.1(g) (defining the training).

567 U.S. at 408-09 (emphases added).

[9] Further, 8 U.S.C. § 1357(g)(10)(B) provides that state and local officers may "cooperate with the Attorney General in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States." As the Court in *Arizona* also explained,

> [t]here may be some ambiguity as to what constitutes cooperation under the federal law; but no coherent understanding of the term would incorporate the unilateral decision of state officers to arrest an alien for being removable absent any request, approval, or other instruction from the Federal Government. *The Department of Homeland Security gives examples of what would constitute cooperation under federal law*. These

> include situations where States participate in a joint task force with federal officers, provide operational support in executing a warrant, or allow federal immigration officials to gain access to detainees held in state facilities. *See* Dept. of Homeland Security, Guidance on State and Local Governments' Assistance in Immigration Enforcement and Related Matters 13-14 (2011), online at http://www.dhs.gov/files/resources/immigration.shtm (all Internet materials as visited June 21, 2012, and available in Clerk of Court's case file). State officials can also assist the Federal Government by responding to requests for information about when an alien will be released from their custody. *See* § 1357(d).

567 U.S. at 410 (emphasis added). While state officials may assist the federal government with immigration matters, it is well settled that, under federal law, state and local cooperation with federal immigration officials is voluntary, not mandatory. *See City of El Cenizo v. Texas*, 890 F.3d 164, 180-81 (5th Cir. 2018) (stating that, "under the Tenth Amendment, Congress could not compel local entities to enforce immigration law").

[10] As we have noted, in his complaint, Nicholson describes Section 3 and Section 4 as "mandates." On appeal, however, Nicholson eschews that label and contends that the statutes are not mandates but merely prohibit limitations or restrictions on state and local cooperation to the full extent of federal immigration law. Thus, while both Nicholson and the State assert that Gary is barred from prohibiting its employees from cooperating with federal immigration authorities, they acknowledge that ultimately, under federal immigration law, the cooperation of state and local agents and agencies is voluntary.

Standard of Review

[11] Summary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Ind. Trial Rule 56(C). In reviewing a trial court's ruling on summary judgment, we stand in the shoes of the trial court and apply the same standards in deciding whether to affirm or reverse summary judgment. *City Sav. Bank v. Eby Const., LLC*, 954 N.E.2d 459, 462 (Ind. Ct. App. 2011), *trans. denied*. The party appealing the grant of summary judgment bears the burden of persuading this Court that the trial court's ruling was improper. *Id.* Statutory interpretation presents a pure question of law for which summary judgment is particularly appropriate. *Id.* Where, as here, the relevant facts are undisputed and the issue presented on appeal is a pure question of law, we review the matter de novo. *Id.* "'The fact that the parties have filed cross-motions for summary judgment does not alter our standard for review, as we consider each motion separately to determine whether the moving party is entitled to judgment as a matter of law.'" *SCI Propane, LLC v. Frederick*, 39 N.E.3d 675, 677 (Ind. 2015) (quoting *Reed v. Reid*, 980 N.E.2d 277, 285 (Ind. 2012)).

Issue One: Injunction Order

[12] Indiana Code Section 5-2-18.2-6 provides in relevant part that if a court finds that a governmental body has knowingly or intentionally violated Indiana Code Sections 5-2-18.2-3 or -4, the court shall enjoin the violation. Gary contends that the trial court's injunction order is unenforceable because it is not

sufficiently definite and certain to bind Gary. Our Supreme Court has stated that

> [a] decree granting permanent injunctive relief should be as definite, clear, and precise in its terms as possible, and should be so clear and certain, and so worded, that the party enjoined *may know from a reading of it what he is restrained from doing*.

Martinal v. Lake O' the Woods Club, Inc., 248 Ind. 252, 225 N.E.2d 183, 184 (1967) (quoting 16 I.L.E., Injunctions, § 125 (1959); emphasis added).

[13] Again, the trial court's order provides in relevant part that:

> [Nicholson's] Summary-Judgment Motion as filed on 12/27/2017 is GRANTED as to its claims against the sole remaining party-defendant, [Gary], such that [Gary] is hereby prohibited from enforcing *those provisions* of its City of Gary Ordinance 9100 Section 26-52, Section 26-55, Section 26.58(c) and Section 26.59[] *that are violative* of Indiana Code §§ 5-2-18.2-3, 5-2-18.2-4 and/or other applicable state or federal law.

Appellant's App. Vol. 2 at 3 (emphases added).

[14] Nicholson contends that "the whole of each challenged Ordinance section violates Chapter 18.2" and offers some six reasons why the injunction order is adequate, all of which require reference to matters outside the four corners of the order. Appellees' Br. at 53-55. We disagree and conclude that the order, in itself, is not sufficiently definite. The order does not indicate *which* of "those provisions" of the Ordinance "are violative" of Section 3 and Section 4. Gary cannot know "from a reading of [the order] what [Gary] is restrained from

doing." *See Martinal*, 225 N.E.2d at 184. The scope of an injunction should be clear and not subject to reasonable dispute or misinterpretation. We hold that the scope of the trial court's injunction as written is ambiguous and, therefore, unenforceable. However, by its grant of Nicholson's summary judgment motion "as to [his] claims," the court also entered a declaratory judgment for Nicholson on his claims that the Ordinance violates Indiana law. Thus, while the purported injunction is inadequate, the question remains whether the challenged provisions of the Ordinance are unlawful.

Issue Two: Indiana Code Section 5-2-18.2-3

[15] Gary next contends that the trial court erred when it concluded that the Ordinance violates Section 3. As our Supreme Court has stated,

> "[o]ur first task when interpreting a statute is to give its words their plain meaning and consider the structure of the statute as a whole." *ESPN, Inc. v. University of Notre Dame Police Dept.*, 62 N.E.3d 1192, 1195 (Ind. 2016) (citation omitted)). In doing so, "[w]e avoid interpretations that depend on selective reading of individual words that lead to irrational and disharmonizing results." *Id.* (quotation omitted). We consider what the statute says and what it doesn't. *Id.* (citation omitted).

Temme v. State, 169 N.E.3d 857, 863 (Ind. 2021).

[16] Section 3 provides in relevant part as follows:

> *A governmental body . . . may not enact or implement an ordinance . . . that prohibits or in any way restricts another governmental body . . . ,* including a law enforcement officer, a state or local official, or a state or local government employee, *from taking the following*

actions with regard to information of the citizenship or immigration status, lawful or unlawful, of an individual:

(1) Communicating or cooperating with federal officials.

(2) Sending to or receiving information from the United States Department of Homeland Security.

(3) Maintaining information.

(4) Exchanging information with another federal, state, or local government entity.

I.C. § 5-2-18.2-3 (emphases added.)[5]

[17] The parties dispute the meaning of the phrase "with regard to information of the citizenship or immigration status" of an individual. Gary interprets that language to mean, simply, information stating a person's citizenship or immigration status. Nicholson alleges that the statute is ambiguous and interprets it more broadly to mean "matters pertaining to enforcement" of immigration laws, "including unobstructed cooperation in locating illegal aliens." Appellees' Br. at 16, 19. Nicholson urges us to read "information of" to mean "information regarding" to bring Section 3 closer to the wording of 8 U.S.C. §§ 1373 and 1644.[6] *Id.* at 24. Thus, Nicholson asserts, Section 3

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[5] Pursuant to Indiana Code Section 5-2-18.2-4, "governmental body" is defined as an agency, board, branch, bureau, commission, council, department, institution, office, or another establishment of the executive branch, the judicial branch, the legislative branch, or a political subdivision. *See* I.C. § 5-22-2-13.

[6] 8 U.S.C. § 1373 provides, in relevant part, "[n]otwithstanding any other provision of Federal, State, or local law, a Federal, State, or local government entity or official may not prohibit, or in any way restrict, any

"should be understood to share" the purportedly broader scope of those statutes. *Id.*

[18] Similarly, the State urges us to interpret Section 3 to encompass "all actions that are taken '*with regard to*' an individual's immigration status." State's Br. at 17 (emphasis original). The State contends that "regarding" means "respecting," and, it continues, "respecting" used in a legal context "'generally has a broadening effect, ensuring that the scope of a provision covers not only its subject but also matters relating to that subject.'" *Id.* (quoting *Lamar, Archer & Cofrin, LLP v. Appling*, 138 S. Ct. 1752, 1759-60 (2018)). Thus, the State maintains, and Nicholson agrees, that the information described in Section 3 "encompasses such immigration-related information as an individual's release date, home address, and employment address." *Id.* at 19.

[19] We are not persuaded. The United States District Court for the District of New Jersey has interpreted the word "regarding" as used in 8 U.S.C. § 1373 and held that:

> [w]hile, generally, a term like "regarding" has a broadening effect, to read it as broadly as advanced by Plaintiffs . . . would impermissibly expand the scope of these statutes to sweep in any

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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. (Emphasis added.)

8 U.S.C. § 1644 provides, "[n]otwithstanding any other provision of Federal, State, or local law, no State or local government entity may be prohibited, or in any way restricted, from sending to or receiving from the [INS] *information regarding* the immigration status, lawful or unlawful, of an alien in the United States." (Emphasis added.)

> information, including personal identifying data, concerning an alien in the United States. . . . *There is simply nothing in the statute to suggest that the inclusion of the word "regarding" requires States and local governments to share personal identifying information and dates of release from detention, as such information does not directly relate to, or regard, an individual's immigration status.*[] *See City of Philadelphia* [*v. Sessions*,] 309 F. Supp. 3d [289,] 331[(E.D. Pa. 2018), *aff'd in part and vacated in part on other grounds*, 916 F.3d 276 (3d Cir. 2019)]; *see also Steinle* [*v. City & Cnty. of San Francisco*], 230 F. Supp. 3d [994,] 1015 [(N.D. Cal. 2017)]. Rather, plainly, the phrase "regarding the citizenship or immigration[status], lawful or unlawful of any individual" means just that—information relating to the immigration status of an alien, including his/her citizenship.

Grewal, 475 F. Supp. 3d at 375-76 (emphasis added).

[20] Likewise, here, we hold that Section 3 is unambiguous.[7] The cardinal rule of statutory interpretation is that words and phrases will be taken in their plain, or ordinary and usual sense. *See* I.C. § 1-1-4-1(1). And we will not add words that are not there. Under the plain meaning of Section 3, Gary is barred from prohibiting or in any way restricting another governmental body from taking

[7] Even if Section 3 were deemed ambiguous, the interpretation advanced by Nicholson and the State would fail because they focus selectively on the words "with regard to" and "regarding" as if those words were detached from the remainder of the sentence. Again, "'[w]e avoid interpretations that depend on selective reading of individual words that lead to irrational and disharmonizing results.'" *Temme*, 169 N.E.3d at 863 (quoting *ESPN, Inc.*, 62 N.E.3d at 1195). The phrase "citizenship or immigration status" plainly refers to immigration classifications, which do not require collateral, extraneous information to be understood.

the enumerated actions with regard to information of the citizenship or immigration status of an individual, and nothing more.[8]

[21] In every case, the first question is whether a person's immigration status is lawful or unlawful. The second, more specific question is whether the person's immigration status is, for example, that of a citizen, a non-citizen but lawful resident, a non-immigrant such as a student admitted to the United States on a student visa, or an undocumented immigrant, an alien who is not a citizen or national of the United States who is present in the United States without any form of temporary or permanent authorization, or a person who has otherwise committed a civil immigration violation. Here, the only relevant "information of" is that information which identifies the person's citizenship and immigration status.

[22] Given the plain meaning of Section 3, we conclude that three of the four challenged sections of the Ordinance, namely, 26-55, 26.58(c), and 26.59, do not limit or restrict a governmental body from communicating, sending, receiving, maintaining, or exchanging information of the citizenship or

---

[8] As our Supreme Court has observed, the "best evidence" of the legislature's intent "is a statute's text," and "we need not delve into legislative history if no ambiguity exists." *Adams v. State*, 960 N.E.2d 793, 798 (Ind. 2012). Because the plain meaning of Section 3 is unambiguous, we need not consider federal legislative history as suggested by Nicholson. We reject Nicholson's contention that the meaning of this provision in Section 3 is dictated by congressional committee reports issued in connection with 8 U.S.C. §§ 1373 and 1644. *See* Appellees' Br. at 20-21.

immigration status of an individual and, thus, that these three sections of the Ordinance do not violate Section 3.

[23] However, Section 26-52 provides in part that "[n]o agent or agency *shall . . . assist* in the investigation of the citizenship or immigration status of any person unless such . . . investigation is required by an order issued by a court of competent jurisdiction." Appellant's App. Vol. 2 at 41 (emphasis added). Because Section 3 expressly prohibits an ordinance that would restrict "cooperating with federal officials" with regard to information of the citizenship or immigration status of a person, we conclude that that provision of the Ordinance, which prohibits an agent or agency from assisting, violates Section 3. While it is lawful to prohibit a governmental body from initiating an inquiry or investigation concerning a person's citizenship or immigration status, assisting with such an inquiry or investigation at the request of federal authorities cannot be prohibited.

[24] We must next consider whether Section 26-52's violation of Section 3 requires that the entire Ordinance be nullified. We conclude that it does not. The Ordinance includes a severability clause, Section 26.60, which provides that

> [i]f any provision, clause, section, part, or application of this chapter to any person or circumstance is declared invalid by any court of competent jurisdiction, such invalidity shall not affect, impair, or invalidate the remainder hereof or its application to any other person or circumstance. It is hereby declared that [it is] the legislative intent of the City Council that this chapter should have been adopted had such invalid provision, clause, section, part, or application not been included herein.

Id. at 45. Therefore, we affirm the trial court's injunction prohibiting Gary from enforcing that part of Section 26-52 which bars an agent or agency from *assisting* in the investigation of the citizenship or immigration status of any person. The remainder of Section 26-52 is valid. In effect, the first sentence of Section 26-52 would read as follows: "No agent or agency shall request information about or otherwise investigate the citizenship or immigration status of any person unless such inquiry or investigation is required by an order issued by a court of competent jurisdiction."

Issue Three: Indiana Code Section 5-2-18.2-4

[25] Gary next contends that the trial court erred when it enjoined the City from enforcing the Ordinance under Section 4. This issue also requires statutory interpretation, which again requires that we determine legislative intent de novo. *Justice v. Am. Family Mut. Ins. Co.*, 4 N.E.3d 1171, 1175 (Ind. 2014). We also review de novo whether a statute is constitutional. *Morgan v. State*, 22 N.E.3d 570, 573 (Ind. 2014).

[26] Section 4 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."[9] I.C. § 5-2-18.2-4. Gary maintains that only the federal

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[9] In his summary judgment motion, Nicholson also argued that the challenged provisions of the Ordinance violate Indiana Code Section 5-2-18.2-7 ("Section 7"). However, the trial court's order does not identify that specific statute as having been violated. Indeed, only violations of Section 3 or Section 4 will support an injunction under Chapter 18.2. *See* I.C. § 5-2-18.2-6. In any event, Section 7 does not add any duties or prohibitions relevant to this appeal that are not already required by Indiana Code Section 5-2-18.2-4.

government can enforce federal immigration law. Thus, Gary asserts that the plain meaning of the statute is that it is prohibited "from restricting the *federal* government's efforts to enforce federal immigration law," that is, from interfering with federal immigration enforcement, which the Ordinance does not do. Appellant's Br. at 37 (emphasis original). In the alternative, Gary contends that any ambiguity in Section 4's meaning must be resolved in its favor under the Home Rule Act, which confers on Gary "all powers granted it by statute; and . . . all other powers necessary or desirable in the conduct of its affairs, even though not granted by statute." I.C. § 36-1-3-4(b).

[27] Nicholson, however, reads Section 4 to "bar[] restricting whether the enforcer is federal, state, or local—since 'federal' modifies 'immigration laws,' not 'enforcement[.]'" Appellees' Br. at 25. The State agrees, generally, with Nicholson and describes "this provision [a]s a 'catch-all' provision that 'prohibit[s] cities from limiting or restricting their involvement in immigration enforcement.'" State's Br. at 21 (quoting Pratheepan Gulasekaram et al., *Anti-Sanctuary and Immigration Localism*, 119 Colum. L. Rev. 837, 848 (2019)).

[28] Again, we consider the plain meaning of this unambiguous and concisely-worded statute. "Enforcement" is not modified, and we will not add words that are not there. *See Temme*, 169 N.E.3d at 863. As Gary points out, and as the State concedes, state and local authorities may not *unilaterally* enforce federal immigration law. *See Arizona*, 567 U.S. at 408. But it is well established that the Department of Homeland Security ("DHS") may seek the cooperation of state and local law enforcement agencies in the enforcement of immigration

law, including by participating "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." *Id.* at 410.

[29] Because "the full extent" of federal law permits voluntary state and local cooperation with federal officials in the enforcement of immigration law, we agree with Nicholson and the State that, under Section 4, Gary may not limit or restrict its agents or agencies, including law enforcement officers, from cooperating with the federal government, to less than the full extent permitted by federal law. As the State asserts, Section 4 "simply bars [Gary] from limiting its employees' ability to assist in the enforcement of immigration laws *at the request of* a federal immigration official." State's Br. at 24 (emphasis original). We agree with the State and adopt that interpretation.

[30] During oral argument Nicholson acknowledged that, while Gary is barred from prohibiting its employees, agents, or officials from cooperating with federal officials, Section 4 does not require that they agree to cooperate with federal officials in the enforcement of immigration law. Rather, Section 4 simply requires that Gary's employees, agents, or officials be given the opportunity to decide whether to cooperate when a request is made. Indeed, implicit in Section 4 is an acknowledgment that immigration law enforcement is a federal responsibility and that the State generally lacks independent authority over civil immigration violations. *See, e.g.*, *Santos v. Frederick Cnty. Bd. of Comm'rs*, 725 F.3d 451, 463-64 (4th Cir. 2013).

[31] We conclude that Section 4 bars Gary from directing its employees, agents, or officials not to cooperate with federal immigration officials in the enforcement of immigration laws. Accordingly, under the Home Rule Act, Gary has no power to enforce the Ordinance where it conflicts with Section 4. I.C. § 36-1-3-5(a). With that initial construction of Section 4 in place, we next consider whether the four challenged sections of the Ordinance violate Section 4.

Section 26-52

[32] After striking the enjoined text[10] as explained in Issue Two, the Section would read as follows:

> **Requesting information prohibited**.
>
> No agent or agency shall request information about or otherwise investigate the citizenship or immigration status of any person unless such inquiry or investigation is required by an order issued by a court of competent jurisdiction. Notwithstanding this provision, the Corporation Counsel may investigate and inquire about citizenship or immigration status when relevant to potential or actual litigation or an administrative proceeding in which the City is or may be a party.

Appellant's App. Vol. 2 at 41.

[33] Again, Section 4 prohibits only limitations or restrictions on a governmental body's ability to cooperate in the enforcement of immigration laws at the

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[10] Again, the enjoined provision prohibited an agent or agency from assisting in the investigation of the citizenship or immigration status of a person.

request of a federal immigration official. This section of the Ordinance does not prohibit cooperation *when requested*. Rather, it prohibits an agent or agency *from initiating* a request for information *sua sponte*. According to the DHS, "[a] state or local officer's ability to acquire such information as to immigration status . . . must derive from another source[.]" *See* Dept. of Homeland Security, Guidance on State and Local Governments' Assistance in Immigration Enforcement and Related Matters 12, (online at https://www.dhs.gov/sites/default/files/publications/guidance-state-local-assistance-immigration-enforcement.pdf (last visited September 17, 2021). Accordingly, we hold that, after striking the enjoined text as explained in Issue Two, Section 26-52 does not violate Section 4.

Section 26-55

[34] Section 26-55 of the Ordinance reads as follows:

> **Immigration enforcement actions—Federal responsibility**.
>
> No agency or agent shall stop, arrest, detain, or continue to detain a person *after that person becomes eligible for release from custody or is free to leave an encounter with an agent or agency*, based on any of the following:
>
> (a) an immigration detainer;
>
> (b) an administrative warrant (including but not limited to entered into the Federal Bureau of Investigation's National Crime Information Center database); or

(c) any other basis that is based solely on the belief that the person is not present legally in the United States, or that the person has committed a civil immigration violation.

(d) No agency or agent shall be permitted to accept requests by ICE or other agencies to support or assist in any capacity with immigration enforcement operations, including but not limited to requests to provide information on persons who may be the subject of immigration enforcement operations (except as may be required under section 11 of this ordinance), to establish traffic perimeters, or to otherwise be present to assist or support an operation. In the event an agent receives a request to support or assist in an immigration enforcement operation, he or she shall report the request to his or her supervisor, who shall decline the request and document the declination in an interoffice memorandum to the agency director through the chain of command.

(e) No agency or agent shall enter into an agreement under Section 1357(g) of Title 8 of the United States Code or any other federal law that permits state or local governmental entities to enforce federal civil immigration laws.

(f) Unless presented with a valid and properly issued criminal warrant, no agency or agent shall:

> (1) permit ICE agents access to a person being detained by, or in the custody of, the agency or agent;
>
> (2) transfer any person into ICE custody;
>
> (3) permit ICE agents use of agency facilities, information (except as may be required under Section 11 of this ordinance), or equipment, including any agency electronic databases, for investigative interviews or other investigative purpose or for

> purposes of executing an immigration enforcement operation; or
>
> (4) expend the time of the agency or agent in responding to ICE inquiries or communicating with ICE regarding a person's custody status, release date, or contact information.

Appellant's App. Vol. 2 at 42-43 (emphasis added).

1. Subsections (a) through (c)

[35] Under 8 C.F.R. § 287.7(a), "[a]ny authorized immigration officer" may issue an immigration detainer, which

> serves to advise another law enforcement agency that the [DHS] seeks custody of an alien presently in the custody of that agency, for the purpose of arresting and removing the alien. The detainer is a request that such agency advise the [DHS], prior to release of the alien, in order for the [DHS] to arrange to assume custody, in situations when gaining immediate physical custody is either impracticable or impossible.

And 8 C.F.R. § 287.7(d) provides that,

> [u]pon a determination by the Department to issue a detainer for an alien *not otherwise detained by a criminal justice agency*, such agency shall maintain custody[11] of the alien for a period not to

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[11] We note that the United States Court of Appeals for the Third Circuit has held that the phrase "shall maintain custody" does *not* mandate a detention based on a request under § 287.7(d). *Galarza v. Szalczyk*, 745 F.3d 634, 640 (3rd Cir. 2014). Indeed, such a mandate would violate the Tenth Amendment. *See El Cenizo*, 890 F.3d at 180-81.

> exceed 48 hours, excluding Saturdays, Sundays, and holidays in order to permit assumption of custody by the Department.

(Emphasis added). Further,

> [a]s of April 2, 2017, ICE policy requires that immigration detainers be accompanied by a signed *administrative warrant* attesting to probable cause of removability from the United States. *City of Philadelphia*, 916 F.3d at 281; *Lopez-Lopez*[*v. Cnty. of Allegan*], 321 F. Supp. 3d [794,] 797[(W.D. Mich. 2018)]. "*Administrative warrants differ significantly from warrants in criminal cases in that they are not issued by a detached and neutral magistrate*." *Lopez-Lopez*, 321 F. Supp. 3d at 799.

Rios v. Jenkins, 390 F. Supp. 3d 714, 719 (W.D. Va. 2019) (emphases added).

[36] Gary contends that nothing in subsections (a) through (c) of Section 26-55 limits or restricts the enforcement of federal immigration laws to less than the full extent permitted by federal law. First, Gary asserts that 8 U.S.C. § 1357(g)(10) does not permit local officers to detain individuals pursuant to civil immigration detainers. Second, Gary asserts that detentions based solely on civil immigration violations violate the Fourth Amendment. We address each contention in turn.

1.a. Does federal law permit detentions by local officers based solely on civil immigration detainers or administrative warrants?

[37] 8 U.S.C. § 1357(g)(10)(B) permits state and local officers to "*cooperate* with the Attorney General in the identification, apprehension, detention, or removal of

aliens not lawfully present in the United States." (Emphasis added). As the Court in *Arizona* explained,

> *[t]here may be some ambiguity as to what constitutes cooperation under the federal law; but no coherent understanding of the term would incorporate the unilateral decision of state officers to arrest an alien for being removable absent any request, approval, or other instruction from the Federal Government*. The Department of Homeland Security gives examples of what would constitute cooperation under federal law. These include situations where States participate in a joint task force with federal officers, provide operational support in executing a warrant, or allow federal immigration officials to gain access to detainees held in state facilities. See Dept. of Homeland Security, Guidance on State and Local Governments' Assistance in Immigration Enforcement and Related Matters 13-14 (2011), online at http://www.dhs.gov/files/resources/immigration.shtm (all Internet materials as visited June 21, 2012, and available in Clerk of Court's case file).

567 U.S. at 410 (emphasis added). The Court further observed 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.* at 413 (emphases added).

[38] Immigration detainers and administrative warrants seek local assistance with detention of removable aliens without federal training or supervision, a distinction that sets them apart from the myriad other ways local agencies may cooperate with federal officials in the enforcement of immigration law. *See* Guidance on State and Local Governments' Assistance at 13-14; *see also Lopez-Aguilar v. Marion Cnty. Sheriff's Dep't*, 296 F. Supp. 3d 959 (S.D. Ind. 2017)

(noting that "[o]nly when acting under color of federal authority, that is, as directed, supervised, trained, certified, and authorized by the federal government, may state officers effect constitutionally reasonable seizures for civil immigration violations. . . . [D]etainers, standing alone, do not supply the necessary direction and supervision"), *rev'd on other grounds*, 924 F.3d 375 (7th Cir. 2019). In *Melendres v. Arpaio*, the United States Court of Appeals for the Ninth Circuit observed that, without a 287(g) agreement, a local law enforcement officer is "not empowered to enforce civil immigration violations." 695 F.3d 990, 1001 (9th Cir. 2012). In this case, there is no such agreement.

[39] In *Lunn v. Commonwealth*, the Supreme Judicial Court of Massachusetts addressed this issue and stated that

> *it is not reasonable to interpret § 1357(g)(10) as affirmatively granting authority to all State and local officers to make arrests that are not otherwise authorized by State law*. Section 1357(g)(10), read in the context of § 1357(g) as a whole, simply makes clear that State and local authorities, even without a 287(g) agreement that would allow their officers to perform the functions of immigration officers, may continue to cooperate with Federal immigration officers in immigration enforcement *to the extent they are authorized to do so by their State law* and choose to do so.

78 N.E.3d 1143, 1159 (Mass. 2017) (emphases added). The *Lunn* court held that state law enforcement officers did not "have an inherent authority to arrest that exceeds what is conferred on them by our common law and statutes." *Id.* And the court concluded that "Massachusetts law provides no authority for Massachusetts court officers to arrest and hold an individual solely on the basis

of a Federal civil immigration detainer, *beyond the time that the individual would otherwise be entitled to be released from State custody*." *Id.* at 1160 (emphasis added).

[40] As Gary points out, Indiana law likewise does not authorize state or local officers to arrest or detain an individual based solely on a civil immigration detainer. Indeed, as we discuss below, in *Buquer v. City of Indianapolis*, No. 1:11-CV-00708-SEB, 2013 WL 1332158, at *11 (S.D. Ind. Mar. 28, 2013), the United States District Court for the Southern District of Indiana held that a proposed Indiana statute seeking to authorize a law enforcement officer to arrest an individual based on a civil immigration detainer violated the Fourth Amendment. Therefore, we agree that nothing in 8 U.S.C. § 1357(g)(10) provides authority for such a detention. *See Lunn*, 78 N.E.3d at 1159. Indeed, a state cannot expand the "limited circumstances" in which state and local officers may perform the functions of immigration officers. *See Arizona*, 567 U.S. at 408. As such, we hold that federal law does not permit detentions by state and local officers based solely on civil immigration detainers or administrative warrants. Accordingly, subsections (a) through (c) of Section 26-55 do not limit or restrict the enforcement of federal immigration laws to less than the full extent permitted by federal law.

1.b. Does the Fourth Amendment permit detentions based solely on civil immigration violations?

[41] Subsections (a)-(c) prohibit stopping, arresting, detaining, or continuing to detain a person "after that person becomes eligible for release from custody or is free to leave an encounter with an agent or agency" based on (a) an

immigration detainer, (b) an administrative warrant, or (c) "any other basis that is based solely on the belief that the person is not present legally in the United States, or that the person has committed a civil immigration violation." Appellant's App. Vol. 2. at 42. Gary contends that the trial court erred in enjoining these provisions because they "merely ensure [Gary's] compliance with the Fourth Amendment's prohibition [against] unreasonable searches and seizures," and Gary cites several cases demonstrating "'a broad consensus around the nation'" in support of that contention. Appellant's Br. at 53-54 (quoting *Ramon v. Short*, 460 P.3d 867, 875 (Mont. 2020)). In other words, Gary asserts that subsections (a) through (c) comport with federal constitutional law and, thus, do not violate Section 4. We agree.

[42] The Fourth Amendment provides: "The right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause . . . particularly describing the place to be searched, and the persons or things to be seized." "The fundamental command of the Fourth Amendment is that searches and seizures be reasonable[.]" *New Jersey v. T.L.O.*, 469 U.S. 325, 340 (1985). And "'the general rule [is] that Fourth Amendment seizures are 'reasonable' only if based on probable cause' to believe that the individual has committed a crime." *Bailey v. United States*, 568 U.S. 186, 192 (2013) (quoting *Dunaway v. New York*, 442 U.S. 200, 213 (1979)) (emphasis added). Finally, the Supreme Court of the United States "has insisted that inferences of probable cause be drawn by 'a

neutral and detached magistrate . . . .'" *Shadwick v. City of Tampa*, 407 U.S. 345, 350 (1972).

Probable Cause and Neutral and Detached Magistrate

[43] While 8 C.F.R. § 287.7 purports to authorize a state or local governmental body to detain someone "not otherwise detained" up to forty-eight hours, the question presented here is whether such a detention would violate the Fourth Amendment. As the Supreme Court stated in *Arizona*, "[a]s a general rule, it is not a crime for a removable alien to remain present in the United States." 567 U.S. at 407. An immigration detainer is not a criminal warrant. *Buquer*, 2013 WL 1332158 at *3. Neither is an administrative warrant. *Lopez-Lopez*, 321 F. Supp. 3d at 799. And neither a detainer nor an administrative warrant is issued by a neutral and detached magistrate. *Id.* Accordingly, on the narrow question presented here, we hold that the detention of a person "not otherwise detained by a criminal justice agency" based on an immigration detainer or an administrative warrant would violate the Fourth Amendment and, thus, subsections (a) through (c) of Section 26-55 do not violate Section 4.[12]

[12] The dissent would hold that subsections (a) through (c) of Section 26-55 violate Section 4 because, it asserts, neither civil immigration detainers nor administrative warrants violate the Fourth Amendment. In support, the dissent relies on *Tenorio-Serrano v. Driscoll*, 324 F. Supp. 3d 1053 (D. Ariz. 2018), which, in turn, relies on *Abel v. United States*, 362 U.S. 217 (1960). However, the Court in *Abel* declined to address the constitutionality of detainers and administrative warrants under the Fourth Amendment because Abel had "expressly disavowed" that claim to the district court. 362 U.S. at 230. *Tenorio-Serrano* also relies on *El Cenizo*, 890 F.3d 164 (5th Cir. 2018), which, as we explain below, we decline to follow. Instead, we follow opinions from the First, Third, and Ninth Circuit Courts of Appeal, as well as the United States District Court for the Southern District of Indiana.

Morales and *El Cenizo*

[44] We find the analysis of the United States Court of Appeals for the First Circuit in *Morales v. Chadbourne*, 793 F.3d 208 (1st Cir. 2015), to be instructive. There, Morales, a naturalized United States citizen, was detained for twenty-four hours "after her criminal custody had terminated" based on an immigration detainer issued by ICE agents under 8 C.F.R. § 287.7. *Id.* at 217. Morales sued the ICE agents for violating her rights under the Fourth and Fifth Amendments.

[45] In *Morales*, the court observed that "[l]ongstanding precedent establishes that '[t]he Fourth Amendment applies to all seizures of the person, including seizures that involve only a brief detention short of traditional arrest.'" *Id.* at 215 (quoting *United States v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975)). And the court held that, "[b]ecause Morales was kept in custody for a new purpose after she was entitled to release, she was subjected to a new seizure for Fourth Amendment purposes—one that must be supported by a new probable cause justification." *Id.* at 217 (citing *Illinois v. Caballes*, 543 U.S. 405, 407-08 (2005); *Arizona*, 567 U.S. at 413 ("[D]elay[ing] the release of some detainees for no reason other than to verify their immigration status . . . would raise constitutional concerns.")).

[46] We are not persuaded by that part of the Fifth Circuit's analysis in *El Cenizo*, 890 F.3d at 164, cited by Nicholson. As relevant here, in *El Cenizo*, the plaintiffs sought a preliminary injunction to enjoin a Texas statute that required law enforcement agencies to honor immigration detainers issued by ICE. *Id.* at

174. The plaintiffs brought a facial challenge to the constitutionality of the statute under the Fourth Amendment. The Fifth Circuit noted that, in bringing a facial Fourth Amendment challenge, the plaintiffs had the high burden to "establish that every seizure authorized by the ICE-detainer mandate violates the Fourth Amendment. They have not satisfied this exacting standard." *Id.* at 187. The court held that the statute was not facially unconstitutional under the Fourth Amendment. *Id.* at 189-90.

[47] Nicholson contends that "[t]he present case must also be considered in the 'facial challenge' context, for no specific application is at issue." Appellees' Br. at 47. We agree that Gary's Fourth Amendment argument in defense of the Ordinance amounts to a facial challenge to the constitutionality of immigration detainers and administrative warrants. However, as we explain below, Gary has met its burden on this facial challenge. And, in *Arizona*, which was also a facial challenge, the Supreme Court recognized that "[d]etaining individuals solely to verify their immigration status would raise constitutional concerns," and we find the Court's logic applicable here. 567 U.S. at 413.

Facial Challenge

[48] In *City of Los Angeles, California v. Patel*, 576 U.S. 409 (2015), the Supreme Court of the United States clarified a party's burden in making a facial Fourth Amendment challenge to a statute. The Court stated,

> claims for facial relief under the Fourth Amendment are unlikely to succeed when there is substantial ambiguity as to what conduct a statute authorizes: Where a statute consists of

> "extraordinarily elastic categories," it may be "impossible to tell" whether and to what extent it deviates from the requirements of the Fourth Amendment.

Id. at 416 (quoting *Sibron v. New York*, 392 U.S. 40, 59, 61, n.20 (1968)). And the Court observed that, while such a challenge is difficult, "the Court has on numerous occasions declared statutes facially invalid under the Fourth Amendment." *Id.* at 417.

[49] Here, again, Gary maintains that immigration detainers and administrative warrants violate the Fourth Amendment, and, as such, state law cannot require that the City comply with such *per se* unconstitutional requests. We must agree. There is nothing ambiguous or elastic about the immigration detainers and administrative warrants at issue here. *See id.* at 416. The Ordinance makes clear that Gary prohibits only detentions based solely on civil immigration violations when those detentions are based on an assertion of probable cause that has not been found by a neutral and detached magistrate. For instance, the Ordinance defines "administrative warrant" as explicitly *excluding* "criminal warrants issued upon a judicial determination of probable cause and in compliance with the requirements of the Fourth Amendment[.]" Appellant's App. Vol. 2 at 39. And the Ordinance defines "immigration detainer" in relevant part as a request to detain "based on an alleged violation of a civil immigration law[.]" *Id.* at 40. Because the Ordinance makes clear that only detentions based on civil immigration violations without a finding of probable cause by a neutral and detached magistrate are prohibited, subsections (a)

through (c) of Section 26-55 unambiguously apply only to those detentions that would be unconstitutional under the Fourth Amendment.

[50] In *Buquer*, three foreign nationals living in Indiana sued to permanently enjoin proposed legislation that sought, in relevant part, to authorize law enforcement officers to arrest an individual based on a removal order issued by an immigration court or based on an immigration detainer. 2013 WL 1332158 at *2. The United States District Court for the Southern District of Indiana granted the permanent injunction, stating that, "because [the proposed statute] authorizes state and local law enforcement officers to effect warrantless arrests for matters that are not crimes, it runs afoul of the Fourth Amendment, and thus, is unconstitutional on those grounds." *Id.* at *10. The court expressly held that an immigration detainer "does not provide lawful cause for arrest under the Fourth Amendment." *Id.* at *11.

[51] In particular, in concluding that the proposed statute, Indiana Code Section 35-33-1-1 ("Section 20") was unconstitutional, the court held as follows:

> "[A]n arrest is reasonable under the Fourth Amendment so long as there is probable cause to believe that *some* criminal offense has been or is being committed." *Fox v. Hayes*, 600 F.3d 819, 837 (7th Cir. 2010) (emphasis in original) (citations omitted). When a federal court is tasked with evaluating a facial challenge to a state law, the court must "consider any limited construction that a state court or enforcement agency has proffered." *Ward v. Rock Against Racism*, 491 U.S. 781, 795-96, 109 S. Ct. 2746, 105 L.Ed.2d 661 (1989) (quoting *Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 n.5, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982)). However, "a federal court may not slice

and dice a state law to 'save' it; we must apply the Constitution to the law the state enacted and not attribute to the state a law we could have written to avoid the problem." *K-S Pharmacies, Inc. v. Am. Home Products, Corp.*, 962 F.2d 728, 730 (7th Cir. 1992) (citations omitted).

* * *

. . . Section 20 expressly provides that state and local enforcement officers "may arrest" individuals for conduct that all parties stipulate and agree is not criminal. The statute contains no reference to Fourth Amendment protections nor does it include a requirement that the arrest powers granted to law enforcement officers under Section 20 be used *only in circumstances in which the officer has a separate, lawful reason for the arrest*.

* * *

. . . Nor are we persuaded by Defendants' argument that the law in fact requires a "higher standard than probable cause" because it requires the officers to actually "have" certain documents in their possession before exercising their discretion under Section 20, to wit, a removal order from an immigration court, *a detainer* or notice of action from DHS, or probable cause to believe that an individual was indicted or convicted of an aggravated felony. Defs.' Resp. at 14. However, even assuming that "have" is interpreted to require physical possession, *being in possession of any of the documents enumerated in Section 20 does not provide lawful cause for arrest under the Fourth Amendment*.

In short, . . . *we find that Section 20 is susceptible to only one interpretation, to wit, that it authorizes the warrantless arrest of persons for matters and conduct that are not crimes. Because such power contravenes the Fourth Amendment, Section 20 is unconstitutional*.

Id. at *10-11 (emphases added).

[52] Here, likewise, the scope of the facial challenge is narrow, clearly defined, and susceptible to only one interpretation, and the hurdle of a Fourth Amendment facial challenge is easily cleared. For these reasons, just as the court concluded in Buquer, we hold that 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. Accordingly, federal permission to cooperate in federal immigration enforcement does not mean that state and local law enforcement officers are authorized to comply with immigration detainers or administrative warrants standing alone in violation of the Fourth Amendment.

Arizona v. United States

[53] In *Arizona*, the Supreme Court of the United States observed that there was "no need in this case to address whether reasonable suspicion of illegal entry or another immigration crime would be a legitimate basis for prolonging a[n otherwise lawful] detention." 567 U.S. at 414. Nonetheless, the Court stated that "[d]etaining individuals solely to verify their immigration status would raise constitutional concerns." 567 U.S. at 413 (citation omitted, emphasis added). And as the United States Court of Appeals for the Fourth Circuit has explained,

> [a]lthough *Arizona* . . . did not resolve whether knowledge or suspicion of a civil immigration violation is an adequate basis to conduct a brief investigatory stop, . . . the Court's logic regarding

> arrests readily extends to brief investigatory detentions. In particular, to justify an investigatory detention, a law enforcement officer must have reasonable, articulable suspicion that "criminal activity may be afoot." *Terry*[*v. Ohio*], 392 U.S. [1,] 30[(1968)]. And because civil immigration violations are not criminal offenses, suspicion or knowledge that an individual has committed a civil immigration violation "alone does not give rise to an inference that criminal activity is 'afoot.'" *Melendres*, 695 F.3d at 1001.

Santos, 725 F.3d at 465.

[54] We conclude that the Supreme Court's expression of "constitutional concerns" in *Arizona* extends to detentions without reasonable suspicion or probable cause of a crime. 567 U.S. at 413. Thus, again, we decline to follow the Fifth Circuit's analysis in *El Cenizo*. Instead, we follow the numerous decisions of federal circuit and district courts holding that detentions based only on civil immigration violations violate the Fourth Amendment. *See, e.g.*, *Santos*, 725 F.3d at 465 (holding detention for immigration violation without probable cause of a crime violated Fourth Amendment); *Melendres*, 695 F.3d at 1001 (holding that extending detention of traffic stop "must be supported by additional suspicion of criminality"); and *Buquer*, 2013 WL 1332158 at *10 (holding that "warrantless arrests for matters that are not crimes" violate the Fourth Amendment).

Summary

[55] In sum, as the Supreme Court of the United States has stated, "it is not a crime for a removable alien to remain present in the United States." *Arizona*, 567 U.S.

at 407. Both immigration detainers and administrative warrants are administrative documents issued by an executive branch agency without the intervention of a detached and neutral magistrate. Under the Supremacy Clause and the doctrine of preemption, state and local governments are subordinate to the federal government in immigration matters. But neither the Supremacy Clause nor the preemption doctrine supersedes or preempts the Fourth Amendment, which, of course, applies to state and local officials acting under color of state law. This is especially true where state and local participation is voluntary. *See El Cenizo*, 890 F.3d at 178 (noting "Tenth Amendment prevents Congress from compelling . . . municipalities to cooperate in immigration enforcement"). And neither Section 3 nor Section 4 has altered, nor can alter, the operation and effect of the Fourth Amendment. There is no immigration law exception to the Fourth Amendment.

[56] Subsections (a) through (c) of Section 26-55 of the Ordinance prohibit a Gary agency or agent from stopping, arresting, detaining, or continuing to detain an individual 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." Appellant's App. Vol. 2 at 42. We hold that detentions by State and local agents based only on civil immigration violations contravene the Fourth Amendment. Section 4 prohibits Gary from restricting the enforcement of federal immigration laws to less than the full extent permitted by federal law, and federal immigration laws are subject to the Fourth Amendment.

[57] Federal law also includes 42 U.S.C. § 1983,[13] which prohibits the deprivation of Fourth Amendment rights under color of state law. Our legislature would not have intended that local units of government risk Fourth Amendment violations in order to cooperate with federal immigration authorities, thereby subjecting local officials to actions brought under 42 U.S.C. § 1983. *See, e.g.*, *Morales*, 793 F.3d at 208; *Santos*, 725 F.3d at 451; *Melendres*, 695 F.3d at 990. Thus, we conclude that Gary's contention that subsections (a) through (c) of Section 26-55 of the Ordinance do not violate Section 4 but "merely ensure [Gary's] compliance with the Fourth Amendment's prohibition [against] unreasonable searches and seizures" is correct. Appellant's Br. at 53-54.

2. Subsections (d) through (f)

[58] With respect to subsections (d) through (f), Gary's argument on appeal turns on its proffered interpretation of Section 4, which we do not adopt. We agree with Nicholson that subsections (d) through (f) violate Section 4 because those subsections prohibit actions that are permitted under federal law. *See* Guidance

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[13] 42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

on State and Local Governments' Assistance at 13-14;[14] *see also Arizona*, 567 U.S. at 410. For example, subsection (d) purports to prohibit an agency or agent from accepting requests from federal authorities to support or assist with immigration and enforcement operations and, further, requires that an agent who receives a request to support or assist an immigration enforcement operation to report that request to his or her supervisor, who shall decline the request and document the declination. This subsection as well as subsections (e) and (f) fly in the face of Section 4. Accordingly, Gary is enjoined from enforcing subsections (d) through (f) of Section 26-55 of the Ordinance, but the remainder of that Section, including subsections (a) through (c), remains valid and enforceable.

Section 26.58(c)

[59] This subsection of 26.58 provides as follows:

> The City recognizes the arrest of an individual increases that individual's risk of deportation even in cases where the individual is found to be not guilty, creating a disproportionate impact from law enforcement operations. Therefore, for all individuals, the Gary Police Department will recognize and consider the extreme potential negative consequences of an arrest in exercising its discretion regarding whether to take such an action and will arrest an individual only after determining that less severe

[14] We note that this comprehensive list of permissible local cooperation with federal enforcement of immigration law, while not exhaustive, does not mention either detainers or administrative warrants.

> alternatives are unavailable or would be inadequate to effect a satisfactory resolution.

Appellant's App. Vol. 2 at 56-57. Gary contends, and the State agrees, that nothing in this subsection violates Section 4 as interpreted above because it pertains only to a law enforcement officer's discretion, which is not dictated by federal law.[15] We agree and conclude that the traditional, well-established exercise of law enforcement discretion does not violate Section 4 and that the trial court's judgment on this issue is erroneous.

Section 26.59

[60] This section of the Ordinance provides as follows:

> **Information regarding citizenship or immigration status**.
>
> 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. All municipal agents shall be instructed that federal law does not allow any such prohibition. *"Information regarding an individual's citizenship or immigration status," for purposes of this section, means a statement of the individual's country of citizenship or a statement of the individual's immigration status*.

Id. at 57 (emphasis added).

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[15] We reject Nicholson's speculation that this provision "seeks to limit the natural immigration-enforcement consequences for those at deportation risk, thereby restricting both the enforcement of federal immigration law and what federal law permits." Appellees' Br. at 43.

[61] Gary contends that this section of the Ordinance does not violate Section 4 because it mirrors the prohibition found in 8 U.S.C. § 1373 and is entirely consistent with federal law. However, Nicholson contends that the definition of "information regarding an individual's citizenship or immigration status" within Section 26.59 is "too narrow" and that federal law permits the sharing of additional information in the enforcement of federal immigration law. Appellees' Br. at 45. For the same reasons we agree with Gary on the interpretation of Section 3, we agree that the definition of "information regarding an individual's citizenship or immigration status" in Section 26.59 comports with the plain meaning of 8 U.S.C. § 1373. Again, as the Court in *Grewal* held, nothing in § 1373 suggests that state and local governments must share anything more than the fact of a person's citizenship or immigration status. *See Grewal*, 475 F. Supp. 3d at 375-76. Accordingly, we hold that this section of the Ordinance does not violate Section 4.

Conclusion

[62] The trial court entered summary judgment for Nicholson on his request for declaratory judgment that the four challenged provisions of the Ordinance violate Indiana law. We hold that only that part of Section 26-52 that prohibits an agent or agency from *assisting* in the investigation of the citizenship or immigration status of a person violates Indiana Code Section 5-2-18.2-3. And none of the other challenged sections of the Ordinance violate Section 3.

[63] We also hold that subsections (a) through (c) of Section 26-55 do not violate Indiana Code Section 5-2-18.2-4 because subsections (a) through (c) do not

limit or restrict the enforcement of federal immigration laws to less than the full extent permitted by federal law. However, we conclude that subsections (d) through (f) do violate Section 5-2-18.2-4. And we hold that neither Section 26.58(c) nor Section 26.59 violates Indiana Code Section 5-2-18.2-4.

[64] Accordingly, we affirm in part and reverse in part, and we remand with instructions that the trial court enter partial summary judgment in favor of Nicholson regarding the stricken portion of Section 26-52 and subsections (d) through (f) of Section 26-55. The trial court shall also enter partial summary judgment in favor of Gary on its claims regarding the remainder of Section 26-52, subsections (a) through (c) of Section 26-55, Section 26.58(c), and 26.59.

[65] Finally, the trial court's injunction order is not sufficiently definite to advise Gary "'from a reading of [the order] what [it] is restrained from doing.'" *See Martinal*, 225 N.E.2d at 184 (quoting 16 I.L.E., Injunctions, § 125 (1959)). On remand, the trial court is instructed to specifically enjoin Gary from enforcing: the portion of Section 26-52 that prohibits assisting in the investigation of the citizenship or immigration status of a person and subsections (d) through (f) of Section 26-55 of the Ordinance. The Ordinance remains valid and enforceable in all other respects.

[66] Affirmed in part, reversed in part, and remanded with instructions.

Riley, J., concurs.

Brown, J., concurs in part and dissents in part with separate opinion.

IN THE
COURT OF APPEALS OF INDIANA

City of Gary,
Appellant-Defendant,

v.

Jeff Nicholson, Douglas Grimes, Greg Serbon, and Cheree Calabro,
Appellees-Plaintiffs,

and

State of Indiana,

Appellee-Intervenor.

Court of Appeals Case No. 20A-MI-2317

Brown, Judge, concurring in part and dissenting in part.

[67] I respectfully dissent with regard to the majority's determination that subsections (a) through (c) of Section 26-55 remain valid and enforceable. In *Tenorio-Serrano v. Driscoll*, Guillermo Tenorio-Serrano was in custody on a DUI charge in Coconino County, Arizona, and brought a lawsuit against the local Sheriff and other officials challenging their policy of holding persons in state custody for up to forty-eight additional hours as requested in ICE detainers and

warrants and asked the court to preliminarily enjoin the Sheriff's Office and the Coconino County Detention Facility from detaining him on the ICE warrant after he posted bail or resolved his state charges. 324 F. Supp. 3d 1053, 1057 (D. Ariz. 2018). In addressing arguments under the Fourth Amendment, the court held:

> Plaintiff asserts that all arrests must be "based on probable cause to believe that the individual has committed a crime." Doc. 14 at 6 (quoting *Bailey v. United States*, 568 U.S. 186, 192, 133 S. Ct. 1031, 185 L.Ed.2d 19 (2013)). This certainly is the general rule in the criminal context, *Bailey*, 568 U.S. at 192, 133 S. Ct. 1031, but arrests for civil reasons are also constitutionally permissible. *See, e.g.*, *Maag v. Wessler*, 960 F.2d 773, 776 (9th Cir. 1991), *as amended on denial of reh'g* (Apr. 1, 1992) (upholding arrest based on probable cause of danger due to serious mental illness); *United States v. Phillips*, 834 F.3d 1176, 1181 (11th Cir. 2016) ("The Fourth Amendment does not require warrants to be based on probable cause of a crime, as opposed to a civil offense. Nothing in the original public meaning of 'probable cause' or 'Warrants' excludes civil offenses.") (collecting cases).
>
> Arrests based on probable cause of removability – a civil immigration violation – have been long recognized in the courts. *See Abel v. United States*, 362 U.S. 217, 230, 80 S. Ct. 683, 4 L.Ed.2d 668 (1960) ("Statutes authorizing administrative arrest to achieve detention pending deportation proceedings have the sanction of time."); *City of El Cenizo, Texas v. Texas*, 890 F.3d 164, 187 (5th Cir. 2018) ("It is undisputed that *federal* immigration officers may seize aliens based on an administrative warrant attesting to probable cause of removability.") (emphasis in original).

Id. at 1066.

[68] With respect to whether a judicial warrant was required, the court held:

> The [federal Immigration and Nationality Act] expressly authorizes ICE to arrest and detain aliens pending removal decisions "on a warrant issued by the Attorney General." See 8 U.S.C. § 1226. It does not require judicial approval of the warrant. The Supreme Court noted more than 50 years ago that there is "overwhelming historical legislative recognition of the propriety of administrative arrest for deportable aliens." *Abel*, 362 U.S. at 233, 80 S. Ct. 683. Plaintiff cites no authority suggesting that ICE must seek judicial warrants in order to arrest individuals suspected of being removable

Id. The court noted that "probable cause in a particular case can be established on the basis of the collective knowledge of all law enforcement officers involved, provided there is communication among the officers," *Id.* at 1066 n.3 (citing *United States v. Villasenor*, 608 F.3d 467, 475 (9th Cir. 2010), *cert. denied*, 562 U.S. 1020, 131 S. Ct. 547 (2010); *United States v. Ramirez*, 473 F.3d 1026, 1032-1033 (9th Cir. 2007), *cert. denied*, 552 U.S. 866, 128 S. Ct. 159 (2007)), and that "state officers may act on valid probable cause determinations by federal officers." *Id.* (citing *United States v. Martin Takatsy, et al.*, No. CR-17-08163-PCT-DGC, 2018 WL 3221598, at *6-8 (D. Ariz. July 2, 2018)). The court concluded that the injunction would interfere with the judgment of the elected officials, would interfere with the Arizona legislature's policy determination that Arizona should cooperate with federal immigration enforcement, and might interfere with Arizona's interest in preventing unlawful immigration, as recognized by the Supreme Court in *Arizona v. United States*, 567 U.S. 387, 132 S. Ct. 2492 (2012). *Id.* at 1067. The court noted that Tenorio-Serrano claimed

that he would suffer irreparable harm from a violation of his constitutional rights, "but, for reasons explained above, he ha[d] not raised serious questions on his Fourth Amendment claim." *Id.* at 1067 n.4. *See also State v. Rodriguez*, 854 P.2d 399, 408 (Or. 1993) ("In the light of *Abel* and the unquestioned recognition by the Supreme Court that aliens subject to deportation proceedings do not enjoy the full panoply of constitutional protections accorded to persons subject to criminal prosecution, we conclude that the administrative arrest warrant issued to procure defendant's arrest as a deportable alien in this case did not violate the Fourth Amendment."); *United States v. Tsung Min Yu*, No. 3:17-CR-180-CRS, 2019 WL 202206, at *4 (W.D. Ky. Jan. 15, 2019) ("An arrest pursuant to a valid administrative warrant permits the officer to conduct a search incident to arrest akin to that following execution of a judicially-issued arrest warrant.") (citing *Abel*, 362 U.S. at 235-237); *see also Gonzalez v. United States Immigr. & Customs Enf't*, 975 F.3d 788, 825 (9th Cir. 2020) ("In *Abel*, the Supreme Court opined that, consistent with the Fourth Amendment, immigration authorities may arrest individuals for civil immigration removal purposes pursuant to an administrative arrest warrant issued by an executive official, rather than by a judge.").

[69] Based upon *Tenorio-Serrano* and the authorities cited therein, I would conclude that the trial court properly granted Nicholson's motion for summary judgment with respect to subsections (a) through (c) of Section 26-55. I concur with the majority in all other respects.