No. 18-1050

In the United States Court of Appeals for the Seventh Circuit

ANTONIO LOPEZ-AGUILAR,
Plaintiff-Appellee,

v.

MARION COUNTY SHERIFF'S DEPARTMENT, ET AL.,
Defendants-Appellees,

STATE OF INDIANA, Proposed Intervenor-Appellant.

On Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division, No. 1:16-cv-02457-SEB-TAB

BRIEF FOR THE STATES OF TEXAS, ALABAMA, ARKANSAS, GEORGIA, LOUISIANA, MICHIGAN, NEBRASKA, OHIO, OKLAHOMA, SOUTH CAROLINA, WEST VIRGINIA, GOVERNOR PAUL R. LEPAGE OF MAINE, AND THE COMMONWEALTH OF KENTUCKY, BY AND THROUGH GOVERNOR MATTHEW G. BEVIN, AS AMICI CURIAE IN SUPPORT OF PROPOSED INTERVENOR-APPELLANT STATE OF INDIANA

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INTEREST OF AMICI CURIAE[1]

Amici are the States of Texas, Alabama, Arkansas, Georgia, Louisiana, Michigan, Nebraska, Ohio, Oklahoma, South Carolina, West Virginia, Governor Paul R. LePage of Maine, and the Commonwealth of Kentucky, by and through Governor Matthew G. Bevin (collectively, "the States").[2] The States have a significant interest in protecting their residents' safety by promoting cooperation with federal immigration officials to enforce federal immigration law. An important component of that cooperation is complying with written requests by federal immigration officials for state or local officials to detain an alien for up to 48 additional hours so that federal officials can subsequently detain the alien for removal proceedings. And these written detainer requests convey to state and local officials that the federal government has probable cause to believe that the subject is a removable alien. All States are empowered to choose to direct their political subdivisions to comply with such a "detainer" request. And as more municipalities seek to declare themselves "sanctuary cities," the decision below presents a troubling scenario: A municipality dissatisfied with its obligations under state law evaded that law under the guise of a consent decree. In scenarios like this, it is imperative that

[1] As governmental parties, amici need not file a disclosure statement. *See* Cir. R. 26.1. No party or party's counsel authored any part of this brief. And no person or entity, other than amici, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief. *See* Fed. R. App. P. 29(a)(4)(E).

[2] All parties consent to this filing. *Cf.* Fed. R. App. P. 29(a)(2).

States can intervene in the proceedings, as only they can defend the proper application and scope of their laws.

Summary of the Argument

The court below reached a remarkable result: Simply by being sued, Marion County could do what it otherwise never could—exempt itself from two Indiana statutory provisions plainly requiring the County to comply with federal immigration detainer requests. To accomplish this maneuver, the County had to keep the State of Indiana in the dark. And when the State learned of this attempt to circumvent its laws by consent decree, the State sought to intervene and defend its sovereign prerogatives. Yet the district court denied the State's request even to intervene. Indiana's sovereignty should not be stripped from the State before it at least has a chance to defend its statutes in court. And to state the obvious: Indiana is uniquely situated to defend its own sovereign statutes.

Moreover, the district court's constitutional analysis of Indiana's law is flawed. As the State of Texas has argued at length in other cases, State laws directing state and local officials to comply with federal immigration detainer requests are not preempted and do not violate the Fourth Amendment. *See, e.g.*, *City of El Cenizo v. Texas*, No. 17-50762, 2018 WL 1282035, at *17 (5th Cir. Mar. 13, 2018) (holding that "there is no merit" to preemption and Fourth-Amendment facial challenges to Texas provisions requiring compliance with immigration detainer requests). Nothing in *Arizona v. United States*, 567 U.S. 387 (2012), or any of the other binding court decisions on which the district court purported to rely holds that federal law preempts a State from requiring its own political subdivisions to cooperate with

federal Immigration and Customs Enforcement ("ICE") officials by complying with detainer requests. Likewise, a State's decision to mandate compliance with those requests would not violate the Fourth Amendment—regardless of whether those requests are grounded in probable cause of a federal criminal violation—because the seizure is reasonable based on the federal government's probable cause of a civil immigration violation.

Argument

I. Indiana Has a Unique, Direct Interest in This Consent Decree, and Its Participation by Intervention Is Necessary to Uphold State Law.

By granting a consent decree in which Marion County officers are prohibited from cooperating with federal immigration officials' detainer requests absent proof of probable cause of a federal criminal violation, the court below effectively exempted Indiana's largest county from part of Indiana law. By all accounts, Marion County was pleased to be enjoined: As the district court noted, the County—the purported defendant in a 42 U.S.C. § 1983 lawsuit stemming from an immigration detention—"prefer[red] to cease . . . cooperat[ing] with the government's immigration detainers." *Lopez-Aguilar v. Marion Cty. Sheriff's Dept.*, No. 1:16-cv-2457, 2017 WL 5634965, at *16 (S.D. Ind. Nov. 17, 2017). The consent decree thus allowed the County to do what it preferred but what the County knew state law prohibited.[3] That should have been a signal to the court that the parties' interests like-

[3] *See, e.g.*, ECF No. 46, Response to Statement of Interest on Behalf of the United States, at 2-3, *Lopez-Aguilar v. Marion Cty. Sheriff's Dep't*, No. 1:16-cv-2457 (S.D. Ind. Aug. 16, 2017) ("Indiana law requires [county officers] to cooperate with

ly diverged from those of the State. Yet when the State learned of the consent decree and attempted to intervene to appeal the outcome-determinative and erroneous interpretation of state law in the consent decree, the district court rebuffed the State's attempt. *See generally Lopez-Aguilar v. Marion Cty. Sheriff's Dep't*, No. 1:16-cv-2457, 2018 WL 306722 (S.D. Ind. Jan. 5, 2018). That refusal to allow the State to defend the scope and applicability of its own laws—laws that no party to the decree so much as briefed, much less defended, *see Lopez-Aguilar*, 2017 WL 5634965 at *7—impinges the State's sovereignty and threatens to cement a plainly erroneous interpretation of state law.

A State has a unique, paramount "interest in the continued enforceability of its own statutes." *Maine v. Taylor*, 477 U.S. 131, 136-37 (1986). This derives from the very nature of States in our federalist system of government. The States "entered the federal system with their sovereignty intact." *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 779 (1991). And a key component of that sovereign interest—indeed, "one of the quintessential functions of a State," *Diamond v. Charles*, 476 U.S. 54, 65 (1986)—is the ability "to create and enforce a legal code, both civil and criminal," *Diamond*, 476 U.S. at 65.

This interest stands in marked contrast to that of mere political subdivisions, such as Marion County. The sovereign States and the federal government are "regarded as separate political entities because each derives its power from a different

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federal immigration officials. . . . Historically, the Marion County Sheriff's Office has honored detention requests from ICE as state law requires.").

source." *Haggard v. Indiana*, 445 N.E.2d 969, 972 (Ind. 1983). In contrast, Indiana "[c]ities and counties are regarded as subordinate governmental agencies of the state because their power is granted to them by the state." *Id.* In fact, this is true of most States. *See, e.g.*, *Town of Lakewood Vill. v. Bizios*, 493 S.W.3d 527, 530 (Tex. 2016) ("Municipalities are creatures of law that are created as political subdivisions of the state . . . for the exercise of such powers as are conferred upon them. . . . They represent no sovereignty distinct from the state and possess only such powers and privileges as have been expressly or impliedly conferred upon them.") (quotations omitted); *see also* David J. Barron, *A Localist Critique of the New Federalism*, 51 Duke L.J. 377, 392 (2001) ("It is fair to say that hardly any impediments to the exercise of state power vis-à-vis local governments exist in state constitutional law.").

It has been understood for well over a century that any "powers conferred upon municipalities must be construed with reference to the object of their creation, namely, as agencies of the state in local government." *Scott v. City of La Porte*, 68 N.E. 278, 280 (Ind. 1903). Thus, when local preferences run up against a validly enacted state law, the former generally must yield to the latter. *See, e.g.*, *Berry v. Peoples Broad. Corp.*, 547 N.E.2d 231, 234 (Ind. 1989) ("When a local board regulation is in conflict with a state statute, the local regulation is subordinated."); *Uhl v. Liter's Quarry of Ind., Inc.*, 384 N.E.2d 1099, 1102 (Ind. Ct. App. 1979) ("[W]hen the Legislature has expressed their interest in an area, local regulations in conflict therewith must fall.").

It is no surprise that local officials sometimes "chafe at these restraints and seek to evade them." *Dunn v. Carey*, 808 F.2d 555, 560 (7th Cir. 1986). But politi-

cal subdivisions like Marion County, and its officers, are not endowed with a greater power to avoid a disfavored state statute because they find themselves in litigation: Although "parties can settle their litigation with consent decrees, they cannot agree to 'disregard valid state laws.'" *Perkins v. City of Chicago Heights*, 47 F.3d 212, 216 (7th Cir. 1995) (quoting *People Who Care v. Rockford Bd. of Educ.*, 961 F.2d 1335, 1337 (7th Cir. 1992)). That is, "[a] consent decree is not a method by which state agencies may liberate themselves from the statutes enacted by the legislature that created them." *Kasper v. Bd. of Election Comm'rs*, 814 F.2d 332, 341-42 (7th Cir. 1987) (holding that settling parties "cannot agree to violate state law").[4]

Moreover, contrary to the district court's tortured reading of the state-law provisions at issue, there can be little doubt that the settlement preferred and reached by Marion County (and now enforced by a judicial consent decree) con-

[4] This is no outlier position. Several other circuits have similarly held that governmental units cannot settle their way around laws they do not like. *See, e.g.*, *League of Residential Neighborhood Advocates v. City of Los Angeles*, 498 F.3d 1052, 1055 (9th Cir. 2007) ("A federal consent decree or settlement agreement cannot be a means for state officials to evade state law."); *Cleveland Cty. Ass'n for Gov't by the People v. Cleveland Cty. Bd. of Comm'rs*, 142 F.3d 468, 478 (D.C. Cir. 1998) (per curiam) ("The [county] is, like any other party, free to choose settlement of a suit over the threat of prolonged litigation. But like any other party, it may not do so in a manner that disregards applicable state law. The county's failure to abide by this principle ... renders the consent decree invalid as a matter of law."); *Keith v. Volpe*, 118 F.3d 1386, 1393 (9th Cir. 1997) (holding invalid consent decree because the parties "could not agree to terms which would exceed their authority and supplant state law"); *cf. Overton v. City of Austin*, 748 F.2d 941, 956-57 (5th Cir. 1984) (holding invalid proposed consent decree because it required the city "to take action . . . beyond [its] power and jurisdiction," and the parties' consent "provides an insufficient basis on which to judicially ordain" a change in state law).

flicted with state law. Indiana's sanctuary-cities law is clear: Section 3 provides that "[a] governmental body . . . may not . . . implement . . . a policy that prohibits or in any way restricts . . . a law enforcement officer . . . 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 . . . ." Ind. Code § 5-2-18.2-3 (emphasis added).[5] And 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." Ind. Code § 5-2-18.2-4.

As to section 3, in its effort to bypass state law, the district court read "cooperating" out of the statute entirely. *See Lopez-Aguilar*, 2017 WL 5634965, at *8 ("Marion County's duties under Section 3 do not conflict with its duties under the Stipulated Judgment because the Stipulated Judgment prohibits Marion County only from 'seizing' and 'detaining' certain persons, not from communicating with or about them.") (internal citation omitted). The statute clearly provides that the term "cooperating" cannot possibly be redundant with "communicating." *See* Ind. Code § 5-2-18.2-3 ("[c]ommunicating or cooperating"). It is a "cardinal principle of statutory construction" that that provision should be construed such that "no

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[5] The consent decree itself, therefore, actually is a County policy prohibited by state law. *Cf., e.g.*, Webster's New International Dictionary 1908 (2d ed. 1945) (defining a "policy" as "[a] settled or definite course or method adopted and followed by a government, institution, body, or individual.").

clause, sentence, or word shall be superfluous, void, or insignificant." *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (internal quotations omitted).

As to section 4, a consent decree in which a regulated entity agrees to "limit or restrict the enforcement of federal immigration laws" is squarely prohibited by state law. Ind. Code § 5-2-18.2-4.[6] That is the nature of the consent decree here.

Of course, when it must, a consent decree can override an *invalid* state law. But that can occur only "upon properly supported findings that such a remedy is *necessary* to rectify a violation of federal law." *Perkins*, 47 F.3d at 216 (second emphasis omitted). Even assuming that the state laws here could be held invalid—and they cannot, as explained below, *see infra* Part II—the district court made no attempt to explain why it was necessary to enter a sweeping consent decree enjoining the County from complying with written detention requests by ICE. *See generally Lopez-Aguilar*, 2017 WL 5634965.[7] After all, by the district court's telling, the situ-

[6] In its order denying Indiana's motion to intervene, the court recast its earlier holding, stating that "[t]he extent of its statutory holding" was that "no Indiana statute requires Defendants' cooperation with removal orders, standing alone, or immigration detainers, standing alone." *Lopez-Aguilar*, 2018 WL 306722, at *3. But the fact that the short, simple statutory provisions at issue did not specifically enumerate "ICE detainer requests" at the low level of generality—or any other specific forms of cooperation—is not a valid reason to read those broadly worded provisions as somehow *excluding* detainer requests. *Cf. Glover v. Indiana*, 760 N.E.2d 1120, 1124 (Ind. Ct. App. 2002) ("[A] statute need only inform the individual of the generally proscribed conduct; it need not list with exactitude each item of conduct prohibited.").

[7] The parties' stipulation permanently enjoined Marion County officials from "seizing or detaining any person based solely on detention requests from ICE (in whatever form) or removal orders from an immigration court unless ICE supplies a

ation here did not concern *any* form of detention request by ICE. *See, e.g.*, *id.* at *2 ("[A]ccording to [the ICE agent, ICE] never asked Marion County to detain Lopez-Aguilar, formally or informally; he only asked Marion County to communicate with him about Lopez-Aguilar); *id.* ("[The ICE agent] never says that Lopez-Aguilar was subject to a removal order, an immigration warrant, or that ICE had reason to believe that Lopez-Aguilar was removable.").

It is not enough that the parties agreed that the consent decree should sweep more broadly—to upend more binding law that they mutually dislike. A federal court, after all, "is more than a recorder of contracts from whom parties can purchase injunctions; it is an organ of government constituted to make judicial decisions." *Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 525 (1986) (internal citations and quotations omitted). This case—comprised as it was of a plaintiff and defendant equally willing to circumvent state law—is a prime example of the need for further judicial scrutiny of the scope of the parties' injunction. The State of Indiana's involvement would have provided "that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Baker v. Carr*, 369 U.S. 186, 204 (1962). And, more importantly, "only the State has the kind of 'direct stake' identified in *Sierra Club v. Morton*, [405 U.S. 727, 740 (1972)], in de-

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warrant signed by a judge or otherwise supplies probable cause that the individual identified in the detainer has committed a *criminal* offense." ECF No. 37, Stipulated Final Judgment and Order for Permanent Injunction at 4, *Lopez-Aguilar v. Marion Cty. Sheriff's Dept.*, No. 1:16-cv-2457 (S.D. Ind. July 10, 2017).

fending the standards embodied in [its] code." *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 601 (1982)

To reject Indiana's intervention, the district court declared that neither the consent decree itself nor the court's order authorizing the consent decree "purports to invalidate any part of state law." *Lopez-Aguilar*, 2018 WL 306722, at *3. But the effect of the court-ordered injunction contradicts that statement. It is *not* the case that "Indiana law . . . remains just as enforceable today as it was the day before [the court] approved the Stipulated Judgment." *Id.* The consent decree creates, for Indiana's largest county, a nonstatutory exception to the "cooperation" requirement in section 3, and necessarily curtails the reach of section's 4 prohibition of restricting immigration enforcement to the "full extent permitted by federal law." Ind. Code §§ 5-2-18.2-3-4.

It is hard to overstate the effect of exempting Marion County from Indiana law. Marion County, coterminous with the State's capital city of Indianapolis,[8] is the most populous county in the State.[9] Indianapolis is the twelfth largest city in the United States, and Indiana's next largest city, Fort Wayne, is seventy-eighth.[10] Just

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[8] *Metro. Emergency Commc'ns Agency v. Cleek*, 835 N.E.2d 565, 567 (Ind. Ct. App. 2005) (observing that when Indianapolis became a "consolidated city," it and Marion County effectively became one and the same).

[9] U.S. Census Bureau, *Quick Facts: Indianapolis*, https://www.census.gov/quickfacts/fact/table/indianapoliscitybalanceindiana,US/PST045216 (last accessed Mar. 4, 2018).

[10] U.S. Census Bureau, *American FactFinder*, https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk (last accessed Mar. 4, 2018).

over one in seven Indiana residents live in Marion County.[11] To put that into perspective, only one in twelve New Yorkers lives in New York County,[12] and only one in eleven Texans lives in Dallas County.[13] It strains credulity to contend that a consent decree creating a special carve-out for Manhattan from New York law, or for Dallas from Texas law, would present only an incidental, "indirect[]" harm to those States. *Lopez-Aguilar*, 2018 WL 306722, at *5.

Indiana's "direct, significant, and legally protectable interest" here becomes even clearer when focusing on the "question at issue in this lawsuit": state and local cooperation with federal officials in the enforcement of federal immigration law. *Wisc. Educ. Ass'n Council v. Walker*, 705 F.3d 640, 658 (7th Cir. 2013) (internal quotations omitted). It is a well-observed national trend that unlawfully present aliens tend to cluster in major metropolitan areas. *See, e.g.*, CQ Roll Call, *Pew: Most*

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[11] *Compare* U.S. Census Bureau, *Quick Facts: Marion County, Indiana*, https://www.census.gov/quickfacts/fact/table/marioncountyindiana/PST045217 (last accessed Mar. 4, 2018), *with* U.S. Census Bureau, *Quick Facts: Indiana*, https://www.census.gov/quickfacts/fact/table/IN,US/PST045217 (last accessed Mar. 4, 2018).

[12] *Compare* U.S. Census Bureau, *Quick Facts: New York County, New York*, https://www.census.gov/quickfacts/fact/table/newyorkcountymanhattanborough newyork,US/PST045217 (last accessed Mar. 4, 2018), *with* U.S. Census Bureau, *Quick Facts: New York*, https://www.census.gov/quickfacts/fact/table/NY,US/PST045217 (last accessed Mar. 4, 2018).

[13] *Compare* U.S. Census Bureau, *Quick Facts*, *Dallas County, Texas*, https://www.census.gov/quickfacts/fact/table/dallascountytexas,US/PST045217 (last accessed Mar. 4, 2018), *with* U.S. Census Bureau, *Quick Facts: Texas*, https://www.census.gov/quickfacts/fact/table/TX,US/PST045217 (last accessed Mar. 4, 2018).

undocumented immigrants located in 20 largest U.S. metro areas, 2017 WL 540484, at *1 (Feb. 10, 2017). Indiana is no exception. Out of the over 100,000 unlawfully present aliens estimated to reside in Indiana, roughly one-quarter are in Marion County.[14] Unsurprisingly, then, the Marion County jail receives a disproportionate share of ICE detainer requests issued by federal immigration officials in the State: From 2003 to 2015, over one-third of the total number of ICE detainer requests in Indiana concerned individuals in the custody of Marion County.[15]

Fulfilling federal ICE detainer requests is, and has long been, a key component of cooperation between state and federal officials in enforcing immigration law. For example, during the Obama Administration, ICE deemed detainers "critical" to its enforcement of immigration law, noting that the agency "relies on the cooperation of our state and local law enforcement partners in this effort." U.S. Immigration & Customs Enforcement, *ICE Detainers: Frequently Asked Questions* (Dec. 28, 2011), https://www.ice.gov/ice-detainers-frequently-asked-questions; *see also* U.S. Immigration & Customs Enforcement, *Policy No. 10074.2, Issuance of Immigration Detainers by ICE Immigration Officers*, at 2 (Mar. 24, 2017) (discussing whether local

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[14] Senate Select Committee on Immigration Issues, 27-28 (Oct. 20, 2016), *available at* http://bloximages.chicago2.vip.townnews.com/nwitimes.com/content/tncms/assets/v3/editorial/7/df/7df305db-78f8-5cda-8823-fd3d41894c9a/5824ee2b36001.pdf.pdf.

[15] TRAC Immigration, Tracking Immigration and Customs Enforcement Detainers, http://trac.syr.edu/phptools/immigration/detainhistory/ (select "State: Indiana") (showing that Marion County jail received 4,224 ICE detainer requests out of the 11,984 requests in Indiana; the next county received merely 1,081 requests).

law-enforcement agencies "*cooperate*[] with DHS immigration detainers") (emphasis added). Even immigration-law scholars opposed to the enforcement of existing federal immigration laws admit that "detainers have a long history in immigration enforcement" and "are perhaps the single most important enforcement mechanism driving the record number of deportations seen in recent years." Christopher N. Lasch, *Preempting Immigration Detainer Enforcement under* Arizona v. United States, 3 Wake Forest J.L. & Pol'y 281, 287-88 (2013).

II. State Laws Requiring Local Cooperation with Federal ICE Detainer Requests Are Permitted by Federal Law.

To justify shutting the State out of this case, the district court claimed that its opinion granting a consent decree leaves Indiana law undisturbed. *Lopez-Aguilar*, 2018 WL 306722, at *3. As one part of that claim, the court noted that section 4 applies only to immigration enforcement "permitted by federal law," Ind. Code § 5-2-18.2-4, and held that the conduct enjoined by the consent decree is unconstitutional, thus falling outside section 4's scope and not covered by Indiana law to start with. *Lopez-Aguilar*, 2017 WL 5634965 at *8-14.

But the district court's constitutional holding was reached without any relevant briefing, *id.* at *7, and is seriously misguided. Contrary to the district court's holdings, Indiana's law regulating how its own political subdivisions respond to federal ICE detainer requests is neither preempted by federal law, *see infra* Part II.A, nor violates the Fourth Amendment, *see infra* Part II.B. Those mistaken holdings are concerning in their own right wholly apart from the intervention analysis, and a

correct constitutional analysis only further undermines the district court's basis for excluding Indiana from this case.

A. A State that requires its own political subdivisions to comply with federal ICE detainer requests does not violate the Supremacy Clause.

Contrary to the district court's intimations, federal law does not preempt state laws requiring compliance with federal ICE detainer requests. *Contra Lopez-Aguilar*, 2017 WL 5634965, at *9-11.[16]

8 U.S.C. § 1357(g)(10)(B) is a savings statute that expressly allows state and local *cooperation* with federal officials' enforcement of immigration law, even without a formal deputization agreement under 8 U.S.C. § 1357(g) that would allow *self-guided* enforcement of immigration law by state officers. In other words, while § 1357(g) agreements allow state officers to themselves directly enforce immigration law, Congress made clear that this avenue to receive additional powers did not

[16] The court below cited with approval the preemption analysis in *City of El Cenizo v. Texas*, 264 F. Supp. 3d 744 (W.D. Tex. 2017), which enjoined certain provisions in Texas's recently passed sanctuary-cities law. *See Lopez-Aguilar*, 2017 WL 5634965, at *10-11 (referring to *El Cenizo* as a "closely analogous case"). The Fifth Circuit has now vacated that injunction "in large part," *City of El Cenizo*, 2018 WL 1282035, at *17, and expressly repudiated the district court's preemption analysis, *id.* at *3-8. The Fifth Circuit held that a provision in Texas law that required local cooperation with federal immigration officials was neither field nor conflict preempted. *Id.* at *5-7. Thus, to the extent that *El Cenizo* is an analogous case, the lesson it teaches is that Aguilar-Lopez's preemption challenge is without merit.

somehow preclude *cooperation* by state officers with federal immigration enforcement activities:

> *Nothing in this subsection shall be construed to require an agreement* under this subsection in order for any officer or employee of a State or political subdivision of a State—
>
> (A) to communicate with the Attorney General regarding the immigration status of any individual, including reporting knowledge that a particular alien is not lawfully present in the United States; or
>
> (B) otherwise *to cooperate with the Attorney General* in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States.

8 U.S.C. § 1357(g)(10) (emphases added). This savings statute "permit[s] state officers to cooperate with [federal officials] in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States," *Arizona*, 567 U.S. at 410. Thus, even if States gave up certain aspects of their common-law police powers upon joining the Union by submitting to federal preemption under the Supremacy Clause, the INA through § 1357(g)(10)(B) restored any otherwise-preempted state power to comply with federal ICE detainer requests.

The district court's contrary conclusion rests in large part on a strained reading of *Arizona*. *Lopez-Aguilar*, 2017 WL 5634965, at *10-11. *Arizona* held preempted a state law that allowed detention based on "the *unilateral* decision of state officers to arrest an alien for being removable *absent any request, approval, or other instruction from the Federal Government*." 567 U.S. at 410 (emphases added). But *Arizona* came nowhere close to suggesting that a State cannot honor a federal ICE detainer request. After all, when a State honors an ICE detainer request, the "predicate for an

arrest" is the federal government's express "request" and "instruction." *Id.* at 407, 410. A State honoring a formal ICE detainer request is *not* "[d]etaining individuals solely to verify their immigration status," *id.* at 413, so constitutional concerns from any such practice are absent. Rather, the State must rely on the federal government's representation that there is *already* probable cause of removability. *See El Cenizo*, 2018 WL 1282035, at *13 ("Compliance with an ICE detainer . . . constitutes a paradigmatic instance of the collective-knowledge doctrine, where the detainer request itself provides the required [probable cause of removability]."); *United States v. Quintana*, 623 F.3d 1237, 1241-42 (8th Cir. 2010) (holding that a state trooper was "authorized to assist" in an alien's detention under 8 U.S.C. § 1357(g)(10)(B) based on a border-patrol agent's probable cause of removability).

Because compliance with ICE detainers falls squarely within the savings statute of § 1357(g)(10)(B), Indiana's requirement to comply with those detainers is neither conflict nor field preempted. *Cf. Lopez-Aguilar*, 2017 WL 5634965, at *10-11. It is not conflict preempted because compliance with both federal and state law is not a "physical impossibility," and state law presents no "obstacle" to federal law. *Arizona*, 567 U.S. at 399. Cooperating with an ICE detainer request would give local officials no greater authority to detain aliens than that possessed by federal immigration officers. *Cf. id.* at 408. And the federal government, not state officials, would retain all control over deciding who is an unlawfully present alien that should be removed.

It is thus irrelevant that state law mandates what federal law merely requests. *Cf. Lopez-Aguilar*, 2017 WL 5634965, at *11 (discussing Congress's encouragement

of voluntary local cooperation with federal immigration officials). State laws doing exactly this—making mandatory what federal law merely permitted—in the immigration context were upheld against preemption challenges in both *Arizona* and *Chamber of Commerce v. Whiting*, 563 U.S. 582 (2011). *Arizona* upheld a state law mandating immigration-status inquiries, where federal law made them voluntary. 567 U.S. at 411-13. And *Whiting* upheld a state law mandating that employers check immigration status with an electronic-verification system, where federal law made such use voluntary. 563 U.S. at 609-10. As with the E-Verify system in *Whiting*, federal statutory authority regarding issuance of ICE detainer requests "contains no language circumscribing state action." *Id.* at 608; *see* 8 U.S.C. § 1357(d)(3). State direction to local law-enforcement agencies to cooperate with federal immigration officials by honoring ICE detainer requests "in no way obstructs achieving those aims" of federal law. *Whiting*, 563 U.S. at 609. To the contrary, it helps fulfill them. Far from acting to preempt state involvement in the effort to cooperate with federal immigration officials, Congress has broadly encouraged it. *See, e.g.*, 8 U.S.C. §§ 1103(a)(11), 1357(g)(10), 1373(a), (b), 1644.

Field preemption also does not apply. No statute shows a clear congressional purpose to "pervasively" regulate and "displace[] state law altogether" or to "preclude" States from requiring their localities to cooperate with federal immigration officials. *Arizona*, 567 U.S. at 399. *Cf. Lopez-Aguilar*, 2017 WL 5634965, at *10. In fact, Congress could not have preempted this field—the question whether state and local officers must help enforce federal law—because Congress lacks the power to direct state or local officials to enforce federal law: "Under the Tenth

Amendment, immigration officials may not . . . command the government agencies of the states to imprison persons of interest to federal officials." *Galarza v. Szalczyk*, 745 F.3d 634, 643 (3d Cir. 2014). This is precisely why the INA did not even attempt to "authorize federal officials to *command* local or state officials to detain suspected [removable] aliens." *Id.* at 640 (emphasis added).

Of course, while the Tenth Amendment limits "the federal government," *id.* at 643, it does not limit *a State*'s ability to instruct its own local entities and officials. *See, e.g.*, *Stone v. City of Prescott*, 173 F.3d 1172, 1175 (9th Cir. 1999) ("[T]he power of the federal government . . . is constrained by the Tenth Amendment, not the power of the States."). Rather, local officials' authority is set at "the absolute discretion of the State." *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178 (1907); *see Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 682 (1978) (municipalities are "state instrumentalities"); *see also Haggard*, 445 N.E.2d at 972 ("Cities and counties are regarded as subordinate governmental agencies of the state . . . ."). The anti-commandeering limit on *federal* action is why ICE detainers take the form of federal requests—rather than commands—for state or local action. *See Lopez-Aguilar*, 2017 WL 5634965, at *10 (observing, correctly, that detainers "may not permissibly direct the state to do anything"). But how a State instructs its own subdivisions and officials to act is categorically outside any field Congress can possibly preempt.

B. Requiring compliance with ICE detainers does not violate the Fourth Amendment.

The district court below also cabined section 4's plainly legitimate sweep by positing that compliance with federal ICE detainer requests absent probable cause

of the violation of federal *criminal* law would violate the Fourth Amendment. *See Lopez-Aguilar*, 2017 WL 5634965 at *11-14. But compliance with ICE detainers does not violate the Fourth Amendment. Local officials may constitutionally honor ICE detainer requests, which under the collective-knowledge doctrine conveys probable cause to detain based on an immigration violation.

The Fourth Amendment's "touchstone" is the "reasonableness" of a search or seizure. *Riley v. California*, 134 S. Ct. 2473, 2482 (2014). That reasonableness analysis proceeds in two steps. Courts first "begin with history." *Virginia v. Moore*, 553 U.S. 164, 168 (2008). "When history has not provided a conclusive answer," courts must "analyze[] a search or seizure in light of traditional standards of reasonableness 'by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.'" *Id.* at 171 (quoting *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999)). That balancing test does not turn on the identity of the official making the search or seizure or "the law of the particular State in which the search occurs." *Id.*; *see, e.g.*, *United States v. Laville*, 480 F.3d 187, 196 (3d Cir. 2007); *United States v. Becerra-Garcia*, 397 F.3d 1167, 1174 (9th Cir. 2005); *United States v. Bell*, 54 F.3d 502, 504 (8th Cir. 1995); *McKinney v. George*, 726 F.2d 1183, 1188 (7th Cir. 1984). Rather, the inquiry analyzes "the content of information possessed by police and its degree of reliability." *Alabama v. White*, 496 U.S. 325, 330 (1990).

The reasonableness analysis here ends with the first step: history. History undoubtedly supports state authority to detain aliens based on requests from federal

immigration agents. *Moore*, 553 U.S. at 168. Local cooperation with ICE detainer requests has existed throughout the Nation in some form since at least the 1940s. *See, e.g.*, ECF No. 42, Statement of Interest on Behalf of the United States, at 7, *Lopez-Aguilar v. Marion Cty. Sheriff's Dept.*, No. 1:16-cv-2457 (S.D. Ind. Aug. 4, 2017) ("U.S. Statement of Interest"). This decades-long history validates state ICE-detainer compliance.

Even moving beyond history and thus balancing the liberty intrusion versus governmental interests, honoring ICE detainers does not violate the Fourth Amendment. Detention obviously works a liberty intrusion, but detention for immigration violations is reasonable based on probable cause of removability—not "probable cause of a crime." *Contra Lopez-Aguilar*, 2017 WL 5634965 at *11-13. "Lawful warrantless arrest is not necessarily limited to those instances in which the arrest is made for criminal conduct." 3 Wayne LaFave et al., *Search and Seizure* §5.1(b) (5th ed. 2012). Examples include arrest of intoxicated persons who are "likely to suffer or cause physical harm or damage property," *Commonwealth v. O'Connor*, 546 N.E.2d 336, 341 (Mass. 1989); seizing a juvenile on probable cause that he is a runaway, *In re Marrhonda G.*, 613 N.E.2d 568, 663 (N.Y. 1993); and warrantless arrest for medical evaluation based on probable cause that a person is mentally ill and dangerous to himself or others, *Maag v. Wessler*, 960 F.2d 773, 776 (9th Cir. 1991) (per curiam).

Likewise with immigration enforcement. Civil removal proceedings contemplate the necessity of detention. *See, e.g.*, *Demore v. Kim*, 538 U.S. 510, 523 (2003) (stating, as to no-bail detention: "this Court has recognized detention during de-

portation proceedings as a constitutionally valid aspect of the deportation process"); *Zadvydas v. Davis*, 533 U.S. 678, 697 (2001) (distinguishing "detention pending a determination of removability" from the question of authority to detain indefinitely). So the liberty intrusion of detaining an alien is justified where there is probable cause of civil removability, regardless of probable cause of a crime.

Unsurprisingly, then, "[s]tatutes authorizing administrative arrest to achieve detention pending deportation proceedings have the sanction of time." *Abel v. United States*, 362 U.S. 217, 230 (1960); *see also id.* at 233 (noting that such statutes "have ordinarily authorized the arrest of deportable aliens by order of executive official" since 1798). As numerous courts have held, warrantless detention for civil immigration violations satisfies the Fourth Amendment's reasonableness requirement if there is probable cause to detain an individual. *Morales v. Chadbourne*, 793 F.3d 208, 218 (1st Cir. 2015); *Quintana*, 623 F.3d at 1241-42; *accord City of El Cenizo*, 2018 WL 1282035, at *13 (observing that "civil removal proceedings necessarily contemplate detention absent proof of criminality," and that "[c]ourts have upheld many statutes that allow seizures absent probable cause that a crime has been committed" and collecting cases). Insofar as the decision in *Buquer v. City of Indianapolis*, No. 1:11-cv-00708-SEB-MJD, 2013 WL 1332158, at *10-11 (S.D. Ind. Mar. 28, 2013), required *criminal* probable cause for a locality to honor ICE detainers, that decision is mistaken and cannot be squared with the precedents cited above holding that probable cause of *removability*, not of criminality, is the Fourth Amendment predicate for ICE detainers.

The Fourth Amendment balancing test does not depend on whether federal, state, or local officers carry out the detention.[17] *See Moore*, 553 U.S. at 172 (balancing test does not turn on the identity of the official making the search or seizure). Here, the legitimate interest in civil immigration detention exists regardless of whether the first few hours of detention are carried out by state or local officers or by the federal government. When federal immigration agents request detention, the federal government necessarily asserts its "sovereign prerogative" in maintaining the integrity of its borders. *Landon v. Plasencia*, 459 U.S. 21, 34 (1982).

And immigration-law enforcement is not only a federal interest. *See Arizona*, 567 U.S. at 397 ("The pervasiveness of federal regulation does not diminish the importance of immigration policy to the States."). States are sovereigns with border-control interests. *See, e.g.*, *id.*; *Alfred L. Snapp & Son, Inc.*, 458 U.S. at 601 (noting state "sovereign interest" in exercising "sovereign power over individuals and entities within the relevant jurisdiction"). States did not cede their *interest* in ensuring that aliens within their borders are lawfully present. *See Texas v. United States*, 809 F.3d 134, 163 (5th Cir. 2015) (holding that state "interests" in enforcing

[17] Under *Arizona*, federal law would *preempt* a state or local official from making a *unilateral* determination that a person is an unlawfully present alien. 567 U.S. at 409-10. But that preemption analysis is separate from the Fourth Amendment analysis. *See id.* at 413-14 (distinguishing the two). And regardless, here, ICE detainer requests necessarily communicate the *federal government's* determination that it has probable cause to believe a person is unlawfully present in the country. *See, e.g.*, U.S. Statement of Interest, at 6-7 (discussing I-247A detainer form).

federal lawful-presence provisions "fall within the zone of interests of the INA"), *aff'd by an equally divided Court*, 136 S. Ct. 2271 (2016) (per curiam).

Consequently, multiple circuits agree that state compliance with ICE detainers does not violate the Fourth Amendment. For instance, the Fifth Circuit recently rejected a Fourth-Amendment facial challenge to a Texas provision mandating compliance with ICE detainer requests. *City of El Cenizo*, 2018 WL 1282035, at *11-15. The Sixth Circuit has explained that "[f]ederal detainers do not raise constitutional problems in the normal course." *Ortega v. U.S. ICE*, 737 F.3d 435, 438 (6th Cir. 2013). The Eighth Circuit similarly held "meritless" the argument that state and local officials cannot detain aliens at the express request of federal immigration agents. *United States v. Ovando-Garzo*, 752 F.3d 1161, 1164 (8th Cir. 2014); *see also id.* ("[I]dentifying [the alien, communicating with federal officials, and detaining the alien] until the Border Patrol agent could take custody—were not unilateral and, thus, did not exceed the scope of his authority."). And the Fourth Circuit explained that "a state police officer" does not violate the Fourth Amendment when detaining aliens "at ICE's express direction." *Santos v. Frederick Cty. Bd. of Comm'rs*, 725 F.3d 451, 466-67 (4th Cir. 2013). The holding in *Santos* thus turned on whether the local official was or "was not directed or authorized by ICE," *id.* at 466—that is, whether the seizure was made "absent ICE's express authorization of direction," *id.* at 468. [18]

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[18] *Santos* invalidated a particular arrest because "ICE's request that Santos be detained on ICE's behalf came fully forty-five minutes after Santos had already been arrested," so "the deputies' initial seizure of Santos was not directed or au-

ICE detainer requests convey to state and local officials the existence of probable cause to believe that the subject is a removable alien. Federal officials make particularized determinations assessing probable cause of removability each time they issue an ICE detainer. *See, e.g.*, *City of El Cenizo*, 2018 WL 1282035, at *13; U.S. Statement of Interest, at 6-7 ("The Department's current detainer form, the Form I-247A (Immigration Detainer – Notice of Action), sets forth the basis for the agency's determination that it possesses probable cause to believe that the subject is a removable alien."). Local officials have no countervailing authority to assess removability for themselves. *See Arizona*, 567 U.S. at 409.

The collective-knowledge doctrine therefore gives local officials probable cause to detain based on federal officials' representations, conveyed in ICE detainers and administrative warrants. Lopez-Aguilar does not seriously dispute this. The collective-knowledge doctrine does not require local officials themselves to have performed the immigration investigation, as the doctrine applies even if local officials are "unaware of the specific facts that established probable cause." *United States v. Hensley*, 469 U.S. 221, 231 (1985). And the doctrine applies to all Fourth Amendment seizures, including in the immigration context. *See, e.g.*, *Mendoza v. U.S. ICE*, 849 F.3d 408, 419 (8th Cir. 2017) ("County employees . . . reasonably relied on [ICE agent's] probable cause determination for the detainer."); *People v. Xirum*, 993 N.Y.S.2d 627, 631 (Sup. Ct. 2014) ("Similar to the fellow officer rule . . . the

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thorized by ICE." 725 F.3d at 466; *see also City of El Cenizo*, 2018 WL 1282035, at *15 (observing that *Santos* did not involve an ICE detainer request because "there was no federal request for assistance before the seizure").

[state] had the right to rely upon [a detainer issued by] the very federal law enforcement agency charged under the law with 'the identification, apprehension, and removal of illegal aliens from the United States.'") (quoting *Arizona*, 567 U.S. at 397).

In short, whether analyzed as a matter of historical practice or a balancing of liberty intrusion and justification, the Fourth Amendment is not violated by state and local officials' compliance with ICE detainer requests that communicate federal officials' finding of probable cause of removability.

CONCLUSION

The Court should vacate the stipulated judgment.

Respectfully submitted.

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