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CASE NUMBER: 2018CV30549

DISTRICT COURT, EL PASO COUNTY, COLORADO 270 S. Tejon Colorado Springs, Colorado 80901	
Plaintiffs: Saul Cisneros, Rut Noemi Chavez Rodriguez, On behalf of themselves and all others similarly situated, v. Bill Elder, in his official capacity as Sheriff of El Paso County, Colorado	▲COURT USE ONLY▲
	Case Number: 18CV30549 Div.: 8 Courtroom: W550

ORDER GRANTING PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

This matter comes before the Court on Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction, filed February 27, 2018. In addition to the Motion, the Court has reviewed Sheriff Elder's Response, filed March 9, 2018; Plaintiffs' Reply, filed March 14, 2018; the parties' Joint Submission, filed March 16, 2018; and the Statement of Interest of the United States, filed today. The parties elected to forego an evidentiary hearing and to submit the Motion upon the documentary record, including the stipulations set forth in the parties' Joint Submission. The Court held extensive oral argument today, March 19th. Being fully advised in

the premises and finding good cause, the Court now GRANTS Plaintiffs' Motion and enters a preliminary injunction.

FACTUAL BACKGROUND

The Motion was tried upon the affidavits, documents, and stipulations submitted by the parties, as set forth in the Joint Submission. The facts, as set forth therein, are undisputed (for purposes of the Motion alone). The issues for the Court are purely issues of law.

The Plaintiffs, Saul Cisneros and Rut Noemi Chavez Rodriguez, are pretrial detainees in the custody of the El Paso County Sheriff's Office ("EPSO" or "Sheriff's Office"). Bond for Plaintiff Cisneros has been set at $2,000, and bond for Plaintiff Chavez Rodriguez has been set at $1,000. Both Plaintiffs attempted to post bond, but were informed by Sheriff's Office personnel that they would not be released because federal immigration authorities had imposed an "ICE hold."

On March 15, 2018, after the parties filed their briefs, the Sheriff's Office issued Directive Number 18-02, titled "Change in Ice Procedures." This directive changed existing EPSO policy by requiring a U.S. Immigration and Customs Enforcement (ICE) official to appear in person to serve ICE forms on detainees before they could be transferred to federal custody. Under this new directive, local inmates become federal detainees after ICE has faxed two forms to EPSO (an "immigration detainer" (ICE Form I-247A) and an "administrative warrant" (ICE Form I-200 or I-205) *and* an ICE agent has appeared in person – within 48 hours after conclusion of state-law authority – to serve the inmate with federal papers and take the inmate into federal custody. As ICE detainees, these individuals will then be housed in the El Paso County jail for an indefinite period pursuant to El Paso County's housing agreement with ICE (the

Intergovernmental Services Agreement, or "IGSA"),[1] pending the completion of federal deportation proceedings.

Under the new directive, if Plaintiffs Cisneros and Chavez-Rodriguez post bond, EPSO will refuse to release them for up to 48 hours, to provide ICE an opportunity to take them into ICE custody. In light of the change in EPSO policy, the issue before the Court is whether Sheriff Elder has authority under Colorado law – based on receipt and service of the above-described ICE documents – to hold Plaintiffs for up to 48 hours after they have posted bond, completed their sentence, or otherwise resolved their criminal cases.

ANALYSIS

A court of equity has the power to restrain unlawful actions of executive officials. *See County of Denver v. Pitcher*, 129 P. 1015, 1023 (Colo. 1913) (holding that equity courts may enjoin illegal acts in excess of authority). In order to issue a preliminary injunction, this Court must find that Plaintiffs meet all six requirements for interim relief: (1) they have a reasonable probability of success on the merits; (2) there is a danger of real, immediate and irreparable injury that may be prevented by injunctive relief; (3) there is no plain, speedy, and adequate remedy at law; (4) the granting of a temporary injunction will not disserve the public interest; (5) the balance of equities favors the injunction; and (6) the injunction will preserve the status quo pending trial on the merits. *See Rathke v. MacFarlane*, 648 P.2d 648, 653 (Colo. 1982). As described below, the Court finds the Plaintiffs have satisfied these requirements.

[1] The Parties have stipulated that Plaintiffs are not being held pursuant to the IGSA, and Sheriff Elder is no longer relying on the IGSA for authority to hold Plaintiffs for the 48-hour period.

I. PLAINTIFFS HAVE A SUBSTANTIAL PROBABILITY OF SUCCESS ON THE MERITS.

Colorado sheriffs are limited to the express powers granted them by the Legislature and the implied powers "reasonably necessary to execute those express powers." *People v. Buckallew*, 848 P.2d 904, 908 (Colo. 1993). Powers will be implied only when the sheriff cannot "fully perform his functions without the implied power." *Id.; see also Douglass v. Kelton*, 610 P.2d 1067, 1069 (Colo. 1980) (holding that sheriff and other public officials "have only such power and authority as are clearly conferred by law").

Sheriff Elder (and the United States, in its Statement of Interest) contend that two Colorado statutes, a federal statute, and his inherent authority provide him with the authority to detain the Plaintiffs beyond the date they would otherwise be released – C.R.S. § 16-3-102(1)(c), C.R.S. § 17-26-123, and 8 U.S.C. § 1357(g)(10).

A. C.R.S. § 16-3-102(1)(c).

As Sheriff Elder acknowledged through counsel at oral argument, the ICE forms at issue constitute requests from ICE, not commands, and the Sheriff is making a choice when he decides to honor them. Sheriff Elder also conceded at oral argument that a decision to keep prisoners in custody, who would otherwise be released, constitutes a new arrest. *See, e.g., Morales v. Chadbourne*, 793 F.3d 208, 217 (1st Cir. 2015) ("Because 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."); *Ochoa v. Campbell*, 266 F. Supp. 3d 1237, 1249-50 (E.D. Wash. 2017) (same).

Sheriff Elder also conceded that, while an ICE administrative warrant (ICE Form I-200 or I-205) serves as a warrant for purposes of federal immigration enforcement, neither that

document nor an ICE detainer (ICE Form 247A) constitutes a warrant under Colorado law because neither form is reviewed or signed by a judge. (They are signed instead by federal immigration officers.) Thus, continued detention of a local inmate at the request of federal immigration authorities, beyond when he or she would otherwise be released, constitutes a warrantless arrest, which is governed by C.R.S. § 16-3-102(1)(c). Under this statute, a peace officer may make a warrantless arrest only when he has "probable cause to believe an offense was committed" and probable cause to believe that the suspect committed it. C.R.S. § 16-3-102(1)(c).

Sheriff Elder contends this statute provides authority for his policy of detaining inmates for 48 hours beyond when they would otherwise be released. Both ICE forms (detainer and warrant) request detention of the individual in question on the basis of a finding of probable cause, made by a federal immigration officer, that the individual is removable from the United States. Thus, Elder contends, the ICE forms provide him with "probable cause to believe an offense was committed," and thereby with authority to make the warrantless arrest.

Plaintiffs respond that the term "offense," as used in the warrantless-arrest statute, means a crime, and that the warrantless-arrest statute does not provide authority to detain someone for a civil enforcement proceeding, such as a deportation proceeding. Both sides acknowledge that, with limited exceptions, this statute spells out the scope of peace officers' authority in Colorado to detain individuals without a warrant.

The Colorado criminal code and code of civil procedure make clear that the word "offense," as used in those portions of the Colorado statutes, means a crime. *See* C.R.S. § 18-1-104(1) ("The terms 'offense' and 'crime' are synonymous"); *see also* C.R.S. 16-1-105(2) (stating

that definitions in C.R.S. Title 18 (the criminal code) apply to C.R.S. Title 16 (the code of criminal procedure)).

The parties agree that deportation proceedings are civil, not criminal proceedings. *See Arizona v. United States*, 567 U.S. 387, 396, 407 (2012) ("As a general rule, it is not a crime for a removable alien to remain present in the United States"; the federal administrative process for removing someone from the United States "is a civil, not criminal matter"). *See also Lunn*, 78 N.E. 3d at 1146 ("The removal process is *not* a criminal prosecution. The detainers are not criminal detainers or criminal arrest warrants. They do not charge anyone with a crime, indicate that anyone has been charged with a crime, or ask that anyone be detained in order that he or she can be prosecuted for a crime").

Accordingly, the ICE forms at issue, at best, provide the Sheriff with probable cause to believe an individual is subject to a civil deportation proceeding, but not with "probable cause to believe an offense was committed." Thus, a federal officer's finding that an individual may be removable from the United States does not authorize the Sheriff, under the warrantless-arrest statute, to deprive that individual of liberty.

The ICE forms also raise the issue of whether Sheriff Elder may rely on a federal immigration officer's finding of probable cause, which is set forth on the form simply by checking a box, without providing meaningful specifics as to the basis for the finding. The Sheriff contends he may rely on that finding pursuant to the "fellow officer rule," or "collective knowledge doctrine," which generally allows a law enforcement officer to rely on information known to another officer. *See People v. Washington*, 865 P.2d 145 (Colo. 1994). Plaintiffs disagree. The Court notes that courts in other jurisdictions have differed on whether that

doctrine is applicable under these circumstances, and, for purposes of the Motion, this is not an issue the Court needs to resolve. For present purposes, it is enough to note that, even if this Court were to find the "fellow officer rule" applicable, it would not by itself resolve the issue in the Sheriff's favor. Even if the Sheriff personally had information that amounted to probable cause to believe that an individual is removable, he would still lack authority to make a warrantless arrest, since he would still lack probable cause that a *crime* had been committed.

B. C.R.S. § 17-26-123.

C.R.S. § 17-26-123 provides, in material part:

> It is the duty of the keeper of each county jail to receive into the jail every person duly committed thereto for any offense against the United States, by any court or officer of the United States, and to confine every such person in the jail until he is duly discharged…

Sheriff Elder contends that this statute, in addition to expressly granting him the power to detain federal prisoners, also implicitly authorizes him to temporarily detain individuals whom federal immigration authorities seek to detain. The Court disagrees. By its plain language, this statute grants counties the authority to receive federal prisoners into their jails. It concerns the housing of federal prisoners; it says nothing, either expressly or implicitly, about the power at issue here, the power to arrest.

C. 8 U.S.C. § 1357(g)(10) / "Inherent Authority".

Sheriff Elder (and, more strongly, the United States, in its Statement of Interest) also contends that 8 U.S.C. § 1357(g)(10), and/or a theory of "inherent authority," provides a lawful basis for the 48-hour ICE holds.

This statutory provision recognizes that local officials may communicate and "cooperate" with ICE:

> (10) 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).

To the Court's understanding, this provision does not, on its face, grant any authority to local officials; it is simply a reserve clause, making clear that the statute does not prevent local officials from communicating or cooperating with federal immigration authorities. *See, e.g.*, *Lunn*, 78 N.E.3d at 1159.

However, the courts universally acknowledge that it is legitimate for state and local officials to communicate and cooperate with immigration authorities. Courts have disagreed about the scope of such permissible "cooperation." The Supreme Court, in its *Arizona* decision, recognized that the outer limits of such "cooperation" may be ambiguous. Some courts have suggested that local law enforcement officers, working under the direction of federal immigration authorities, may carry out arrests as part of such cooperation; other courts have flatly rejected that proposition. *Compare City of El Cenizo v. Texas*, 2018 U.S. App. LEXIS 6245 (5th Cir. March 13, 2018) with *Lunn.* Sheriff Elder and the United States urge this Court to find that the Sheriff has the inherent authority, when working under the direction and oversight of federal authorities, to cooperate in the federal mission and thus to carry out the limited, 48-hour holds requested by ICE.

I find this to be Sheriff Elder's strongest argument. Nonetheless, I ultimately conclude the argument falls short, for several reasons. First, the theory of "inherent" or "implicit" state authority in the immigration context has been sharply eroded by the Supreme Court's decision in *Arizona*; pre-*Arizona* decisions, on which the Sheriff and the United States heavily rely, may no longer be good law. Second, as noted above, Colorado sheriffs are limited to the express powers granted them by the Legislature, along with the implied powers "reasonably necessary to execute those express powers." Colorado courts have been reluctant to imply sheriff powers not expressly granted. *See Douglass v. Kelton*, 610 P.2d 1067, 1069 (Colo. 1980). Third, and perhaps most importantly, the power to make warrantless arrests is strictly proscribed by statute, as described above. In addition to the warrantless-arrest statute, the legislature has expressly recognized certain other limited circumstances in which the power to detain is appropriate. In each case, a statute spells out the scope and limits of that power. That is appropriate, in light of the fact that there is no greater deprivation of freedom than the taking of a person into confinement. I am reluctant (as was the Massachusetts Supreme Court in the *Lunn* case, 78 N.E.3d at 1157) to interpret silence in the law as the basis for a heretofore-unrecognized power of arrest.

Finally, I reviewed carefully the Fifth Circuit's recent decision in *City of El Cenizo v. Texas*, 2018 U.S. App. LEXIS 6245 (5th Cir. March 13, 2018). While that case demonstrates the extent to which courts differ on these issues, I do not find it contrary to this ruling. That court upheld a Texas statute that required local law enforcement agencies to honor ICE detainers. The Fifth Circuit concluded that the "cooperation" referenced in 1357(g)(10) includes honoring ICE detainers, and accordingly it found the Texas statute did not offend principles of preemption.

The key distinction from the facts of this case was that the very Texas statute that was challenged provided the state-law authority to honor the ICE detainers that is missing from this case.

If Colorado were to pass a statute either requiring or authorizing law-enforcement agencies to cooperate with ICE detainers – or if the Sheriff were to enter into a formal written agreement with ICE pursuant to section 1357(g)(1) (a so-called "287(g) agreement") – either of those circumstances would provide the authority to arrest that is missing from this case. Significantly, both have existed in the past. The Sheriff's Office entered into a 287(g) agreement with ICE in 2013, which it terminated in 2015. And in 2006, Colorado enacted SB-90, which required local law enforcement to report individuals to ICE when there was probable cause to believe they were present in violation of federal immigration law. *See* C.R.S. § 29-29-101-103 (repealed). In 2013, the Legislature repealed that statute entirely, declaring that "the requirement that public safety agencies play a role in enforcing federal immigration laws can undermine public trust." Colo. HB 13-1258. This legislative action underscores the kind of statutory authority that would authorize Sheriff Elder's policy, but that is missing at this point in time.

I note, finally, that Sheriff Elder, through counsel, acknowledged at oral argument that El Paso County is one of only two counties in Colorado that currently honor ICE detainer requests. (The other is apparently Adams County.) The fact that El Paso County is willing to take this stand means that ultimately all counties in Colorado will reap the benefit of having the Colorado courts address this issue.

I conclude that Plaintiffs have demonstrated a likelihood of success on the merits of their claim that Sheriff Elder does not have authority under Colorado law to refuse to release the Plaintiffs when they post bond or otherwise resolve their criminal cases. Similarly, I conclude

that Plaintiffs have demonstrated a likelihood of success on their claims that (a) any such arrest without legal authority is an unreasonable seizure, in violation of Article II, section 7 of the Colorado Constitution; and (b) by refusing to release pretrial detainees after they post bond, Sheriff Elder violates Article II, section 19.

I find that, whether through mandamus under Rule 106(a)(2) or this Court's authority to issue injunctive relief for violations of the Colorado Constitution, this Court has the authority to issue the requested relief. Under Rule 106(a)(2), Plaintiffs have a clear right to the relief sought; Sheriff Elder has a clear duty to release them when his state authority to hold them ceases; and, as explained below, there is no other adequate legal remedy. *Gramiger v. Crowley*, 660 P.2d 1279, 1281 (Colo. 1983). In addition, the Colorado Supreme Court has repeatedly affirmed the availability of declaratory and injunctive relief in cases alleging violations of the Colorado Constitution. *See, e.g.*, *Bock v. Westminster Mall*, 819 P.2d 55 (Colo. 1991) (Article II, § 10); *Conrad v. City & Cnty. of Denver*, 656 P.2d 662 (Colo. 1982) (Art. II, § 4); *Taxpayers for Pub. Educ. v. Douglas Cnty. Sch. Dist*. 351 P.3d 461 (Colo. 2015) (Art. IX, § 7), *vacated on other grounds*,137 S. Ct. 2327 (2017).

II. PLAINTIFFS SATISFY THE ADDITIONAL REQUIREMENTS FOR A PRELIMINARY INJUNCTION.

"A preliminary injunction is designed to preserve the status quo or protect rights pending the final determination of a cause." *City of Golden v. Simpson*, 83 P.3d 87, 96 (Colo. 2004). Here, an injunction will both preserve the status quo and protect Plaintiffs' rights.

Plaintiffs have satisfied the remaining *Rathke* factors. First, they are suffering real, immediate and irreparable injury that may be prevented by injunctive relief. *See Ochoa*, 266 F. Supp. 3d at 1260-61 (granting TRO on behalf of pretrial detainee wishing to post bond and

forbidding sheriff to deny release on basis of "ICE hold"). Few injuries are more real, immediate, or irreparable than being deprived of one's personal liberty.

Second, Plaintiffs have no plain, speedy, or adequate remedy at law. Monetary damages would be difficult to ascertain and could not compensate adequately for the ongoing violations and threatened violations of Plaintiffs' right to liberty and freedom from unauthorized and unjustified imprisonment.

Third, protection of Plaintiffs' constitutional rights advances the public interest. *See, e.g.*, *Awad v. Ziriax*, 670 F.3d 1111, 1131 (10th Cir. 2012) ("It is always in the public interest to prevent the violation of a party's constitutional rights").

Fourth, the balance of equities favors Plaintiffs. Under Colorado law, Plaintiffs have a right to release when they post the bond set by the state court. Their relatively low bonds ($1,000 and $2,000) demonstrate that the judges did not regard them as flight risks or dangers to public safety. Sheriff Elder will not be harmed in any comparable way by releasing Plaintiffs on bond.

Finally, interim injunctive relief will preserve the status quo pending trial. The status quo is "the last uncontested status between the parties which preceded the controversy." *Dominion Video Satellite, Inc. v. EchoStar Satellite Corp.*, 269 F.3d 1149, 1155 (10th Cir. 2001). While I acknowledge that the meaning of "last uncontested status" is subject to debate, it is reasonable to interpret it to mean the status between the parties after bond had been set but before ICE had sent the jail the ICE detainers and administrative warrants. In the case of both Plaintiffs, each had been booked into the jail and the state courts had set bond before the ICE holds were imposed. Were I to interpret "last uncontested status" the way the Sheriff urges – namely, to preserve his

longstanding policy of honoring ICE holds – then it is hard to imagine how any plaintiff in this context could obtain relief. Such a ruling would not be consistent with fundamental equity.

CONCLUSION

Accordingly, it is hereby ORDERED:

A. Plaintiffs' request for a preliminary injunction is GRANTED. Defendant is ENJOINED from relying on ICE immigration detainers or ICE administrative warrants as grounds for refusing to release the Plaintiffs from custody when they post bond, complete their sentences, or otherwise resolve their criminal cases. If Plaintiffs post bond, Defendant is ordered to release them pending resolution of their criminal matters.

B. Sheriff Elder has not requested an injunction bond, nor has he made a record that he will suffer any specific damages in the event this injunction is ultimately found to have been wrongly granted. Accordingly, the requirement for Plaintiffs to post a security bond under Rule 65(c) is WAIVED.

DONE and ORDERED March 19, 2018.

BY THE COURT

Eric Bentley
DISTRICT COURT JUDGE