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Colorado Court of Appeals 2 East 14th Avenue Denver, CO 80203	
District Court, Teller County, Colorado Honorable Scott A. Sells Case No. 2019CV30051	
Plaintiffs-Appellants: BERCK NASH; JOANNA NASH; RODNEY SAUNDERS; PAUL MICHAEL STEWART; and JANET GOULD, v. **Defendant-Appellee:** JASON MIKESELL, in his official capacity as Sheriff of Teller County, Colorado.	**▲ COURT USE ONLY ▲** Case No.: 2023CA589

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OPENING BRIEF

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 or C.A.R. 28.1, and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with the applicable word limits set forth in C.A.R. 28(g) or C.A.R. 28.1(g).

☒ It contains 9,480 words (principal brief does not exceed 9,500 words; reply brief does not exceed 5,700 words).

The brief complies with the standard of review requirements set forth in C.A.R. 28(a)(7)(A) and/or C.A.R. 28(b).

☒ **For each issue raised by the appellant**, the brief contains under a separate heading before the discussion of the issue, a concise statement: (1) of the applicable standard of appellate review with citation to authority; and (2) whether the issue was preserved, and, if preserved, the precise location in the record where the issue was raised and where the court ruled, not to an entire document.

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I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 or 28.1, and C.A.R. 32.

s/Stephen G. Masciocchi
Signature of attorney or party

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INTRODUCTION

This case of first impression concerns the illegality of the Teller County Sheriff's Office's ("TCSO") policies and practices under the purported authority of a written agreement signed by Sheriff Jason Mikesell between TCSO and U.S. Immigration and Customs Enforcement ("ICE") (the "287(g) Program"). Under the Program, designated TCSO personnel ("Designated Immigration Officers" or "DIOs") perform specified civil immigration enforcement functions within the Teller County Jail ("Jail").

Under Colorado law, when inmates post bond, complete their sentences, or otherwise resolve their criminal cases—when they are "release-eligible"—the Jail must release them. The 287(g) Program unlawfully thwarts this process. Under the Program, when ICE suspects that an inmate is removeable from the United States, DIOs place certain ICE forms in the inmate's file and serve an ICE administrative warrant on the inmate. Thus, even if the inmate is release-eligible, the Jail holds the inmate for ICE and does not release them.

These practices violate Colorado law. A Colorado statute expressly forbids arresting or detaining release-eligible inmates based on the same ICE forms relied on by TCSO. Moreover, because none of those forms is a judicial warrant, arrests and detentions of release-eligible individuals based on them are unauthorized

warrantless arrests that violate the Colorado Constitution's protection against unreasonable seizures and the right to bail. In short, the 287(g) Program does exactly what a Colorado statute prohibits, exceeds the Sheriff's limited arrest authority, and violates two provisions of our Constitution.

The trial court nonetheless upheld the 287(g) Program's legality by characterizing DIOs as "*de facto* federal officers" who are not restricted by Colorado law and by invoking the Sheriff's peacekeeping authority. This was error. Under the federal statute authorizing the 287(g) Program, local law enforcement may perform civil immigration enforcement functions *only* "to the extent consistent with State and local law." Likewise, the Sheriff must exercise his peacekeeping authority consistent with Colorado's statutes and Constitution.

The Sheriff's agreement with ICE does not and cannot exempt the Sheriff from Colorado law or allow what Colorado law forbids. This Court should reverse the trial court's contrary rulings and remand for entry of declaratory and injunctive relief in plaintiffs' favor.

ISSUES PRESENTED

1. Does Sheriff Mikesell violate C.R.S. § 24-76.6-102(2) by authorizing his deputies to rely on ICE forms that are not signed by a judge, including I-200,

I-247A, and/or I-203, as grounds to arrest or continue to detain release-eligible persons?

2. Does Sheriff Mikesell violate Colorado Constitution art. II, § 7, by authorizing his deputies to rely on ICE forms that are not signed by a judge, including I-200, I-247A, and/or I-203, as grounds to arrest or continue to detain release-eligible persons?

3. Does Sheriff Mikesell violate Colorado Constitution art. II, § 19, by authorizing his deputies to rely on ICE forms that are not signed by a judge, including I-200, I-247A, and/or I-203, as grounds to continue imprisoning pretrial detainees who have posted bond and are thus eligible for release?

4. Did the trial court err by ruling that the challenged practices are not subject to Colorado law, because Sheriff's deputies are "*de facto* federal officers" when performing functions under the 287(g) Program, and because the Sheriff has a statutory duty to keep the peace?

5. Did the court err by denying plaintiffs' request for a permanent injunction enjoining TCSO from relying on any combination of ICE documents, including I-200, I-247A, and/or I-203, as grounds for arresting or continuing to detain release-eligible persons?

STATEMENT OF THE CASE

A. Nature of the Case

Using one or more ICE forms, ICE enforcement officers ask local sheriffs' offices to arrest and detain prisoners after state-law authority to detain them has ended so ICE may take them into custody. The forms are: (1) an administrative warrant, Form I-200; (2) an immigration detainer, Form I-247A; and (3) a tracking form, Form I-203. None of these forms is reviewed, approved, or signed by a judicial officer.

Colorado statutes and constitutional provisions restrict the authority of local law enforcement to participate in enforcing federal civil immigration law. In late 2018, a Colorado court ruled for plaintiffs in a class action challenging the El Paso County Sheriff's policy and practice of honoring ICE forms and detaining release-eligible persons at ICE's request. *Cisneros v. Elder*, No. 18CV30549, 2018 Colo. Dist. LEXIS 3388 (El Paso Cty. Dist. Ct., Dec. 6, 2018) ("*Cisneros*"), *vacated as moot*, No. 19CA0136, 2020 Colo. App. LEXIS 1560 (Colo. App. Sept. 3, 2020). The *Cisneros* court held that (1) when inmates post bail, complete their sentences, or otherwise resolve their criminal cases, Colorado Constitution art. II, §§ 7, 19, & 25 require the sheriff to release them, and (2) these constitutional imperatives apply even when ICE provides the sheriff's office with an I-200, I-247A, I-203, or

any combination of these forms. *Id.* at *42-43. In 2019, the Colorado Legislature effectively codified this holding in HB 19-1124.

This case follows on the heels of, and was informed by, *Cisneros*. Aware of the *Cisneros* litigation, Sheriff Mikesell entered into an agreement with ICE (the "287(g) Agreement"). In reliance on that agreement and the three ICE forms, TCSO deputies arrest and continue to detain release-eligible persons. Plaintiffs challenge the legality of this 287(g) Program, because the 287(g) Agreement cannot authorize what Colorado law forbids.

B. Statement of Facts

1. Sheriff Mikesell enters into a 287(g) Agreement with ICE that purports to allow designated Sheriff's deputies (DIOs) to enforce federal civil immigration law.

In January 2019, ICE and TCSO entered into the original 287(g) Agreement, and in June 2020, they entered into the operative 287(g) Agreement. CF, p 1336 ¶¶ 14, 16. Under the Agreement, ICE delegates to nominated, trained, and approved TCSO personnel (DIOs) the authority to perform specified civil immigration enforcement functions. EX (Trial), pp 549-50. This is the only 287(g) Agreement in Colorado. CF, pp 428, ¶ 36; 460, ¶ 36.

Such agreements are authorized by Section 287(g) of the Immigration and Nationality Act (INA). *See* EX (Trial), p 549. Under this statute, the Attorney

General and local governments may enter into agreements under which local government employees may perform specified functions of an immigration officer, but only to the extent consistent with state and local law:

> [T]he Attorney General may enter into a written agreement with a State, or any political subdivision of a State, pursuant to which an officer or employee of the State or subdivision, who is determined by the Attorney General to be qualified to perform a function of an immigration officer in relation to the investigation, apprehension, or detention of aliens in the United States . . . may carry out such function at the expense of the State or political subdivision and *to the extent consistent with State and local law*.

8 U.S.C. § 1357(g)(1) (emphasis added).

The DIOs act under the supervision of an ICE officer when they perform duties under the 287(g) Agreement. CF, p 1337 ¶ 19. TCSO supervises all other aspects of their employment and duties. EX (Trial), p 551.

Under the Agreement, DIOs are delegated authority to (1) interrogate persons detained at the Jail whom the officer believes to be aliens about their right to be or remain in the United States; (2) serve warrants of arrest for immigration violations at the time of the person's scheduled release from criminal custody;[1]

[1] When imprisoning inmates beyond their eligibility for release on their criminal charges, the Jail regarded them as ICE detainees and billed ICE for their housing under TCSO's Intergovernmental Services Agreement (IGSA) with ICE. CF, pp 1337-38. Effective January 1, 2024, IGSAs will be prohibited in Colorado. HB

(3) serve and execute warrants of removal; (4) administer oaths and take evidence to complete alien processing; (5) prepare charging documents; (6) detain and transport aliens subject to removal to ICE detention facilities; and (7) issue immigration detainers and records of deportable/inadmissible alien. EX (Trial), pp 556-57. When engaged in such activities, "no participating [TCSO] personnel will be expected or required to violate or otherwise fail to maintain [TCSO]'s rules, standards, or policies, or be required to fail to abide by restrictions or limitations as may otherwise be imposed by law." EX (Trial), p 552.

2. The Colorado Legislature prohibits local law enforcement officers from arresting or detaining release-eligible individuals based on ICE Forms.

In 2019, the Colorado General Assembly enacted HB 19-1124, "An Act Concerning Clarification of the Authority of Criminal Justice Officials with Respect to the Enforcement of Certain Federal Civil Laws." 2019 Colo. Sess. Laws 2759-62. The Act "effectively codified the trial court's holding" in the *Cisneros* case. *Nash v. Mikesell*, 2021 COA 148M, ¶ 8 n.1.[2]

23-1100, codified at C.R.S. §§ 24-76.7-101 to -103. In the absence of an IGSA, the 287(g) Agreement states that TCSO will hold inmates up to 48 hours beyond when they would otherwise be released. *See* EX (Trial), p 556.

[2] HB 19-1124 mooted Sheriff Elder's appeal of the *Cisneros* ruling; this Court thus vacated it. *Cisneros*, 2020 Colo. App. LEXIS 1560, at *9.

The statute mandates that "[a] law enforcement officer[3] shall not arrest or detain an individual on the basis of a civil immigration detainer request." C.R.S. § 24-76.6-102(2). It defines "civil immigration detainer" as any written request "on any form promulgated by federal immigration enforcement authorities" to "maintain custody of an individual beyond the time when the individual is eligible for release from custody."[4] *Id.* § 24-76.6-101(1). This includes "any request for law enforcement agency action, warrant for arrest of alien, order to detain or release alien, or warrant of removal/deportation on any form promulgated by federal immigration enforcement authorities." *Id.* The definition thus expressly encompasses the titles of Forms I-200, I-247A, and I-203. *See id.*

As the statute explains, these federal immigration forms are not warrants under Colorado law and are not "reviewed, approved, or signed by a judge." *Id*. § 24-76.6-102(1)(b). Thus, "continued detention of an inmate at the request of federal immigration authorities beyond when he or she would otherwise be released" constitutes an unconstitutional warrantless arrest. *Id.*

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[3] DIOs and non-DIO sheriff's deputies are "law enforcement officers" under the statute. C.R.S. § 24-76.6-101(3) ("'Law enforcement officer' means a peace officer employed by . . . a county sheriff's office.").

[4] The statute defines "eligible for release from custody" to mean when an inmate has posted bond or otherwise resolved their criminal charges. C.R.S. § 24-76.6-101(2). Custody means "the restraint of a person's freedom in any significant way." C.R.S. § 16-1-104(9).

3. Sheriff Mikesell implements the 287(g) Program.

The TCSO 287(g) Agreement is a Jail Enforcement Model, which means DIOs are authorized to exercise their immigration-related functions only within the Jail. CF, pp 1336 ¶ 17; 1339-40.

The 287(g) Program was first implemented in 2019. TR (1/24/23), p 270:1-4. Since then, four TCSO officers—Laura Hammond, Dominic Madronio, Taylor Smith, and David Rice—have completed training and received ICE certification to act as DIOs. CF, p 1336 ¶ 18. They were permitted to miss work to participate in ICE training, and TCSO paid them for their training time. CF, p 1341. Of the four, only Madronio was POST-certified, which is a prerequisite for Colorado peace officers to make arrests. CF, p 1341; TR (1/25/23), p 206:5-7.

Under the 287(g) Program, TCSO officers certified as DIOs perform their regular TCSO functions until called upon to exercise a function delegated under the 287(g) Program. TR (1/24/23), pp 246:16-247:3. If a booking officer has reason to believe that an incoming inmate might be undocumented, the officer is to notify a DIO. CF, p 1343. Booking officers are trained that if no DIO is on duty, they can notify ICE directly. TR (1/24/23), pp 249:16-250:1, 287:25-288:8. An inmate having a foreign place of birth is enough to trigger notification of, and investigation by, a DIO. CF, p 1343.

The DIO then investigates the inmate's alienage, which could include interviewing them and consulting ICE databases. CF, pp 1342-43. The DIOs maintain a tracking sheet documenting each inmate booked on local charges who is investigated by a DIO. EX (Trial), p 609; TR (1/25/23), pp 19:21-20:6. The DIOs investigated 16 such inmates up to the time of trial. CF, p 1337 ¶ 20.[5]

4. The DIOs prepare and execute certain ICE forms.

After the DIOs investigate, they forward information to an ICE officer who determines whether the person fits ICE's civil immigration enforcement criteria. TR (1/24/23), pp 292:17-293:3. If the ICE officer approves, the DIO prepares certain ICE documents. TR (1/24/23), pp 292:17-293:3. In practice, a DIO might draft a Form I-200, I-247A, and/or I-203, and place one or some combination of those forms in the inmate's jail file. CF, p 1343.

a. I-200: Warrant for Arrest of Alien

ICE Form I-200 is an administrative warrant titled "Warrant for Arrest of Alien." EX (Trial), p 195. It is signed by an "Authorized Immigration Officer" and issued to any "immigration officer authorized . . . to serve warrants of arrest for immigration violations." CF, p 1335 ¶ 7. It asserts that an ICE officer has

[5] One inmate, Sergio Lazaro-Ramirez, was listed on the tracking sheet twice, for a total of 17 occasions when DIOs conducted investigations. EX (Trial), p 609.

grounds to believe a person is removable from the United States. EX (Trial), p 195. It is issued and signed by the ICE officer, not a judge. CF, p 1346.[6]

b. I-247A: Immigration Detainer

ICE Form I-247A is titled "Immigration Detainer—Notice of Action." EX (Trial), pp 192-94. It is signed and issued by an "Immigration Officer" or a DIO, not a judge. CF, pp 1335 ¶ 5; 1345. Form I-247A names a detainee being held in a local jail and states that ICE has determined probable cause exists that the person is a removable alien. EX (Trial), p 192. The form includes a request to call ICE before the alien is released and to maintain custody for up to 48 hours beyond the time when the person would otherwise be released in order to allow ICE to take custody. CF, p 1335, ¶ 6.

c. I-203: Order to Detain or Release Alien

ICE Form I-203 is titled "Order to Detain or Release Alien." EX (Trial), p 196. Its purpose is to track detainees housed at ICE detention facilities like the Jail. TR (1/25/23), p 112:7-14. The form is addressed to a facility, and the issuing officer can check a "detain" box or a "release" box, asking the facility to detain or

[6] The 287(g) Agreement also purports to authorize DIOs to serve ICE Form I-205, an administrative warrant of removal/deportation, which also is not signed by a judge. EX (Trial), p 546. The TCSO DIOs did not serve those forms.

release the person. EX (Trial), p 196; CF, p 1345. Form I-203 is not signed by a judge. CF, p 1345.

5. Under the 287(g) Program, the Jail holds release-eligible inmates for ICE well beyond their release dates.

In a typical release process, the "releasing officer" oversees the process when an inmate is booked out of the Jail. The releasing officer must follow certain procedures, including completing forms, reclaiming facility-issued property, and returning inmates' personal property. CF, p 1344. The process requires checking for any inmate holds. CF, p 1344.

When an ICE officer gives the green light to move forward with the paperwork, the DIO can place an ICE hold on the inmate. TR (1/24/23), p 298:5-17. This status is prominently reflected in the inmate's Jail file to ensure that the releasing officer will check with the holding agency before releasing the person. CF, p 1344. All Jail detention officers are trained to recognize an ICE hold during the release process. CF, p 1344; TR (1/25/23), p 13:12-15.

Three individuals were not permitted to leave the Jail under the 287(g) Program when they became eligible for release on their criminal charges: Manuel Cordero-Reyes, Guillermo Perez-Velazquez, and Sergio Lazaro-Ramirez. CF, pp 1337-38 ¶¶ 21-23; 1351.

a. Manuel Cordero-Reyes

Manuel Cordero-Reyes was booked into the Jail the evening of November 1, 2019. CF, pp 1337 ¶ 21. The next day, his wife posted his $1,000 bond. CF, p 1337 ¶ 21(b); TR (1/25/23), pp 60:15-62:20. But when the releasing officer completed Cordero-Reyes' bond paperwork, TCSO did not start the release process. TR (1/25/23), p 64:7-11.

Instead, DIO Hammond served a Form I-200 administrative warrant on Cordero-Reyes; on that basis, Cordero-Reyes was not permitted to leave the Jail. TR (1/25/23), pp 63:23-65:16. The I-200 was not signed by a judge; it was drafted by Hammond and signed and issued by an ICE officer. EX (Trial), p 650.

The Jail did not collect facility property from Cordero-Reyes or return his personal property. TR (1/25/23), p 77:2-12. He remained in the Jail until November 10, 2019, when he was transferred to ICE's GEO contract detention facility in Aurora, Colorado. CF, p 1337 ¶ 21; TR (1/25/23), p 77:13-20.

b. Guillermo Perez-Velazquez

Guillermo Perez-Velazquez was booked into the Jail the evening of July 23, 2020. CF, pp 1337-38 ¶ 22. After investigating Perez-Velazquez, DIO Madronio believed he was an "illegal alien." TR (1/25/23), p 226:2-6.

Madronio placed Form I-247A in Perez-Velazquez's Jail file, EX (Trial), pp 660-62, and prepared a Form I-203 and checked the "detain" box, EX (Trial), p 658. On July 24, an ICE Officer signed Form I-200 naming Perez-Velazquez, and Madronio told him that he was now in ICE custody. TR (1/25/23), p 235:5-23.

On July 25, Perez-Velazquez posted the $1,000 bond on his state charges. CF, pp 1337-38 ¶ 22. Though the Jail collected the bond money, it did not release him, collect Jail property from him, or return his personal property. *See* EX (Trial), p 652. Perez-Velazquez was detained at the Jail until July 31, when he was transferred to the GEO detention facility in Aurora. CF, p 1338 ¶ 22(e).

c. Sergio Lazaro-Ramirez

On July 8, 2021, Sergio Lazaro-Ramirez was booked into the Jail as a pre-trial detainee for Lake County, Colorado. CF, p 1338 ¶ 23. He also had a pending criminal charge for Failure to Appear in Eagle County. CF, p 1338 ¶ 23(c).

DIO Smith prepared Forms I-247A and I-203 naming Lazaro-Ramirez, placed them in his Jail file, and wrote a note on the file to see a DIO once bond was met. EX (Trial), pp 712, 715-17; TR (1/25/23), p 44:15-19. An ICE officer issued a Form I-200 naming Lazaro-Ramirez. EX (Trial), p 718.

After dismissal of one charge and a personal reconnaissance bond on the other, Lazaro-Ramirez became release-eligible on February 1, 2022. CF, p 1338

¶ 23. But he wasn't released. CF, p 1338 ¶ 23(e). Instead, after he completed his bond paperwork, DIO Hammond served him with Form I-200 and gave a copy to the releasing officer. TR (1/25/23), pp 47:7-18, 50:16-22, 53:6-25. The Jail did not retrieve its property or return his personal property. TR (1/25/23), p 54:1-6. He was not released until February 18, 2022, when he was transferred to the GEO facility in Aurora. CF, p 1338 ¶ 23(f); TR (1/25/23), p 256:10-25.

C. Course of Proceedings and Disposition Below

1. The Taxpayers sue Sheriff Mikesell for declaratory and injunctive relief.

Plaintiffs sued Sheriff Mikesell in his official capacity in June 2019, after C.R.S. §§ 24-76.6-101 and -102 became law. *See* CF, pp 4-16. They alleged the Sheriff diverts substantial public funds and taxpayer resources from their intended purposes in order to carry out an *ultra vires* 287(g) Program, which includes arrests and detentions that violate the new statute and the Colorado Constitution. CF, p 11. They sought declaratory and injunctive relief. CF, pp 15-16.

2. The district court dismisses the suit for lack of standing, and this Court reverses.

Sheriff Mikesell moved to dismiss, arguing in relevant part that plaintiffs lacked taxpayer standing. CF, pp 48-67, 124-27. The trial court granted the motion on that basis. CF, pp 280-84. Plaintiffs appealed, claiming the court erred

because the Sheriff uses taxpayer funds to carry out the 287(g) Program. CF, pp 291-302. This Court reversed, holding that "Plaintiffs have taxpayer standing to challenge the Sheriff's 287(g) agreement," and remanded. *Nash*, 2021 COA 148M, ¶ 28.

3. On remand, the trial court rules for Sheriff Mikesell.

On remand, plaintiffs amended their complaint for declaratory and injunctive relief, and Sheriff Mikesell answered and counterclaimed for declaratory relief. CF, pp 423-71. After a three-day bench trial, the parties submitted proposed findings of fact and conclusions of law with competing requests for declaratory relief. Plaintiffs sought five declarations:

A. "Sheriff Mikesell's policies and practices under his 287(g) agreement with ICE exceed the limits of the authority granted to him by the Colorado Constitution and statutes";

B. "[T]he 287(g) Agreement does not authorize Teller County deputies, including 287(g) deputies [DIOs] to perform immigration enforcement functions that are inconsistent with Colorado law";

C. "Sheriff Mikesell violates Article II, section 7 of the Colorado Constitution and C.R.S. § 24-76.6-102(2) by authorizing his deputies to arrest or continue to detain persons, who would otherwise be released, on

the basis of ICE documents that are not reviewed or signed by a judge," such as ICE Forms I-200, I-247A, and I-203;

D. "Sheriff Mikesell violates Article II, section 19 of the Colorado Constitution and C.R.S. § 24-76.6-102(2) by authorizing his deputies to rely on ICE forms that are not signed by a judge," including ICE Forms I-200, I-247A, and I-203, "as grounds not to release persons" who "have posted bond and are thus eligible for release"; and

E. "Sheriff Mikesell cannot exempt himself or his deputies from the requirements of state law by entering into a 287(g) agreement."

CF, pp 1293-94, 1333. They also sought an injunction prohibiting the Sheriff from authorizing his deputies to rely on ICE forms not signed by a judge as grounds to arrest or continue detaining release-eligible persons. CF, pp 1294, 1333.

Sheriff Mikesell sought six declarations:

1. "Sheriff Mikesell has the legal authority to enter into the 287(g) Agreement with ICE";
2. "Colorado law does not prohibit" the Sheriff "from entering into a 287(g) Agreement with ICE";

3. "[T]he functions performed under the 287(g) Agreement by trained and certified [TCSO] deputies and officers acting as [DIOs]" under ICE supervision "are lawful and consistent with Colorado law";
4. Sheriff's deputies and officers "who are trained and certified by ICE are *de facto* federal officers when they are performing functions as [DIOs] under the 287(g) Agreement";
5. "Form I-200, Warrant for Arrest of Alien, issued by an ICE officer is not a request but is a valid federal arrest warrant authorized by federal law" and these forms "do not have to be signed by a judge"; and
6. Sheriff's deputies "who perform functions under the 287(g) agreement as [DIOs] do not arrest or detain an individual on the basis of a civil immigration detainer request because they only arrest or detain an individual by serving a valid federal arrest warrant issued by an ICE officer."

CF, pp 1311, 1333-34.

The trial court rejected plaintiffs' proposed declarations and adopted Sheriff Mikesell's with no substantive changes. CF, p 1356.

SUMMARY OF ARGUMENT

1. C.R.S. § 24-76.6-102(2) precludes Colorado law enforcement officers from arresting or detaining persons for civil immigration violations, including based on the very form—"warrant for arrest of alien" (I-200)—on which Sheriff Mikesell relies. The Sheriff's contrary argument impermissibly reads language out of the statute.

2. Colorado Constitution art. II, § 7, which prohibits unreasonable seizures, separately precludes warrantless arrests for civil immigration violations. Colorado statutes authorizing arrests—with or without a warrant—do not permit Colorado peace officers to arrest persons for such violations.

3. Under Colorado Constitution art. II, § 19, once a person is granted bails and posts bond, the Sheriff must release them. Continuing to detain persons for civil immigration purposes beyond when they have posted bond plainly violates this constitutional edict.

4. The 287(g) Agreement does not and cannot justify an end-run around the Colorado statute or Constitution. DIOs are not "*de facto* federal officers," and even if they were, the federal statute that authorizes 287(g) agreements allows local law enforcement to enforce federal immigration law only "to the extent consistent with" Colorado law. The challenged practices are plainly inconsistent with C.R.S.

§ 24-76.6-102(2) and art. II, §§ 7 & 19. Nor can the Sheriff justify arrests and detentions of release-eligible persons based on his statutory duty to keep the peace, because he must fulfill that duty in compliance with Colorado law.

5. Finally, plaintiffs established all four elements necessary for a permanent injunction. The Sheriff should therefore be enjoined from contravening Colorado law by arresting and detaining release-eligible persons for ICE.

ARGUMENT

I. The Sheriff's Policies and Practices Violate C.R.S. § 24-76.6-102(2).

A. Standard of Review and Preservation

The trial court made its rulings in the context of competing requests for declaratory judgments. Though such decisions are generally reviewed for abuse of discretion, where, as here, the issue is one of statutory interpretation, review is de novo. *Mendoza v. Pioneer Gen. Ins. Co.*, 2014 COA 29, ¶ 9; *see also Cisneros v. Elder*, 2022 CO 13M, ¶ 21 (statutory interpretation is reviewed de novo).

Plaintiffs preserved this issue. *See* CF, pp 1166-70, 1283-86; TR (1/26/23), pp 43-47.

B. C.R.S. § 24-76.6-102(2) Forbids the Sheriff from Authorizing the Arrest and Continued Detention of Release-Eligible Persons for Suspected Violations of Federal Civil Immigration Law.

C.R.S. § 24-76.6-102(2) prohibits the Sheriff's challenged policies and practices. In interpreting statutory provisions, this Court's "primary task is to

ascertain and give effect to" legislative intent. *Daniel v. City of Colo. Springs*, 2014 CO 34, ¶ 11. Where a statute is unambiguous, the Court enforces its plain and ordinary meaning. *Id.* ¶ 12. To determine ordinary meaning, the Court "read[s] the words and phrases in a statute 'in context,' and 'according to the rules of grammar and common usage.'" *Carrera v. People*, 2019 CO 83, ¶ 17 (quoting *McCoy v. People*, 2019 CO 44, ¶ 37). And it construes "the legislative scheme 'as a whole' by 'giving consistent, harmonious, and sensible effect to all of its parts.'" *Id.* (quoting *McCoy*, ¶ 37).

Here, C.R.S. § 24-76.6-101 to -102 is unambiguous. The statute first defines the key term "civil immigration detainer." It means "a written request issued by federal immigration enforcement authorities pursuant to 8 CFR 287.7 to law enforcement officers to maintain custody of an individual beyond the time when the individual is eligible for release from custody[.]" C.R.S. § 24-76.6-101(1). Such requests include "any request for law enforcement agency action [I-247A], *warrant for arrest of alien* [I-200], order to detain or release alien [I-203], or warrant of removal/deportation [I-205] on any form promulgated by federal immigration enforcement authorities." *Id.* (emphasis and brackets added). The Legislature thereby defined "civil immigration detainer" to include the ICE forms

at issue, specifically including Form I-200, which is entitled "warrant for arrest of alien." *See* EX (Trial), p 659.

The statute then articulates the applicable prohibition. It states plainly, "A law enforcement officer shall not arrest or detain an individual on the basis of a *civil immigration detainer* request." C.R.S. § 24-76.6-102(2) (emphasis added). It adds that "continued detention of an inmate at the request of federal immigration authorities beyond when he or she would otherwise be released" constitutes an unconstitutional warrantless arrest. *Id*. § 102(1)(b).

This statute thus precludes arrests and detentions for civil immigration violations and expressly forbids reliance on the very form—"warrant for arrest of alien" (I-200)—which, the Sheriff claims, establishes his deputies' authority to arrest and detain release-eligible persons. To the extent the 287(g) Agreement purports to authorize Colorado peace officers to arrest or detain persons on the basis of *any* ICE form, it sanctions conduct that violates this statute.

In ruling to the contrary, the trial court, at the Sheriff's behest, focused on the term "request" and reasoned that because a warrant for arrest of alien (I-200) issued to a DIO is not a "request," it isn't a "civil immigration detainer request," and thus, it is not encompassed by the statute. CF, pp 1346-48. This was error. Read in context, "request" is merely descriptive of the ICE forms included in the

statutory definition of "civil immigration detainer." And "civil immigration detainer" is defined to include a "warrant for arrest of alien." C.R.S. § 24-76.6-101(1). The Legislature's obvious intent was to preclude reliance on this very form. Any other interpretation of the statute elevates form over substance.

The trial court was thus quite wrong to rule that (1) Sheriff Mikesell had the authority to agree to perform functions prohibited by the statute and (2) a warrant for arrest of alien is not covered by the statute. CF, pp 1346-48; 1356 ¶ 3. This interpretation impermissibly reads the definition's language out of the statute. *See McCoy*, ¶ 38 (courts "must avoid constructions that would render any words or phrases superfluous or lead to illogical or absurd results").

Under his 287(g) Program, the Sheriff authorizes his deputies to arrest and detain release-eligible inmates for ICE on the basis of an administrative warrant for arrest of alien. The General Assembly has specifically prohibited the use of this form for this purpose. Three persons have been unlawfully detained when the statute required their release. In each case, the Sheriff violated Colorado law.

Five of six declarations entered in the Sheriff's favor (1-3 & 5-6) state or presuppose that DIOs make valid arrests and detentions under Colorado law by serving a warrant for arrest of alien. In fact, the statute forbids this very practice.

This Court should vacate those declarations and grant plaintiffs' competing requests for declaratory relief (A through E).

II. Sheriff Mikesell Violates Colorado Constitution Art. II, § 7 by Arresting Persons for Federal Civil Immigration Violations.

A. Standard of Review and Preservation of Issues

The construction of constitutional provisions and statutes is reviewed de novo. *McGihon v. Cave*, 2016 COA 78, ¶ 5. Likewise, the application of statutes and constitutional provisions to undisputed facts is reviewed de novo. *Bill Barrett Corp. v. Lembke*, 2018 COA 134, ¶ 14.

In interpreting such provisions, the Court first looks "to the plain and ordinary meaning of the language used" and, where unambiguous, will "apply the language as written." *McGihon*, ¶ 6. "Where a constitutional provision and a statute pertain to the same subject matter," they are construed "in harmony." *Colo. Ethics Watch v. Clear the Bench Colo.*, 2012 COA 42, ¶ 10.

Plaintiffs preserved these arguments. CF, pp 1160-70, 1280-82; TR (1/26/2023), pp 41:16-42:24, 48:15-50:7.

B. The Colorado Constitution Prohibits Unreasonable Seizures and Colorado Law Does Not Authorize the Sheriff to Arrest Persons for Suspected Violations of Federal Civil Immigration Law.

The Colorado Constitution protects the right to be free from unreasonable seizures. Colo. Const. art. II, § 7. The *Cisneros* court held that the El Paso County

Sheriff violated this right by relying on any combination of the three ICE forms as grounds to arrest or detain a person who posted bond, completed their sentence, or otherwise resolved their criminal case. *Cisneros*, 2018 Colo. Dist. LEXIS 3388, at *38, 42; *see* Op., No. 19CA0136 (describing *Cisneros* ruling as a "comprehensive and thoughtful written order").[7] The same result obtains here.

In Colorado, the authority to make arrests is codified in legislation. *People v. Hamilton*, 666 P.2d 152, 154 (Colo. 1983). Accordingly, even if C.R.S. §§ 24-76.6-101 and -102 did not expressly *prohibit* the Sheriff from arresting or detaining release-eligible inmates on the basis of a civil immigration warrant or detainer, the Sheriff would have to be *authorized* by state statutes to do so. The *Cisneros* court looked for such authorization in Colorado law and found none. *Cisneros*, 2018 Colo. Dist. LEXIS 3388, at *19-28. In fact, no such authorization exists. Colorado statutes authorizing arrests—with or without warrants—do not permit TCSO deputies to arrest persons based on ICE forms.

1. The Colorado statute authorizing arrests on a warrant provides no authority for the Sheriff to arrest persons based on ICE forms.

A Colorado statute allows peace officers to make arrests on the basis of a warrant. "A peace officer may arrest a person when . . . [h]e has a warrant

[7] Vacated opinions like *Cisneros* retain their persuasive value. *See Friends of the Everglades v. S. Fla. Water Mgmt. Dist.*, 570 F.3d 1210, 1281 (11th Cir. 2009); *Gould v. Bowyer*, 11 F.3d 82, 84 (7th Cir. 1993) (Posner, J.).

commanding that such person be arrested . . . ." C.R.S. § 16-3-102(1)(a). Sheriffs are peace officers. C.R.S. § 16-2.5-103. A "warrant" is "a written order *issued by a judge* of a court of record directed to any peace officer commanding the arrest of the person named or described in the order." C.R.S. § 16-1-104(18) (emphasis added).

ICE Forms I-200, I-247A, and I-203 are *not* warrants under Colorado law, because they are not "issued by a judge," as the statute requires. *See id.* As the parties stipulated and the trial court found: (i) an I-200 is signed only by an "Authorized Immigration Officer," CF, p 1335 ¶ 7; (ii) an I-247A is likewise "signed and issued by an 'Immigration Officer'" and "is not signed by a state or federal judge," CF, pp 1335 ¶ 5, 1345; and (iii) an I-203 "is an interagency form" that "is not signed by a judge," CF, p 1345. The court thus correctly held that an I-247A "is not a legal basis to detain a person," CF, p 1346,[8] and an I-203 "is an interagency form" that "has nothing to do with an arrest" and is *not* "a reason to detain," CF, p 1345.

Notwithstanding these rulings, Sheriff Mikesell insisted, and the trial court held, that an I-200 is a "valid" arrest warrant under state law, because it is referred

[8] Appellate courts have consistently ruled that ICE detainers are not warrants under analogous state laws. *See*, *e.g.*, *Lunn v. Commonwealth*, 78 N.E. 3d 1143, 1146 (Mass. 2017).

to as a "warrant" and because federal law authorizes immigration officers to issue it. CF, p 1346. Not so. I-200 forms are signed only by an ICE agent; they are not "issued by a judge" as Colorado law requires. *See* C.R.S. § 16-1-104(18) (defining "warrant" as a "written order issued by a *judge* of a court of record") (emphasis added); *Cisneros*, 2018 Colo. Dist. LEXIS 3388, at *21 (the three ICE forms are not issued by a judge, and therefore, they are not warrants under Colorado law).[9] The Colorado statute authorizing warrant-based arrests thus does not permit Sheriff Mikesell's deputies to execute I-200 Forms or make arrests based on them.

2. Colorado statutes permitting warrantless arrests likewise provide no such authority.

Because the ICE documents are not judicial warrants, Colorado law regards an arrest in reliance on them as a warrantless arrest. *Cisneros*, 2018 Colo. Dist. LEXIS 3388, at *21; *accord DeMarco*, 88 N.Y.S.3d at 529 (ICE administrative warrants aren't valid warrants under New York law, and New York law does not authorize warrantless arrests for civil immigration violations); *Lunn*, 78 N.E.3d at 1153 (detention based on immigration detainer constitutes warrantless arrest under

[9] Appellate courts in other states agree that because ICE administrative warrants aren't issued by courts, they are not valid warrants under state law and provide sheriffs with no arrest authority. *People ex rel. Wells v. DeMarco*, 88 N.Y.S. 3d 518, 529 (N.Y. App. Div. 2018); *Esparza v. Nobles Cty.*, 2019 WL 4594512, *26 (Minn. Ct. App. Sept. 23, 2019); *Ramon v. Short*, 460 P.3d 867, 872-73 (Mont. 2020).

Massachusetts law). A warrantless arrest is presumed unconstitutional. *People v. Burns*, 615 P.2d 686, 688 (Colo. 1980). When peace officers make an arrest without a warrant, the government bears the burden of rebutting that presumption and establishing a recognized exception to the warrant requirement. *Id*.; *see also People v. Crow*, 789 P.2d 1104, 1107 (Colo. 1990). Sheriff Mikesell did not and cannot meet this burden.

Under Colorado's warrantless-arrest statute, a peace officer may make a warrantless arrest only when (i) a crime has been or is being committed in the officer's presence, or (ii) the officer has probable cause to believe that an offense[10] was committed and that it was committed by the person to be arrested. C.R.S. § 16-3-102(1)(b) & (c). This requires probable cause of *criminal* conduct. *People v. Haurey*, 859 P.2d 889, 894 (Colo. 1993) (under section 16-3-102(1)(c), a "peace officer may arrest a person when the officer has probable cause to believe that a criminal offense has been or is being committed by that person"). As this Court put it, under the warrantless arrest statute, "[p]robable cause exists 'when there is a fair probability that the defendant has committed, is committing, or is about to

[10] "The terms 'offense' and 'crime' are synonymous." C.R.S. § 18-1-104(1); *see also* C.R.S. § 16-1-105(2) (terms defined in the Criminal Code (Title 18) apply to the Code of Criminal Procedure (Title 16)).

commit a *crime*.'" *People v. Valencia*, 257 P.3d 1203, 1208 (Colo. App. 2011) (citation omitted, emphasis added).

The detention of persons suspected of violating *civil* immigration law is not premised on probable cause of criminal conduct. "As a general rule, it is not a crime for a removable alien to remain present in the United States"—the federal removal process "is a civil, not a criminal matter." *Arizona v. United States*, 567 U.S. 387, 396, 407 (2012); *accord*, *Davila v. N. Reg'l Joint Police Bd.*, 370 F. Supp. 3d 498, 518 (W.D. Pa. 2019) (same); *DeMarco*, 88 N.Y.S.3d at 527 (same). The ICE documents on which TCSO relies "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." *Lunn*, 78 N.E. 3d at 1146 (describing immigration detainers).

In only limited instances has our Legislature authorized peace officers to make warrantless arrests in civil matters, none of which apply to the detention of removable persons for civil immigration violations. Rather, these authorizations apply when a person's condition clearly poses a danger to the health and safety of the person or others. *See* C.R.S. § 27-65-105(1)(a)(I) & (II) (72-hour mental-health hold); C.R.S. § 27-81-111(1)(a) (intoxicated or incapacitated by alcohol or drugs). But these limited authorizations for warrantless seizures are *spelled out in*

statutes. No statutory exception exists for federal civil immigration violations. *Cisneros*, 2018 Colo. Dist. LEXIS 3388, at *20-21. And the Court cannot imply such an authorization when the Legislature has specified the exceptions. *Vigil v. Franklin*, 103 P.3d 322, 327 (Colo. 2004) ("when the legislature speaks with exactitude," courts "construe the statute to mean that the inclusion or specification of a particular set of conditions necessarily excludes others") (internal citation and quotations omitted). Because the Sheriff failed to demonstrate any recognized exception to the warrant requirement for civil immigration violations, warrantless arrests for those violations violate art. II, § 7.

In sum, even absent the statute, the trial court erred in entering the Sheriff's declaratory judgment requests 1-3 and 5-6 and in rejecting plaintiffs' requests A-C and E. This Court should reverse those erroneous conclusions.

III. By Continuing to Detain Persons Who Have Been Granted Bail and Posted Bonds, the Sheriff Violates Colorado Constitution Article II, Section 19.

A. Standard of Review

The construction of constitutional provisions is reviewed de novo, *McGihon*, ¶ 5, as is the application of constitutional provisions to undisputed facts, *Bill Barrett Corp.*, ¶ 14. Plaintiffs preserved this issue. CF, pp 1169-70, 1280-82, 1293-94; TR (1/26/23), pp 42-43.

B. When Persons Who Are Granted Bail Post Bond, the Colorado Constitution Requires the Sheriff to Release Them.

The Colorado Constitution guarantees the right to bail. Under Colorado Constitution art. II, § 19, with exceptions not relevant here, "All persons shall be bailable by sufficient sureties pending disposition of charges." This provision "unequivocally" allows non-excepted persons to bail out of jail pending disposition of charges. *People v. Jones*, 2015 CO 20, ¶ 26 (holding that even petitioner's alleged commission of separate felony while released on bond did not justify revoking his bail); *see also People v. Smith*, 2023 CO 40, ¶ 29 (noting that exceptions to "the absolute right to bail" are spelled out in art. II, § 19).

By unlawfully authorizing his deputies to detain inmates who have been granted bail and posted bonds, Sheriff Mikesell prevents release-eligible inmates from being released on bail in clear violation of art. II, § 19. *See Cisneros*, 2018 Colo. Dist. LEXIS 3388, at *38, 43; *cf. Gaylor v. Does*, 105 F.3d 572, 576 (10th Cir. 1997) (once magistrate set defendant's bond at $1000, defendant "obtained a liberty interest in being freed of detention").

Nothing in state law authorizes a sheriff to continue to detain persons for civil immigration violations when they are granted bail and post bond. To the contrary, art. II, § 19 requires their release. And as explained next, the Court

should reject the Sheriff's argument that the 287(g) Agreement somehow exempts him from this state constitutional mandate.

The trial court thus erred in rejecting plaintiffs' request for declaratory judgment D. The Court should remand for entry of that declaration.

IV. The Trial Court Erred in Ruling the Sheriff Need Not Comply with Colorado Law Because DIOs Are "*De Facto* Federal Officers" and Because the Sheriff Has an Obligation to Keep the Peace.

A. Standard of Review and Preservation

This Court interprets both state and federal statutes de novo. *Estate of Petteys v. Farmers State Bank of Brush*, 2016 COA 34, ¶ 52. Courts interpreting such provisions first look "to the plain and ordinary meaning of the language used" and, where it is unambiguous, will "apply the language as written." *McGihon*, ¶ 6.

These issues were preserved. Sheriff Mikesell sought declarations on these points, CF, pp 1311, 1314-16; the parties briefed them, CF, pp 1290-92, 1312-16; and the trial court decided them, CF, pp 1354-56.

B. DIOs Are Not *De Facto* Federal Officers, and They May Only Perform Duties under the 287(g) Agreement to the Extent They Are Consistent with Colorado Law.

The lynchpin of the trial court's rejection of plaintiffs' claims was its holding that "Teller County Sheriff's deputies and officers who are trained and certified by ICE are *de facto* federal officers when they are performing functions as

[DIOs] the 287(g) Agreement." CF, p 1356, ¶ 4. Based on this premise, the court ruled that the prohibitions in C.R.S. §§ 24-76.6-101 and -102, Colorado's arrest statutes, and the Colorado Constitution do not apply to them when they enforce federal civil immigration law. *See* CF, p 1354-55. This Court should vacate this erroneous ruling on either of two independent grounds.

1. Under the express terms of the Immigration and Nationality Act, the DIOs are not *de facto* federal officers.

First, the federal statute applicable to the 287(g) Program precludes the court's conclusion. Under the INA, a DIO is "an officer or employee of the State or subdivision" who is permitted to "carry out" a "function of an immigration officer" at the "expense of the State or political subdivision and to the extent consistent with State and local law." 8 U.S.C. § 1357(g)(1). Critically, the statute states that except for purposes of determining the DIOs' immunity from suit, compensation for injury, and tort claims, "an officer or employee of a State or political subdivision of a State performing functions under this subsection shall not be treated as a Federal employee for any purpose." 8 U.S.C. § 1357(g)(7)-(g)(8).

Furthermore, the 287(g) Agreement, EX (Trial), p 552, and letters of authorization, EX (Trial), pp 176-77, 185-86, confirm that DIOs are to be treated as federal officers only for the limited purposes set out in the INA. Thus, in

carrying out enforcement functions under the 287(g) Agreement, they are not federal officers, *de facto* or otherwise.

In short, the applicable federal statute forecloses the conclusion that when performing functions under the 287(g) Agreement, DIOs are transformed into "federal officers" who are not bound by Colorado law. The 287(g) Agreement and the letters of authorization DIOs receive from ICE confirm this. The trial court's contrary holding was reversible error.

2. In any event, the federal authority delegated to DIOs does not exempt them from the constraints of Colorado law.

Second, whether a DIO is a "*de facto* federal officer" is beside the point. The trial court was wrong to conclude that the federal authority delegated to DIOs somehow exempts them from the constraints of Colorado law. In so holding, the court got it backwards. Under the INA, DIOs may be delegated immigration enforcement authority only "to the extent consistent with State and local law." 8 U.S.C. § 1357(g)(1) (emphasis added). In short, if state law forbids it, section 1357(g)(1) doesn't authorize it. *See DeMarco*, 88 N.Y.S. 3d at 533; *Esparza*, 2019 WL 4594512, *26. Here, the challenged practices are plainly *inconsistent with* and *unauthorized by* Colorado law. *See* Argument §§ I-III.

The trial court bolstered its ruling with one sweeping, unsupported reference to obstacle preemption. It held that because DIOs are *de facto* federal officers,

C.R.S. §§ 24-76.6-101 and -102 "do not–and cannot, under the doctrine of obstacle preemption–apply to DIOs." CF, p 1354. This was wrong, for multiple reasons.

Initially, the court's major premise was wrong. As explained above, DIOs are not federal officers. *See* Argument § IV(B)(1).

More importantly, obstacle or conflict preemption applies where state law "stands as an obstacle to the accomplishment and execution of Congress's purposes and objectives in enacting a federal statute." *Fuentes-Espinoza v. People*, 2017 CO 98, ¶ 53; *see also Choate v. Champion Home Builders Co.*, 222 F.3d 788, 792 (10th Cir. 2000). Here, the Colorado statute does not stand as an obstacle to the accomplishment of any Congressional purpose or objective. By its terms, the very law that permits ICE to authorize local law enforcement officers to enforce civil immigration law allows such authorization only "to the extent consistent with State and local law." 8 U.S.C. § 1357(g)(1). The statute thus subordinates the federal government's objective to state law and policy, not the other way around.

Finally, any suggestion that a 287(g) Agreement can delegate duties to local law enforcement that state law prohibits is incompatible with the Tenth Amendment's anti-commandeering principle. *See United States v. California*, 921 F.3d 865, 890 (9th Cir. 2019) (upholding state restrictions on participating in immigration enforcement, explaining, "the choice of a state to refrain from

participation cannot be invalid under the doctrine of obstacle preemption" because "it retains the right of refusal" under the Tenth Amendment), *cert. denied* 141 S. Ct. 124 (2020); *McHenry Cty. v. Kwame Raoul*, 44 F.4th 581, 592 (7th Cir. 2022) (same); *Galarza v. Szalczyk*, 745 F.3d 634, 644 (3d Cir. 2014) (compliance with detainers is permissive; to hold otherwise would "violate the anti-commandeering principles inherent in the Tenth Amendment"); *Lunn*, 78 N.E.3d at 1152 (same).

The trial court's conception of obstacle preemption must be rejected, and this Court should vacate erroneous declaration # 4.

C. Sheriff Mikesell Could and Did Fulfill His Peacekeeping Duties Without the 287(g) Program, and Regardless, He Cannot Do So in Violation of Colorado Law.

The Sheriff also claimed his statutory duty to preserve the peace authorized him to implement the challenged practices. CF, pp 1316-19; C.R.S. § 30-10-516. And the trial court found that plaintiffs presented "no evidence" contradicting that assertion. CF, pp 1350-51. In fact, the overwhelming evidence, including the Sheriff's own admissions, contradicted it. The court's contrary ruling was both clearly erroneous, *City of Boulder v. Farmer's Reservoir & Irrigation Co.*, 214 P.3d 563, 567 (Colo. App. 2009), and wrong as a matter of law.

1. Overwhelming evidence showed that Sheriff Mikesell could and did keep the peace without the 287(g) Agreement.

The court erred in finding Sheriff Mikesell needed the 287(g) Agreement to keep the peace, for multiple reasons. *First*, the Sheriff's 287g Agreement is the only one in Colorado. *See* Statement of Facts § B.1. There was no evidence he confronts unique peacekeeping issues that are not shared by any other Colorado sheriff.

Second, Sheriff Mikesell admitted that before he entered into the 287(g) Agreement, he was able to fulfill his duties without it. TR (1/24/23), pp 95:14-96:1. Moreover, after DIO Hammond left TCSO and before DIO Rice was certified, there was a gap in which the Jail had no active DIO. TR (1/24/23), p 244:16-21. Sheriff Mikesell could not recall any issues regarding his ability to perform his duties during the period when the Jail had no DIO. TR (1/24/23), p 75:2-18. And absent the 287(g) Program, Sheriff Mikesell can still arrest people for criminal violations in Teller County regardless of their citizenship status. TR (1/24/23), p 179:11-17.

Third, even without the 287(g) Program, TCSO can coordinate with ICE. Before the 287(g) Agreement and up to the time of trial, ICE regularly staffed an office in the Jail. TR (1/24/23), pp 249:16-50:1, 270:5-24. Prior to the 287(g) Program, TCSO officers contacted ICE to report suspected undocumented inmates

booked into the Jail. TR (1/24/23), p 270:5-24. Independent of the 287(g) Program, Jail detention officers are trained to contact either in-house or regional ICE officers directly about suspected undocumented inmates. TR (1/24/23), pp 249:16-250:1; 288:4-10. Even under the 287(g) Agreement, DIOs act under ICE supervision, and an ICE officer, not a DIO, determines probable cause of removability and alignment with ICE's civil immigration enforcement priorities. TR (1/25/23), pp 86:3-9, 101:10-21. There is nothing DIOs are authorized to do that ICE officers are not. TR (1/25/23), p 201:8-11. The court's finding that the Sheriff needed the 287(g) Agreement to fulfill his statutory duties therefore constituted clear error.

2. As a matter of law, the Sheriff must keep the peace in compliance with Colorado's statutes and Constitution.

In any event, the court was wrong as a matter of law. Sheriff Mikesell cannot contravene Colorado law by authorizing his deputies to make warrantless arrests and continued detentions for civil immigration violations, even if doing so helps him keep the peace. The Sheriff's duty is to keep the peace without violating section 24-76.6-102(2) and Colo. Const. art. II, §§ 7 & 19. *See* Colorado Attorney General Formal Op. No. 99-7, 19991 WL 33100121 (sheriffs carry out their duty to "keep and preserve the peace" under C.R.S. § 30-10-516 by "making arrests for

violations of the criminal statutes," and "the use of authority beyond the arrest power must be found in a specific statute").

Colorado sheriffs are limited to the express powers granted them by the Legislature and implied powers "reasonably necessary to execute those express powers." *People v. Buckallew*, 848 P.2d 904, 909 (Colo. 1993); *see McArthur v. Boynton*, 74 P. 540, 541 (Colo. 1903) (a sheriff's power "is conferred by the statutes; and no power exists in him except such as is expressly so conferred, or may be fairly implied"). Powers are implied only if a sheriff cannot "fully perform his functions without the implied power." *Buckallew*, 848 P.2d at 908.

Douglass v. Kelton, 610 P.2d 1067 (Colo. 1980), demonstrates just how narrowly our Supreme Court has construed the scope of a sheriff's implied powers. In *Douglass*, a statute provided an affirmative defense to the crime of carrying a concealed weapon if a person had a concealed-carry permit issued by a sheriff or police chief. *Id.* at 1069. The Legislature "must have contemplated" that sheriffs and police chiefs had the power to issue such permits. *Id.* Yet, because the Legislature had never expressly authorized them to do so, the Court held they had no such power. *Id*.

Nor can a sheriff enter into a contract to enlarge the powers of his office. Colorado law restricts intergovernmental contracts and cooperation—including

with the United States—to those that "provide any function, service, or facility *lawfully authorized to each of the cooperating or contracting units.*" Colo. Const. art. XIV, § 18(2)(a) (emphasis added); *see also* C.R.S. §§ 29-1-201 to 207 (implementing the constitutional provision). Under these provisions, Sheriff Mikesell may only contract with the federal government to provide functions, services, or facilities that his office is independently authorized to provide in Teller County. *See Durango Transp. Inc., v. Durango*, 824 P.2d 48, 51 (Colo. App. 1991) (holding that the phrase "lawfully authorized to each" means each party to an intergovernmental contract "must have the authority to perform the subject activity within its jurisdictional boundaries").

The Sheriff has no power to expand his arrest or detention authority beyond the restrictions imposed by C.R.S. § 24-76.6-102(2) and Colo. Const. art. II, §§ 7 & 19, whether via a 287(g) Agreement or otherwise. The Court should therefore reverse and remand for entry of plaintiffs' declarations A-E.

V. Plaintiffs are Entitled to Permanent Injunctive Relief.

A. Standard of Review

This Court reviews denials of permanent injunctions for abuse of discretion. *Langlois v. Bd. of Cty. Comm'rs of El Paso*, 78 P.3d 1154, 1157 (Colo. App.

2003). But where, as here, the denial involves statutory interpretation, review is de novo. *Mendoza*, ¶ 9; *Cisneros*, ¶ 21.

B. Plaintiffs Met All Four Requirements for a Permanent Injunction

A party seeking a permanent injunction must show that: "(1) the party has achieved actual success on the merits; (2) irreparable harm will result unless the injunction is issued; (3) the threatened injury outweighs the harm that the injunction may cause to the opposing party; and (4) the injunction, if issued, will not adversely affect the public interest." *Dallman v. Ritter*, 225 P.3d 610, 631 n.11 (Colo. 2010) (quoting *Langlois*, 78 P.3d at 1158).

Actual success on merits. As shown above, Sheriff Mikesell's 287(g) Program violates section 24-76.6-102(2) and Colorado Constitution art. II, §§ 7 & 19. Colorado law prohibits arresting persons for civil immigration violations or continuing to detain them once they become release-eligible. Plaintiffs therefore have succeeded on the merits.

Irreparable harm. "Few injuries are more real, immediate, or irreparable than being deprived of one's personal liberty." *Cisneros*, 2018 Colo. Dist. LEXIS 3388 at *38. "[T]he deprivation of constitutional rights 'unquestionably constitutes irreparable injury.'" *de Jesus Ortega Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (quotation omitted); *accord United States v. Bogle*, 855

F.2d 707, 710-11 (11th Cir. 1988) (unnecessary incarceration is a liberty deprivation that "clearly constitutes irreparable harm").

Here, the unauthorized, warrantless arrests and continued detentions of release-eligible persons under the 287(g) Program violate statutory and constitutional rights. Further, the permanent injunction test requires only resulting irreparable harm, not irreparable harm to the plaintiffs. *See Dallman*, 225 P.3d at 631, n.11; *K9Shrink, LLC v. Ridgewood Meadows Water & Homeowners Ass'n*, 278 P.3d 372, 378 (Colo. App. 2011).

The injuries outweigh any harm to the Sheriff. Sheriff Mikesell has no legitimate interest in acting beyond the authority of his office or violating Colorado laws he is sworn to uphold. The Sheriff failed to demonstrate that he cannot fulfill his duties as a peace officer absent the 287(g) Program. *See* Argument, § IV.C.1.[11] And in any event, the purported benefits of the 287(g) Program cannot justify violating Colorado law. *Id*. § IV.C.2.

The public interest militates in favor of an injunction. The protection of constitutional rights always advances the public interest. *Awad v. Ziriax*, 670 F.3d

[11] Moreover, the 287(g) Program has seen limited activity. Only three inmates have been detained in four years, each was granted bail, and each had to post only a modest bond or personal recognizance bond. Statement of Facts § B.5. And there has been no activity on the 287(g) tracking sheet since February 2022. TR (1/25/23), p 29:6-14.

1111, 1131 (10th Cir. 2012). So does ensuring that law enforcement complies with the law. *See Washington v. Reno*, 35 F.3d 1093, 1103 (6th Cir. 1994) (explaining that injunction furthered the public interest in having government officials follow federal law); *Zepeda v. INS*, 753 F.2d 719, 727 (9th Cir. 1984) (holding that "the INS cannot reasonably assert that it is harmed in any legally cognizable sense by being enjoined from constitutional violations").

Furthermore, allowing Colorado peace officers to enforce federal civil immigration law contravenes the legislatively decreed public interest. Colorado once had a statute requiring local law enforcement to cooperate with federal immigration authorities. C.R.S. § 29-29-101 to -103 (2006). But the Legislature repealed it, declaring, "The requirement that public safety agencies play a role in enforcing federal immigration laws can undermine public trust[.]" H.B. 13-1258 (April 26, 2013). Studies have corroborated this concern.[12] More recently, the Legislature declared, "It is an inappropriate exercise of a state's police powers to

[12] *See* Randy Capps *et al.*, Migration Policy Institute, Delegation and Diverge: 287(g) State and Local Immigration Enforcement 3 (Jan. 2011), https://www.migrationpolicy.org/research/delegation-and-divergence-287g-state-and-local-immigration-enforcement; Laura Muñoz Lopez, How 287(g) Agreements Harm Public Safety, Center for American Progress (May 8, 2018), https://www.americanprogress.org/issues/immigration/news/2018/05/450439/287g-agreements-harm-public-safety/.

detain individuals for federal immigration purposes given its implication on foreign relations." HB 23-1100, § 1(c).

The Sheriff should therefore be enjoined from violating Colorado law, including C.R.S. § 24-76.6-102(2) and Colo. Const. art. II, §§ 7 & 19, under the purported auspices of the 287(g) Program.

CONCLUSION

The Court should vacate the trial court's declarations and remand for entry of plaintiffs' requested declarations and a permanent injunction.

Dated September 28, 2023.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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