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▲
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PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION	

Certification of Conferral. Pursuant to C.R.C.P. 121, § 1-15, Plaintiffs' counsel consulted with Lisa Kirkman, counsel for Defendant, who takes no position on this motion.

INTRODUCTION

Defendant Bill Elder, the El Paso County Sheriff, refuses to release certain prisoners, including the Plaintiffs, who have posted bond, completed their sentences, or otherwise resolved their criminal cases, solely because federal immigration authorities have asked him to keep the prisoners in custody. Even though Colorado law requires him to release these prisoners, he holds them illegally for days, weeks, even months based on his claimed authority to jail prisoners who are suspected of civil violations of federal immigration law.

That authority does not exist.

Colorado law provides the Sheriff with no authority to enforce federal immigration law. And under Colorado law, once prisoners have posted bond, completed their sentence, or otherwise resolved their case, the Sheriff must release them. His policy of jailing persons for suspected civil violations of federal law is thus ultra vires. It abdicates the Sheriff's mandatory legal duties under Colorado law, and it violates Plaintiffs' state constitutional rights to be free from unreasonable seizures and to post bond.

Plaintiffs, Mr. Saul Cisneros and Ms. Rut Noemi Chavez Rodriguez, are pretrial detainees in the El Paso County Jail. The court has set their bonds at $2000 and $1000, respectively. They want to post bond and secure their pretrial release. Their friends and family members have the money, are willing and able to post bond, and have offered to post it. But under the challenged policies and practices, Sheriff Elder refuses to release them on bond.

Plaintiffs have suffered and will continue to suffer irreparable injury with every day that passes without this Court's intervention. They therefore urge the Court to issue a temporary restraining order and a preliminary injunction pending final judgment on the merits.

THE CHALLENGED PRACTICES

Being present in the United States in violation of federal immigration law is a civil matter, not a crime. Nevertheless, at the request of federal immigration authorities, Sheriff Elder is regularly imprisoning individuals solely because they are suspected of being removable from the United States. Complaint, ¶ 4. By refusing to release prisoners when his state-law authority has ended, Sheriff Elder carries out a new arrest without a warrant, without probable cause of a crime, and without any lawful authority.

The requests for continued detention come from immigration enforcement officers employed by U.S. Immigration and Customs Enforcement (ICE), an agency within the Department of Homeland Security (DHS). The requests are formalized by documents that ICE officers email or fax to EPSO regarding particular prisoners held in the jail.

The requesting documents are standardized ICE forms. They include an immigration detainer, ICE Form I-247A; an administrative warrant, ICE Form I-200; and a tracking form, ICE Form I-203. None of these forms is reviewed, approved, or signed by a judicial officer.

Immigration Detainer, ICE Form I-247A

An immigration detainer, ICE Form I-247A, identifies a prisoner being held in a local jail. It asserts that ICE believes the prisoner may be removable from the United States. It asks the jail to continue to detain that prisoner for an additional 48 hours after he or she would otherwise be released, to allow time for ICE to take the prisoner into federal custody. *See Lunn*

v. Commonwealth, 78 N.E.3d 1143, 1146 (Mass. 2017). ICE began using the I-247A version of the immigration detainer in early 2017. *Id*. at 1151 n.17. Courts and law enforcement officers often refer to a Form I-247 detainer as an "ICE hold." *E.g.*, *Gonzalez v. ICE*, 2014 U.S. Dist. LEXIS 185097, at *2 (C.D. Cal. July 28, 2014) (explaining that ICE Form I-247 is "known as an 'immigration detainer,' 'immigration hold,' or 'ICE hold'").

An immigration detainer is not a warrant. Immigration detainers are issued by ICE enforcement officers. They are not reviewed, approved, or signed by a judge or judicial officer. *Lunn*, 78 N.E.3d at 1146. Immigration detainers naming Plaintiffs Cisneros and Chavez, sent to the El Paso County Jail, are attached as Exhibit 1.[1]

For many years, the wording of Form I-247 suggested that compliance with the federal request was mandatory. The wording has changed. *See* Ex. 1 ("It is therefore *requested* that you . . . [m]aintain custody of the alien . . . .") (emphasis added). It is now clear, and federal officials and multiple court decisions agree, that these detainers represent a mere request from the federal government, not a command. *Lunn,* 78 N.E.3d at 1152.

Administrative Warrant, ICE Form I-200

Although an ICE administrative warrant features the word "warrant," it is not reviewed, approved, or signed by a judge or a judicial officer. ICE administrative warrants are issued by ICE enforcement officers. *Lunn*, 78 N.E.3d at 1151 n.17. (Administrative warrants naming Plaintiffs Cisneros and Chavez are attached as Exhibit 3.) ICE administrative warrants are directed to federal immigration officers. *See* Ex. 3. Federal law states that ICE administrative

[1] Exhibits 1, 3-5, 17, 19, and 22 were obtained from EPSO in response to Colorado open records requests, and Exhibits 16 and 20 were obtained from the El Paso County District Court. *See* Ex. 2, Affidavit of Arash Jahanian, ¶¶ 7-8.

warrants may be served or executed only by certain immigration officers who have received specialized training in immigration law. *See Arizona v. United States*, 567 U.S. 387, 408 (2012). Colorado sheriffs have no authority to execute ICE administrative warrants.

The Jail's Notation: "ICE Hold"

When a prisoner is booked into the El Paso County Jail, the jail sends fingerprints to the FBI and to ICE. In addition, the jail initiates contact with ICE directly when it believes that ICE may be interested in a particular prisoner.[2] For example, when bond is posted for any foreign-born detainee, Sheriff Elder requires deputies to contact ICE. He requires deputies to intentionally delay the bonding process, in order to provide ICE with time to send an immigration detainer, if one has not been sent already. *See* Ex. 4.[3]

When ICE believes that a prisoner in the jail may be in violation of federal immigration law, ICE sends a detainer, ICE Form I-247A. Pursuant to ICE policy adopted in 2017, ICE now also sends an administrative warrant, ICE Form I-200, to accompany the detainer. *Lunn*, 78 N.E.3d at 1151 n.17.[4] A directive from the EPSO Jail Commander states, "In order to hold foreign born nationals, we will require an I-247A form." Ex. 6.[5] When the Jail receives the I-247A Form, deputies enter the notation "ICE hold" in the jail's computer.[6]

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[2] *See* Ex. 4 ("When a foreign born national is booked . . . . [w]e will notify the ICE agents by the duty agent cell phone"); *id*. ("If a foreign born national is booked on a county sentence, we will . . . call the on call ICE duty agent cell phone the day of release.").

[3] *See also* Ex. 5, at 18 (S.O.P. 02.08 at 10) ("[H]old the bonded inmate for a maximum of two hours. This will give the ICE agent time . . . to place a hold.").

[4] When individuals are subject to a final order of removal, the I-247A Form is accompanied instead by an I-205 Form. The I-205 Form is signed by immigration officers, not by a judge, and is not a criminal arrest warrant. *Lunn*, 78 N.E.3d at 1151 n.17.

[5] Exhibit 6 is Directive 18-01, dated February 1, 2018. The Directive required brief written updates to S.O.P.s 2.05, 02.06, and 02.08. These updates are contained in Exhibit 7.

[6] Exhibit 5, at 9 (EPSO S.O.P. 02.05, at 13).

"ICE hold" is not a formal legal term. There is no legal significance to the notation "ICE hold" in the EPSO computer. Under Sheriff Elder's policies and practices, however, the notation "ICE hold" unjustifiably causes the continued imprisonment of detainees whose release is required by Colorado law.

The IGSA

DHS has signed an Intergovernmental Service Agreement ("IGSA") with El Paso County. Ex. 8. An IGSA is a contract between ICE and a state or local government for the purpose of arranging housing for federal detainees. The contract calls for ICE to pay a daily rate for each detainee housed in the local jail. The IGSA between ICE and El Paso County states that its purpose is "for the detention, and care of persons detained under the authority of the Immigration and Nationality Act." Ex. 8, Art. I.A.

The IGSA contemplates that ICE will bring certain detainees to the El Paso County Jail for temporary housing, at ICE's expense. It applies to persons who are already in the custody of ICE officers at the time that they arrive at the El Paso County Jail. *See* Ex. 8, Art. IV.A. It does not purport to grant or delegate any authority to Sheriff Elder to initiate a seizure for the purpose of enforcing federal immigration law.

Form I-203

To track detainees housed at its contract detention facilities, ICE uses Form I-203. It is an internal administrative form signed by a deportation officer. It accompanies ICE detainees when ICE officers move them to and from a detention facility. The ICE Detention Standards state that a Form I-203 must accompany every detainee brought to an ICE detention facility. Regarding releases, the ICE Detention Standards state that "a detainee's out-processing begins

when release processing staff receive the Form I-203." ICE Performance-Based National Detention Standards, § 2.1 Admission and Release, available at https://www.ice.gov/doclib/detention-standards/2011/2-1.pdf.

In connection with an IGSA, the I-203 Form functions as documentation for billing purposes, so that EPSO can seek compensation from ICE at the daily rate for housing ICE detainees.[7] A sample I-203 Form is attached as Exhibit 9. Although the I-203 Form bears the title "Order to Detain or Release Alien," is it not an order that is reviewed, authorized, approved, or signed by a judge or a judicial officer. It confers no authority on Sheriff Elder to initiate custody of an individual who is not already in federal custody.

Sheriff Elder regards prisoners as "IGSA holds" when state-law authority to hold the prisoners has ended and ICE has sent an I-203 Form in addition to an administrative warrant (ICE Form I-200) and/or an immigration detainer (ICE Form I-247). For example, shortly after Cesar Castellon was booked into the jail on August 31, 2017, ICE faxed both an I-247A Form and an I-200 Form to the Jail. *See* Ex. 10, 11. When Mr. Castellon completed his sentence on December 31, 2017, ICE faxed an I-203 Form. *See* Ex. 9. At 3:41 a.m., a deputy wrote that Mr. Castellon "completed his sentence on 12/31/2017 and has transitioned from an ICE Hold to an IGSA Hold." Ex. 12.[8] Although Mr. Castellon had completed his sentence on December 31 and Colorado law required his release, he remained a prisoner in the jail until January 2, 2018. EPSO billed ICE for two days' confinement pursuant to the IGSA. *See* Ex. 13, 14.

[7] *See* Ex. 4 ("We still require . . . an I-203 for billing purposes").
[8] *See also* Ex. 5, at 16 (EPSO S.O.P. 02.08, at 1), which defines "IGSA Detainees" as "[i]ndividuals who are not incarcerated on any charges/warrants, and are *only* confined on an IGSA Hold for ICE purposes." (emphasis in original).

According to Sheriff Elder, the jail's receipt by fax or email of an I-203 Form, in addition to an I-200 Form and/or an I-247A Form, transfers a detainee from state custody to federal custody. To the contrary, neither an I-247A Form, nor an I-200 Form, nor an I-203 Form, nor any combination thereof, justifies Sheriff Elder's refusal to release prisoners when the state-law authority for their detention has ended.

Sheriff Elder regularly relies on "ICE Holds" to refuse to release prisoners on bond.

When a detainee's family or friends inquire about posting bond, deputies at the jail routinely discourage them, advising them that they would be "wasting" their money, because their loved one would not be released even if the bond is posted. Complaint, ¶¶ 42-44. In some cases, deputies say that bond cannot be posted at all because of an "ICE hold." *See* Ex. 15, Affidavit of Leonor Fragoso. In other cases, deputies have accepted bond money but have still declined to release the detainee. For example, on January 25, 2018, Gretchen Hoff went to the jail to post bond for her boyfriend, Omar Valdez-Lerma, whom the jail listed as having an "ICE hold." The deputies accepted the $4000 that Ms. Hoff posted for Omar's two cases and filed the bond paperwork with the state court. *See* Ex. 16, 17; Ex. 18, Affidavit of Gretchen Hoff.

Pursuant to the challenged policies, however, the jail refused to release Mr. Valdez. Although Colorado law required the jail to release him after bond was posted, the jail labeled him as an "IGSA detainee." The jail continued to imprison him for six additional days, until January 31, 2018.[9] *See* Ex. 14, 20. Ms. Hoff was out $4,000.[10] Complaint, ¶ 46.

[9] The jail did not label Mr. Valdez an IGSA detainee until January 30, when ICE sent an I-203 Form. *See* Ex. 19. Thus, the EPSO billed ICE for only the last two of the six days Mr. Valdez was imprisoned after bond was posted. *See* Ex. 13, 14.

[10] The district court subsequently issued Ms. Hoff a Notice of Forfeiture and Citation to Show Cause. Ex. 20.

SPECIFIC FACTS REGARDING SAUL CISNEROS

Plaintiff Saul Cisneros, age 47, has lived in Colorado Springs for more than 20 years. He has three children in Colorado Springs, ages 20, 14, and 10. Ex. 21, Affidavit of Gloria Cisneros, ¶ 2. On November 24, 2017, he was booked into the El Paso County Jail on two misdemeanor offenses. Complaint, ¶¶ 49-50. The court set bond for Mr. Cisneros at $2000. On November 28, 2017, Gloria Cisneros, Saul's eldest daughter, went to the jail to post bond for her father. She posted the money and obtained a receipt, but her father was not released. Ex. 21.

Jail records show that an "Inmate Release Checklist" was filled out at 9:33 p.m. Ex. 22, at 1. A receipt for $2000 was made out to Gloria Cisneros, and the jail copied Gloria's photo ID. *Id*. at 2, 3. At 11:16 p.m., the jail sent ICE a fax, stating, "Alien has posted bond, need info (clear or hold) ASAP please." *Id*. at 4-5. By 1:30 a.m., ICE responded by faxing an I-247A Form and an I-200 Form. *Id*. at 6, 9.

On November 29, Gloria made several calls to the jail. She was told that after she posted the bond money, ICE put a "hold" on her father, so the jail would not release him. Later that day, another jail deputy explained that with an "ICE hold" on her father, he could not get out on bond. Ex. 21, ¶¶ 10-13. Gloria obtained a refund of her bond money, but her father remained, and still remains, in jail. She remains willing and able to post the $2000 bond, plus any related fee, to secure his pretrial release. *See* Ex. 21, ¶¶ 14-15.

SPECIFIC FACTS REGARDING RUT NOEMI CHAVEZ RODRIGUEZ

Plaintiff Rut Noemi Chavez Rodriguez, age 21, has lived in Colorado Springs for almost five years. On November 18, 2017, she was arrested and booked into the El Paso County Jail. She had never been arrested before. Her bond is set at $1000. Complaint, ¶ 56.

Rut attends services at Calvary Chapel Eastside in Colorado Springs. Pastor Juan Fragoso of Calvary Chapel and his wife Leonor Fragoso have been concerned about Rut's incarceration. They have visited Rut regularly at the El Paso County Jail. Ex.15, Affidavit of Leonor Fragoso, ¶¶ 2-3. Two days after Rut was arrested, they went to the jail to ask about posting bond for her. They were told it was not possible to post bond. *Id*. at ¶ 4.

On February 15, 2018, Leonor went to the jail again, accompanied by Siena Mann, to ask about posting bond for Rut. At the jail, they explained that they came to post bond for Rut. The woman at the desk confirmed that the bond was $1000 plus a $10 fee. When a different jail employee came to assist, Siena explained that she and Leonor were aware that Rut had an "ICE hold." Siena and Leonor were then told that if they posted bond, Rut would not be released. Ex.15, ¶¶ 6-12; Ex. 23, Affidavit of Siena Mann, ¶¶ 5-11. Leonor Fragoso remains willing and able to post bond for Rut. She will do so if this Court grants Plaintiffs' request to prohibit Sheriff Elder from relying on the "ICE hold" as grounds for blocking Rut's release. Ex. 15, ¶ 14.

ARGUMENT

Plaintiffs invoke the time-honored power of a court of equity to restrain unlawful actions of executive officials. *See Cnty. of Denver v. Pitcher*, 129 P. 1015, 1023 (Colo. 1913) (holding that equity courts may enjoin illegal acts in excess of authority). Interim injunctive relief is necessary to remedy Sheriff Elder's ultra vires deprivation of Plaintiffs' liberty, to compel him to release Plaintiffs when they post bond or complete their sentence, and to protect Plaintiffs' fundamental state constitutional rights to be free from unreasonable seizures and to post bail. 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).

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

By relying on ICE documents as grounds for refusing to release Plaintiffs when they post bond, complete their sentence, or resolve their criminal cases, Sheriff Elder carries out a new arrest, for civil violations of federal immigration law, without legal authority. Section I.A., *infra*. Because Sheriff Elder has a clear legal duty to release Plaintiffs when his state-law authority to confine them has ended, Plaintiffs are entitled to relief in the nature of mandamus. Section I.B., *infra*. By carrying out arrests without legal authority, Sheriff Elder violates Plaintiffs' rights under Colorado Constitution Article II, section 7. Section I.C., *infra*. And by failing to release Plaintiffs even when they, their family, or their friends have posted, or offered to post, the bond set by the court, Sheriff Elder also violates Article II, section 19. Section I.D., *infra*.

A. By Granting ICE's Requests to Keep Plaintiffs in Custody Because They Are Suspected of Civil Violations of Federal Immigration Law, Sheriff Elder Exceeds His Authority Under Colorado Law.

After a thorough analysis, the Supreme Judicial Court of Massachusetts recently concluded that state law provided no authority for state or local law enforcement officials to hold a prisoner on the basis of an immigration detainer. The court explained that Massachusetts law did not provide authority to hold prisoners for civil violations of federal immigration law. *Lunn v. Commonwealth*, 78 N.E.3d 1143 (Mass. 2017). The same result obtains here.

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 McArthur v. Boynton*, 74 P. 540, 541 (Colo. App. 1903) (holding that the El Paso County Sheriff is limited to the express powers granted by legislation and the implied powers "reasonably necessary to execute those express powers."). Neither the Colorado Constitution, nor any Colorado statute, provides Colorado sheriffs with authority to enforce federal immigration law.

As shown below, Sheriff Elder is not required to honor ICE detainer requests. He has made a choice—a choice forbidden under Colorado law. By refusing to release Plaintiffs, he has carried out new arrests, and those arrests exceed his authority under Colorado law.

1. Sheriff Elder is choosing to honor ICE requests.

Nothing in federal law compels local law enforcement authorities to hold prisoners whom ICE suspects are removable. Immigration detainers are requests, not commands. *See, e.g.*, *Galarza v. Szalczyk*, 745 F.3d 634, 645 (3rd Cir. 2014). As *Galarza* explained, if detainers *were* regarded as commands from the federal government to state or local officials, they would violate the anti-commandeering principle of the Tenth Amendment. *Id*. at 644; *accord Lunn*, 78 N.E.3d at 1152. In addition, ICE administrative warrants are directed to federal officers, not to county sheriffs, and federal law specifies that only certain federal officers are authorized to execute these administrative warrants. *Id*. at 1151 n.17; *see* 8 C.F.R. § 287.5(e)(3). Sheriff Elder thus has no legal obligation to honor ICE's request to hold prisoners who would otherwise be released. He has made a choice—a choice that Colorado law does not authorize.

2. Sheriff Elder's decision to keep Plaintiffs in custody is a new arrest.

Courts analyzing ICE detainers agree that the decision to hold a prisoner who would otherwise be released is the equivalent of a new arrest that must comply with the statutory and constitutional requirements for depriving persons of liberty, including the Fourth Amendment. *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*, 2017 U.S. Dist. LEXIS 131727, at *20 (E.D. Wash. July 31, 2017) ("Where detention is extended as a result of an immigration hold, that extension is a subsequent seizure for Fourth Amendment purposes."). Thus, by refusing to release Plaintiffs upon posting of bond, Sheriff Elder carries out a new arrest without legal justification.

3. Sheriff Elder has no authority to make arrests for civil violations of federal immigration law.

Defendant's limited authority to make an arrest or otherwise deprive a person of liberty derives from, and is limited by, the Colorado Constitution and Colorado statutes. *See Buckallew*, 848 P.2d at 908. The two most clearly applicable statutes are the statute authorizing arrest on a warrant and the statute authorizing warrantless arrests. Neither statute authorizes or justifies arrest for a purely civil violation of federal immigration law. Neither statute authorizes an arrest on the basis of an I-247A Form, an I-200 Form, an I-203 Form, or any combination of the three.

a. The Colorado statute authorizing arrest on a warrant provides no authority for Sheriff Elder to hold Plaintiffs at ICE's request.

Sheriffs are peace officers. C.R.S. § 16-2.5-103. A peace officer may arrest a person when he has a warrant commanding the person's arrest. C.R.S. § 16-3-102(1)(A). The

Legislature defines a "warrant" as "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).

The forms faxed by ICE to the jail are not judicial warrants. Neither an immigration detainer (ICE Form I-247A), nor an administrative warrant (ICE Form I-200), nor an I-203 Form, is reviewed or signed by a judge. These documents are issued by ICE enforcement officers. Accordingly, the papers faxed to the jail by ICE do not qualify as "warrants" under Colorado law. Thus, the statute authorizing arrests on the basis of a warrant does not authorize Sheriff Elder to hold Plaintiffs on the basis of an I-247 Form, an I-200 Form, or an I-203 Form.

b. The statute authorizing certain warrantless arrests provides no authority for Sheriff Elder to Hold Plaintiffs at ICE's request.

Because the ICE documents are not warrants, an arrest in reliance on them constitutes a warrantless arrest. *See, e.g., Moreno v. Napolitano*, 213 F. Supp. 3d 999, 1005 (N.D. Ill. Sept. 30, 2016) (reporting ICE's concession that detention pursuant to an immigration detainer is a warrantless arrest); *El Badrawi v. DHS*, 579 F. Supp. 2d 249, 276 (D. Conn. 2008) (holding that arrest on the basis of an ICE administrative warrant must be regarded as a warrantless arrest); *Lunn*, 78 N.E. 3d at 1153 (noting that United States amicus brief made the same concession).

An arrest without a warrant is presumed to be 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 rebutting that presumption and demonstrating that the arrest fits within a recognized exception to the warrant requirement. *Id.*; *see also People v. Crow*, 789 P.2d 1104, 1107 (Colo. 1990). Sheriff Elder cannot meet this burden.

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) (emphasis added). The term "offense" means a "crime." *See* C.R.S. § 18-1-104(1). The new arrests that Sheriff Elder carries out when Plaintiffs post bond or complete their sentences do not fit within this statutory exception to the warrant requirement, because suspicion of removability is not suspicion of a crime.

Even when ICE asserts that it has probable cause to believe a person is removable from the country, that is a civil matter, not a crime. "As a general rule, it is not a crime for a removable alien to remain present in the United States." *Arizona v. United States*, 567 U.S. 387, 407 (2012). The federal administrative process for removing someone from the United States "is a civil, not criminal matter." *Id*. at 396. As the *Lunn* court observed:

> 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.

Lunn, 78 N.E. 3d at 1146 (holding that Massachusetts statute authorizing warrantless arrests on probable cause of a crime did not authorize holding persons on an ICE detainer).

Thus, the Colorado statute authorizing warrantless arrests requires probable cause of a crime. Plaintiffs are suspected only of violating civil provisions of federal immigration law, not crimes. The Colorado statute provides no authority for Sheriff Elder to refuse to release Plaintiffs when they post bond or otherwise resolve their state criminal cases.

4. The IGSA provides no authority for Sheriff Elder to refuse to release Plaintiffs when they post bond or otherwise resolve their criminal cases.

The terms of the IGSA do not purport to confer any authority on Sheriff Elder to initiate custody or make an arrest for immigration enforcement. Its terms are limited to the housing of prisoners who *already* are in ICE custody at the time that they arrive at the El Paso County Jail. The contract states that the EPSO "shall receive and discharge detainees *only to and from properly identified ICE Personnel* . . . . Presentation of U.S. Government identification shall constitute 'proper identification.'" Ex. 8, Art. IV.A (emphasis added). In order to "properly identify" an ICE officer who wishes to house an ICE prisoner in the jail, deputies must be able to see the ICE officer and match the officer's face to the photograph on the proffered government-issued identification. The IGSA does not authorize converting a prisoner from state to federal custody by fax or email.

Moreover, the federal statute authorizing ICE to enter into IGSA's, 8 U.S.C. § 1103(a)(11), does not purport to confer any authority on state or local officers to initiate seizures or make arrests. Thus, neither this particular IGSA, nor the statute authorizing these contracts, furnishes any authority to initiate arrests for civil immigration violations at all, let alone in circumstances like here, where the Sheriff also lacks such authority under state law.

B. Plaintiffs Are Entitled to Relief in the Nature of Mandamus, Because Sheriff Elder Has a Clear Legal Duty to Release Plaintiffs When They Have Posted Bond, Completed Their Sentences, or Otherwise Resolved Their Criminal Cases.

Relief in the nature of mandamus under Rule 106(a)(2) is available when the plaintiff has a clear right to the relief sought, when the defendant has a clear duty to perform the act requested, and when there is no other adequate legal remedy. *Gramiger v. Crowley*, 660 P.2d 1279, 1281 (Colo. 1983). All three conditions are met here.

As explained in Section I.A., Sheriff Elder relies unlawfully on ICE documents as grounds for refusing to release Plaintiffs when they post bond, complete their sentences, or otherwise resolve their criminal cases. Absent valid legal authority for depriving Plaintiffs of liberty, Sheriff Elder must carry out his mandatory legal duty under Colorado law to release Plaintiffs when Colorado law requires release. Plaintiffs have no adequate remedy at law. *See* Section II.B., *infra*. Accordingly, Plaintiffs have a substantial probability of prevailing on their claim that they are entitled to relief in the nature of mandamus.

C. By Depriving Plaintiffs of Liberty Without Legal Authority, Sheriff Elder Carries Out Unreasonable Seizures in Violation of Article II, Section 7.

As explained in Section I.A., Sheriff Elder has carried out arrests and threatens Plaintiffs with arrest that is not authorized by any valid legal authority. Sheriff Elder has no authority under Colorado law to deprive individuals of liberty on the ground that federal immigration authorities suspect them of civil violations of federal immigration law. An arrest without legal authority is an unreasonable seizure, in violation of Article II, section 7 of the Colorado Constitution. Accordingly, Plaintiffs have a substantial probability of success on their claim that the challenged policies violate Article II, section 7.

D. By Failing to Release Plaintiffs When They Have Posted or Offered to Post Bond, Sheriff Elder Violates Their Rights Under Article II, Section 19.

Finally, under Colorado Constitution Article II, section 19, "All persons shall be bailable by sufficient sureties pending disposition of charges," with exceptions not relevant here. As the Colorado Supreme Court has observed, this provision "unequivocally" allows non-excepted persons like Plaintiffs to bail out of jail pending disposition of charges. *People v. Jones*, 346 P.3d 44, 52 (Colo. 2015) (holding that even petitioner's alleged commission of separate felony

while released on bond did not justify revoking his bail). By refusing to release Plaintiffs even after they have posted bail, Sheriff Elder is violating their constitutional right to bail. *See id.*; *cf. Gaylor v. Does*, 105 F.3d 572, 576 (10th Cir. 1997) (once magistrate set defendant's bond at $1,000, defendant "obtained a liberty interest in being freed of detention").

Here, bond has been set for both Plaintiffs. Colorado's "statutory scheme requires that the type and conditions of release set by the court be sufficient not only to reasonably ensure the appearance of the person as required but also to protect the safety of any person or the community." *Jones*, 346 P.3d at 52 (citing C.R.S. § 16–4–103(3)(a)). The court thus already decided that relatively small bonds—$2,000 and $1,000—were sufficient to ensure that Plaintiffs will appear and that the public will be safe. Plaintiffs have an unequivocal right to post bail and be released *now*.

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

This is a clear case where "fundamental constitutional rights are being destroyed or threatened with destruction," *Rathke*, 648 P.2d at 652, thus warranting interim injunctive relief. The preceding sections demonstrate Plaintiffs' overwhelming probability of success on the merits. The following sections establish the additional requirements for interim injunctive relief.

A. Plaintiffs Are Suffering Real, Immediate, and Irreparable Injury That May Be Prevented by Injunctive Relief.

Plaintiffs' friends and family are willing, able, and eager to post bond immediately to secure their release from pretrial detention. Under the challenged policies, however, Sheriff Elder refuses to release the Plaintiffs on bond. As a result, he denies freedom to Plaintiffs, who have a right to liberty upon the posting of bond.

Plaintiffs are currently suffering irreparable injury from Defendant's practices. They will continue to suffer irreparable injury every day that passes without this Court's intervention. *See Ochoa*, 2017 U.S. Dist. LEXIS 131727, at *49-50 (granting TRO on behalf of pretrial detainee wishing to post bond and forbidding sheriff to deny release on basis of "ICE hold").

"A plaintiff suffers irreparable injury when the court would be unable to grant an effective monetary remedy after a full trial because such damages would be inadequate or difficult to ascertain." *Awad v. Ziriax,* 670 F.3d 1111, 1131 (10th Cir. 2012); *see also Gitlitz v. Bellock*, 171 P.3d 1274, 1278-79 (Colo. App. 2007) (injury is irreparable "where there exists no certain pecuniary standard for the measurement of the damages"). Here, 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.

As explained above, Defendant's reliance on ICE documents to imprison Plaintiffs constitutes a new arrest. "[T]here can be no injury more irreparable than being illegally arrested." *Barwood, Inc. v. District of Columbia*, 1999 U.S. Dist. LEXIS 21427, at *18 (D.D.C. Feb. 16, 1999); *see also Rubinstein v. Brownell*, 206 F.2d 449, 456 (D.C. Cir. 1953) (explaining that illegal arrest "would constitute irreparable loss of personal liberty"). Sheriff Elder's illegal arrests are unreasonable seizures, in violation of Colorado Constitution Article II, section 7, and deprivations of their right to post bail, under Article II section 19. As the leading treatise on civil procedure recognizes, "When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary." Wright, Miller and Kane, 11A Fed. Prac. & Proc. Civ. 2d § 2948.1 (2008). The Court should so hold.

B. Plaintiffs Have No Plain, Speedy, or Adequate Remedy at Law.

As explained above, a possible award of damages is not an adequate remedy for unjustified loss of liberty. Accordingly, there is no adequate remedy at law. "[W]hen injury cannot be rectified by award of damages, an action at law is an inadequate remedy." *Herstam v. Bd. of Dir. of Silvercreek Water & Sanitation Dist*., 895 P.2d 1131, 1139 (Colo. App. 1995). Moreover, any possible award of damages is plainly not a "speedy" remedy.

C. A Temporary Injunction Will Not Disserve the Public Interest.

It is the *denial* of interim relief that would disserve the public interest. Protection of constitutional rights advances the public interest. *See, e.g.*, *Awad*, 670 F.3d at 1131 ("It is always in the public interest to prevent the violation of a party's constitutional rights"); *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").

D. The Balance of Equities Favors a Grant of Interim Relief.

The balance of equities strongly 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 demonstrate that the judges did not regard Plaintiffs as flight risks or dangers to public safety. Defendant has no legitimate interest in imprisoning Plaintiffs after the state-law authority to detain them has ended. Defendant will not be harmed by releasing Plaintiffs on bond.

E. 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). In this case, the requested interim injunctive relief will preserve the status quo that existed before Sheriff Elder imposed "ICE holds" on Plaintiffs. Thus, the status quo to be preserved is the status between the parties at the instant when Plaintiffs were first booked into the El Paso County Jail—before ICE had sent any documents to the jail regarding Plaintiffs.

F. Security Bond Should Be Waived or Set at $1.

This Court has discretion to set the amount of the security bond contemplated by Rule 65(c). Defendant will not suffer any compensable loss if it were later determined that the requested injunctive relief was wrongfully issued. Accordingly, this Court should waive the requirement to post a security bond, or should set the amount, at the most, at one dollar. *See Kaiser v. Market Square Discount Liquors, Inc.*, 992 P.2d 636, 643 (Colo. App. 1999).

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully ask this Court to (1) set an accelerated briefing schedule and a prompt date for an evidentiary hearing on the issues Plaintiffs raise here, (2) issue an immediate temporary restraining order—to be effective until the Court conducts an evidentiary hearing—that Defendant is prohibited from relying on ICE immigration detainers, ICE administrative warrants, or I-203 forms as grounds for refusing to release Plaintiffs from custody when they post bond, complete their sentences, or otherwise resolve their criminal cases, and (3) after a hearing, issue a preliminary injunction ordering the same relief.

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