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DISTRICT COURT, EL PASO COUNTY, COLORADO
270 S. Tejon Street
Colorado Springs, Colorado 80901

Plaintiffs:

Saul Cisneros,
Rut Noemi Chavez Rodriguez,

On behalf of themselves and all others similarly situated,

v.

Defendant:

Bill Elder, in his official capacity
as Sheriff of El Paso County, Colorado

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Case Number: 18CV30549

Div.: 8

Courtroom: W550

PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

INTRODUCTION

Sheriff Elder does not dispute the facts asserted in the Motion. He insists that Plaintiffs' constitutional claims are "dismissible," but he overlooks the copious cases holding that Colorado courts have the power to redress state constitutional violations through declaratory and injunctive relief. He claims he has authority under state and federal law to hold Plaintiffs at ICE's request, but he disregards the relevant statutory language and on-point case authorities. For these reasons, and because Plaintiffs have satisfied the other *Rathke* factors, the Court should grant the Motion.

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

A. This Court Has the Power to Issue Injunctive Relief to Address Sheriff Elder's Ultra Vires Actions and His Violations of the Colorado Constitution.

In a section of his response titled "The Dismissible Claims," Sheriff Elder contends that Colorado courts are powerless to issue declaratory or injunctive relief to enforce the provisions of the state constitution. The Sheriff cites just one Colorado case, which holds only that Colorado has not recognized an action for *damages* for state constitutional violations. Response at 6 (citing *Bd. of Cnty. Comm'rs v. Sundheim*, 926 P.2d 545 (Colo. 1996)).[1]

Here, by contrast, Plaintiffs seek prospective relief, not damages. Sheriff Elder has not cited a single case that holds that Colorado courts cannot issue declaratory or injunctive relief to correct or prevent violations of state constitutional rights. Nor could he. The Colorado Supreme Court has repeatedly affirmed the availability of declaratory and injunctive relief in cases alleging violations of the Colorado Constitution. *See, e.g.*, *Bock v. Westminster Mall*, 819 P.2d

[1] Sheriff Elder also cites a federal case that relies on *Sundheim*. *Vanderhurst v. Colo. Mtn. Coll. Dist*., 16 F. Supp. 2d 1297, 1304 (D. Colo. 1998). The federal district court cited *Sundheim* for the proposition that there is no implied cause of action *for damages* under the Colorado Constitution. *Id.* In this case, Plaintiffs bring only equitable claims.

55 (Colo. 1991) (Article II, § 10); *Conrad v. City & Cnty. of Denver*, 656 P.2d 662 (Colo. 1982) (Art. II, § 4); *Taxpayers for Pub. Educ. v. Douglas Cnty. Sch. Dist*. 351 P.3d 461 (Colo. 2015) (Art. IX, § 7), *vacated on other grounds*,137 S. Ct. 2327 (2017); *see also Trinidad Sch. Dist. No. 1 v. Lopez*, 963 P.2d 1095 (Colo. 1998) (affirming prospective relief on the basis of Article II, § 7 and the Fourth Amendment); *Univ. of Colo. v. Derdeyn*, 863 P.2d 929 (Colo. 1993) (same).

This Court thus has the authority to issue declaratory and injunctive relief, including the interim injunctive relief requested here—enjoining Sheriff Elder from exceeding his authority under Colorado law and from violating Plaintiffs' rights under the Colorado Constitution. In any event, Sheriff Elder concedes that this Court has authority to address all of Plaintiffs' constitutional claims under the second claim for relief, for mandamus. *See* Response at 6-7. Plaintiffs' claims therefore are not "dismissible."

B. Sheriff Elder Has Failed to Demonstrate that Colorado Law Authorizes Him to Refuse to Release Plaintiffs After They Have Posted Bond.

Sheriff Elder does not deny that his refusal to release Plaintiffs on bond is the equivalent of a new arrest. He acknowledges that ICE administrative warrants are not issued by a judge. Response at 7. He thus concedes that these documents do not meet the definition of "warrant" under Colorado law. *See* C.R.S. § 16-1-104(18). In doing so, he further concedes that by refusing to release Plaintiffs on bond, he carries out warrantless arrests. Sheriff Elder does not deny that he bears the burden of justifying such warrantless arrests. *See People v. Burns*, 615 P.2d 686, 688 (Colo. 1980). He utterly fails to carry that burden.

Colorado law authorizes Sheriff Elder to carry out a warrantless arrest only when he has probable cause to believe an *offense*, meaning a crime, was committed. C.R.S. § 16-3-102(1)(c). He does not deny that the ICE documents on which he relies do not provide probable cause of a

crime. He does not claim to suspect Plaintiffs of crimes other than the charged offenses for which the state courts have authorized release on bond. Because there exists no probable cause of a separate crime, state law provides no legal authority for Sheriff Elder's warrantless arrests.

Sheriff Elder's unconvincing attempt to justify his warrantless arrests for civil immigration violations relies on three purported sources of arrest authority: (1) 8 U.S.C. § 1357; (2) the "fellow officer" rule; and (3) C.R.S. § 17-26-123. None of them justifies his refusal to release Plaintiffs on bond.

1. Contrary to Sheriff Elder's suggestion, 8 U.S.C. § 1357 does not provide him with authority to refuse to release Plaintiffs on bond.

Sheriff Elder claims that his refusal to release Plaintiffs on bond is authorized by 8 U.S.C. § 1357, specifically § 1357(g)(10). Response at 7. His reliance on §1357(g) misses the point at issue here: He has no authority under *state* law to deprive Plaintiffs of liberty on the basis of ICE detainers or ICE administrative warrants.

Section 1357(g), titled "Performance of immigration officer functions by State officers and employees," provides for what is commonly known as a "287(g) agreement," named after the section of the Immigration and Nationality Act that is now codified as 8 U.S.C. § 1357(g). *See Lunn v. Commonwealth*, 78 N.E.3d 1143, 1158 (Mass. 2017). The statute provides that under certain conditions, local law enforcement agencies can enter into written agreements with federal authorities to perform functions ordinarily reserved to federal immigration officers. But the participation of local law enforcement must be "consistent with State and local law." *Id*.; *see* 8 U.S.C. § 1357(g)(1). The non-federal officers performing immigration functions under these agreements must "receive[] adequate training regarding the enforcement of relevant Federal

immigration laws." § 1357(g)(2). Subsections (g)(3) through (g)(9) provide additional statutory caveats regarding the written agreements known as 287(g) agreements.

Sheriff Elder is not operating under a 287(g) agreement.[2] Section (g)(10), upon which Sheriff Elder purports to rely, merely allows local officials to "cooperate:"

> (10) Nothing in this subsection shall be construed to require an agreement under this subsection in order for any officer or employee of a State or political subdivision of a State—
>
> > (A) to communicate with the Attorney General regarding the immigration status of any individual, including reporting knowledge that a particular alien is not lawfully present in the United States; or
> >
> > (B) otherwise to cooperate with the Attorney General in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States.

8 U.S.C. § 1357(g)(10). This subsection simply confirms that certain actions in the absence of a 287(g) agreement are not *preempted* by federal law. But that does not address the question here: whether *state* law provides arrest authority in the first place. Whether or not the arrest is preempted, if state law does not authorize the Sheriff to seize the Plaintiffs, he may not do so.

Critically, courts have held, and the federal government has agreed, that section 1357(g)(10) does not *supply* arrest authority. The Massachusetts Supreme Judicial Court in *Lunn* court flatly rejected any suggestion that §1357(g)(10) authorizes a state or local official like Sheriff Elder to arrest Plaintiffs or refuse to release them on bond:

> [I]t is not reasonable to interpret §1357(g)(10) as affirmatively granting authority to all State and local officers to make arrests that are not otherwise authorized by State law. Section 1357(g)(10), read in the context of § 1357(g) as a whole,

[2] An IGSA is not a 287(g) agreement. An IGSA provides only for housing and does not purport to provide federal authority for non-federal officers to perform the functions of immigration officers. *See Ochoa v. Campbell*, 266 F. Supp. 3d 1237, 1253 (E.D. Wash. 2017). Moreover, even a 287(g) agreement provides federal authority only "to the extent consistent with State and local law." 8 U.S.C. 1357(g)(1).

> simply makes clear that State and local authorities, even without a 287(g) agreement that would allow their officers to perform the functions of immigration officers, may continue to cooperate with Federal immigration officers in immigration enforcement to the extent they are authorized to do so by their State law and choose to do so.

78 N.E.3d at 1159. Thus, § 1357(g)(10) does not grant authority to non-federal officers beyond whatever authority they already have under state law. *See Ochoa v. Campbell*, 266 F. Supp. 3d 1237, 1246 (E.D. Wash. 2017). The United States agrees. *See Lunn*, 78 N.E. 3d at 1159 ("[T]he United States does *not* contend that § 1357(g)(10) affirmatively confers authority on State and local officers to make arrests pursuant to civil immigration detainers, where none otherwise exists.") (emphasis in original). Thus, Sheriff Elder cannot rely on §1357(g)(10) to furnish authority that he does not have under Colorado law.

2. The "fellow officer" rule does not authorize Sheriff Elder's refusal to release Plaintiffs on bond.

The "fellow officer rule," as articulated in *People v. Washington*, 865 P.2d 145 (Colo. 1994) (Response at 7 n.3), likewise does not authorize the refusal to release Plaintiffs when they post bond. The rule, as it appears in search and seizure cases, provides that an arresting officer who does not personally have sufficient information to constitute probable cause may rely on information obtained from a fellow officer, and courts will evaluate whether the police collectively have information amounting to probable cause. *Id*. at 147 n.2. The purpose of the "fellow officer" rule, which is also called the "collective knowledge" doctrine, "is to allow law enforcement agencies to work together as a team." *People v. Jauch*, 2013 COA 127, ¶ 35 (2013).

Sheriff Elder's reliance on the "fellow officer" rule misses the point. The ICE documents regarding Plaintiffs Cisneros and Chavez assert, at most, probable cause to believe they are in violation of a civil provision of federal immigration law. Sheriff Elder is not a "fellow officer"

with regard to immigration enforcement. He is not on the immigration enforcement "team," because he has no authority to enforce immigration law. *See Ochoa*, 266 F. Supp. 3d at 1257-58 (declining to apply "collective knowledge" doctrine and granting TRO prohibiting jail's reliance on ICE administrative warrant). Even if he personally had information that amounted to probable cause to believe that an individual is removable, Colorado law provides him with no authority to deprive that individual of liberty. The "probable cause" that Sheriff Elder needs in order to justify his warrantless arrests is probable cause of a *crime*. In this case, the "fellow officer" rule does not justify refusing to release Plaintiffs on bond.

3. Neither the IGSA nor C.R.S. § 17-26-123 provides Sheriff Elder with authority to refuse to release Plaintiffs on bond.

Sheriff Elder asserts, erroneously, that C.R.S. § 17-26-123 authorizes him "to hold ICE detainees at ICE's direction." On the contrary, this statute provides no authority for him to contract with ICE to house individuals suspected of violating the civil provisions of federal immigration law. The statute requires Colorado sheriffs to house certain federal prisoners, at the request of federal authorities, but this statutory duty is limited to cases involving federal *crimes*. The statute applies to prisoners who are "duly committed thereto for any *offense* against the United States." C.R.S. § 17-26-123 (emphasis added). In Colorado statutes, "the terms 'offense' and 'crime' are synonymous." C.R.S. § 18-1-104(1). Neither Plaintiff Cisneros nor Plaintiff Chavez is accused of a federal crime.

Moreover, Sheriff Elder has not shown that he is acting pursuant to the IGSA in refusing to release Plaintiffs on bond. He does not assert that he is holding Plaintiff Cisneros or Plaintiff Chavez pursuant to the IGSA contract. Indeed, Plaintiffs' Exhibits 13 and 14 contain the records

of EPSO's billings to ICE for prisoners held under the IGSA in December, 2017, and January, 2018. Neither Plaintiff appears in those records.

Moreover, the IGSA does not and cannot supply Sheriff Elder with the legal authority to seize the Plaintiffs that he lacks under Colorado law. As Plaintiffs explained in their Motion, neither the IGSA nor its authorizing statute can be construed to provide authority for immigration arrests. Motion at 15. Nothing in the IGSA remotely suggests that it authorizes or contemplates Sheriff Elder's refusal to release prisoners who post bond on their pending state-court charges. Indeed, the IGSA says nothing about detainees held on pending state criminal charges. As Plaintiffs explained in their Motion, the IGSA provides for the temporary housing of prisoners who are *already in ICE custody* at the time they enter the jail. Nor does the IGSA contemplate that prisoners can be transferred from state to federal custody by means of documents faxed to the jail. Sheriff Elder has not attempted to refute this argument.

Finally, Sheriff Elder mistakenly asserts that the "crux" of this case is "whether ICE and EPSO have authority to enter into the IGSA[.]" Response at 7; *see also id.* at 2 (arguing that Plaintiffs are challenging Sheriff Elder's "performance under the IGSA"). Rather, the "crux" of this case is Sheriff Elder's lack of legal authority under Colorado law to re-arrest Plaintiffs once they post bond or resolve their pending criminal cases. Sheriff Elder has failed to rebut Plaintiffs' contention that the IGSA does not supply the legal authority he lacks under state law.

II. PLAINTIFFS SATISFY THE REMAINING RATHKE FACTORS

A. Plaintiffs Are Suffering Irreparable Injury and There Is No Plain, Speedy and Adequate Remedy at Law.

Plaintiffs are locked up in jail. They have a right to pretrial release upon the posting of bond. But Sheriff Elder refuses to release them. With each day that passes, they are suffering

injury that is irreparable. The law classifies this injury as irreparable in part because monetary damages, even if available, are difficult to ascertain and cannot adequately compensate for loss of liberty. *See* Motion at 18 (collecting cases). The Sheriff cites no contrary authority.

Sheriff Elder points out that plaintiffs can sometimes secure monetary compensation for the unjustified loss of liberty. Response at 9. Money, however, is not *adequate* compensation for an illegal arrest or for months of unjustified confinement. And the law provides no definite mathematical formula for calculating that compensation. For the same reasons, the remedy at law—potential monetary compensation—is neither speedy nor adequate. This Court can and should prevent this irreparable injury by awarding interim injunctive relief.

B. A Preliminary Injunction Will Serve the Public Interest.

Plaintiffs cited cases holding that it serves the public interest to issue injunctions that prevent violations of constitutional rights and that prevent government officials from exceeding their authority or violating the law. Motion at 19. Sheriff Elder again offers no contrary legal authority. Instead, he asserts a purported interest in refusing to release "individuals arrested on state charges, who have been deemed deportable under federal regulations." Response at 9. But courts have set modest bonds for Plaintiffs and thus authorized their release. And contrary to Sheriff Elder's suggestion, Plaintiffs have not been "deemed deportable." There have been no immigration proceedings. They are not subject to orders of removal. Moreover, the federal government's suspicions of removability do not allow Sheriff Elder to disregard the limits of his legal authority under Colorado law or violate Plaintiffs' state constitutional rights. The public interest is served by requiring Sheriff Elder to comply with Colorado law.

C. The Balance of Equities Favors Plaintiffs.

The relatively low bonds set by the state court indicate that Plaintiffs pose no danger to public safety nor a risk of flight. Motion at 19. They are entitled to pretrial freedom, pending their state criminal charges, when they post bond. Sheriff Elder has failed to advance any legally supportable interest that outweighs Plaintiffs' right to release pursuant to Colorado law.

D. A Temporary Injunction Will Preserve the Status Quo.

Sheriff Elder agrees that the status quo is "the last uncontested status between the parties which preceded the controversy." Response at 9; *see Dominion Video Satellite, Inc. v. EchoStar Satellite Corp.*, 269 F.3d 1149, 1155 (10th Cir. 2001). When bond was set for Plaintiffs, they had no "ICE holds."[3] That is the last uncontested status. The conflict between the parties arose after Sheriff Elder received documents from ICE that prompted him to place "ICE holds" on Plaintiffs. Plaintiffs ask this Court to preserve the status quo by prohibiting Sheriff Elder from relying on those "ICE holds" as a reason to refuse release on bond.

CONCLUSION

For the foregoing reasons, Plaintiffs urge the Court to issue a preliminary injunction.

Respectfully submitted this 14th day of March, 2018.

s/Stephen G. Masciocchi
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In cooperation with the American Civil Liberties Union Foundation of Colorado

[3] When Gloria Cisneros posted bond for her father, Saul Cisneros, there was no ICE hold. *See* Ex. 21, Affidavit of Gloria Cisneros. Rut Chavez was booked into the jail at 3:52 pm on November 18, 2017, and her bond was set at $1,000. *See* Ex. 24. The jail did not receive an immigration detainer and administrative warrant for Ms. Chavez until much later that evening. *See* Ex.1 (immigration detainer); Ex 3 (administrative warrant).

s/Mark Silverstein
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