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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' MOTION FOR SUMMARY JUDGMENT AND REQUEST FOR MANDAMUS, DECLARATORY, AND PERMANENT INJUNCTIVE RELIEF

INTRODUCTION

This motion raises a pure question of law on the merits: May Sheriff Elder rely on ICE immigration detainers, administrative warrants, and/or tracking documents to hold prisoners in jail after they post bond or state authority to detain them otherwise expires? At the preliminary injunction stage, the Court answered "no." The parties have now stipulated to all relevant facts, which are set forth in this Motion. The case is therefore ripe for summary judgment.

The three forms ICE faxes to the jail—I-247A, I-200, and I-203—do not *themselves*, separately or in combination, confer legal authority on the Sheriff to detain prisoners after they have posted bond or their criminal case has been resolved. So that authority, if it exists, must come from some other source. But, as this Court has ruled, no such authority exists. Colorado law provides no authority for the Sheriff to enforce the civil provisions of federal immigration law. Detaining prisoners after state-law authority to hold them expires constitutes a separate arrest, and Colorado law does not allow the Sheriff to arrest persons for suspected civil immigration violations. Nor does federal law supply the missing arrest authority in the absence of state-law authority. By holding Plaintiffs and class members for suspected civil immigration violations after state-law authority expires, the Sheriff exceeds his authority under Colorado law, breaches his clear legal duty to release, and violates multiple constitutional rights.

In addition to success on the merits, the other requirements for mandamus, declaratory, and permanent-injunctive relief exist here. The Court should therefore grant summary judgment, grant mandamus relief, declare that the Sheriff's challenged policies violate the Colorado Constitution, and enter a permanent injunction prohibiting the challenged practices.

STIPULATED FACTS

Immigration enforcement officers employed by U.S. Immigration and Customs Enforcement (ICE), an agency within the Department of Homeland Security (DHS), make requests that the El Paso County Sheriff's Office (EPSO) continue to detain prisoners after state-law authority to detain has ended. Amended Stipulations (Sept. 20, 2018) (Stip.) ¶ 5. The requesting documents are standardized ICE forms: an immigration detainer, ICE Form I-247A; an administrative warrant, ICE Form I-200; and a tracking form, ICE Form I-203. Stip. ¶¶ 6-7. None of these forms is reviewed, approved, or signed by a judicial officer. Stip. ¶ 7.

Immigration Detainer, ICE Form I-247A

An immigration detainer, ICE Form I-247A, identifies a prisoner being held in a local jail and asserts that ICE believes the prisoner may be removable from the United States. Stip. ¶ 8; *see* Ex. 1. 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. Stip. ¶ 8; *see* Ex. 1. For many years, the wording of Form I-247 suggested that compliance with the federal request was mandatory. The language has changed. It is now clear, and federal officials and multiple court decisions agree, that these detainers represent mere requests from the federal government, not commands. Stip. ¶ 11; *see* Ex. 1.

Administrative Warrant, ICE Form I-200

ICE sends an administrative warrant, ICE Form I-200, to accompany the I-247A detainer request. Stip. ¶ 12. An administrative warrant names a particular prisoner, asserts that ICE has grounds to believe that the subject is removable from the United States, and directs federal

immigration officers to arrest the person. *Id.*; *see* Ex. 2. Although an ICE administrative warrant features the word "warrant," it is not reviewed, approved, or signed by a judge or a judicial officer. Stip. ¶ 13; *see* Ex. 2. Under federal law, ICE administrative warrants may be served or executed only by certain immigration officers who have received specialized training in immigration law. Stip. ¶ 13.

The IGSA And Form I-203

DHS and El Paso County have signed an Intergovernmental Services Agreement (IGSA), a contract that provides for housing ICE detainees at the El Paso County Jail (the Jail). Stip. ¶ 14; *see* Exs. 7, 26, A & B. The IGSA was in operation at the time this suit was filed and is still in operation. Stip. ¶ 14; Exs. 7, 26, A & B. The IGSA contemplates that certain detainees will be held in the Jail for temporary housing, in ICE's custody and at ICE's expense. Stip. ¶ 17. It contemplates that properly identified ICE personnel will bring detainees to the Jail for temporary housing, because the contract applies only to persons who are already in the physical custody of ICE officers when they arrive at the Jail. *See* Ex. 7, Art. IV.A.

Plaintiffs Cisneros and Chavez were not held pursuant to the IGSA. Stip. ¶ 21. The IGSA is not a 287(g) agreement under 8 U.S.C. § 1357(g)(1). Stip. ¶ 22; *see* Exs. C-E (showing termination of El Paso County's prior 287(g) agreement).

ICE uses Form I-203 to track detainees housed at the Jail. Stip. ¶ 18; *see* Ex. 8. Form I-203 accompanies ICE detainees when ICE officers place them in, or remove them from, a detention facility. Stip. ¶ 18. According to the applicable ICE detention standards, a Form I-203 must accompany every detainee who is brought into an ICE detention facility. *Id.*; *see* Ex. I.

The I-203 functions as documentation for daily-rate billing purposes for ICE detainees held at the Jail under the IGSA. Stip. ¶ 19; *see* Ex. 3. Although the I-203 Form bears the title "Order to Detain or Release Alien," it is not reviewed, authorized, approved or signed by a judge or judicial officer. Stip. ¶ 20; *see* Ex. 8. The I-203 Form confers no authority on a Colorado sheriff to initiate custody of an individual who is not already in federal custody. Stip. ¶ 20.

The Challenged Practices At The Time This Lawsuit Was Filed

At the time this suit was filed on February 27, 2018, it was EPSO's policy and practice to refuse to release prisoners who had posted bond, completed their sentence, or resolved their criminal case whenever ICE had faxed or emailed an immigration detainer (Form I-247A) and an administrative warrant (Form I-200). Stip. ¶ 23; *see* Exs. 3-6. EPSO used the term "ICE hold" to indicate the following: (1) for the particular prisoner, ICE had sent Form I-247A and/or I-200; (2) EPSO would contact ICE to notify it of the prisoner's release date and time; and (3) EPSO would continue to hold the prisoner for ICE if the prisoner posted bond, completed his/her sentence, or otherwise resolved his/her criminal charges. Stip. ¶ 25; *see* Ex. 4 at 9. Even when a prisoner did not have an "ICE hold," Sheriff Elder's written policies required deputies to delay the processing of bond paperwork when the prisoner was a "foreign born national." Stip. ¶ 26; *see* Ex. 3; Ex. 4 at 14-15, 18.

These practices applied to the named Plaintiffs. On November 24, 2017, Saul Cisneros was booked into the Jail and charged with two misdemeanor offenses. Stip. ¶ 41. The court set his bond at $2000. Stip. ¶ 42; *see* Ex. 21 at 2. On November 28, 2017, Gloria Cisneros, Saul's eldest daughter, went to the Jail to post bond for her father. Stip. ¶ 42; Ex. 20. She posted the

money, but her father was not released. Stip. ¶ 42; Ex. 20. EPSO deputies notified ICE that the Jail had been asked to release Mr. Cisneros on bond, ICE sent the Jail Forms I-247A and I-200, and the Jail placed an "ICE Hold" on Mr. Cisneros and continued to detain him. Stip. ¶ 43; *see* Exs. 1, 2, 20 & 21. The Jail returned Gloria Cisneros' money. Stip. ¶ 44; Ex. 20.

Rut Noemi Chavez Rodriguez was arrested and booked into the Jail on November 18, 2017, and her bond was set at $1000. Stip. ¶ 46; Ex. 23. ICE sent the Jail Forms I-247A and I-200, and the Jail placed an "ICE Hold" on her. Stip. ¶ 47; *see* Exs. 1, 2, 14 & 22. Pursuant to EPSO's practices at the time, if Ms. Chavez had posted bond, the Jail would not have released her, because ICE had sent an I-247A and an I-200. Stip. ¶ 48; *see* Exs. 1, 2, 14 & 22.[1]

At the time this suit was filed, Jail inmates were transferred to what EPSO termed "IGSA holds" when state-law authority to hold prisoners ended and ICE had sent an I-203 Form in addition to an I-200 and/or I-247A. Stip. ¶ 29; *see* Ex. 4 at 18, 21; Ex. 11. This change in the characterization of the inmate's status did not require ICE officers to personally appear to take physical custody of the inmate. Stip. ¶ 29.

The Challenged Practices As Of March 8, 2018

EPSO approved Directive Number 18-02, "Change in Ice Procedures," on March 15, 2018, but started following it in practice on March 8, 2018. Stip. ¶ 49; *see* Ex. F. This change was made after a meeting with ICE supervisors on March 8, 2018, where EPSO staff learned for the first time that ICE had changed its procedure and practice in 2017. Stip. ¶ 49; *see* Ex. G.

[1] The parties' Amended Stipulations provide additional, specific examples of the application of the challenged practices to other detainees. *See* Stip. ¶¶ 32-40 & Exs. 8-13, 15-19 & 24.

EPSO Directive 18-02 ended EPSO's policy and practice of transferring inmates to "IGSA holds" when ICE sent the Jail an I-203 Form in addition to an I-200 and/or an I-247A. Stip. ¶ 50; *see* Ex. F. Rather, detainees were transferred to federal custody and housed pursuant to the IGSA only if EPSO had received Forms I-247A and 200, and an ICE agent appeared in person to serve paperwork on the detainee and provided Form I-203 to the Jail. Stip. ¶ 50; *see* Ex. F. The inmate was released if an ICE agent did not personally appear to take custody within 48 hours of the expiration of state-law authority to hold the inmate. Stip. ¶ 50; *see* Ex. F. Thus, under EPSO Directive 18-02, if Plaintiffs posted bond, EPSO would hold them for an additional 48 hours in order to provide ICE an opportunity to take them into ICE custody. Stip. ¶ 51.

Since this Court issued its March 19, 2018, Order granting the Motion for Preliminary Injunction (PI Order), Defendant Elder no longer detains any inmates based on EPSO's receipt from federal immigration authorities of faxed or emailed Forms I-200 or I-247. Stip. ¶ 52.

SUMMARY JUDGMENT STANDARD

"When, as here, the material facts are undisputed, summary judgment is proper only when the pleadings and supporting documents show that the moving party is entitled to judgment as a matter of law." *Rocky Mtn. Expl., Inc. v. Davis Graham & Stubbs LLP*, 420 P.3d 223, 229 (Colo. 2018). A court "grants the nonmoving party the benefit of all favorable inferences that may be reasonably drawn from the undisputed facts and resolves all doubts against the moving party[.]" *Id.* Here, however, the parties have stipulated to every relevant fact. There is no need to draw any inferences or resolve any doubts. Thus, "a trial would be useless." *Cont'l Air Lines, Inc. v. Kennan*, 731 P.2d 708, 712 (Colo. 1987).

PERMANENT INJUNCTION STANDARD

"The requirements for a permanent injunction are essentially the same as those for a preliminary injunction; however, the applicant must show actual success on the merits rather than merely a reasonable probability of success." *Langlois v. Bd. of Cty. Comm'rs of Cty. of El Paso*, 78 P.3d 1154, 1157 (Colo. App. 2003). In contrast to a preliminary injunction, which requires a court to weigh six elements, *see Rathke v. MacFarlane*, 648 P.2d 648, 653 (Colo. 1982), "the elements of a permanent injunction simply eliminate irrelevancies from the *Rathke* preliminary injunction elements," *Dallman v. Ritter*, 225 P.3d 610, 631, n.11 (Colo. 2010). The Colorado Supreme Court in *Dallman* endorsed the *Langlois* court's formulation of the permanent injunction test, which eliminated two of the six *Rathke* factors:

> A party seeking 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.

Id. (quoting *Langlois*, 78 P.3d at 1158).[2] Thus, in deciding whether to issue a permanent injunction, the Court need only address these four factors. The determination of whether these factors have been met, and thus, whether to issue permanent injunctive relief, is a matter within the Court's discretion. *Stulp v. Schuman*, 410 P.3d 457, 460 (Colo. App. 2012).

Here, all four factors militate strongly in Plaintiffs' favor. Plaintiffs are entitled to summary judgment on multiple claims, and this satisfies the requirement for actual success on

[2] The two eliminated factors are whether an injunction will preserve the status quo until a trial on the merits, and whether there is an adequate remedy at law. *See Rathke*, 648 P.2d at 653-54.

the merits. *See id*. at 459-62 (affirming permanent injunction entered after parties filed joint summary judgment motion and stipulated facts); *Marriott v. Cty. of Montgomery*, 426 F. Supp. 2d 1, 11 (N.D.N.Y. 2006) ("By succeeding on their motion for partial summary judgment, plaintiffs have also demonstrated actual success on the merits of their claim."). And the rationales for the Court's prior rulings on the other three elements remain valid.

ARGUMENT

I. PLAINTIFFS ARE ENTITLED TO SUMMARY JUDGMENT ON THE MERITS, AND THEREFORE, THEY SATISFY THE "ACTUAL SUCCESS" ELEMENT AND THE BASIS FOR MANDAMUS AND DECLARATORY RELIEF.

By relying on ICE documents as grounds for refusing to release Plaintiffs and class members when they post bond, complete their sentence, or resolve their criminal cases, Sheriff Elder carries out a new arrest, for alleged violations of the *civil* provisions of federal immigration law, without legal authority. **Section I.A.** By carrying out arrests without legal authority, the Sheriff violates Plaintiffs' rights under Colorado Constitution Article II, Section 7. **Section I.B.** By failing to release Plaintiffs even when they post, or offer to post, bonds set by the court, he also violates Article II, Section 19. **Section I.C.** And for the same reasons, he deprives them of liberty without due process in violation of Article II, Section 25. **Section I.D.**

A. Under Colorado Law, Sheriff Elder Has No Authority To Arrest Or Seize Persons For Civil Violations Of Federal Immigration Law.

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 carries out new arrests, and those arrests exceed his authority under Colorado law.

1. Sheriff Elder has chosen to honor ICE requests.

Nothing in federal law compels local law enforcement authorities to hold prisoners whom ICE suspects are removable. ICE Immigration detainers are requests, not commands. *See Galarza v. Szalczyk*, 745 F.3d 634, 645 (3rd Cir. 2014). As the *Galarza* court explained, if detainers *were* regarded as commands from the federal government to state or local officials, they would violate the Tenth Amendment's anti-commandeering principle. *Id*. at 644; *see Lunn v. Commonwealth*, 78 N.E.3d 1143, 1152 (Mass. 2017) (noting United States' concession that state officials' compliance with immigration detainers "is voluntary"). Likewise, ICE administrative warrants are directed to federal officers, not county sheriffs, and federal law specifies that only certain federal officers are authorized to execute them. *Lunn*, 78 N.E.3d at 1151 n.17; *see* 8 C.F.R. § 287.5(e)(3).

Sheriff Elder admits both that ICE detainers are mere requests from the federal government and that ICE administrative warrants can be served only by ICE agents who have specialized training. Stip. ¶¶ 11,13. The Sheriff thus has no legal obligation to honor ICE's requests to hold prisoners who would otherwise be released. He has made a choice—a choice that Colorado law prohibits.

2. Sheriff Elder's decision to honor detainers and keep Plaintiffs in custody constitutes a new arrest.

Numerous courts analyzing ICE detainers agree that holding a prisoner who would otherwise be released is the equivalent of a new arrest, and a seizure for Fourth Amendment purposes, that must comply with the statutory and constitutional requirements for depriving persons of liberty. *See Lunn*, 78 N.E.2d at 1153-54 (continued detention of inmate on an

immigration detainer after he was entitled to release was "plainly an arrest within the meaning of Massachusetts law"); *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."); *Roy v. Cty. of L.A.*, 2018 WL 3435417, at *2 (C.D. Cal. July 11, 2018) ("holding the inmates beyond their release dates on the basis of civil immigration detainers constituted a new arrest"); *Ochoa v. Campbell*, 266 F.Supp.3d 1237 (E.D. Wash. 2017) ("Where detention is extended as a result of an immigration hold, that extension is a subsequent seizure for Fourth Amendment purposes."); *Orellana v. Nobles Cty.*, 230 F. Supp. 3d 934, 944 (D. Minn. 2017) (immigrant's continued detention under ICE detainer was "properly viewed as a warrantless arrest"); *Miranda-Olivares v. Clackamas Cty.*, 2014 WL 1414305, at *9 (D. Ore. Apr. 11, 2014) (continued detention constituted seizure for Fourth Amendment purposes).[3]

Thus, by refusing to release Plaintiffs and class members upon posting of bond or resolution of criminal cases, Sheriff Elder carries out new arrests, as he previously conceded. *See* PI Order at 4. As shown below, those arrests are wholly without legal justification.

[3] The court in *Salinas v. Mikesell*, 2018CV30057 (Teller County Dist. Ct.), requested additional briefing on this issue. But the court failed to recognize that even the one case on which it relied in making this request is not to the contrary. *See Tenorio-Serrano v. Driscoll*, 2018 WL 3329661, at *9 (D. Ariz. July 5, 2018) ("the Court does not necessarily disagree with Plaintiff's premise—that continued detention is tantamount to an arrest"), cited in *Salinas*, Order Denying Preliminary Injunction (Aug. 19, 2018) (*Salinas* PI Order), at 12.

3. Sheriff Elder has no authority under Colorado law to arrest detainees based on suspected civil violations of federal immigration law.

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, 908 (Colo. 1993). Powers will be implied only when the sheriff cannot "fully perform his functions without the implied power." *Id.*; *see Douglass v. Kelton*, 610 P.2d 1067, 1069 (Colo. 1980) (public officials "have only such power and authority as are clearly conferred by law"). *Douglass* demonstrates how narrowly the Colorado Supreme Court construes the scope of implied powers. In *Douglass*, the Court addressed a statute that provided an affirmative defense to carrying a concealed weapon if a person had a concealed-carry permit issued by a sheriff or police chief. *Id.* The Court noted that the Legislature "must have contemplated" that sheriffs and police chiefs had the power to issue such permits. *Id.* Yet, because the Legislature never expressly authorized them to do so, the Court held that they had no such power. *Id.*; *accord* Colo. Att'y Gen. Formal Opinion No. 99-7, 1999 WL 33100121, at *5 (Sept. 8, 1999) (notwithstanding Y2K concerns about widespread chaos, Colorado sheriffs have no power to "commandeer the use of an electricity generator and employ it to provide electricity to other citizens").

Sheriff Elder's limited authority to make an arrest or seizure derives from, and is limited by, Colorado's Constitution and statutes. *See Buckallew*, 848 P.2d at 908. There are two arguably relevant statutes: one authorizing arrests based on a warrant, and one authorizing warrantless arrests. Neither statute authorizes or justifies arrest for a purely civil violation of

federal immigration law. Neither authorizes an arrest based on 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). 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).

The forms ICE faxes to the Jail are not warrants under Colorado law. Immigration detainers (I-247A Forms), administrative warrants (I-200 Forms), and I-203 Forms are not "issued by a judge" as the statute requires; they are issued by ICE enforcement officers. *See* 8 C.F.R. §§ 287.5(e)(2), 287.7(b). The Sheriff does not dispute this. He admits that ICE detainers (I-247A Forms), ICE administrative warrants (I-200 Forms), and I-203 Forms are not reviewed, approved, or signed by a judicial officer. Stip. ¶ 7. Thus, the statute authorizing warrant-based arrests does not authorize Sheriff Elder to hold Plaintiffs based on an I-247, I-200, or I-203.

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 judicial warrants, an arrest in reliance on them constitutes a warrantless arrest. *See 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 conceded in *Lunn* and other cases that detention based on an immigration detainer constitutes a warrantless arrest).

A warrantless arrest 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 of 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 to believe that the suspect committed it. C.R.S. § 16-3-102(1)(c); *accord Burns*, 615 P.2d at 688-89. "The terms 'offense' and 'crime' are synonymous." C.R.S. § 18-1-104(1); *see* C.R.S. 16-1-105(2) (stating that terms defined in the Criminal Code (Title 18) apply to the Code of Criminal Procedure (Title 16)). The Colorado Supreme Court has consequently interpreted the warrantless-arrest statute to require 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 our Court of Appeals succinctly 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 commit a *crime*.'" *People v. Valencia*, 257 P.3d 1203, 1208 (Colo. App. 2011) (citation omitted, emphasis added). [4]

[4] Peace officers can detain persons in very limited, non-criminal circumstances, such as when their condition clearly poses a danger to the health and safety of the person or others. *E.g.*, 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); C.R.S. § 27-82-107(1) (intoxicated by drugs). But these additional authorizations for warrantless seizures are *spelled out in statutes*. No such statutory authorization exists for ICE holds.

The parties agree that "[b]eing present in violation of the federal immigration laws is a civil matter, not a crime." Stip. ¶ 10; *see Arizona v. United States*, 567 U.S. 387, 396, 407 (2012) ("As a general rule, it is not a crime for a removable alien to remain present in the United States"; the federal removal process "is a civil, not criminal matter"). Detainers "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 (state statute authorizing warrantless arrests on probable cause of a crime did not authorize holding persons on ICE detainers).

The new arrests Sheriff Elder carries out when Plaintiffs and class members post bond or resolve their criminal cases do not satisfy the statutory exception to the warrant requirement, because suspicion of removability is not suspicion of a *crime*. He therefore cannot rely on the warrantless-arrest statute as authority to detain Plaintiffs and class members.

4. Federal law does not and cannot supply the missing authority to arrest or seize Plaintiffs for civil immigration violations.

Sheriff Elder may contend that 8 U.S.C. § 1357 (g)(10) supplies him with the authority, which is absent in state law, to refuse to release inmates when they post bond, complete their sentence, or resolve their criminal case. At the preliminary injunction phase, the Court opined that this argument "falls short." PI Order at 9. The Court should reaffirm that ruling.[5]

[5] The *Salinas* court reached a contrary conclusion without acknowledging, much less discussing, this Court's analysis. One error by the *Salinas* court was its heavy reliance on a case that did not analyze whether state law provided authority. *See Salinas* PI Order at 9-11 (citing *Lopez-Lopez v. Cty. of Allegan*, 2018 WL 3407695 (W.D. Mich. July 13, 2018)). Another was distinguishing *Lunn* on the basis that it predated ICE's 2017 decision to issue administrative warrants with

Section 1357(g), titled "Performance of immigration officer functions by State officers and employees," provides for a so-called "287(g) agreement," named after the section of the Immigration and Nationality Act codified as 8 U.S.C. § 1357(g). *See Lunn*, 78 N.E.3d at 1158. Sheriff Elder is not operating under a 287(g) agreement. *See* Stip. ¶ 22; Exs. D & E.[6] And section 1357(g)(10), on which Sheriff Elder relies, 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 . . .
>
> > (B) [to] 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)(B). As this Court correctly reasoned, this subsection is a saving clause that simply confirms that, in the absence of a 287(g) agreement, certain forms of "cooperation" are *not preempted* by federal law. PI Order at 8.[7] But a lack of preemption does not equate with

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detainers. *Id.* at 10. The *Lunn* court considered whether the addition of an ICE administrative warrant provided authority to local officers to hold persons who would otherwise be released, and concluded that it did not. *Lunn*, 78 N.E.2d at 1155 n.21; *id*. at 1151 n.17.

[6] In its PI Order, this Court suggested, *in dicta*, that a 287(g) agreement would supply the missing arrest authority. PI Order at 10. But a 287(g) agreement can confer arrest authority only if it is "consistent with State and local law." 8 U.S.C. § 1357(g)(1). Under *Buckallew* and *Douglass*, Colorado sheriffs must have *explicit state-law authority* to enforce immigration law before they may enter into such an agreement.

[7] As this Court noted, courts have disagreed about the scope of the "cooperation" contemplated by section 1357(g)(10), including whether it includes holding prisoners based on ICE detainer requests. PI Order at 8. But the Court need not resolve the conflict. In this case, it does not matter whether federal preemption doctrine forbids Sheriff Elder to make arrests on the basis of ICE documents. The issue here is the Sheriff's authority under state law.

affirmative authority to make an arrest. If state law does not authorize the Sheriff to arrest or detain the Plaintiffs—and it does not—he may not do so.

Courts have held, and the United States has agreed, that section 1357(g)(10) does not *supply* arrest authority. The *Lunn* court explained that section 1357(g)(10) "simply makes clear that State and local authorities 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." *Lunn*, 78 N.E.3d at 1159 (emphasis added); *see Ochoa*, 266 F. Supp. 3d at 1254-55. The United States has conceded that section 1357(g)(10) does not grant authority to non-federal officers beyond what they possess under state law. *See Lunn*, 78 N.E. 3d at 1158 ("the 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, section 1357(g)(10) does not supply the arrest authority that Sheriff Elder lacks under Colorado law. The Sheriff's reliance on section 1357(g)(10) is therefore misplaced.

B. By Depriving Plaintiffs Of Liberty Without Legal Authority, Sheriff Elder Carries Out Unreasonable Seizures In Violation Of Article II, Section 7.

Colorado Constitution Article II, Section 7 forbids unreasonable seizures. As explained in Section I.A.3, by detaining Plaintiffs and class members based on the three ICE forms, Sheriff Elder has carried out, or threatens, warrantless arrests. An arrest without a warrant is *presumed* to be unconstitutional under Article II, Section 7, and the Sheriff can rebut this presumption only if he shows "both that the arrest was supported by probable cause, . . . and that it fell within a

recognized exception to the warrant requirement." *Burns*, 615 P.2d at 688 & n.3 (citations omitted).

The Sheriff cannot carry this burden, because he cannot establish a recognized exception to the warrant requirement. The most commonly authorized exception allows warrantless arrests on probable cause of a *crime*. *Burns*, 615 P.2d at 688-89; *Haurey*, 859 P.2d at 894; *Valencia*, 257 P.3d at 1208. But the Sheriff has conceded that removal is a civil, not criminal, matter. Per *Burns*, *Haurey*, and *Valencia*, he has no authority to deprive individuals of liberty merely because federal immigration authorities suspect persons of being removable, and thus, of violating federal *civil* immigration law.

Furthermore, the Sheriff cannot establish any other recognized exception to the warrant requirement. "In Colorado, the authority of peace officers to effectuate arrests is now defined by legislation." *People v. Hamilton*, 666 P.2d 152, 154 (Colo. 1983). There is no Colorado statute authorizing warrantless arrests for civil violations of federal immigration laws. *See supra* § I.B. and footnote 4. Thus, the challenged practices—wholly unauthorized by any statute— are unreasonable arrests that violate Article II, Section 7.

C. By Failing To Release Plaintiffs When They Have Posted Or Offered To Post Bond, Sheriff Elder Violates Their Rights Under Article II, Section 19.

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 $1000, defendant "obtained a liberty interest in being freed of detention").

Here, bond was 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)). A court decided that relatively small bonds—$2000 and $1000—were sufficient to ensure that Plaintiffs would appear and that the public would be safe. By denying Plaintiffs and the bond subclass they represent their right to release after posting of bond, the Sheriff violates Article II, Section 19.

D. The Sheriff Has Deprived Plaintiffs Of Their Due Process Rights.

Finally, Article II, Section 25 of the Colorado Constitution ensures the right to procedural and substantive due process. Once courts set a bond, Plaintiffs have "obtained a liberty interest in being freed of detention." *Gaylor*, 105 F.3d at 576; *Dodds v. Richardson*, 614 F.3d 1185, 1192 (10th Cir. 2010) ("[a]n arrestee obtains a liberty interest in being freed of detention once his bail is set because the setting of bail accepts the security of the bond for that arrestee's appearance at trial and hence the state's justification for detaining him fades.") (quotation omitted). The Sheriff deprives them of that interest by detaining them without affording them any process. *See Dodds*, 614 F.3d at 1192 ("[t]he denial of bail must comport with the requirements of due process."). "An essential principle of due process is that a deprivation of

life, liberty, or property 'be preceded by notice and opportunity for hearing appropriate to the nature of the case.'" *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985) (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950)). Here, the Sheriff concedes he provided no notice to Plaintiffs or other class members that ICE had named them in detainers. *See* Stip. ¶ 31.

Deprivations of liberty carried out without lawful authority also constitute deprivations of substantive due process, in violation of Article II, Section 25. "In a constitutional sense, how much more basic could it get—jails cannot confine people without the authority to do so." *Armstrong v. Squadrito*, 152 F.3d 564, 578 (7th Cir. 1998). The Sheriff has violated, and threatens to violate, Article II, Section 25 by depriving class members of liberty without due process and without any lawful authority.

The Sheriff, in short, has committed, and threatens to commit, multiple constitutional violations. Plaintiffs therefore have established actual success on the merits.

II. PLAINTIFFS SATISFY THE REMAINING THREE ELEMENTS FOR PERMANENT INJUNCTIVE RELIEF.

Plaintiffs also satisfy the other three elements for permanent injunctive relief. The Court's prior rulings on these elements fully apply.

A. Plaintiffs And Class Members Suffered And Will Suffer Irreparable Injury Unless The Injunction Issues.

Plaintiffs and class members have a right to release upon posting of bond, completion of their sentence, or when state-law authority to hold them has otherwise expired. But Sheriff Elder has refused to release them, and therefore, has deprived them of liberty without any legal basis.

"It is well established that the deprivation of constitutional rights 'unquestionably constitutes irreparable injury.'" *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)); *accord United States v. Bogle*, 855 F.2d 707, 710-11 (11th Cir. 1988) (stating that unnecessary incarceration is a deprivation of liberty that "clearly constitutes irreparable harm.").

Sheriff Elder's illegal arrests are unreasonable seizures, deprivations of the right to post bail, and violations of due process. *See supra* §§ I.B. – D. As stated in the leading treatise on civil procedure, "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). And as this Court put it, "Few injuries are more real, immediate, or irreparable than being deprived of one's personal liberty." PI Order at 12. The Court can and should prevent this injury by awarding permanent injunctive relief.

B. The Threatened Injury Outweighs Any Harm The Injunction May Cause.

The balance of equities strongly favors Plaintiffs and the classes. Under Colorado law, Plaintiffs and bond class members have a right to release when they post the bond set by the state court. The low bonds set for the Plaintiffs demonstrated that the judges did not regard them as flight risks or dangers to public safety. And the Sheriff has no legitimate interest in imprisoning other class members after the state-law authority to detain them has expired.

By contrast, Sheriff Elder will not be harmed by releasing Plaintiffs and class members on bond or freeing them when state law detention authority ends. He will be complying with Colorado law, which is in his interest. And he may continue to cooperate with ICE, if he

chooses, within the bounds of the law. The Sheriff may continue to contact ICE and let it know when a prisoner is about to leave the Jail. *See* Stip ¶ 54. But he cannot arrest persons or hold them beyond the time permitted by Colorado law.

C. A Permanent Injunction Will Serve The Public Interest.

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

By contrast, the denial of permanent injunctive relief would disserve the public interest. The federal government's suspicions of removability do not allow Sheriff Elder to disregard the limits of his legal authority under Colorado law or to violate Plaintiffs' state constitutional rights. The public interest is served by requiring Sheriff Elder to comply with Colorado law.

Finally, Colorado once had a statute authorizing and requiring local law enforcement to cooperate with federal immigration authorities. *See* C.R.S. § 29-29-101 to 103 (2006). But in 2013, the Legislature repealed the statute and declared, "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). Given this clear expression of legislative intent, it would promote the public interest to enjoin Sherriff Elder from undermining the public trust.

III. PLAINTIFFS SATISFY THE REQUIRMENTS FOR MANDAMUS RELIEF AND ARE ENTITLED TO A DECLARATORY JUDGMENT.

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. And because Plaintiffs prevailed on the merits, they are also entitled to the declaratory relief they sought in their operative complaint.

A. Plaintiffs Are Entitled To Mandamus Relief.

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

As explained in Section I.A., Sheriff Elder relies unlawfully on ICE documents as grounds for refusing to release inmates when they post bond, complete their sentences, or otherwise resolve their criminal cases. Absent valid legal authority for depriving Plaintiffs and class members of liberty, Sheriff Elder must carry out his mandatory legal duty under Colorado law to release them when Colorado law requires release.

Plaintiffs also have 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). As this Court previously found, "Monetary damages would be difficult to ascertain and could not adequately compensate for the ongoing violations and threatened violations of Plaintiffs' right to liberty

and freedom from unauthorized and unjustified imprisonment." PI Order at 12. Plaintiffs are thus entitled to mandamus relief.

B. Plaintiffs Are Entitled To Declaratory Relief.

The Uniform Declaratory Judgments Law, C.R.S. §§ 13-51-101 to -115, "is a remedial statute which must be liberally construed and administered." *Mt. Emmons Min. Co. v. Town of Crested Butte*, 60 P.2d 231, 240 (Colo. 1984). Its purpose is to "settle controversies and to afford parties judicial relief from uncertainty and insecurity with respect to their rights and legal relations." *Id.*; § 13-51-102. A plaintiff seeking declaratory judgment must demonstrate ripeness and standing. *Metal Mgmt. West, Inc. v. State*, 251 P.3d 1164, 1174 (Colo. App. 2010) (ripeness); *Bd. of Cty. Comm'rs, La Plata Cty. v. Bowen/Edwards Assocs., Inc.*, 830 P.2d 1045, 1052 (Colo. 1992) (standing).

Ripeness requires "an actual case or controversy between the parties that is sufficiently immediate and real so as to warrant adjudication." *Metal Mgmt.*, 251 P.3d at 1174 (quoting *Jessee v. Farmers Ins. Exch.*, 147 P.3d 56, 59 (Colo. 2006)). The "essential requirement is that all relevant events have occurred, so that the court is addressing a present dispute." *Villa Sierra Condo. Ass'n v. Field Corp.*, 878 P.2d 161, 165 (Colo. App. 1994). Here, Plaintiffs unquestionably have ripe claims. They are litigating an actual controversy over the Sheriff's power to detain class members after state-law authority to do so has expired. The Sheriff is vigorously contesting their claims. Ripeness plainly exists.

Standing requires an analysis of whether the plaintiff "has alleged an injury in fact, and, if so, whether the injury is to a legally protected or cognizable interest." *Bowen/Edwards*

Associates, 830 P.2d at 1052. In declaratory judgment actions, "the required showing of demonstrable injury is somewhat relaxed." *Mt. Emmons*, 690 P.2d at 240. A plaintiff's injury is to a legally protected interest if it "emanates from a constitutional, statutory, or judicially created rule of law that entitles the plaintiff to some form of judicial relief." *Id.* Here, the Court has already ruled that Plaintiffs have standing, which "is determined as of the time the action is filed." Order Re Class Certification at 4 (citing *Grossman v. Dean*, 80 P.3d 952, 958 (Colo. App. 2003)). As the Court observed, there is "no question" that Plaintiffs had standing when the action was filed, "when they were both detained as a result of ICE holds." *Id.* at 5.

The Colorado Supreme Court has repeatedly affirmed the availability of declaratory relief in cases alleging violations of the Colorado Constitution. *See, e.g., Bock v. Westminster Mall*, 819 P.2d 55 (Colo. 1991) (Art. II, § 10); *Conrad v. City & Cty. of Denver*, 656 P.2d 662 (Colo. 1982) (Art. II, § 4); *Taxpayers for Pub. Educ. v. Douglas Cty. 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 based on Article II, Section 7 and the Fourth Amendment); *Univ. of Colo. v. Derdeyn*, 863 P.2d 929 (Colo. 1993) (same). Given that Plaintiffs have established multiple violations of the Colorado Constitution, *see supra* §§ I.B – D, declaratory relief is appropriate.

Plaintiffs therefore ask the Court to issue a judgment declaring that Sheriff Elder:

> exceeds his authority under Colorado law when he relies on ICE detainers or ICE administrative warrants or I-203 Forms, or any combination thereof, as grounds for refusing to release prisoners who post bond, complete their sentence, or otherwise resolve their state criminal case;

> violates the Colorado constitutional right to be free of unreasonable seizures when he relies on ICE detainers or ICE administrative warrants or I-203 Forms, or any combination thereof, as grounds for refusing to release prisoners who post bond, complete their sentence, or otherwise resolve their state criminal case;
>
> violates the Colorado constitutional right to due process of law when he relies on ICE detainers or ICE administrative warrants or I-203 Forms, or any combination thereof, as grounds for refusing to release prisoners who post bond, complete their sentence, or otherwise resolve their state criminal case; [and]
>
> violates the Colorado constitutional right to bail when he relies on ICE detainers or ICE administrative warrants as grounds for refusing to release pretrial detainees who post bond[.]

See Amended Complaint, ¶¶ 115(C) – (F).

CONCLUSION

Plaintiffs ask the Court to (i) enter summary judgment in favor of Plaintiffs and the classes and against Sheriff Elder determining that the Challenged Practices exceed his authority and are unconstitutional, (ii) permanently enjoin Sheriff Elder from engaging in the Challenged Practices, (iii) grant mandamus relief, and (iv) issue a declaratory judgment as set forth above.

Respectfully submitted this 27th day of September, 2018.

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CERTIFICATE OF SERVICE

I certify that on September 27, 2018, I served a copy of the foregoing document to the following by

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