DATE FILED: November 6, 2018 2:40 PM
FILING ID: 8C6DBAAB2CC70
CASE NUMBER: 2018CV30549

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

▲COURT USE ONLY▲

Attorneys for Plaintiffs:

Stephen G. Masciocchi, # 19873
Claire E. Wells Hanson, # 47072
Kyriaki Council, # 51157
HOLLAND & HART, LLP
555 17th Street, Suite 3200
Denver, CO 80202
Telephone: 303-295-8000
Fax: 303-295-8261
smasciocchi@hollandhart.com
cehanson@hollandhart.com
kcouncil@hollandhart.com

Mark Silverstein, # 26979
Arash Jahanian, # 45754
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION OF COLORADO
303 E. Seventeenth Ave. Suite 350
Denver, Colorado 80203
Telephone: (303) 777-5482
Fax: (303) 777-1773
msilverstein@aclu-co.org
ajahanian@aclu-co.org

Case Number: 18CV30549

Div.: 8

Courtroom: W550

PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AND REQUEST FOR MANDAMUS, DECLARATORY, AND PERMANENT INJUNCTIVE RELIEF

INTRODUCTION

Sheriff Elder agrees that summary adjudication is appropriate. Resp. at 1–2. And he does not contest that his pre-March 8 policy is unconstitutional and ultra vires. Instead, he implies that his former policy is no longer at issue. *See id.* at 2–3, 5. But as Plaintiffs explained, and as the Court ruled, Plaintiffs' challenge to the prior policy remains a live controversy. *See* Amended Reply in Support of Class Certification at 3–9; Order Re Class Certification at 3–8. The Court should therefore enter summary judgment as to that policy.

With respect to his current, 48-hour detainer policy, the Sheriff does not contest many of Plaintiffs' arguments and makes little or no mention of their requested remedies. He raises no issues of fact and provides no valid legal basis for his current policy. The Court should therefore enter summary judgment for Plaintiffs and grant them the remedies they seek.

ARGUMENT

I. PLAINTIFFS ARE ENTITLED TO SUMMARY JUDGMENT ON THE MERITS.

Plaintiffs showed that, by refusing to release Plaintiffs and class members when they post bond, complete their sentences, or resolve their criminal cases, Sheriff Elder carries out a new, warrantless arrest, for alleged violations of the *civil* provisions of federal immigration law, without the requisite state-law authority. *See* Mot. at 8–14. Plaintiffs demonstrated that no Colorado statute provides the Sheriff with the authority he lacks. *Id.*

The Sheriff responds by claiming that (i) 8 U.S.C. § 1357 (g)(10)(B) supplies him with the authority that is lacking under state law, (ii) his detentions are akin to an investigatory stop, (iii) he has inherent authority to detain, and (iv) ICE can make probable-cause determinations in

civil immigration matters and need not obtain a prompt, judicial probable-cause determination. The first three rationales do not hold water, and the fourth pertains to a federal-law claim that Plaintiffs have not even asserted. Plaintiffs will address each argument in turn.

A. Federal Law Does Not—And Cannot—Supply The Missing State-Law Authority To Arrest Or Seize Plaintiffs For Civil Immigration Violations.

Sheriff Elder is not operating under a 287(g) agreement. Stip. ¶ 22. But, as anticipated, he contends that 8 U.S.C. § 1357(g)(10)(B) supplies him with independent authority, absent in state law, to refuse to release inmates when they post bond, complete their sentence, or resolve their criminal case. Resp. at 3–12. This Court expressly rejected that argument once, PI Order at 9, and should do so again. Section 1357(g) allows only what state law allows, and Colorado law does not permit the Sheriff to make arrests for civil immigration violations. Section 1357(g)(10)(B) thus does not supply the arrest and detention authority that is lacking under Colorado law.

1. Properly interpreted, subsection 1357(g)(10)(B) allows only whatever cooperation state law allows.

The Sheriff's argument that subsection 1357(g)(10)(B) permits him to arrest Plaintiffs without regard to whether state law authorizes their arrests has no legal basis. Indeed, it skips a necessary step in the analysis. Before a state officer can make an arrest for a federal offense, (i) federal law must permit—*i.e.*, not preempt—the arrest, *and* (ii) state law must authorize it. *See Arizona v. United States*, 567 U.S. 387, 414–15 (2012) (absent federal preemption, the "authority of state officers to make arrests for federal crimes is . . . a matter of state law"); *Gonzales v. Peoria*, 722 F.2d 468, 475–476 (9th Cir. 1983) (concluding that federal law did not preclude Arizona officers from enforcing criminal provisions of federal immigration statutes, and stating,

"[w]e now must consider whether state law grants [Arizona] police the affirmative authority to make arrests under those statutes"), *overruled on other grounds*, *Hodgers–Durgin v. de la Vina*, 199 F.3d 1037 (9th Cir. 1999).

The federal scheme addressing immigration arrests by state agents requires this two-part analysis. In 8 U.S.C. § 1357(g), "Performance of immigration officer functions by State officers and employees," Congress provided for a so-called "287(g) agreement," named after section 287(g) of the Immigration and Nationality Act ("INA"). Section 1357(g) permits cooperative agreements between the federal government and state and local governments whereby non-federal officials—subject to federal training, direction, and supervision—are authorized "to perform [the] function of an immigration officer" as to the "investigation, apprehension, or detention of aliens in the United States." 8 U.S.C. § 1357(g)(1)–(3).

Critically, however, local law enforcement can carry out the functions of an immigration officer under a 287(g) agreement only "to the extent consistent with State and local law." 8 U.S.C. § 1357(g)(1). In other words, even a 287(g) agreement does not provide independent authorization for local officials to act. They must also comport with state and local law.

This is the context in which the Court must evaluate the Sheriff's contention that subsection 1357(g)(10)(B) confers authority to make arrests pursuant to civil immigration detainers and warrants where no authority otherwise exists. Subsection 1357(g)(10) follows the nine statutory subsections that address 287(g) agreements. It clarifies that local officials need not enter into such formal agreements in order to "communicate" with federal officials regarding an individual's immigration status or "cooperate" with federal officials:

> (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 . . . ; or (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).

As this Court held, subsection 1357(g)(10)(B) cannot be interpreted as a grant of independent arrest authority; instead, "it is simply a reserve clause, making clear that the statute does not prevent local officials from communicating or cooperating with federal immigration authorities." PI Order at 10. This clause provides that, absent a 287(g) agreement, state and local 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." *Lunn v. Commonwealth*, 78 N.E.3d 1143, 1159 (Mass. 2017); *accord Ochoa v. Campbell*, 266 F. Supp. 3d 1237, 1254 (E.D. Wash. 2017) (agreeing that '"it 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"') (quoting *Lunn*, 78 N.E.3d at 1159). Thus, subsection 1357(g)(10) merely confirms that "communication" and "cooperation" are *not preempted* by federal law, but it reserves to states whether and in what manner peace officers may "cooperate."

The question then becomes whether, by authorizing "cooperation," Congress permitted (did not preempt) state officers to *make arrests* for civil immigration violations. The *Lunn* court said no. It observed that, "[i]n those limited circumstances where the [INA] affirmatively grants authority to State and local officers to arrest, it does so in more explicit terms than those in §

1357(g)(10)." *Lunn*, 78 N.E.3d at 1159–60 (citing four specific examples in which the INA expressly authorizes non-federal officers to take custody of persons).

But this Court need not resolve whether non-preempted "cooperation" includes "arrests," because even if it does, Colorado law does not authorize Sheriff Elder to arrest persons for suspected federal civil immigration violations. PI Order at 4–7; Mot. at 8–14; *see infra* § I.C. The absence of state-law authority to arrest is dispositive.

2. The unanimous authorities have ruled that state law controls the extent of permissible "cooperation" under subsection 1357(g)(10)(B).

Consistent with our interpretation of subsection 1357(g)(10)(B), courts have repeatedly ruled that whether a state or local officer can honor an immigration detainer or warrant turns on state law. In cases where the question of whether state law authorized honoring an immigration detainer has been raised, courts decided the cases based on state law:

- Where no state authority existed, plaintiffs have prevailed. *See* PI Order at 4–11; *Lunn*, 78 N.E.3d at 1158–59 ("cooperation" under section 1357(g)(10)(B) must be consistent with state law, and state law provided no statutory or common-law authority to arrest for civil immigration violations); *Esparza v. Nobles Cty.*, No. 53-CV-18-751 (Nobles Cty., Minn. Dist. Ct., Oct. 19, 2018) (**Ex. 1**) (agreeing that section 1357(g)(10)(B) allows cooperation only when consistent with state law, and ruling that plaintiffs were likely to prevail, because under Minnesota law, peace officers have no power to arrest for civil immigration offenses).
- By contrast, when state law authorized peace officers to arrest and detain for civil immigration violations, defendants have prevailed. *See City of El Cenizo v. Texas*, 890

F.3d 164, 188 (5th Cir. 2018) (distinguishing *Lunn* because a Texas statute "itself authorizes and requires state officers to carry out federal detention requests"); *Rojas v. Suffolk Cty. Sheriff's Office*, 73 N.Y.S.3d 860, 865 (Sup. Ct. 2018) (ruling, without analysis, that state law permitted federal civil immigration enforcement); *see also Tenorio-Serrano v. Driscoll*, 2018 WL 3329661, at *4–9 (D. Ariz. July 5, 2018) (although plaintiffs raised "serious questions" as to whether state law permitted peace officers to honor immigration detainers, they were unlikely to succeed on the merits, because Arizona case law was unclear).

For his contrary argument, the Sheriff relies heavily on *Lopez-Lopez v. Cty. of Allegan*, 2018 WL 3407695 (W.D. Mich. July 13, 2018). Resp. at 4–7. But *Lopez-Lopez* did not involve state law. The question whether state law authorized peace officers to arrest and detain persons for civil immigration violations was not raised, considered, or decided in *Lopez-Lopez*. Notably, the court in *Salinas v. Mikesell*, 2018CV30057 (Teller County Dist. Ct.) relied heavily—and inappropriately—on *Lopez-Lopez*, *see Salinas* PI Order at 9–12, even though the case involved no issue, discussion, or ruling on whether state law authorized the county sheriff to honor the ICE detainer and administrative warrant.[1]

[1] Sheriff Elder asks this Court to follow the reasoning of *Lopez-Lopez*, where the court ruled that a county sheriff could arrest and detain due to the *combination* of ICE's new detainer form and an administrative warrant. *See* Resp. at 6–8; *Lopez-Lopez*, 2018 WL 3407695, at *3–5. But the *Lunn* court rejected the notion that the combination of the new detainer form (I-247A) and an administrative warrant (I-200 or I-205) somehow conferred arrest authority that was lacking under state law. *Lunn*, 78 N.E.3d at 1151, n.17 & 1155, n.21. The court observed that (1) new Form I-247A provides even less information than the old form, and (2) Form I-200 is unsworn, not judicially approved, and directed to federal immigration officials. *Id.* at 1151, n.17; *accord*

In sum, section 1357(g)(10)(B) does not supply independent authority to arrest and detain persons for suspected violation of civil immigration law. That authority must come from state law. As shown in our Motion and below, in Colorado, no such authority exists.

B. Detaining Plaintiffs For 48 Hours In A Jail Cannot Be Justified As A Brief, Investigatory Stop, Because It Is Neither Brief Nor Investigatory.

Sheriff Elder does not address Plaintiffs' arguments that he has no authority under Colorado law to arrest Plaintiffs for civil immigration violations. *See* Mot. at 8–14. Instead, he insists that a 48-hour detainer is not an arrest but "a cooperative short-term detention" that is "akin to a *Terry* stop." Resp. at 3. This argument fails for multiple reasons.

A 48-hour immigration detainer meets none of the requirements for an investigatory stop. A warrantless seizure is unreasonable unless it satisfies an "established and clearly articulated exception[] to the warrant requirement." *People v. Rodriguez*, 945 P.2d 1351, 1359 (Colo. 1997). An arrest based on probable cause of a crime is one exception. A second exception, a *Terry* stop, "is a brief investigatory stop supported by a reasonable suspicion of criminal activity." *Id*. (citing *Terry v. Ohio*, 392 U.S. 1 (1968)).

A *Terry* stop must be "brief in duration, limited in scope, and narrow in purpose." *Id.* at 1359, 1362 (citation omitted). Sheriff Elder's 48-hour holds do not satisfy any of these three essential elements of a *Terry* stop. They are not brief in duration, they are not limited in scope, and their purpose is not to investigate, much less to investigate a possible crime.

Stip. ¶ 13. The court concluded that these forms "do not transform the removal process into a criminal process, nor do they change the fact that Massachusetts officers have no common-law authority to make civil arrests." *Id.* at 1155, n.21. The same result obtains here.

Detainers are not brief. The first essential element of a *Terry* stop is brevity. *See, e.g.*, *Rodriguez* , 945 P.2d at 1359, 1362 ("brief in duration"); *People v. Pacheco*, 182 P.3d 1180, 1183 (Colo. 2008) ("brief investigation"). While courts have refrained from establishing a rigid time limit, the duration of reasonable *Terry* stops is measured in minutes, not hours or days. *See Rodriguez*, 945 P.2d at 1355 (90 minutes exceeded parameters of permissible investigative stop); *People v. Hazelhurst*, 662 P.2d 1081, 1086 (Colo. 1983) (20-to-30 minute detention exceeded scope of a *Terry* stop); *United States v. Place*, 462 U.S. 696, 709–10 (1983) ("although we decline to adopt any outside time limitation for a permissible *Terry* stop, we have never approved a seizure of the person for the prolonged 90-minute period involved here"); *United States v. Rasberry*, 882 F.3d 241, 248 (1st Cir. 2018) ("A twenty-minute detention may be lengthier than the paradigmatic *Terry* stop"); *United States v. Tucker*, 610 F.2d 1007, 1011–13 (2d Cir. 1979) (detention in a police station "holding pen" for "several hours" was an arrest, not a *Terry* stop).

Notably, the *Lunn* court rejected an identical investigative-stop argument, in part because an immigration detainer lasts "up to two full days." *Lunn*, 78 N.E.3d at 1153. The First Circuit likewise rejected an attempt to fit immigration detainers into the *Terry* framework:

> Although the line between an arrest that requires probable cause and a temporary detention for interrogation which does not is not always clear, pre–2009 cases did clearly show that 48 hours of imprisonment—which is what the detainer requests, *see* 8 C.F.R. § 287.7(d)—falls well on the arrest side of the divide.

Morales v. Chadbourne, 793 F.3d 208, 215–16 (1st Cir. 2015).

Furthermore, virtually every court to have addressed the issue, including this Court, has held that detaining persons in custody based on ICE documents constitutes a new *arrest*. *See* PI

Order at 4; *Lunn*, 78 N.E.3d at 1153–54 (inmate's detention on immigration detainer after he was entitled to release was "plainly an arrest within the meaning of Massachusetts law"); *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*, 266 F. Supp. 3d at 1249–50 (detention extended due to an immigration hold constituted a new arrest and a seizure); *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 *10 (D. Or. Apr. 11, 2014) (continued detention that exceeded jail's lawful authority "constituted a new arrest"); *Esparza*, No. 53-CV-18-751, at 14 (**Ex. 1**) ("The continued detention of a person after release from State custody or expiration of sentence is an arrest."); *see also Tenorio-Serrano*, 2018 WL 3329661, at *9 ("the Court does not necessarily disagree with Plaintiff's premise—that continued detention is tantamount to an arrest").

Sheriff Elder does not acknowledge, much less address, any of these cases. He does not and cannot cite a single case holding that a two-day detention in a jail cell can be justified as a *Terry* stop rather than an arrest. His argument must be rejected on this basis alone.

Detainers are not limited in scope. A *Terry* stop is a limited intrusion on personal security, less intrusive than a full-scale arrest. In *Rodriguez*, the court held that "an investigatory traffic stop does not permit a prolonged detention intrusive to the point where the occupants of a vehicle are forced to wait in a restaurant." 945 P.2d at 1363; *see Gonzales*, 722 F.2d at 477 ("where the defendant is transported to the police station and placed in a cell or interrogation

room he has been arrested, even if the purpose of the seizure is investigatory rather than accusatory"). Forcing a suspect to spend up to 48 hours in a jail cell is far more intrusive than a short wait in a restaurant and far exceeds the scope of a permissible *Terry* stop.

Detainers have no investigatory purpose. A *Terry* stop is a brief "investigatory stop." *Rodriguez*, 945 P.2d at 1359. The purpose is to allow law enforcement to conduct a limited investigation in order to quickly confirm or dispel the reasonable suspicion of criminal activity that justifies the intrusion. *See id*. at 1362 (confirm or dispel police's suspicion); *People v. Funez-Paiagua*, 276 P.3d 576, 578 (Colo. 2012) (same).

Notably, the *Lunn* court expressly rejected an argument identical to the one the Sheriff makes here. The court reasoned that holding someone on an immigration detainer could not constitute an investigatory stop because it had no investigatory purpose:

> When a Massachusetts custodian holds an individual solely on the basis of a civil detainer, the custodian has no investigatory purpose. . . . The sole purpose of the detention is to maintain physical custody of the individual, so that he or she remains on the premises until the Federal immigration authorities arrive and take him or her into Federal custody to face possible removal.

Lunn, 78 N.E.3d at 1153. Sheriff Elder's practice of jailing persons on the basis of ICE documents thus cannot be justified an "investigatory stop," because he conducts no investigation aimed at confirming or dispelling ICE's suspicions that the Plaintiffs are removable. Indeed, Colorado sheriffs and their deputies have no authority, training, or competence to investigate whether detainees are in violation of federal civil immigration laws. In short, jailing persons on the basis of ICE detainers and administrative warrants far exceeds the permissible duration, scope, and purpose of an investigative stop.

C. The Sheriff Has No Inherent Authority To Enforce Civil Immigration Detainers.

Without addressing Plaintiffs' arguments and authorities, Mot. at 8–14, Sheriff Elder also claims he has "inherent" authority under Colorado common law to "keep and preserve peace," and thus, to arrest and detain persons for civil immigration violations. Resp. at 16–18. In fact, 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.* Colorado courts thus will not lightly infer that sheriffs have any powers beyond those "clearly conferred by law." *Douglass v. Kelton*, 610 P.2d 1067, 1069 (Colo. 1980) (even though Colorado legislature must have contemplated that sheriffs and police chiefs had authority to issue concealed-carry permits, the legislature had not clearly conferred that power, and the Court would not infer it); *see* Mot. at 11.

Sheriff Elder relies on Colorado Attorney General Formal Opinion No. 99-7, 1999 WL 33100121 (Sept. 8, 1999). But that Opinion underscores just how limited the concept of inherent authority is in Colorado. It confirms that a sheriff carries out his peacekeeping duties by exercising the arrest power "found in a *specific statute*" and implied powers necessary "to fully perform his functions" under that "express authority." *Id.* at *4 (emphasis added). And in Colorado, there is no common-law or inherent authority to make arrests; that authority "is now defined by legislation." *People v. Hamilton*, 666 P.2d 152, 154 (Colo. 1983).

For express authority, Sheriff Elder invokes C.R.S. § 17-26-123, which states that county jailers have a duty "to receive into the jail every person duly committed thereto for any offense

against the United States, by any court or officer of the United States." But here, the Sheriff claims the authority to arrest and hold Plaintiffs in order to transfer them *to* federal agents—not to receive individuals committed to him *by* federal agents. And, as Plaintiffs explained in their Motion, a statutory reference to "offense" means a *crime*. Mot. at 13 (citing C.R.S. §§ 16-1-105(2) & 18-1-104(1)). The Sheriff does not disagree.

More to the point, the Sheriff has no statutory duty to enforce civil immigration law or even to cooperate with its enforcement. Colorado 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 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 (Apr. 26, 2013). The Sheriff plainly has no "inherent authority" to take actions to enforce immigration laws that he has no express authority or duty to enforce.

Sheriff Elder finally warns that failing to recognize his inherent authority will expose the community to risk and thwart his cooperation with other law enforcement agencies. Resp. at 17–18. But he gives no details and cites no evidence, and he cannot raise a genuine issue of material fact by mere argument of counsel. *Front Range Res., LLC v. Colo. Ground Water Comm'n*, 415 P.3d 807, 817 (Colo. 2018). The Court should reject these unsupported contentions.

D. Plaintiffs Have Asserted No Claim Against ICE Pertaining To Its Probable Cause Determinations.

Sheriff Elder finally insists he is authorized to detain Plaintiffs because, under federal law, there is no requirement for review of an ICE detainer or warrant by a neutral magistrate.

This argument is a classic straw man. It addresses a claim for relief Plaintiffs did not make against federal defendants Plaintiffs did not sue.

The Sheriff's argument is based on *Roy v. Cty. of Los Angeles*, 2017 WL 2559616 (C.D. Cal. June 12, 2017). Importantly, *Roy* involves two consolidated cases: a suit by Duncan Roy, *et al.*, against the County of Los Angeles and county officials, and a suit by Gerald Gonzales, *et al.*, against ICE and three ICE employees. *See id.* at *1, n.1; *see also Roy v. Cty. of Los Angeles*, 2018 WL 914773, at *1 (C.D. Cal. Feb. 7, 2018) (listing parties and claims in the two cases).

In the first case, *Roy*, the court ruled that the county and its sheriff violated the Fourth Amendment by honoring detainers after state-law authority to hold plaintiffs expired. *See Roy*, 2018 WL 914773, at *23–24 (granting summary judgment to Plaintiffs); *Roy*, 2018 WL 3435417, at *2 (confirming ruling). The *Roy* opinion thus supports our similar position.

The decision on which the Sheriff relies involved only the second case, *Gonzales*. *See Roy*, 2017 WL 2559616, at *1. In that case, plaintiffs alleged that because ICE detainers are unsworn documents that are not reviewed by judges, ICE violates the Fourth Amendment by making warrantless, detainer-based arrests without providing plaintiffs with a prompt judicial finding of probable cause. *Id.* at *1–2. The court rejected this claim. *Id.* at *6–10. Here, Plaintiffs brought no claim against ICE or ICE officials, much less the specific claim at issue in the *Gonzales* case. *Gonzales* is thus completely off point.

II. SHERIFF ELDER FAILS TO ADDRESS THE CONSTITUTIONAL CLAIMS.

Plaintiffs made detailed arguments, supported by on-point authorities and stipulated facts, showing that Sheriff Elder, by engaging in the Challenged Practices, has violated Colorado

Constitution Article II, Section 7 (unreasonable seizures), Article II, Section 19 (right to bail), and Article II, Section 25 (procedural and substantive due process). *See* Mot. at 16–19. The Sheriff does not respond to those arguments and authorities and does not contend there is any genuine issue of material fact.[2] He has thus conceded these constitutional violations.

III. PLAINTIFFS ARE ENTITLED TO A PERMANENT INJUNCTION AND TO DECLARATORY AND MANDAMUS RELIEF.

Plaintiffs also submitted detailed arguments and authorities supporting their requests for mandamus and declaratory relief. *See* Mot. at 22–25. Again, the Sheriff has tendered no response. He therefore concedes that, assuming Plaintiffs prevail on the merits, they are entitled to those remedies, as stated in the Motion. The Sheriff does contend that Plaintiffs failed to establish the permanent-injunction elements set forth in *Dallman v. Ritter*, 225 P.3d 610, 631, n.11 (Colo. 2010). Plaintiffs showed above that they satisfied the first element, success on the merits. As for the other three elements, the Court should reject the Sheriff's tepid responses.

Irreparable Injury. Plaintiffs showed that constitutional violations and deprivations of liberty constitute irreparable injury. *See* Mot. at 19–20 (citing cases). The Sheriff does not disagree. He says only that, if there is no constitutional violation, there is no irreparable harm. Resp. at 21. But Plaintiffs have, in fact, established those violations, Mot. at 16–19, and the Sheriff has no further response.

[2] Sheriff Elder curiously states Mr. Cisneros was "rolled over under the IGSA" before he was released per the Court's March 20, 2018 ruling. Resp. at 9 & n.6. In fact, the Sheriff *stipulated* that neither Mr. Cisneros nor Ms. Chavez was ever held under the IGSA. Stip. ¶ 21. And in his response, he does not rely on the IGSA as a basis to avoid summary judgment. His offhanded and mistaken reference to "rolling over" thus creates no genuine issue of material fact.

Balance of Equities. Plaintiffs also showed that the threatened injury—deprivation of constitutional rights and imprisonment without authority—outweighs any conflicting interest. Mot. at 20–21. The Sheriff identifies that interest as "the government's interest in efficiently and effectively enforcing immigration law." Resp. at 21. But that is the *federal* government's job. The Sheriff has no duty to enforce civil immigration law and thereby violate state law. *See supra* § I.C.; H.B. 13-1258. Plaintiffs also pointed out that the Sheriff can continue to communicate and cooperate without violating this Court's injunction. Mot. at 21. The Sheriff has no retort.

Public Interest. Finally, the Sheriff contends that (i) immigrants don't have the same constitutional rights as citizens and (ii) his cooperation with ICE serves the public interest. In fact, "the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful [or] unlawful[.]" *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001). Immigrants also enjoy constitutional rights to privacy and protection from unreasonable seizures. *See People v. Gutierrez*, 222 P.3d 925, 929, 931–40 (Colo. 2009). And courts have repeatedly confirmed that they enjoy the rights asserted in this lawsuit. Mot. at 9–19; *see supra* at 4–9. The public interest in the vindication of these rights is powerful. By contrast, "[t]he requirement that public safety agencies play a role in enforcing federal immigration laws can undermine public trust[.]" H.B. 13-1258. All four permanent-injunction elements exist.

CONCLUSION

For the reasons stated above and in their Motion, Plaintiffs ask the Court to (i) enter summary judgment in their favor, (ii) permanently enjoin Sheriff Elder from engaging in the Challenged Practices, (iii) grant mandamus relief, and (iv) issue a declaratory judgment.

Respectfully submitted this 6th day of November, 2018.

s/Stephen G. Masciocchi
Stephen G. Masciocchi, # 19873
Claire E. Wells Hanson, # 47072
Kyriaki Council, # 51157
HOLLAND & HART, LLP
In cooperation with the American Civil Liberties Union Foundation of Colorado

s/Mark Silverstein
Mark Silverstein, # 26979
Arash Jahanian, # 45754
AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF COLORADO

CERTIFICATE OF SERVICE

I certify that on November 6, 2018, I served a copy of the foregoing document to the following by

☐ U.S. Mail, postage prepaid
☐ Hand Delivery
☐ Fax
☒ Colorado E-Filing

Kenneth R. Hodges, Sr. Assistant County Attorney
Lisa Kirkman, Sr. Assistant County Attorney
Peter A. Lichtman, Sr. Assistant County Attorney
Office of the County Attorney
of El Paso County, Colorado
200 S. Cascade Ave.
Colorado Springs, CO 80903

s/Brenda S. Proskey

11587174_4