DISTRICT COURT, TELLER COUNTY, COLORADO
101 W. Bennett Avenue, Cripple Creek, Colorado 80813

Plaintiffs-Counterclaim Defendants:
BERCK NASH; JOANNA NASH; RODNEY SAUNDERS; PAUL MICHAEL STEWART; and JANET GOULD,

v.

Defendant-Counterclaimant: JASON MIKESELL, in his official capacity as Sheriff of Teller County, Colorado.

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Case No. 2019CV030051
Division: 11

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Plaintiffs Berck Nash, Joanna Nash, Rodney Saunders, Paul Michael Stewart, and Janet Gould by and through undersigned counsel, respectfully move, under C.R.C.P 56(a) and (b), for summary judgment on all claims and counterclaims for relief.

C.R.C.P. 121, § 1-15(8) CERTIFICATION

Counsel for Plaintiffs has conferred with counsel for Defendant. Sheriff Mikesell opposes the relief requested herein.

INTRODUCTION

This case concerns the legality of Teller County Jail policies and practices—the essential facts of which are not in dispute—under the purported authority of a written agreement between the Teller County Sheriff's Office ("TCSO") and U.S. Immigration and Customs Enforcement ("ICE"). Under the agreement, designated TCSO detention officers are trained, certified, and authorized by ICE to perform specified immigration enforcement functions within the Jail. The purpose of this federal-local arrangement is to identify and process inmates booked at the Jail on local or state charges who may be subject to removal under ICE's civil immigration enforcement priorities. Because the agreement is entered pursuant to section 287(g) of the Immigration and Nationality Act, it is commonly referred to as the "287(g) program," and the TCSO personnel certified to perform immigration functions at the Jail are known as "287(g) deputies."

In the normal course, and as required by Colorado law, when a county inmate booked on local or state charges posts bond, completes their sentence, or otherwise resolves their criminal case, the Jail releases them. The 287(g) program disrupts this chain of events for the county inmates who become its targets.

When a 287(g) deputy, supervised by ICE, determines there is probable cause that a county inmate is removeable, they will place certain ICE forms representing that determination in the inmate's jail file, instructing the Jail to detain the person for eventual transfer to ICE custody. None of these documents purports to establish probable cause of any crime, and none is signed or authorized by a judge. But so long as such ICE forms are on file, then even if the inmate posts bond, completes their sentence, or otherwise resolves their criminal case, the Jail will not release them. Instead, a 287(g) deputy serves an ICE administrative warrant on the inmate and deems the inmate to be in ICE custody, not free to leave.

The trouble with these admitted policies and practices is that there is no basis in federal or state to authorize them.

Federal law does not independently authorize or justify the Jail's challenged policies and practices. By the express terms of the federal statute authorizing 287(g) agreements, a local law enforcement officer who is delegated authority to perform immigration enforcement functions under such an agreement may perform those functions *only* "to the extent consistent with State and local law." 8 U.S.C. § 1357(g). Sheriff Mikesell's 287(g) agreement with ICE thus cannot confer upon his deputies any power to do what state law forbids.

And Colorado law expressly forbids the 287(g) program's essential feature. It specifically prohibits arresting or detaining an inmate, who is otherwise eligible for release, on the basis of the very ICE forms the Jail relies on for that exact purpose. C.R.S. §§ 24-76.6-101, 102. Moreover, because none of those ICE forms are judicial warrants, Sheriff Mikesell's arrests and detentions of release-eligible individuals are presumptively unconstitutional warrantless arrests—and they cannot be justified by any exception to the warrant requirement. Simply put, the keystone of the

Jail's 287(g) program does precisely what Colorado statute forbids and violates the Colorado Constitution, which Sheriff Mikesell is sworn to uphold. Moreover, the program exceeds the scope of the limited authority conferred upon Defendant as a sheriff of a statutory county.

There is no genuine dispute that several individuals have already been detained by the Jail under the 287(g) program when they were eligible for release under Colorado law. Nor is there any genuine dispute that this practice will continue without this Court's intervention. The sole material disagreement between the parties is the legality of the Sheriff's practices. Because neither state nor federal law supplies the authority Sheriff Mikesell asserts, this Court should enter summary judgment for Plaintiffs.

PROCEDURAL HISTORY

Relying on taxpayer standing, Plaintiffs filed this action for declaratory and injunctive relief on June 27, 2019. Defendant moved to dismiss for lack of standing and argued that Plaintiffs failed to state a claim. After briefing and oral argument, the Court ruled that Plaintiffs lacked taxpayer standing and dismissed the case without reaching Defendant's other arguments.

Plaintiffs appealed, and the Court of Appeals reversed. *Nash v. Mikesell*, 2021 COA 148M. On remand, Defendant filed an Answer and Counterclaim, and Plaintiffs replied. Plaintiffs then filed their operative Amended Complaint on June 23, and Defendant answered on July 7.

In their Amended Complaint, Plaintiffs seek a declaration that (1) Sheriff Mikesell's 287(g) program exceeds the limits of his authority under state law, and (2) he violates the Colorado Constitution and C.R.S. § 24-76.6-102 by authorizing his deputies to arrest or detain persons, who would otherwise be released, on the basis of ICE forms not reviewed or signed by a judge. Plaintiffs also ask this Court to enjoin Sheriff Mikesell from continuing these unlawful practices

and from expending taxpayer resources to finance them. In his Counterclaim, Sheriff Mikesell seeks a declaration that he has the legal authority to enter the 287(g) Agreement with ICE; that the functions performed by 287(g) deputies under the 287(g) agreement are lawful; that the 287(g) deputies act as federal officers when they are performing functions under the 287(g) agreement. Plaintiffs request summary judgment on all claims and counterclaims.

STANDING

As the Court of Appeals concluded in this very case, "Plaintiffs have taxpayer standing to challenge the Sheriff's 287(g) agreement." *Nash v. Mikesell*, 2021 COA 148M, ¶ 28 (2021). Each of the Plaintiffs pays taxes that go into the Teller County General Fund. Def.-Countercl.'s Discovery Responses, attached as Ex. 1,[1] at RFA Nos. 8, 18. Funds from the Teller County General Fund are moved into the Jail Enterprise Fund, *id.* at RFA No. 11, and the Jail Enterprise Fund pays for the salaries and benefits of the Teller County 287(g) deputies. *Id.* at RFA No. 13; Affidavit of Sheryl K. Decker, Teller County Administrator, attached as Ex. 2, ¶¶ 7–8.

STATEMENT OF FACTS

Federal immigration authorities, through Immigrations and Customs Enforcement (ICE), often ask local sheriffs to continue to detain an inmate who is eligible for release from custody. Answer & Countercl., attached as Ex. 3, at Answ. ¶ 14. ICE initiates formal requests for continued detention by means of three types of forms that it sends to county jails: ICE Form I-247A; an administrative warrant, which is either Form I-200 or Form I-205, and/or Form I-203. *Id.*, ¶ 18; Ex. 1 at Resp. to Interrog. No. 2; Dominic Madronio Dep., attached as Ex. 4, 166:20-167:11.

[1] Page numbers of exhibits refer to bates stamps where possible. Documents produced by Defendant are referenced with a "T_" preceding the page number, and documents produced by Plaintiffs are referenced with a "P_" preceding the page number.

1. Immigration Detainer: ICE Form I-247A[2]

ICE Form I-247A is titled "Immigration Detainer—Notice of Action." Courts and law enforcement commonly refer to this form as a detainer, an immigration detainer, or an "ICE hold." Canseco v. Mikesell, Compl. & Answer, attached as Ex. 5, at P_568 ¶ 14. It names a detainee being held in a local jail. It asserts that ICE believes that the prisoner may be removable from the United States. It requests that the jail continue to detain that person for an additional 48 hours after they would otherwise be released, to allow time for ICE to take the person into federal custody. Ex. 1 at RFA No. 15. It is not issued, reviewed, or signed by a judge. *Id.*

2. Administrative Warrant: ICE Forms I-200[3] and I-205[4]

An administrative warrant asserts that ICE has grounds to believe that a particular person is removable from the Unites States. It directs an ICE officer to arrest that person and take them into ICE custody for removal proceedings. Form I-200 is titled "Warrant for Arrest of Alien," and Form I-205 is titled "Warrant of Removal/Deportation." Although the titles of these administrative forms contain the word 'warrant,' they are issued by ICE officers, not by judges. Ex. 3 at Answer ¶ 22; Ex. 1 at RFA No. 16; 30(b)(6) Dep. of David Rice, attached as Ex. 6, 16:15-17:15. Pursuant to an ICE policy effective in April, 2017, ICE officers issue administrative warrants, either Form I-200 or I-205, to accompany any I-247A forms that are issued. ICE Policy 10074.2, attached as Ex. 7; Ex. 5, at P_568 ¶ 17.

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[2] A sample Form-I247A is available at https://www.ice.gov/sites/default/files/documents/Document/2017/I-247A.pdf

[3] A sample Form I-200 is available at https://www.ice.gov/sites/default/files/documents/Document/2017/I-200_SAMPLE.PDF.

[4] A sample Form I-205 is available at https://www.ice.gov/sites/default/files/documents/Document/2017/I-205_SAMPLE.PDF.

3. ICE Form I-203 and the IGSA

ICE maintains a contract with TCSO that provides for housing ICE detainees, at a daily rate, at the Jail. This bed-rental contract is called an Intergovernmental Service Agreement ("IGSA"). IGSA, attached as Ex. 8. It provides for housing certain detainees who are already in federal custody when they are booked into the jail as IGSA detainees. Ex. 3, at Answer, ¶ 24.

To track detainees housed at contract detention facilities, ICE uses an internal administrative tracking form, Form I-203, titled "Order to Detain or Release Alien." According to ICE's detention standards, it accompanies ICE detainees when ICE officers place them, in, or remove them from, a particular contract facility. ICE Performance-Based National Detention Standards, attached as Ex. 9, at P_548; P_551. The issuing officer can check a "detain" box or a "release" box. An I-203 Form is not a court order; it is not reviewed, authorized, approved, or signed by a judge. Ex. 3 at Answer ¶ 26; Ex. 1 at RFA No. 17.

Sheriff Mikesell Honors ICE Requests to Continue to Detain County Inmates Who Are Otherwise Eligible for Release

From the time Defendant Mikesell became Sheriff in 2017, it has been his policy to honor ICE's requests. Thus, when ICE sent the jail an I-247A Form and an ICE administrative warrant naming a Teller prisoner, the jail entered "ICE hold" or "INS hold" in the inmate's jail file. Mikesell's policy was to continue detaining these prisoners up to an additional 48 hours after they would otherwise be released, to allow ICE to take them into custody. When ICE decided to house the arrestee in the Teller jail under the IGSA contract, ICE also submitted a Form I-203 with the "detain" box checked. When the inmate became eligible for release on their Colorado charges, the Jail then regarded the prisoner as an IGSA detainee and billed ICE at a daily rate. Ex. 5, at P_567–69 ¶¶ 13, 23–24; *Canseco* Disc. Resps., attached as Ex. 10, at P_581 Resp. to Interrog. No. 5.

The TCSO's pre-287(g) practice is illustrated by the example of Ernesto Meza-Pacheco, who was booked on September 20, 2018, for driving under restraint. TCSO Meza-Pacheco Records, attached as Ex. 11, at P_610. That evening, a Teller deputy informed ICE that Mr. Meza had been granted a personal recognizance ("PR") bond. *Id.* at P_614. ICE sent an administrative warrant and an I-247A form dated that day. *Id.* at P_614–17. Despite his PR bond, Mr. Meza spent that night in jail. The next morning, a Teller deputy reminded ICE that Mr. Meza had a PR bond. A handwritten note reports that the ICE agent "stated to fill out DHS form I-247A and one of his agents would come and pick it up." *Id.* at P_614. A Teller deputy served the I-247A form on Mr. Meza that morning. Later that day, an ICE agent served the administrative warrant and provided the Jail with a Form I-203 for Mr. Meza with the "detain" box checked. *Id.* at P_615–19. Despite his PR bond, Mr. Meza spent an additional 12 days in the Teller County Detention Center. The Jail billed ICE for the 12 days it regarded Meza as an IGSA detainee. TCSO IGSA Inmate Billing Summary, 2016–2019, attached as Ex. 12, at P_603 (highlighting added).

A Court Holds that Colorado Sheriffs Violate the State Constitution When They Honor ICE Requests for Continued Detention

In late 2018, the district court in neighboring El Paso County ruled for the plaintiffs in a class action that challenged practices similar to Mikesell's carried out by the El Paso County Sheriff. In *Cisneros v. Elder*, the court ruled that when county jail prisoners post bail, complete their sentences, or otherwise resolve their criminal cases, the Colorado Constitution requires that the sheriff release them. This state constitutional imperative applies, the court held, even when ICE has provided the sheriff's office with an immigration detainer, an administrative warrant, an

I-203 Form, or any combination of these forms.[5] *Cisneros v. Elder*, No. 18CV30549, 2018 WL 7199167 (El Paso Cty. Dist. Ct. Dec. 6, 2018) ("the *Cisneros* ruling"), attached as Ex. 13; Judgment, *Cisneros v. Elder*, No. 18CV30549 (Colo. Dist. Ct. Dec. 14, 2018) attached as Ex. 14.

The *Cisneros* litigation prompted Sheriff Mikesell to explore the 287(g) program, in the hope that explicit federal authority would insulate his work with ICE from a similar legal challenge. 30(b)(6) Dep. of Sheriff Mikesell, attached as Ex. 15, 39:1-15; Ex. 3 at Countercl. ¶ 15.

Colorado Codifies the *Cisneros* Holding: HB 19-1124

In 2019, the Colorado legislature enacted HB 19-1124, "An Act Concerning Clarification of the Authority of Criminal Justice Officials with Respect to the Enforcement of Certain Federal Civil Laws." 2019 Colo. Sess. Laws 2759–62. As the Colorado Court of Appeals has acknowledged, the Act "effectively codified the trial court's holding" in the *Cisneros* case. *Nash*, ¶ 8 n.1, 507 P.3d at 96 n.1. The statute mandates that "[a] law enforcement officer shall not arrest or detain an individual on the basis of a civil immigration detainer request." C.R.S. § 24-76.6-102(2). The term "civil immigration detainer" is defined to include any written request "on any form promulgated by federal immigration enforcement authorities" to "maintain custody of an individual beyond the time when the individual is eligible for release from custody."[6] *Id.* § 101(1). The definition expressly includes the titles of Form I-247A, Forms I-200 and I-205, and Form I-203.[7] The statute states that these forms promulgated by federal immigration

[5] Appellate courts in four states reached the same conclusion, holding that arrests or continued detentions based on ICE forms not signed by a judge violate their respective state constitutional prohibitions on unreasonable seizures. *See Lunn v. Commonwealth*, 78 N.E.3d 1143 (Mass. 2017); *People ex rel. Wells v. DeMarco*, 168 A.D. 3d 31 (N.Y. App. Div. 2018); *Esparza v. Nobles Cty.*, 2019 WL 4594512 (Minn. Ct. App. 2019); *Ramon v. Short*, 460 P.3d 867 (Mont. 2020).

[6] Under Colorado's Code of Criminal Procedure, custody means "the restraint of a person's freedom in any significant way." C.R.S. 16-1-104(9)."

[7] The definition includes " . . . any request for law enforcement agency action, warrant for arrest

authorities are not warrants under Colorado law and are not "reviewed, approved, or signed by a judge." *Id*. § 102(1)(b). The statute makes clear that "continued detention of an inmate at the request of federal immigration authorities beyond when he or she would otherwise be released" constitutes an unconstitutional warrantless arrest. *Id*. The statute defines "eligible for release from custody" to mean when an inmate has posted bond or otherwise resolved their criminal charges. *Id.* § 101(2).

The 287(g) Memorandum of Agreement

The program challenged in this case began in 2019 with the signing of the 287(g) Memorandum of Agreement ("MOA"). 2019 MOA, attached as Ex. 16. A slightly modified version of was signed in 2020 and remains current. 2020 MOA, attached as Ex. 17. The federal authority for the MOA is Section 287(g) of the Immigration and Nationality Act (INA), codified as 8 U.S.C. 1357(g). *Id.* at T_21. The MOA is a Jail Enforcement Model, meaning that the ICE has authorized Teller deputies to exercise functions of immigration officers only within the confines of the jail, not in the community. *Id.* Sheriff Mikesell is the only Colorado sheriff with an active 287(g) agreement. Ex. 15 at 118:7-11.

Pursuant to the MOA, ICE trains selected TCSO detention officers and then authorizes them to exercise certain civil immigration enforcement powers that ordinarily are reserved to federal immigration officers. The MOA authorizes Teller's 287g officers to work under ICE supervision to question detainees, investigate potential immigration violations, prepare charging documents, and issue immigration detainers (I-247A Forms). Ex. 17 at T_23–29. Teller's 287(g) officers are also authorized to serve and execute ICE administrative warrants. *Id.* at T_28. The

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of alien, order to detain or release alien, or warrant of removal/deportation. . . ." *Id.*

INA limits the scope of these delegated powers: they may be exercised only "to the extent consistent with state and local law." 8 U.S.C. § 1357(g)(1).

The program became operational in late 2019. Four Jail staff members—first Laura Hammond and Dominic Madronio, and later Taylor Smith and David Rice—have completed training and received ICE certification under the 287(g) agreement. Def.-Countercl.'s Initial Discls., attached as Ex. 18, at 4-7. During their respective tenures at the Jail, only Deputy Madronio was a POST-certified peace officer authorized to carry out arrests under Colorado law. Ex. 4 at 70:11-25; Dep. of Laura Hammond, attached as Ex. 19, at 18:1-20:10; Dep. of Taylor Smith, attached as Ex. 20, at 14:21-15:15; 170:17-21; 171:14-21; Ex. 6 at 8:5-12. David Rice, who lacks POST certification, is the only current 287(g) deputy.[8] Ex. 6 at 24:16-20. Jail deputies remain employees of TCSO throughout their tenure as 287(g) deputies, including while they perform delegated immigration functions under the MOA. Ex. 15 at 166:21–25; Ex. 20 at 182:10-18.

Sheriff Mikesell's 287(g) Program

Under Sheriff Mikesell's 287(g) program, when Jail detention staff suspects that a person booked at the Jail on local or state charges might be subject to removal, they alert a 287(g) deputy. TCSO Policy 502: Inmate Reception, attached as Ex. 21, at T_1416–17; 30(b)(6) Dep. of Kevin Tedesco, attached as Ex. 22, at 55:22-56:7. The 287(g) deputy communicates ICE's interest (or lack thereof) in the inmate to their Jail detention staff peers. Ex. 19 at 178:13-21; 250:17-22; 252:16-25. When ICE wants to take custody, the 287(g) deputy prepares an I-247A, I-203, I-200 (signed by an ICE officer), or some combination of those forms, for the inmate's jail file. Ex. 1 at Resp. to Interrog. No. 2; Ex. 4 at 166:20-167:11. The Sheriff's Custody Manual states that the Jail

[8] Former 287(g) deputies Hammond, Madronio, and Smith have left the employ of the Jail.

will hold detainees when the jail file contains either an ICE administrative warrant or a Form I-203: "The Teller County Jail will hold persons with active Immigration Warrants of Arrests (I-200) and those ordered to detain (I-203) by ICE." Ex. 21 at T_1417. Jail detention staff notate that an inmate in TCSO custody is to be held for ICE on a form titled "detainer and warrant holds" that sits on the inside cover of the inmate's jail file. Ex. 4 at 112:20–113:20; Ex. 19 at 222:17-223:6; *see, e.g.*, TCSO Lazaro-Ramirez Records, attached as Ex. 23, at T_928.

When Jail records show an active ICE hold on an inmate who was initially booked on local or state charges, then even when the person becomes eligible for release under Colorado law—because they post bond, complete their sentence, or otherwise resolve their criminal case—the Jail does not permit them to leave. Ex. 22 at 40:7-22; Ex. 4 at 40:3-13; Ex. 19 at 222:17-223:11, 224:8-10; Ex. 21 at 163:12-14, 164:10-11. They do not have their street property returned to them. Ex. 4 at 40:3-13. The Jail does not proceed with its typical release procedures. Ex. 19 at 179:21–180:1. Instead, the Jail edits a computer record to indicate that the inmate now is being detained for civil immigration purposes, Ex. 6 at 29:9-21, and the Jail begins billing ICE for such detention pursuant to the IGSA. Ex. 23 at T_1213-16, 1218; TCSO Cordero-Reyes Records, attached as Ex. 24, at T_351; TCSO Perez-Velazquez Records, attached as Ex. 25, at T_738; TCSO Invoices, attached as Ex. 26, at T_1157–58, 1162–63. The inmate does not receive new clothing; they are not moved to a different location within the facility. Ex. 6 at 29:22-30:3. A 287(g) deputy may or may not serve an ICE administrative warrant before the inmate's status in the Jail's computer system is adjusted--if they ever personally serve the administrative warrant at all. Ex. 6 at 27:3–29:8; Ex. 4 at 53:4-8, 152:22-153:7, 158:16-160:9, 169:10–24; Ex. 19, 167:22-168:9, 245:2-4.

Individuals Arrested and Detained Based on ICE Forms Beyond When They Were Eligible for Release

Pursuant to Sheriff Mikesell's 287(g) program, the Jail has already arrested and detained several county inmates—based solely on suspected civil immigration violations—when they were eligible for release. In each case, Jail detention staff relied on some combination of the same ICE documents discussed in C.R.S. § 24-76.6-101-102 and the *Cisneros* ruling: Form I-247A, an administrative warrant, and Form I-203.

1. Manuel Cordero-Reyes

Late in the evening of November 1, 2019, a Teller County deputy arrested Manuel Cordero-Reyes on a traffic misdemeanor. Ex. 24 at T_362–63. He was booked into the Jail at 11:24 p.m. Bond was set at $1,000. *Id.* at T_359. In the middle of the night, his wife arrived to post bond. A non-287(g) Jail deputy sent a "Detained Alien Status Inquiry Form" to ICE, with a handwritten note that states "Somebody called for him. Plans on bonding out." *Id.* at T_390. The form indicates that release from custody is "imminent." *Id.*

A booking sheet in Mr. Cordero's jail file was printed at 3:51 a.m. that shows no holds or detainers. *Id.* at T_359. At 4:08 am, a deputy accepted $1000 cash from Claudia Calderon-Bustos, Mr. Cordero's wife, and issued a receipt. *Id.* at T_357-58. But Mr. Cordero was not permitted to sign his bond paperwork until almost 5 hours later. *Id.* at T_358. And when he finally signed, he was not allowed to leave the Jail. Ex. 19 at 167:16–21; Ex. 24 at T_351.

At some point after the Jail accepted the money for Mr. Cordero's bond, 287(g) deputy Laura Hammond communicated to the Jail detention staff that ICE was interested in him, Ex. 19 at 130:11–22, 139:20-25, 171:13–21, 176:19–21, and she placed a Form I-203 in his jail file. The form, titled "Order to Detain or Release Alien," was directed to the Sheriff of the Teller County

Jail and the "detain" box was checked. Ex. 24 at T_389; Ex. 19 at 166:8–12. A notation in the jail file says, "Detainer has been served," Ex. 24 at T_355; another says, "ICE hold." Ex. 24 at T_357.

Mr. Cordero finally signed his bond paperwork at 8:58 a.m. Ex. 24 at T_358. 287(g) deputy Hammond served him with an ICE administrative warrant and told him he was now being held for ICE. *Id.* at T_391; Ex. 19 at 162:9-13, 167:16–21, 169:7-10. By 10:53 am, the Sheriff's Office listed Mr. Cordero as an IGSA detainee. Ex. 24 at T_351. He remained at the Jail until November 10, when he was transferred to ICE's contract detention facility in Aurora. *Id*. Teller County billed ICE for the eight days it regarded Mr. Cordero as an IGSA detainee. Ex. 26 at T_1158.

2. Guillermo Perez-Velazquez

On July 23, 2020, a Teller County deputy conducted a traffic stop and arrested Guillermo Perez-Velazquez. Ex. 25 at T_752–53. After an initial adjustment, his bond was set at $1000. *Id.* at T_775; Perez-Velazquez Court Records, attached as Ex. 27, at P_396.

Before Mr. Perez posted bond, the Jail marked "ICE Hold" in his jail file. Ex. 25 at T_775. The file contains an ICE administrative warrant (I-200) and an I-247A Form, both dated July 24, signed by Teller County 287(g) deputy Dominic Madronio. *Id.* at T_778–79; Ex. 4 at 168:7–169:25. Madronio also signed ICE Form I-203, "Order to Detain or Release Alien," with the "detain" box checked. Ex. 25 at T_777; Ex. 4 at 160:10-25. The Jail considered Perez "checked out" of state custody on July 24 and, as of 1:15 pm on July 25, began billing ICE for his detention under the IGSA. Ex. 25 at T_738.

About three hours later, at 4:18 pm on July 25, Mr. Perez posted the $1000 bond on his pending criminal case. Ex. 25 at T_739; Ex. 4 at 158:19-160:9. Although it collected the bond money, the Jail did not release him.

Perez remained locked in the Jail until ICE transferred him to the GEO contract detention facility on July 31. Ex. 25 at T_738, 784; Ex. 4 at 133:20-134:1, 148:16-149:1, 173:2-14. Teller County billed ICE for the 6 days that it regarded Perez as an IGSA detainee. Ex. 26 at T_1163. The bond Perez posted required him to appear in court on August 3. Ex. 25 at T_739. On that date, a court entry states that "TCJ notified div this morning def was picked up by ICE." The court noted "Def posted bond and was picked up by ICE; counsel [sic] will need to figure out where def is." Ex. 27 at P_396.

3. Sergio Lazaro-Ramirez

In early 2022, Sergio Lazaro-Ramirez was a pre-trial detainee held in the Jail. On February 1, 2022, after dismissal of one charge and a PR bond on the other, he was eligible for release. Ex. 23 at T_877-84. But he was not released. *Id.* at T_1213–14. The jail continued to detain him on the basis of three ICE forms: an I-247A, administrative warrant and a Form I-203. *Id.* at T_929-32. A note in Mr. Lazaro's jail file makes clear that the ICE documents prevented his release on bond: "ICE Detainer Active. Inmate must see 287(g) officers Hammond or Smith after Lake County Bond is met." *Id.* at T_928. Another note, dated February 1, 2022, states "inmate served ICE warrant for arrest. Now in ICE custody after rel. from local charges." *Id.* at T_928. Mr. Lazaro remained locked in the Jail until February 18. Intake and Release Log, attached as Ex. 28. TCSO invoiced ICE for the 17 days it regarded Mr. Larazaro as an IGSA detainee. Ex. 23 at T_1216.

Sheriff Mikesell Will Continue to Arrest and Detain People on the Basis of ICE Forms Without this Court's Intervention

The operative 287(g) MOA will continue until terminated by either party. Ex. 17 at T_26. Sheriff Mikesell intends to continue the policies and practices described herein, unless there is a contrary ruling from this Court. Ex. 15 at 216:2-20.

ARGUMENT

As discussed in Part I below, Sheriff Mikesell's 287(g) program not only exceeds his authority as a sheriff of a statutory county; its central feature also violates the Colorado Constitution, which he is sworn to uphold, and the express command of a Colorado statute, C.R.S. § 24-76.6-102(2). Sheriff Mikesell cites the 287(g) agreement as a cure-all for these legal defects, but as discussed in Part II, the agreement confers upon local officers the power to exercise immigration functions *only* to the extent consistent with state law. In any event, relying on the agreement as the source of powers Sheriff Mikesell lacks in its absence is inconsistent with the Colorado Constitution, which does not permit Sheriff Mikesell to enter an intergovernmental contract to enlarge the powers of his office. For all these reasons, there is no basis in law—state or federal—to permit Sheriff Mikesell's 287(g) program.

I. Defendant Mikesell's 287(g) program violates Colorado law and exceeds his limited authority as sheriff of a statutory county.

A. By relying on ICE forms to arrest and detain inmates for civil immigration violations when they are eligible for release on their state and local charges, Sheriff Mikesell violates Colorado law.

A Colorado law enforcement officer cannot arrest an individual on the basis of a Form I-247A, an administrative warrant (Form I-200 or I-205), or Form I-203. C.R.S. §§ 24-76.7-101 to 102.[9] Directly flouting this clear statutory prohibition, Sheriff Mikesell authorizes his 287(g) deputies to rely on an ICE administrative warrant (Form I-200 or I-205) to arrest release-eligible inmates for alleged civil immigration violations. Ex. 1 at Resp. to Interrog. No. 2; Ex. 19 at 67:16–

[9] "A law enforcement officer shall not arrest or detain an individual on the basis of a civil immigration detainer request." C.R.S. 24-76.6-102(2). The statute's definition of "civil immigration detainer" expressly includes the titles of Form I-247A, Forms I-200 and I-205, and Form I-203. *Id*. § 101(1).

20, 167:12-168:9; Ex. 6 at 28:14-29:6. Under the program, 287(g) officers are trained to serve the Form I-200 or I-205 on an inmate in the Jail's custody "in order to transfer custody of the alien to ICE." Ex. 17 at T_28; Ex. 19 at 248:3-12. An inmate who is the subject of the Form I-200 or I-205 is not free to leave the Jail, even if they post bond or otherwise resolve their criminal case.[10] Ex. 1 at Resp. to Interrog. No. 2.

A Colorado law enforcement officer likewise cannot continue to detain a release-eligible individual on the basis of any of these three ICE forms. C.R.S. §§ 24-76.7-101 to 102. Under Colorado law, an inmate becomes eligible for release from custody when they post bond, complete their sentence, or otherwise resolve their criminal case. *Id.* § 101(2); *see also Cisneros* ruling, Ex. 13, at *40 (holding that release in such circumstances is constitutionally required). Nevertheless, the Jail does not release prisoners when they are eligible for release if they are subject to an active "ICE hold," Ex. 19 at 222:17-223:11, 224:8-10; Ex. 4 at 82:20–83:1; Ex. 22 at 40:7-22, which is triggered by ICE forms alone. Ex. 6 at 46:4-10, 48:4-5. A 287(g) deputy might indicate ICE's interest in the inmate through one or a combination of the Form I-247A, administrative warrant, or Form I-203, Ex. 6 at 28:15-17, and written policy states the Jail will hold an inmate whenever there is an administrative warrant or a Form I-203 in the file. Ex. 1 at Resp. to Interrog. No. 2; Ex. 21 at T_1417; Ex. 19 at 66:13-67:8.

The Jail's continued detention of release-eligible inmates on the basis of ICE forms in their jail file directly violates C.R.S. § 24-76.6-102(2). Indeed, this practice pursuant to the 287(g) program bears no material difference from Mikesell's pre-287(g) practice or from the practice of

[10] The 287(g) deputies not only effectuate these arrests in violation of C.R.S. § 24-76.6-102(2); they also do so regardless of their lack of POST certification.

the El Paso County Sheriff that was held to violate the Colorado Constitution in the *Cisneros* case. The only distinction under the 287(g) program is that the federal immigration authorities' request for continued detention of release-eligible inmates now arrives at the Jail via a TCSO officer (a 287(g) deputy) instead of an ICE officer. *See* Ex. 4 at 182:8-183:5.

Moreover, as the *Cisneros* court concluded and the Colorado legislature codified, such continued detention at the behest of immigration authorities constitutes a new arrest. *Cisneros ruling*, Ex. 13, at *15–16; C.R.S. § 24-76.6-102(1). As *Cisneros* noted, numerous state and federal courts recognize that holding a prisoner who would otherwise be released is the equivalent of a new arrest, a seizure for purposes of the Fourth Amendment and parallel state constitutional provisions such as Art. II, § 7, that must comply with the statutory and constitutional requirements for depriving persons of liberty. Ex. 13 at *15–16; *see, e.g.*, *Morales v. Chadbourne*, 793 F.3d 208, 217 (1st Cir. 2015) ("Because Morales was kept in custody for a new purpose after she was entitled to release, she was subjected to a new seizure for Fourth Amendment purposes—one that must be supported by a new probable cause justification").[11]

But the 287(g) deputies' arrests and the Jail's detentions in violation of C.R.S. § 24-76.6-102(2) are warrantless arrests and, therefore, presumptively unconstitutional. *See People v. Burns*, 615 P.2d 686, 688 (Colo. 1980). Under Colorado law, a "warrant" is "a written order issued by a judge of a court of record that commands the arrest of a particular person. C.R.S. § 16-1-104(18). None of the ICE documents relied on by the 287(g) deputies or their Jail detention staff peers is

[11] *See also, e.g.*, *Esparza*, 2019 WL 4594512, *4-5 (continued detention of persons after their release from state custody is a "new seizure"); *DeMarco*, 88 N.Y.S.3d at 526-27 (detention pursuant to an ICE detainer or warrant constitutes a new arrest and seizure); *Lunn*, 78 N.E.3d 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").

reviewed or signed by a judge. Ex. 1 at RFA Nos. 15–17.

Sheriff Mikesell bears the burden of demonstrating that the arrests fit an exception to the warrant requirement. *Burns*, 615 P.2d at 688. Colorado's longstanding arrest statute, C.R.S. § 16-3-102, authorizes exceptions to the warrant requirement when there is probable cause (or personal observation) of a crime:

> (1) A peace officer may arrest a person when:
> (a) He has a warrant commanding that such person be arrested; or
> (b) Any crime has been or is being committed by such person in his presence; or
> (c) He has probable cause to believe that an offense was committed and has probable cause to believe that the offense was committed by the person to be arrested.

C.R.S. § 16-3-102. But the warrantless arrests Sheriff Mikesell authorizes his deputies to carry out are for purely civil violations of federal immigration law, not for crimes.[12] Ex. 19 at 34:7–18, 39:12-24; *see Arizona v. United States*, 567 U.S. 387, 407 (2012) ("As a general rule, it is not a crime for a removable alien to remain present in the United States."). Sheriff Mikesell cannot meet his burden of fitting these warrantless arrests into a constitutional exception. Thus, in addition to violating C.R.S. 24-76.6-102(2), they also violate the Colorado Constitution: they constitute unreasonable seizures in violation of article. II, § 7, and, when bail is posted, the refusal to release also violates article. II, § 19. As *Cisneros* held, a Colorado sheriff violates these constitutional provisions "when he relies on ICE detainers or ICE administrative warrants of 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." *Cisneros* ruling, Ex. 13, at *42–43.

Sheriff Mikesell may have changed the form of his Jail's unlawful practices, but their

[12] Nor would a 287(g) deputy who lacked POST-certification as a peace officer even be authorized to arrest for suspected crimes.

function is the same: to continue detaining release-eligible prisoners to allow ICE to take them into custody. Ex. 15 at 153:8-14. Because he relies on ICE forms to arrest and detain individuals in his Jail who are otherwise free to leave, Sheriff Mikesell's 287(g) program violates Colorado law.

B. Sheriff Mikesell's 287(g) program exceeds his authority as sheriff of a statutory county.

Colorado law is crystal clear that counties and their officers have only those powers granted to them by the General Assembly. A county is merely a "political subdivision existing only for the convenient administration of the state government and created to carry out the will of the state." *Bd. of Cty. Comm'rs v. Hygiene Fire Prot. Dist.*, 221 P.3d 1063, 1068 (Colo. 2009). Because a county is "created by the legislature without reference to the will of its inhabitants," it has no "independent authority of any kind whatever." *Stermer v. La Plata Cty.*, 38 P. 839, 842 (Colo. Ct. App. 1895). Instead, its powers "are limited to those conferred by the General Assembly," 221 P.3d at 1068, while "[i]ts officers, although elected by its people, are virtually officers of the state, . . . charged with the administration and execution of the laws of the state," 38 P. at 842.[13]

Teller County was created by the Colorado Legislature. 1899 Sess. Laws 359 ("hereby establish[ing] . . . a county to be called the County of Teller"), and its residents have never adopted a home rule charter. As a statutory county, Teller not only derives its powers entirely from the General Assembly, but such powers are strictly construed, "bearing in mind that statutory governmental entities may only exercise those powers that are expressly conferred or exist by necessary implication." *S. Fork Water & Sanitation Dist. v. Town of S. Fork*, 252 P.3d 465, 469

[13] The relationship between Colorado counties and the state is an expression of Dillon's Rule, the principle that local governments "owe their origin to, and derive their powers and rights wholly from, the legislature." *City of Clinton v. Cedar Rapids & Mo. River R.R.*, 24 Iowa 455, 475 (1868).

(Colo. 2011); *see also Colo. Mining Ass'n v. Bd. of Cty. Comm'rs*, 199 P.3d 718, 735 (Colo. 2009) ("[A] statutory county . . . has only the powers that are expressly granted to it by the General Assembly and the implied powers necessary to exercise those that are expressly delegated."). "In a case involving a statutory county, the question is whether a single sovereign authority—the State of Colorado—has given the county the authority . . . in question." 199 P.3d at 735.

The powers of the sheriff and other county offices contemplated by article XIV of the Colorado Constitution are subject to the same inquiry.[14] Although the state charter creates these offices, their functions and duties are prescribed by the General Assembly. *State Bd. of Equalization v. Bimetallic Inv. Co.*, 138 P. 1010, 1011 (1914) ("Our constitution creates many offices, the duties of which it does not prescribe . . . . ;" instead, "sheriffs and county assessors[s'] . . . functions and duties were defined by statute."); *Skidmore v. O'Rourke*, 383 P.2d 473, 475 (Colo. 1963) ("County treasurers are constitutional officers, but have no constitutional duties to perform or constitutional authority to do any particular act . . . ."); *People v. Pitcher*, 61 Colo. 149, 167 (Colo. 1916) ("The office of County Assessor in each county was created by the Constitution, but the duties thereof were prescribed by legislative acts."); *Stermer*, 38 P.3d at 843 ("The duties of the county clerk are defined and prescribed by . . . statute.").

Like his sister county officers, "the power possessed by the sheriff is conferred by the statutes; and no power exists in him except such as is expressly so conferred, or may be fairly implied." *McArthur v. Boynton*, 74 P. 540, 541 (Colo. 1903). In *People v. Buckallew*, 848 P.2d 904 (Colo. 1993), the Colorado Supreme Court announced that "the test for determining whether

[14] *See* Colo. Const. art. XIV, § 8 (providing for the offices of county sheriff, county clerk and recorder, county coroner, county treasurer, county attorney, county surveyor, and county assessor).

a power is implicit within a sheriff's express authority is whether or not the sheriff can fully perform his functions without the implied power." *Id.* at 909; *see also* C.R.S. § 24-76.6-102(3) ("The authority of law enforcement is limited to the express authority granted in state law.").

Sheriff Mikesell cannot identify any statutory basis for his 287(g) program.[15] The Sheriff's claim of state-law authority invokes only his statutory duty to "keep and preserve the peace." C.R.S. § 30-10-511. Ex. 3 at Countercl. ¶¶ 5, 49; Ex. 1 at Resp. to Interrog. No. 2**.** But that duty merely reflects the role of sheriffs as local law enforcement officers, which they fulfill by "by issuing summons and making arrests" to enforce the criminal law. Colo. Att'y Gen. Formal Op. No. 99-7, 1999 Colo AG. LEXIS 4, at *9 (Sept. 8, 1999). In any event, Sheriff Mikesell has not produced any evidence showing that the 287(g) program is in any way necessary to keep and preserve peace in Teller County.

The only asserted contribution of the 287(g) program to peace in Teller County stems from the continued confinement of potentially removeable county inmates who are eligible for release on their Colorado charges—the very mechanism that expressly violates Colorado law.[16] But whether Sheriff Mikesell believes that practice makes Teller County safer is not the litmus test for

[15] Unlike at least eight other states, Colorado has not authorized local law enforcement to participate in 287(g) agreements. *See, e.g.*, Ala. Code. § 31-13-4; Ga. Code Ann. § 35-6A-10; Mo. Ann. Stat. § 43.032; N.C. Gen. Stat. Ann. § 128-1.1; Okla. Stat. Ann. tit. 74, § 20j; S.C. Code Ann. § 23-6-60; Tenn. Code. Ann. § 50-1-101; Utah Code Ann. § 67-5-28; Vt. Stat. Ann. tit. 20, § 4652. On the contrary, the legislature has highlighted the danger of undermining "public trust" when law enforcement agencies "play a role in enforcing federal immigration laws." An Act Concerning Local Government Involvement with Federal Immigration Issues, 2013 Colo. Sess. Laws 477.

[16] The Sheriff characterizes this continued custody at the request of ICE as the "fundamental law enforcement function[] authorized by the 287(g) agreement," Resp. to Pls.' Sur-Reply, attached as Ex. 29, at 3; Ex. 3 at Countercl. ¶¶ 27–29; Ex. 17 at T_28. He has never suggested, let alone produced evidence, that the 287(g) program would be of any significance to the preservation of peace in Teller County without that "fundamental" function.

its legality. His general statutory duty to keep and preserve the peace cannot be extended to justify violating the specific prohibitions of C.R.S. § 24-76.6-102.[17]

Finally, without specific authorization from the legislature, it does not matter whether the Sheriff—or this Court—considers the 287(g) program to be good public policy. Broader powers cannot be "merely assumed by [the sheriff]; nor can they be created by the courts in the proper exercise of their judicial functions. No consideration of public policy can properly induce a court to reject the statutory definition of the powers of an officer." *Skidmore*, 383 P.2dd at 475.

Sheriff Mikesell's 287(g) program is not authorized by any express or implied grant of power under state law. More than that, its main and motivating feature—the continued detention, for purposes of civil immigration enforcement, of persons who would otherwise be released—is clearly prohibited by state statute and violates the Colorado Constitution.

II. The 287(g) Agreement cannot authorize what Colorado law forbids.

A. The 287(g) Agreement's authorizing statute requires 287(g) officers to comply with state law.

The 287(g) agreement is not a loophole that allows Sheriff Mikesell to evade the limits of his state-law authority. Just the opposite: the federal statute authorizing 287(g) agreements is explicit that local officers deputized thereunder must comply with state and local law while performing delegated immigration-related functions:

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

[17] Indeed, any affirmative statutory duty or power conferred upon the Sheriff must be read together with C.R.S. § 24-76.6-102 to constitute the General Assembly's directive that the Sheriff exercise his duties *without* unlawfully arresting and detaining inmates for civil immigration purposes.

> function at the expense of the State or political subdivision and *to the extent consistent with State and local law*.

8 U.S.C. § 1357(g)(1) (emphasis added).[18] As many courts have concluded, this statute means what it says.[19] A 287(g) agreement cannot be read to convey upon deputized state or local law enforcement officers any power to violate state or local law.

Unequivocally, under the 287(g) agreement's authorizing statute, Sheriff Mikesell's 287(g) deputies cannot carry out their delegated immigration enforcement functions at the Jail if doing so is *in*consistent with Colorado law. *Id.* Sheriff Mikesell's reliance on the 287(g) agreement to justify his claim that his 287(g) deputies are exempt from the requirements of Colorado law is therefore plainly misplaced.

1. 287(g) deputies are not "federal officers" who are exempt from Colorado law.

Sheriff Mikesell asks this Court to declare that 287(g) officers "do not act as local or state officers" but instead "act as federal officers when they are performing functions under the 287(g) agreement." Ex. 3 at Countercl. 14. This characterization is both wrong and beside the point.

As discussed above, under the INA itself, a 287(g) deputy is "an officer or employee of the State or subdivision," who is permitted to "carry out" a "function of an immigration officer," at the "expense of the State or political subdivision and to the extent consistent with State and local law." 8 U.S.C. § 1357(g)(1). There is no support in the statute or in

[18] The operative 287(g) agreement and its predecessor both make clear that they are entered pursuant to 8 USC § 1357(g). Ex. 16 at T_1; Ex. 17 at T_21.

[19] *See, e.g.*, *Gonzalez v. ICE*, 2019 WL 4734579, at *17 (C.D. Cal. Sept. 27, 2019); *Lopez-Flores v. Douglas Cty.*, 2020 U.S. Dist. LEXIS 94847, at *12 (D. Or. May 30, 2020); *Esparza*, 2019 WL 4594512, at *26; *see also Lunn*, 78 N.E.3d at 1158–60.

the MOA for the notion that the 287(g) deputies metamorphose into federal officers when performing functions under a 287(g) agreement. On the contrary, the statute expressly directs that except for purposes of determining the individual 287(g) deputies' immunity from suit, 8 U.S.C. § 1357(g)(8), compensation for injury, and tort claims, "an officer or employee of a State or political subdivision of a State performing functions under this subsection *shall not be treated as a Federal employee for any purpose*." 8 U.S.C. § 1357(g)(7) (emphasis added). The MOA itself, as well as the letters of authorization the 287(g) officers receive from ICE, refute Sheriff Mikesell's unsupported claim that his deputies are "federal officers" who are not bound by Colorado law. Ex. 17**;** ICE Letters of Authorization, attached as Ex. 30.

In any event, whether a 287(g) deputy "acts as a federal officer" when she performs immigration functions under the agreement is irrelevant. As described above, under the INA, she cannot exercise those functions if doing so is inconsistent with state law. Nor may the Jail comply with her requests, represented by an ICE form that is not signed, reviewed, or authorized by a judge, to continue to detain release-eligible inmates for alleged civil immigration violations. Sheriff Mikesell violates Colorado law by authorizing both practices.

B. Sheriff Mikesell cannot enter into a contract to enlarge the powers of his office or to exempt himself from having to comply with state law.

Colorado law restricts intergovernmental contracts and cooperation—including with the United States—to those that "provide any function, service, or facility *lawfully authorized to each of the cooperating or contracting units.*" Colo. Const. art. XIV, § 18(2)(a) (emphasis added); *see also* C.R.S. §§ 29-1-201 to 207 (implementing the constitutional provision). Under these

provisions, Sheriff Mikesell may only contract with the federal government to provide functions, services, or facilities that his office is independently authorized to provide in Teller County. *See Durango Transp. Inc., v. City of Durango*, 824 P.2d 48 (Colo. App. 1991) (holding that the phrase "lawfully authorized to each" means that each party to an intergovernmental contract must have the authority to perform the subject activity within its jurisdictional boundaries). Not only does Sheriff Mikesell lack the authority to arrest or detain individuals for alleged civil immigration violations in Teller County; a Colorado statute expressly prohibits him and his deputies from doing so. C.R.S. § 24-76.6-102. Because Sheriff Mikesell does not have authority under state law to arrest or detain individuals for alleged civil immigration violations in Teller County, he cannot derive such power from his 287(g) agreement with ICE.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court enter summary judgment in favor of Plaintiffs and against Sheriff Mikesell on all claims and counterclaims.

Date: December 30, 2022

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 30, 2022, a true and correct copy of the foregoing was filed and served electronically through the E-Filing System pursuant to C.R.C.P. 121, § 1-26(3) upon counsel of record.

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