

<p>DISTRICT COURT, EL PASO COUNTY, COLORADO  270 S. Tejon Street  Colorado Springs, Colorado 80901</p>	<p>DATE FILED: December 28, 2018 3:08 PM  FILING ID: 9667C0DEF3C44  CASE NUMBER: 2018CV32870</p>
<p><b>Plaintiff:</b></p> <p>Saul Cisneros,</p> <p>v.</p> <p><b>Defendant:</b></p> <p>Bill Elder, in his official capacity  as Sheriff of El Paso County, Colorado</p>	<p>▲COURT USE ONLY▲</p>
<p><b>Attorneys For Plaintiff:</b></p> <p>Stephen G. Masciocchi, # 19873  Kyriaki Council, # 51157  HOLLAND &amp; HART, LLP  555 17<sup>th</sup> Street, Suite 3200  Denver, CO 80202  Telephone: 303-295-8000  Fax: 303-295-8261  <a href="mailto:smasciocchi@hollandhart.com">smasciocchi@hollandhart.com</a>  <a href="mailto:kcouncil@hollandhart.com">kcouncil@hollandhart.com</a></p> <p>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  <a href="mailto:msilverstein@aclu-co.org">msilverstein@aclu-co.org</a>  <a href="mailto:ajahanian@aclu-co.org">ajahanian@aclu-co.org</a></p>	<p>Case Number: 2018CV32870</p> <p>Div.: 8</p> <p>Ctrm: W550</p>
<p style="text-align: center;"><b>PLAINTIFF'S RESPONSE IN OPPOSITION TO  DEFENDANT'S MOTION TO DISMISS</b></p>	

## I. INTRODUCTION

In moving to dismiss Plaintiff's false imprisonment claim for lack of jurisdiction, the Defendant, Sheriff Bill Elder (1) misapplies the applicable immunity provision of the Colorado Governmental Immunity Act (CGIA or the Act) and (2) overlooks that, because he is being sued in his official capacity, Mr. Cisneros had no need to allege willful and wanton conduct.

*First*, under the CGIA, a public entity waives sovereign immunity for injuries suffered by pretrial detainees in connection with the operation of a jail. Sheriff Elder injured Plaintiff Saul Cisneros, a pretrial detainee, when—as this Court has ruled—he unlawfully detained Mr. Cisneros in the El Paso County Jail for over three months, in violation of the Sheriff's duty to release Mr. Cisneros when he posted bond. Mr. Cisneros's claim against Sheriff Elder thus falls within the CGIA's waiver of immunity for injuries resulting from the operation of a jail.

The Sheriff's related argument—that Mr. Cisneros cannot sue him in tort now that he has been released—is completely unfounded. Contrary to the Sheriff's assertion, the habeas corpus statute is not Mr. Cisneros's exclusive remedy; it is but one, non-exclusive remedy available to a plaintiff like Mr. Cisneros who has been unlawfully imprisoned. This conclusion is underscored by the CGIA's express waiver of the Sheriff's tort immunity pertaining to the operation of a jail.

*Second*, because Sheriff Elder is being sued only in his official capacity as the El Paso County Sheriff, Mr. Cisneros need not allege that the Sheriff's conduct was willful and wanton. Under the CGIA, a plaintiff must allege willful and wanton conduct only when he asks a court to impose individual liability on a public employee. An official-capacity suit like this one is a suit against a public entity, not a public employee. And where, as here, sovereign immunity does not bar a suit against a public entity, the CGIA treats the entity like any other private litigant. The Sheriff is therefore subject to liability for false imprisonment like any private party, including for mere negligence. The Court should therefore deny the Sheriff's motion.

## II. FACTUAL BACKGROUND

On November 24, 2017, Plaintiff Saul Cisneros was booked into the El Paso County Criminal Justice Center (“El Paso County Jail” or “the Jail”). Compl., ¶ 11. He was charged with two misdemeanor offenses, and the court set his bond at \$2,000. *Id.*, ¶¶ 11–12. On November 28, 2017, Mr. Cisneros’s eldest daughter posted the bond and obtained a receipt. *Id.* Sheriff Elder, however, did not release Mr. Cisneros. *Id.*, ¶¶ 13–17. Instead, under his policies and practices at the time, the Sheriff held Mr. Cisneros on an indefinite “ICE hold,” because U.S. Immigration and Customs Enforcement (“ICE”) had sent the Jail a detainer and an administrative warrant requesting that the Sheriff continue to hold Mr. Cisneros. *Id.*, ¶¶ 13–17, 37–50.

Mr. Cisneros and one other plaintiff then sued Sheriff Elder in his official capacity for declaratory, injunctive, and mandamus relief on behalf of themselves and a class of similarly situated persons. Complaint, *Cisneros v. Elder*, Case No. 18CV30549 (District Court, El Paso County); *see People v. Sa’ra*, 117 P.3d 51, 55–56 (Colo. App. 2004) (“A court may take judicial notice of the contents of court records in a related proceeding.”); *see also* Mot. at 1-2 (relying on complaint and amended complaint in Case No. 18CV30549). On March 19, 2018, this Court issued a preliminary injunction enjoining the Sheriff from relying on ICE immigration detainers or ICE administrative warrants as grounds for refusing to release plaintiffs from custody when they post bond. Order Granting Plaintiffs’ Motion for Preliminary Injunction, Case No. 18CV30549. The Court ruled that, if plaintiffs posted bond, Sheriff Elder must release them pending resolution of their criminal matters. *Id.* at 13. After Mr. Cisneros’s eldest daughter again posted bond on March 20, 2018, he was finally released. Compl. ¶ 53.

On September 27, 2018, Mr. Cisneros and his co-plaintiff moved for summary judgment, a declaratory judgment, mandamus relief, and a permanent injunction in Case No. 18CV305549. This Court granted the motion on December 6, 2018. Order Granting Motion for Summary

Judgment, Case No. 18CV30549. The Court then entered a judgment declaring that Sheriff Elder exceeded his authority under Colorado law and violated the Colorado Constitution by failing to release prisoners who post bond, complete their sentence, or otherwise resolve their criminal cases. *See* Judgment, Case No. 18CV30549, ¶¶ A, D.

### **III. STANDARD OF REVIEW**

Sheriff Elder correctly articulates the standard of review for a motion to dismiss on governmental-immunity grounds. Mot. at 3. But the Sheriff misapplies the standard. Although the Court need not treat the facts alleged by the plaintiff as true, as it would under C.R.C.P. 12(b)(5), the Sheriff does not dispute any fact set forth in Mr. Cisneros’s complaint. Given this, the operative complaint is not “under a factual attack,” and as such, the complaint’s allegations retain their “presumptive truthfulness.” *Medina v. State*, 35 P.3d 443, 452 (Colo. 2001) (quoting Moore’s Federal Practice § 12.30[4] (3d ed. 1997)). Because the Sheriff does not dispute the facts presented in the complaint, this Court should apply the law to, and base its conclusions on, those undisputed facts. *See id.*

### **IV. ARGUMENT**

#### **A. Mr. Cisneros’s Claim Pertains To The Operation Of A Jail Under The Colorado Governmental Immunity Act.**

##### **1. Mr. Cisneros has adequately alleged that the Sheriff’s conduct falls within the CGIA’s express waiver for the operation of a jail.**

Mr. Cisneros has sufficiently alleged that his injuries resulted from Sheriff Elder’s operation of a jail and therefore fall within the exception to CGIA immunity articulated in C.R.S. § 24-10-106(1)(b). “Because governmental immunity under the CGIA is in derogation of Colorado’s common law, we narrowly construe the CGIA’s immunity provisions, and as a logical corollary, we broadly construe the CGIA’s waiver provisions.” *Daniel v. City of Colo.*

*Springs*, 327 P.3d 891, 895 (Colo. 2014). Properly and broadly construed, the section 106(1)(b) waiver applies here.

Under the CGIA, sovereign immunity is waived in an action for injuries resulting from “the operation of any . . . jail” by a public entity. C.R.S. § 24-10-106(1)(b). “Operation” means “the act or omission of a public entity or public employee in the exercise or performance of the powers, duties, and functions vested in them by law with respect to the purposes of any . . . jail.” C.R.S. § 24-10-103(3)(a).

As the Sheriff notes, Mot. at 4-5, “sovereign immunity is waived . . . if the activity at issue relates to the facility’s purpose.” *Pack v. Arkansas Valley Correctional Facility*, 894 P.2d 34, 37 (Colo. App. 1995) (italics omitted). Importantly, section 24-10-106(1)(b)’s waiver of immunity applies to claimants who, like Mr. Cisneros during his detention, are incarcerated but not yet convicted of the crime for which they are being held, if the claimant suffered an injury due to negligence. C.R.S. § 24-10-106(1.5)(b).

The Sheriff’s unlawful detention of Mr. Cisneros directly falls within this waiver of immunity. As the complaint alleges, and as this Court has held, the Sheriff had a mandatory duty to release Mr. Cisneros from the Jail when his daughter posted bond. *See* Compl. ¶¶ 57–65; Order Granting Summary Judgment, Case No. 18CV30549, at 30 (concluding that “Sheriff Elder has a clear legal duty to release Plaintiffs when his state-law authority to confine them has ended”). Indeed, the Sheriff acknowledges that Mr. Cisneros “specifically alleges he was held without valid legal authority.” Mot. at 5. The failure to release Mr. Cisneros constituted an “act or omission” in violation of the “duties . . . vested in [Sheriff Elder] by law with respect to the purposes of” the jail. C.R.S. § 24-10-103(3)(a).

Yet the Sheriff insists he is somehow immune from Mr. Cisneros’s false imprisonment claim under the CGIA because the complaint “does not allege Mr. Cisneros suffered an injury by way of *operation* of the jail.” Mot. at 5 (emphasis in original). According to the Sheriff, the statutory purpose of a jail is “detention, safekeeping, and confinement of persons *lawfully* committed.” *Id.* (quoting C.R.S. § 17-26-101) (emphasis in original). The Sheriff claims he is immune because Mr. Cisneros has alleged he was held *unlawfully*, and thus, his detention was not related to the facility’s purpose—lawful detention. *See id.*

This argument substitutes semantics for statutory interpretation. As “keeper” of the El Paso County Jail, Sheriff Elder has a duty to safekeep persons “duly committed” to the jail. C.R.S. § 17-26-102 to 103. A sheriff may not release such a person “without lawful authority.” *Id.*, § 17-26-103. Deciding whether to release an inmate on bond and processing a bond payment thus relates to the “operation” of a jail.

Mr. Cisneros contends that the Sheriff had the authority—indeed, the legal obligation—to release him once his daughter posted bail. Compl. ¶¶ 57–65. By refusing to release Mr. Cisneros when he had the power and duty to do so, the Sheriff committed an “act or omission . . . in the exercise or performance of the powers, duties, and functions vested in [him] by law with respect to the purposes of any . . . jail.” C.R.S. § 24-10-103(3)(a). By choosing to continue holding Mr. Cisneros after his daughter paid his bond, the Sheriff waived his immunity.

## **2. Mr. Cisneros’s remedy was not limited to habeas corpus.**

The Sheriff next asserts that if any jail inmate wishes to challenge the legal authority of his or her detention, the inmate must do so while he or she is in custody, and the appropriate mechanism is a writ of habeas corpus under C.R.S. § 13-45-101. Mot. at 5. This argument has no legal basis.

The Sheriff cites no authority supporting the proposition that prisoners must sue while they are still in custody<sup>1</sup> or that their sole remedy for improper detention is a writ of habeas corpus. Section 13-45-101(1), on which he relies, Mot. at 5, merely provides that “it is lawful,” i.e., *permissible*, for a person detained for “a criminal or supposedly criminal matter” to apply for a writ. Here, the Sheriff detained Mr. Cisneros because ICE believed he was removable from the United States—a civil, not criminal, matter. Order Granting Motion for Summary Judgment, Case No. 18CV30549, at 17. And the statute does not say that a writ is the person’s exclusive remedy. A writ of habeas corpus is simply one form of civil action in which a prisoner asks a court to determine “whether a person is lawfully detained.” *Duran v. Price*, 868 P.2d 375, 377 (Colo. 1994). But Mr. Cisneros has already challenged his detention, and this Court has already held that Mr. Cisneros was unlawfully detained, all without invoking the habeas corpus statute. This alone shows that habeas corpus was not his exclusive remedy.

Just as nothing in the habeas corpus statute or caselaw suggests that a wrongfully detained prisoner cannot sue a jail after he is released, the CGIA likewise does not foreclose such relief. To the contrary, the CGIA provides an express remedy sounding in tort pertaining to the operation of a jail. In *Masters v. Castrodale*, 121 P.3d 362, 365 (Colo. App. 2005), a formerly incarcerated woman sued a city police officer and county deputy sheriff for false imprisonment. Though the *Masters* court ultimately determined the plaintiff failed to give the defendants proper notice of her claims under the CGIA, the court never suggested that her false imprisonment claim was not a cognizable action under the CGIA. *See id.* at 365–66.

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<sup>1</sup> Under the CGIA, tort claimants must file a notice of claim within 180 days of the injury and then wait until the entity denies the claim, or until 90 days after filing the notice, before commencing an action. C.R.S. § 24-10-109(1) & (6). The Sheriff does not explain how most pretrial detainees could comply with these jurisdictional prerequisites yet still file suit while remaining in custody.

False imprisonment is a valid legal claim for those whose freedom of movement has been restricted absent legal justification. “Absent any legal justification for restricting another’s freedom of movement, each of the three following elements must be proven to sustain a claim for false imprisonment: (1) The defendant intended to restrict plaintiff’s freedom of movement; (2) plaintiff’s freedom of movement was restricted for a period of time . . . by an act of defendant; and (3) plaintiff was aware that his freedom of movement was restricted.” *Goodboe v. Gabriella*, 663 P.2d 1051, 1055–56 (Colo. App. 1983). Because Mr. Cisneros posted bond, he was entitled to release in November 2017. The Sheriff’s decision to continue detaining him was not legally justified, thus allowing Mr. Cisneros to pursue a claim for false imprisonment. *See, e.g., C.F.C. v. Miami-Dade County*, -- F.Supp.3d --, 2018 WL 6616030, at \*19 (S.D. Fla. Dec. 14, 2018) (denying motion to dismiss state-law false imprisonment claim against county, where claim was based on county’s alleged unlawful holding of the plaintiff under an ICE detainer); *Creedle v. Miami-Dade County*, 2018 WL 6427713, at \*26 (S.D. Fla. Nov. 9, 2018) (same); *Parada v. Anoka Cty.*, 332 F. Supp. 3d 1229, 1246 (D. Minn. July 30, 2018) (same).

Finally, as noted in *Pack*, one basic purpose of the CGIA is “to permit injured claimants to seek redress for injuries caused by a public entity in specified circumstances.” 894 P.2d at 36–37. Here, Mr. Cisneros was held in a jail without legal authority for over three months due to the Sheriff’s illegal policies and practices, and as a result, he suffered grave, irreparable injuries. *See Order Granting Summary Judgment*, Case No. 18CV30549, at 29 (“Few injuries are more real, immediate, or irreparable than being deprived of one’s personal liberty.”). But the Sheriff’s argument, if accepted, would deprive individuals like Mr. Cisneros, who have been unlawfully imprisoned, of any compensation whatsoever from the government. Nothing in the language or underlying policy of the CGIA supports this draconian conclusion.



**B. Mr. Cisneros Is Not Suing Sheriff Elder In His Individual Capacity; Therefore, He Had No Need To Allege Willful And Wanton Conduct.**

Contrary to Sheriff Elder's contention, Mr. Cisneros need not allege "willful and wanton" conduct, because this suit is against the Sheriff in his official capacity, not as an individual public employee. In this type of suit, no such allegation is required.

The CGIA permits suits against both public entities and public employees. *See* C.R.S. § 24-10-106(1)(a), (3). Here, Mr. Cisneros did not sue the Sheriff as a public employee in his individual capacity. Rather, he sued the Sheriff in his official capacity, i.e., he sued the *sheriff's office*, which is the relevant governing body and the relevant public entity. "If the action is determined to be against the Sheriff in his official capacity, it is effectively an action against his office, and the immunity principles applicable to suits against the state or public entities apply." *Carothers v. Archuleta*, 159 P.3d 647, 652 (Colo. App. 2006). Because the complaint "clearly specif[ies]" that Sheriff Elder is being sued in his official capacity, the Court need not further examine the complaint to determine how the Sheriff is being sued. *Id.* at 652–53; Compl ¶ 9.

"[W]aivers of immunity for acts or omissions that are willful and wanton only apply to public employees, not to public entities." *Gray v. Univ. of Colo. Hosp. Auth.*, 284 P.3d 191, 196 (Colo. App. 2012). By contrast, where, as here, "sovereign immunity is not a bar under section 24-10-106, liability of the public entity shall be determined in the same manner as if the public entity were a private person." C.R.S. § 24-10-107 (2018). "The language of this section evinces an intent by the General Assembly to treat a public entity the same as a private litigant." *Nguyen v. Reg'l Transp. Dist.*, 987 P.2d 933, 935 (Colo. App. 1999).

Having been sued in his official capacity for an injury that falls within an express waiver of sovereign immunity, the Sheriff is subject to liability like any private defendant. Further, the applicable waiver of immunity requires a claimant to prove only that he "suffered an injury due

to negligence.” C.R.S. § 24-10-106(1.5)(b). The Sheriff does not dispute that Mr. Cisneros has alleged that the Sheriff acted at least negligently in imprisoning Mr. Cisneros at ICE’s request beyond the time permitted by Colorado law. Mr. Cisneros has thus alleged an injury that falls squarely within an express exception to sovereign immunity.

## V. CONCLUSION

For the above-stated reasons, plaintiff Cisneros respectfully requests that the Court deny the Sheriff’s Motion to Dismiss.

Respectfully submitted this 28th day of December 2018.

*s/Stephen G. Masciocchi*

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## CERTIFICATE OF SERVICE

I certify that on December 28, 2018, I served a copy of the foregoing document to the following by Colorado Courts E-Filing:

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