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Colorado Court of Appeals 2 East 14th Avenue Denver, CO 80203	
District Court, El Paso County, Colorado Honorable Judge Eric Bentley District Court Case No. 2018CV32870	
Appellee/Plaintiff: Saul Cisneros v. Appellant/Defendant: Bill Elder, in his official capacity as Sheriff of El Paso County, Colorado.	▲ COURT USE ONLY ▲
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ANSWER BRIEF

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 or C.A.R. 28.1, and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with the applicable word limits set forth in C.A.R. 28(g) or C.A.R. 28.1(g).

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I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 or 28.1, and C.A.R. 32.

s/Stephen G. Masciocchi
Signature of attorney or party

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INTRODUCTION

El Paso County Sheriff Bill Elder refused to release prisoners who posted bonds, completed their sentences, or otherwise resolved their criminal cases, because federal immigration authorities asked him to keep the prisoners in custody. In this case, a court granted bail to Saul Cisneros, and his daughter posted bond. Yet Sheriff Elder held Cisneros illegally for almost four months based on the Sheriff's claimed authority to jail persons suspected of civil violations of federal immigration law. As the district court held in a companion case pending in a separate appeal before this Court, that authority does not exist.

Cisneros thus sued the Sheriff for false imprisonment. The Sheriff asserted sovereign immunity under the Colorado Governmental Immunity Act (CGIA), even though the CGIA waives immunity relating to the "operation of any . . . jail" so long as the claimant can "show injury due to negligence."

Cisneros's claim that the Sheriff continued holding him in jail when he was entitled to release plainly involved the operation of a jail. He adequately alleged that Elder's conduct was knowing and intentional, which subsumes negligence. And he had no need to allege willful and wanton conduct, because he sued Elder only in his official capacity, based on the sheriff's office's policies and practices. The CGIA's waiver of immunity thus applies.

The Sheriff forfeited many of his appellate arguments, which are based on the merits, not subject matter jurisdiction, and the arguments fail in any event. The Court should therefore affirm the district court's ruling that Cisneros's claim falls within the CGIA's waiver of immunity relating to the operation of a jail.

ISSUES PRESENTED

1. C.R.S. § 24-10-106(1)(b) waives sovereign immunity for the "the operation of any . . . jail." The Sheriff refused to release Cisneros from jail even though a court had set bail and Cisneros's daughter posted the required bond. Did the Sheriff's act involve the operation of a jail?

2. Under C.R.S. § 24-10-106(1.5)(b), the waiver of immunity in section 106(1)(b) applies if one can "show injury due to negligence." Cisneros alleged that the Sheriff acted intentionally and knowingly. Did this allegation satisfy the negligence requirement, because (a) intent and knowledge subsume negligence, (b) the legislative history shows that the Legislature intended to require *at least* negligence, or (c) CGIA waivers must be broadly construed?

3. Under C.R.S. § 24-10-118(2), public employees are immune from suit unless their acts were willful or wanton. Cisneros sued Elder only in his official capacity—he sued the *sheriff's office*. Is section 118(2) inapplicable because Cisneros sued a public entity, not a public employee?

STATEMENT OF THE CASE

A. Nature Of The Case

Immigration enforcement officers employed by Immigration and Customs Enforcement (ICE), an agency within the Department of Homeland Security (DHS), ask the El Paso County Sheriff's Office (EPSO) to continue to detain prisoners after state-law authority to detain has ended. CF, p 3, ¶ 19. EPSO complied with such a request pertaining to Saul Cisneros.

Cisneros had been granted bail and his daughter had posted bond, but EPSO deputies nonetheless detained him for nearly four months. Cisneros claimed that EPSO had no authority to do so. He thus sued the El Paso County Sheriff in his official capacity for false imprisonment. The merits of Cisneros's claim are not at issue. Instead, this is an interlocutory appeal from the district court's ruling that his claim falls within a CGIA waiver of immunity.

B. Statement Of Facts

ICE officers ask EPSO to detain prisoners after authority to detain has ended under Colorado law. CF, p 3, ¶ 19. The requesting documents are three standard ICE forms: (1) an immigration detainer, ICE Form I-247A; (2) an administrative warrant, ICE Form I-200; and (3) a tracking form, ICE Form I-203, none of which is reviewed, approved, or signed by a judicial officer. CF, p 3, ¶ 21.

1. Immigration Detainer, ICE Form I-247A

An immigration detainer, Form I-247A, identifies a prisoner being held in a local jail and asserts that ICE believes the prisoner may be removable from the United States. CF, p 3, ¶ 22. It asks the jail to continue to detain that prisoner for an additional 48 hours after they would otherwise be released, to allow time for ICE to take the prisoner into federal custody. CF, p 3, ¶ 22. Detainers represent mere requests from the federal government, not commands. CF, p 4, ¶ 26.

2. Administrative Warrant, ICE Form I-200

ICE sends an administrative warrant, Form I-200, to accompany the I-247A detainer request. CF, p 4, ¶ 27. An administrative warrant names a prisoner, asserts that ICE has grounds to believe the prisoner is removable, and directs federal immigration officers to arrest the person. CF, p 4, ¶ 27. ICE warrants aren't reviewed, approved, or signed by a judge or judicial officer. CF, p 4, ¶ 28. ICE warrants may be executed or served only by certain immigration officers who have received specialized training in immigration law. CF, p 4, ¶ 28.

3. The IGSA and Tracking Form, ICE Form I-203

DHS and El Paso County signed an Intergovernmental Services Agreement (IGSA), a contract for housing ICE detainees. CF, p 4, ¶ 29. It provided that federal detainees in ICE's custody would be temporarily housed in the Jail at ICE's

expense. CF, p 4, ¶¶ 30-32. The contract contemplated that ICE personnel would bring detainees to the Jail for temporary housing. CF, p 4, ¶ 32. It applied only to persons already in ICE officers' physical custody when they arrived at the Jail. CF, p 4, ¶ 32. Cisneros wasn't held under the IGSA. CF, p 5, ¶ 36.

ICE uses Form I-203 to track detainees housed at the Jail. CF, p 4, ¶ 33. Per ICE detention standards, a Form I-203 must accompany every ICE detainee who is brought into an ICE detention facility. CF, p 4, ¶ 33. Although Form I-203 bears the title "Order to Detain or Release Alien," it is not reviewed, authorized, approved, or signed by a judge or judicial officer. CF, p 5, ¶ 35. An I-203 Form confers no authority on a Colorado sheriff to initiate custody of an individual who is not already in federal custody. CF, p 5, ¶ 35.

4. EPSO's Practices during Cisneros's unlawful detention

During Cisneros's detention, EPSO's policy and practice was to refuse to release prisoners who had posted bond, completed their sentences, or resolved their criminal cases, when ICE had faxed or emailed an immigration detainer (I-247A) and an administrative warrant (I-200). CF, p 5, ¶ 37. EPSO used the term "ICE Hold" to indicate the following: (1) For the particular prisoner, ICE had sent Form I-247A and/or I-200; (2) EPSO would contact ICE to notify it of the prisoner's release date and time; and (3) EPSO would continue to hold the prisoner for ICE if

they posted bond, completed their sentence, or otherwise resolved their criminal charges. CF, p 5, ¶ 39. Even when a prisoner didn't have an ICE Hold, the Sheriff's written policies required deputies to delay processing bond paperwork when the prisoner was a "foreign born national." CF, p 5, ¶ 40.

Jail inmates were transferred to what EPSO termed "IGSA holds" when state-law authority to hold them ended and ICE had sent an I-203 in addition to an I-200 and/or I-247A. CF, p 6, ¶ 44. This change in the characterization of the inmates' status did not require ICE officers to personally appear to take physical custody of the inmates. CF, p 6, ¶ 44.

5. EPSO's unlawful detention of Saul Cisneros

EPSO applied its ICE Hold policy to Saul Cisneros. On November 24, 2017, Cisneros was booked into the Jail and charged with two misdemeanors. CF, p 3, ¶ 11. The court set his bond at $2,000. CF, p 3, ¶ 12. On November 28, 2017, his eldest daughter, Gloria Cisneros, posted the bond money, but her father wasn't released. CF, p 3, ¶ 12.

The next day, Gloria called the jail. CF, p 3, ¶ 15. She was told that after she posted the bond, ICE had put a "hold" on her father, so EPSO would not release him. CF, p 3, ¶ 15. Later that day, another EPSO deputy explained to

Gloria that with an "ICE hold" on her father, he could not get out on bond. CF, p 3, ¶ 15.

EPSO deputies had notified ICE that the Jail had been asked to release Cisneros on bond; ICE sent Forms I-247A and I-200 to the Jail; and the Jail placed an ICE Hold on him and continued to detain him. CF, p 3, ¶ 13. The Jail later returned Gloria's money. CF, p 3, ¶ 16.

6. The Challenged Practices as of March 8, 2018

On March 15, 2018, EPSO approved Directive 18-02, "Change in Ice Procedures." CF, p 6, ¶ 48. This change was made after a meeting with ICE supervisors on March 8, 2018, where EPSO staff learned for the first time that ICE had changed its procedure and practice in 2017. CF, p 6, ¶ 48.

EPSO Directive 18-02 ended EPSO's policy and practice of transferring inmates to "IGSA holds" when ICE sent the Jail an I-203 and an I-200 and/or an I-247A. CF, p 6, ¶ 49. Instead, detainees were transferred to federal custody and housed under the IGSA only if EPSO had received Forms I-247A and I-200 *and* an ICE agent appeared in person to serve the papers on the detainee and take the person into ICE custody. CF, p 6, ¶ 49. The inmate was released if an ICE agent did not personally appear to take custody within 48 hours of the expiration of state-law authority to hold the inmate. CF, p 6, ¶ 49. If Cisneros had posted bond while

Directive 18-02 was operative, EPSO would have held him only for up to 48 hours, to provide ICE an opportunity to take him into ICE custody. CF, p 6, ¶ 50.

C. Course of Proceedings and Disposition Below

1. Plaintiffs sue the Sheriff for mandamus, declaratory, and injunctive relief in a separate case.

Cisneros and another plaintiff filed a class action complaint for declaratory, mandamus, and injunctive relief in Case No. 18CV30549. *See* CF, p 17. They claimed Sheriff Elder was exceeding his authority under Colorado law by holding persons who posted bonds, completed their sentences, or otherwise resolved their criminal cases, solely because they were suspected of civil violations of federal immigration law. They asserted five claims: (1) ultra vires actions; (2) mandamus; (3) unreasonable seizure under Colo. Const. Art. II, § 7; (4) deprivation of procedural and substantive due process under Colo. Const. Art. II, § 25; and (5) violation of the right to bail under Colo. Const., Art. II, § 19.

The court certified two classes and entered summary judgment in plaintiffs' favor on all claims. Order Granting Summary Judgment, Case No. 18CV30549 (Appendix) at 4, 30. The summary judgment order is currently the subject of the Sheriff's pending appeal in Case No. 2019CA136.

2. Cisneros sues Sheriff Elder for damages in this case.

The original class action complaint included Cisneros's false imprisonment claim and request for damages. CF, pp 17-18. The parties wished to segregate the requests for prospective relief from Cisneros's damages claim so the prospective claims could be resolved expeditiously. CF, p 18. Plaintiffs thus amended the class action complaint, Cisneros dropped the damages claim, and he reasserted it in the instant case. *See* CF, pp 1-8, 18. In consideration of Cisneros dropping his damages claim in the class action, the Sheriff agreed to waive the affirmative defenses of issue preclusion and claim preclusion in this case. CF, p 18.

3. The Sheriff files a Rule 12(b)(1) motion.

Cisneros then filed this action asserting a claim for damages. CF, pp 1-8. The Sheriff moved to dismiss the complaint under C.R.C.P. 12(b)(1) based CGIA sovereign immunity. CF, pp 17-24. He maintained that the CGIA's waiver of immunity for the operation of a jail did not apply, because a jail exists for lawful detentions and Cisneros alleged he had been held *un*lawfully. CF, pp 20-21. The Sheriff added that his decision whether to impose an ICE Hold rather than release someone who had posted bond was "ancillary" to the operation of a jail. CF, pp 21-22. He also contended that Cisneros failed to allege willful and wanton conduct as required when a claimant sues a public employee. CF, p 22.

Cisneros responded that CGIA waivers must be broadly construed, and by continuing to hold him in jail after bail had been set and bond posted, Elder was engaged in the operation of a jail. CF, pp 38-40. Cisneros explained that there was no need to allege willful and wanton conduct, because he had sued Elder only in his official capacity, meaning he had sued the *sheriff's office*. CF, p 43.

CGIA section 106(1)(b), which waives immunity for the "operation of any . . . jail," applies if a claimant can show "injury due to negligence." C.R.S. § 24-10-106(1.5)(b). The district court requested supplemental briefing on the question, "Was it the intent of the legislature to waive immunity when the claim is, as here, an intentional tort?" CF, p 53. The parties submitted supplemental briefs. CF, pp, 62-120. In his brief, Cisneros provided the relevant legislative history of section 106(1.5)(b) and demonstrated that the legislature added section 1.5(b) so claimants would have to show *at least* negligence. CF, pp 70-110.

4. The district court denies the Sheriff's motion.

The district court denied the Sheriff's motion. CF, pp 121-28. The court first noted that the Sheriff did not dispute the facts alleged in the complaint. CF, p 121. It then ruled that the Sheriff was involved in the operation of a jail. The court described the Sheriff's contrary argument—that his refusal to release Cisneros from jail was "ancillary" to the jail's operation—as "Orwellian." CF, p 124.

The court rejected Elder's argument that he had been sued in his individual capacity when the complaint plainly showed otherwise. CF, p 125. And though the court found the legislative history on the need to show negligence inconclusive, it ruled that the waiver provision applied. It relied on the principles that courts must construe CGIA immunity provisions narrowly and construe CGIA waiver provisions broadly. CF, pp 127-28. The court also opined that a contrary result would be unjust and absurd. CF, p 128.

The Sheriff then filed this interlocutory appeal. CF, pp 142-48.

SUMMARY OF ARGUMENT

1. Cisneros's false imprisonment claim falls comfortably within the CGIA's waiver of immunity for the operation of a jail. This waiver applies if the activity at issue relates to the facility's purpose. The Sheriff's decision to continue holding Cisneros in jail, even though a court had granted bail and bond had been posted, plainly related to the jail's purpose.

In arguing to the contrary, the Sheriff raises *merits* arguments that he did not preserve for review—he never filed a Rule 12(b)(5) motion—and over which this Court has no jurisdiction. The arguments are also foreclosed by rulings in the companion class action, and they are in any event unfounded.

2. Cisneros's complaint met the requirement to "show injury due to negligence." This is so for any of three reasons: (a) Cisneros pled both intent and knowledge, and these mental states subsume negligence; (b) the legislative history of CGIA section 106(1.5)(b) confirms that the legislature wanted to abolish absolute liability for jails and require claimants to show *at least* negligence; or (c) the waiver of immunity must be broadly construed, and thus, any ambiguity must be resolved in Cisneros's favor.

3. Cisneros had no duty to allege willful and wanton conduct. This requirement applies only to claims against public employees who are sued in their individual capacities. But Cisneros sued the Sheriff only in his official capacity, *i.e.*, he sued the *sheriff's office*. As the complaint's substantive allegations show, the Sheriff adopted illegal policies and practices, which his deputies carried out. This is thus a suit against his office, not against him.

Sheriff Elder's contrary arguments raise merits issues and seek to impose non-existent pleading requirements. Finally, the Sheriff did not request a *Trinity* hearing below on willful and wanton conduct and did not dispute the facts pled in the complaint, which show there was no need to allege such conduct. Therefore, his request for a *Trinity* hearing was forfeited and is also superfluous.

ARGUMENT

I. CISNEROS'S CLAIM FALLS WITHIN THE CGIA'S WAIVER OF IMMUNITY RELATING TO THE OPERATION OF A JAIL.

A. Standard Of Review And Preservation Of Issues

CGIA Interpretation. The Sheriff's motion to dismiss based on CGIA immunity raised an issue of subject matter jurisdiction under C.R.C.P. 12(b)(1). Where, as here, "the relevant facts underlying a trial court's jurisdictional findings are undisputed and the issue presents a question of law, then appellate review is de novo." *Daniel v. City of Colo. Springs*, 327 P.3d 891, 894 (Colo. 2014).

This issue turns on the interpretation of CGIA section 24-10-106(1)(b). Where, as with section 106(1)(b), a statute is unambiguous, this Court gives effect to its plain terms. *Id.* Further, because "the CGIA is in derogation of the common law," the Court will "narrowly construe the CGIA's immunity provisions, and as a logical corollary, . . . broadly construe the CGIA's waiver provisions." *Id.* at 895.

Factual Allegations. As the district court noted, the Sheriff did not contest the complaint's allegations. CF, p 121. Contrary to the Sheriff's contention, Op. Br. 13, 23, 35, *Uptime Corp. v. Colo. Research Corp.*, 420 P.2d 232 (Colo. 1966) does not apply. The *Uptime* standard applies only when courts adopt fact findings prepared by a prevailing party. *Id.* at 235. Here, the district court relied on the complaint's undisputed allegations, not on proposed, disputed fact findings.

Forfeiture and Plain Error. In the trial court, Sheriff Elder failed to raise many of the arguments he makes on appeal. He thus failed to preserve them for review. *Cody Park Prop. Owners' Ass'n, Inc. v. Harder*, 251 P.3d 1, 4 (Colo. App. 2009). To the extent he requests plain error review, this Court will do so only in "the most compelling" civil cases when "justice requires the correction of a manifest error." *Hall v. Frankel*, 190 P.3d 852, 866 (Colo. App. 2008). The Sheriff has identified no such error.

B. As Alleged By Cisneros, EPSO's Conduct Falls Within The Express Waiver Of Immunity Under CGIA Section 106(1)(b) For Injuries Resulting From The Operation Of Any Jail.

Cisneros sufficiently alleged that his injuries resulted from the operation of a jail; therefore, his claim falls within the exception to CGIA immunity set forth in C.R.S. § 24-10-106(1)(b). Because section 106(1)(b) is a waiver provision, this Court will give it a broad construction. *Daniel*, 327 P.3d at 895. Properly and broadly construed, section 106(1)(b) applies, and the Sheriff's immunity thus has been statutorily waived.[1]

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-

[1] Section 24-10-106(1)(b)'s waiver of immunity applies to claimants who, like Cisneros during his detention, are pretrial detainees who have not been convicted. C.R.S. § 24-10-106(1.5)(b).

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). Under these provisions, "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).

In *Howard v. City & County of Denver*, 837 P.2d 255 (Colo. App. 1992), this Court articulated the purposes for which a sheriff operates a jail:

> The Sheriff is the keeper of the jail and is responsible for maintaining the jail for the detention, safekeeping, and confinement of persons lawfully committed. The Sheriff's duties in keeping the jail are to receive and safely detain every person duly committed thereto. The Sheriff specifically "shall not, without lawful authority, let out of such jail, on bail or otherwise, any such person."

Id. at 257 (citations omitted). The Court cited C.R.S. §§ 17-26-101 to 103 (1986) for these propositions. *Id.* Those statutes remain materially unchanged today. *See* C.R.S. §§ 17-26-101 to 103 (2019).

Based on this Court's articulation of the duties of a jail keeper in *Howard* and *Pack*, Sheriff Elder's unlawful detention of Cisneros falls squarely within this waiver of immunity. As "keeper" of the El Paso County Jail, the Sheriff has a duty

to safekeep persons "duly committed" to the jail. C.R.S. § 17-26-101 to 103. He could not release such persons "without lawful authority." C.R.S. § 17-26-103.

As Cisneros alleged and the district court held, the Sheriff had a mandatory duty to release Cisneros from the Jail once his daughter posted bond. *See* CF, pp 2, ¶¶ 1-5; 7-8, ¶¶ 57-65; 124; *see also* Appendix at 30 ("Sheriff Elder has a clear legal duty to release Plaintiffs when his state-law authority to confine them has ended").[2] The failure to release 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). The Sheriff's decision not to release Cisneros even though he posted bond relates to the "operation" of a jail. CF, p 124. The district court thus was quite right to characterize the Sheriff's argument below—that the decision whether to release an inmate was "ancillary" to the jail's operation—as "Orwellian." CF, p 124.

[2] The summary judgment order reproduced in the Appendix is part of this Court's file in Case No. 2019CA136. This Court may take judicial notice of the order. *See Lovato v. Johnson*, 617 P.2d 1203, 1204 (Colo. 1980) (a court can take judicial notice "at any stage of a proceeding," including "on appeal"); *McGee v. Hardina*, 140 P.3d 165, 167 (Colo. App. 2005) ("A court can take judicial notice of its own records and files.").

C. This Court's Decision In *Howard* Fully Supports The District Court's Conclusion That The Sheriff's Acts Pertained To The Operation Of A Jail.

The Sheriff insists that *Howard* somehow supports his argument that he is immune from Cisneros's false imprisonment claim under the CGIA. Op. Br. 16-18. The opposite is true. In *Howard*, after a defendant was accused of assaulting his wife, the sheriff's department performed a criminal history search *prior to* the defendant's bond hearing. 837 P.2d at 256. The search failed to unearth the defendant's prior felony convictions in another state and an arrest warrant for a probation violation relating to another offense. *Id.* When the defendant was later released on a personal recognizance bond, he murdered his wife. *Id.*

The wife's children alleged that the sheriff's office was liable for failing to obtain a full criminal history and to obtain and execute an arrest warrant. *Id.* This Court ruled that the sheriff was immune from suit, because the sheriff's acts didn't pertain to the operation of a jail. *Id.* at 257-58. The Court distinguished a sheriff's duties relating to operating a jail—detaining, safekeeping, and confining persons lawfully committed, and declining to release them without lawful authority—from his duties in investigating a prisoner's criminal history and making a bond recommendation. *Id.* at 257. It noted, "It is the court . . . that is responsible for setting the amount, type, and any conditions of a bond." *Id.* Because the sheriff

was performing the functions of a court, not a jailer, the waiver of immunity for the operation of a jail did not apply. *See id.* at 257-58.

Here, a court had already granted bail and set the bond amount. CF, p 3, ¶ 12. Cisneros's daughter then posted the requisite $2,000 bond, and once she did so, the Sheriff had the legal authority—indeed, the legal *obligation*—to release him. CF, p 7, ¶¶ 57-64. By refusing to release 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).

The *Howard* plaintiffs also alleged that the sheriff failed to obtain and execute warrants to arrest the defendant. 837 P.2d at 256. This Court rightly ruled that these alleged omissions did not involve the operation of a jail. *Id.* at 258. In sharp contrast, Cisneros, had been arrested, a court had granted bail and set bond, and bond had been posted. The decision whether to release him on bond or to continue to hold in jail him plainly involved the operation of a jail.

D. The Sheriff's Merits Arguments, Presented For The First Time On Appeal, Are Irrelevant And Illogical.

Sheriff Elder's remaining arguments pertaining to the "operation of any . . . jail" were forfeited. They are also irrelevant and illogical. The Sheriff insists that Cisneros's false imprisonment claim is really one for violation of Colorado's arrest

statute; that the Sheriff's "ICE Hold" policy, under which he held Cisneros, was legally justified; and he cites federal cases in support. *See* Op. Br. at 18-22.

These arguments fail for multiple reasons. *First*, they were not preserved for review. The Sheriff thus forfeited them. *Harder*, 251 P.3d at 4. The Sheriff appears to request plain error review of some of them, Op. Br. at 22, n.11, but he does not identify any grave injustice that would require the Court to correct "manifest error." *Hall*, 190 P.3d at 866.

Second, these new arguments are *merits arguments*, not jurisdictional arguments. The Sheriff made no Rule 12(b)(5) motion below. Yet he now asks this Court to rule in the first instance that Cisneros cannot prevail on his claim, because the Sheriff's refusal to release him was legally justified. Op. Br. at 18-22. These arguments are entirely inappropriate in the present procedural posture—a Rule 12(b)(1) motion based on sovereign immunity. Indeed, this Court has no jurisdiction to decide them. *Casey v. Colo. Higher Educ. Ins. Benefits Alliance Tr.*, 310 P.3d 196, 206 (Colo. App. 2012) (on interlocutory appeal from order denying sovereign immunity, this Court has no jurisdiction to address grounds for reversal other than CGIA immunity, because there is no final order as to other issues).

Third, the arguments would be inapt even if the Sheriff had filed a Rule 12(b)(5) motion and this Court had jurisdiction. A false imprisonment claim lies

when a defendant has knowingly restricted a plaintiff's freedom of movement. It requires a plaintiff to prove three elements: "(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); *see* C.J.I.-Civ. 21:1 (same). Cisneros pled all three elements, and though it wasn't required, he also alleged that his detention was unlawful. CF, p 7, ¶¶ 57-64.

By contrast, *legal justifications* are *affirmative defenses* to claims for false imprisonment. *Goodboe*, 663 P.2d at 1057-58 (instructing trial court to treat legal justification as an affirmative defense on remand); *White v. Pierson*, 533 P.2d 514, 516 (Colo. App. 1974) ("[i]n an action for false arrest, the issue of probable cause, or legal justification to arrest, is a substantive matter of affirmative defense"). The Colorado Civil Jury Instructions confirm this. *See, e.g.*, C.J.I.-Civ. 21:7 (statutory privilege to detain for investigation is an affirmative defense); 21:8 (common-law privilege to detain for investigation is an affirmative defense); 21:11 (privilege of peace officer to arrest without a warrant is an affirmative defense); 21:15 (privilege to arrest with a warrant is an affirmative defense). These defenses are not valid bases to dismiss a complaint for failure to state a claim under Rule 12(b)(5).

Fourth, in the companion class action, the district court ruled that Sheriff Elder's detention of Cisneros after his daughter posted bond (1) lacked any legal justification under Colorado and federal law and (2) violated Cisneros's rights to bail, to due process, and to be free from unreasonable seizures. Appendix at 9-28. In that case, the Sheriff ultimately did not contend that he had any authority to hold Cisneros or other similarly situated persons on immigration detainers for more than *48 hours*. *See* Appendix at 3-4, 9; Opening Brief, Case No. 2019CA136, at 3 & n.2. He thus cannot contend it was lawful to hold Cisneros for *four months*.

Finally, Sheriff Elder notes that Cisneros had only a limited right to bail. Op. Br. at 18-19. He attempts to justify his ICE Hold policy by contending that bail can be denied in some circumstances and conditioned in others. *Id.* Here, however, a court granted bail, and Cisneros's daughter posted the bond. Cisneros thus had the right to be released on bond pending disposition of charges. *People v. Jones*, 346 P.3d 44, 52 (Colo. 2015); *cf. Gaylor v. Does*, 105 F.3d 572, 576 (10th Cir. 1997) (once magistrate set defendant's bond at $1000, defendant "obtained a liberty interest in being freed of detention"). The fact that the court could have imposed additional conditions on his release is of no moment.[3]

[3] Elder relies on *Bell v. Wolfish*, 441 U.S. 520, 530-43, 555-60 (1979) and *Porro v. Barnes*, 624 F.3d 1322, 1324-27 (10th Cir. 2010), where pretrial detainees challenged conditions of confinement (*Bell*) or the use of excessive force (*Porro*).

That said, the Court need not wade into the Sheriff's merits arguments or Cisneros's retorts. The Court has no jurisdiction to decide them, and they have no bearing on the question whether the CGIA's waiver of sovereign immunity applies. Because the Sheriff was involved in the operation of a jail, it plainly does.

II. CISNEROS SATISFIED THE CGIA'S REQUIREMENT TO PLEAD AN INJURY DUE TO NEGLIGENCE.

A. Standard Of Review And Preservation Of Issues

Because "the relevant facts underlying a trial court's jurisdictional findings are undisputed and the issue presents a question of law," "appellate review is de novo." *Daniel*, 327 P.3d at 894.

This issue turns on the interpretation of CGIA section 24-10-106(1.5)(b). When a statute is unambiguous, this Court gives effect to its plain terms. *Id.* An ambiguous statute allows the Court to go beyond the text and consider pertinent legislative history. *Id.* Because "the CGIA is in derogation of the common law," the Court must "narrowly construe the CGIA's immunity provisions, and . . . broadly construe the CGIA's waiver provisions." *Id.* at 895.

Cisneros agrees that the Sheriff preserved this issue for review.

Op. Br. 19. Here, Cisneros challenges the lawfulness of *the detention itself* after bail was granted and bond was posted. In *U.S. v. Salerno*, 481 U.S. 739, 742-55 (1987) pretrial detainees challenged the constitutionality of the Bail Reform Act, where a court relied on the statute to *deny* bail; here, the court *granted* bail.

B. C.R.S. 24-10-106(1.5)(b), Which Requires Claimants To Show That The Operation Of A Jail Involved Negligence, Sets A Floor, Not A Ceiling.

The waiver in section 106(1)(b) for injuries pertaining to the operation of a jail applies if the claimant was "incarcerated but not yet convicted" of the crime for which he was in jail and the claimant can "show injury due to negligence." C.R.S. § 24-10-106(1.5)(b). The first part of this test has undisputedly been met, because at all relevant times, from November 24, 2017 to March 18, 2018, Cisneros was incarcerated but not yet convicted. The second part is disputed.

Whether the Court views the statute's plain language alone or considers the relevant legislative history, the statute sets negligence as a floor, not a ceiling. To the extent this Court were to find, like the district court, that even the legislative history doesn't resolve the issue, the applicable rules of CGIA construction require a broad construction of this waiver to encompass Cisneros's claim.

1. The statute's plain language requires a claimant to prove *at least* negligence.

Section 106(1.5)(b) applies if a claimant can show negligence. Here, Cisneros alleged *at least* negligence. He alleged that the Sheriff's detention of him was knowing and intentional. CF, p 7, ¶ 61. That more than suffices to establish the applicability of the waiver.

The Legislature's negligence requirement sets a floor, not a ceiling. A contrary interpretation would read the word "only" into the statute, such that it would read that the waiver applies if the claimant can "show injury due *only* to negligence." But the statute doesn't contain that term, and a court will not read terms into a statute to restrict its application where the Legislature did not do so. *DuBois v. Abrahamson*, 214 P.3d 586, 588 (Colo. App. 2009).

Cisneros's interpretation of section 24-10-106(1.5)(b) is consistent with the settled principle that more culpable mental statutes subsume less culpable ones. For instance, the Colorado Criminal Code provides, "If a statute provides that criminal negligence suffices to establish an element of an offense, that element also is established if a person acts recklessly, knowingly, or intentionally." C.R.S. § 18-1-503(3) (2018). So too with respect to statutes that impose civil liability. *See Sheehan v. Oblates of St. Francis de Sales*, 15 A.3d 1247, 1256–57 (Del. 2011) (interpreting statute requiring gross negligence, court ruled that, "by definition a finding of an intentional breach of a duty subsumes a grossly negligent breach of that duty"). The same result obtains here.

Critically, the Sheriff concedes for purposes of this appeal that section 106(1.5)(b) applies to intentional torts that involve bodily injuries, such as assault or battery. Op. Br. 38. He then suggests that the statute only applies to claims for

such injuries and not the type of claim at issue. Op. Br. at 38-39. But nothing in text of section 106(1.5)(b) or in the CGIA as a whole supports this supposed distinction between physical harm and other injuries.

The Sheriff's concession that section 106(1.5)(b) applies to intentional torts makes this an easy decision. This section plainly applies to the intentional tort of false imprisonment, which subsumes negligence. The Court should so hold.

2. The relevant legislative history confirms Cisneros's Interpretation.

A statute is ambiguous if it is susceptible to more than one interpretation. *Colo. Oil & Gas Conservation Comm'n v. Martinez*, 2019 CO 3, ¶ 19. If this Court were to determine that the CGIA's language does not resolve whether negligence is a floor or a ceiling, the Court "may examine the legislative intent, the circumstances surrounding the statute's adoption, and the possible consequences of different interpretations to determine the proper construction of the statute." *Id*.

The relevant legislature history, which Cisneros supplied below, confirms his interpretation of the section 106(1.5)(b). Section 1.5 was added to C.R.S. § 24-10-106 in 1994 via House Bill (H.B.) 94-1284. Its chief proponents were Representative Martha Kreutz and Senator Dick Mutzebaugh.

House Version. As proposed by Representative Kreutz, H.B. 94-1284 would have reinstated sovereign immunity for all injuries to all inmates. *See* CF,

pp 74-75. The bill's rationale was to prevent "frivolous lawsuits" by inmates who relied on court decisions recognizing a "special relationship" between jailers and inmates, such that inmates need not prove jailors were at fault. CF, pp 93-95 (Tr. 4:23–6:14). Thus, as originally drafted, H.B. 94-1284 would have deleted "correctional facility" and "jail" from the list of facilities exempted from sovereign immunity in section 24-10-106(1)(b). CF, pp 74-75.

Senate Second Reading. When the bill moved to the Senate, it was changed. In the Senate Second Reading, Senator Mutzebaugh proposed a floor amendment to distinguish between inmates who had and had not been convicted at the time of injury. The amendment (a) reinstated sovereign immunity for claims by persons incarcerated and convicted of crimes but (b) waived immunity for claims by persons "incarcerated but not yet convicted of a crime" if they could show negligence. CF, pp 77-78; *see* CF, p 92 (Tr. 3:3-24). Importantly, this amendment included the term "only," such that it could have been interpreted to mean that not-yet-convicted persons could recover only for negligence:

> The waiver of sovereign immunity in section 24-10-106(1)(b) and (1)(e) in the operation of or regarding any dangerous condition of a correctional facility or jail is hereby limited to a person who is incarcerated but has not been convicted of the crime relating to which the person is incarcerated. Such a person shall have a cause of action *only* if the person can show injury due to negligence.

CF, pp 77-78 (capital letters omitted, emphasis added). Senator Mutzebaugh clarified that under this amendment, a claimant "at least has to allege some sort of negligence on the part of the jail or correctional facility" to prevail. CF, p 92 (Tr. 3:16–24). Requiring at least negligence was necessary to abolish the "absolute responsibility" courts had imposed on prison custodians. CF, pp 93-94 (Tr. 4:23–5:5).

Senate Third Reading. Finally, in the Senate Third Reading, the Senate amended the bill to create a separate subsection 1.5. CF, pp 79-80; *see* CF, pp 102-03 (Tr. 2:15–3:10). During the floor debate, Senator Mutzebaugh further addressed the issue of the requisite mental state. Senator Rizzuto asked Senator Mutzebaugh whether, in requiring pretrial detainees to show negligence, this would include "anything greater than mere negligence," such as "gross negligence or intentional actions." CF, pp 105-06 (Tr. 5:25–6:21). He added, "I'd hate to have some person . . . in some jail or some Department of Corrections saying, 'No, it wasn't negligence. We meant to beat him up.'" CF, pp 106-07 (Tr. 6:22–7:1).

Senator Mutzebaugh noted that if someone had been intentionally beaten, it probably violated their civil rights. CF, p 107 (Tr. 7:3-6).[4] He then clarified his

[4] The Sheriff insists this means the waiver wasn't intended to apply to civil rights claims and asserts that Cisneros's claim is such a claim. Op. Br. 38-39. In fact, Cisneros brought a *tort* claim. In any event, the CGIA does not and cannot apply

intent: He wanted to impose "a minimal standard" and "gross negligence would have been a higher standard than I . . . particularly wanted." CF, p 107 (Tr. 7:7-23). Senator Rizzuto asked, "Would it be your intent as a sponsor and basically our intent . . . that . . . if you show a mere minimum of negligence, that's enough, but that if somebody claims more than that, then that doesn't become a defense for the sovereign immunity to apply?" CF, pp 107-08 (Tr. 7:25-8:6). Mutzebaugh replied, "If, for instance, the claimant can show gross negligence, then he would have right to pursue his action under this bill[.]" CF, p 108 (Tr. 8:8-14).

Consistent with this colloquy, the Senate amended the bill again and, among other things, removed the term "only." The language that the Senate passed and the Legislature ultimately adopted was codified in new subsection 1.5(b):

> (b) The waiver of sovereign immunity created in paragraphs (b) and (e) of subsection (1) of this section does apply to claimants who are incarcerated but not yet convicted of the crime for which such claimants are being incarcerated if such claimants can show injury due to negligence.

CF, pp 79-80.

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to civil rights claims, because their source is the constitution, not the common law. *See Jorgenson v. City of Aurora*, 767 P.2d 756, 758 (Colo. App. 1988) (claims having a "constitutional genesis" are not subject to the CGIA); *Ruegsegger v. Jefferson Cty. Bd. of Cty. Comm'rs*, 197 F. Supp. 2d 1247, 1265-66 (D. Colo. 2001) (claims derived from constitutional rights don't lie in the common law of torts and cannot be barred by the CGIA). There was no need to "waive" immunity for such claims when there is no immunity in the first place.

This history clarifies the legislative intent. House Bill 94-1284 addressed the perceived problem of strict liability for correctional facilities by requiring claimants to show a facility was *at least* negligent. Senator Mutzebaugh repeatedly stated that claimants must "at least" show negligence. CF, pp 92 (Tr. 3:16-24), 95 (Tr. 6:16-21). And in response to direct questioning from Senator Rizzuto as to whether negligence was a maximum, such that defendants could escape liability by claiming gross negligence or intent, he confirmed that negligence was a minimum, not a maximum. CF, pp 107-08 (Tr. 7:7-8:14). The bill was later amended to remove the term "only," confirming that conduct more culpable than negligence fell within the waiver. *Compare* CF, pp 77-78 *with* 79-80. The legislative history thus confirms Cisneros's interpretation and obviates the Sheriff's contrary construction.

3. The applicable rules of CGIA construction militate in favor of the interpretation advocated by Cisneros and adopted by the district court.

Finally, if the Court believes that both the statute's text and the legislative history are inconclusive, then, like the district court, CF, pp 127-28, it should apply the rules of CGIA construction. Because the CGIA "is in derogation of Colorado's common law," this Court must "narrowly construe the CGIA's immunity provisions, and as a logical corollary," it must "broadly construe the CGIA's

waiver provisions." *Daniel*, 327 P.3d at 895. Construing section 106(1.5)(b) to allow claims sounding only in negligence would constitute an impermissibly narrow construction of the section 106(1)(b) waiver provision. By contrast, Cisneros' broad construction effectuates the waiver.

Further, 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, Cisneros was held in a jail without legal authority for nearly four months due to the Sheriff's illegal policies and practices, and as the district court observed, he suffered grave, irreparable injuries. *See* Appendix at 29 ("Few injuries are more real, immediate, or irreparable than being deprived of one's personal liberty."). By contrast, the Sheriff's argument, if accepted, would deprive individuals like Cisneros, who have been unlawfully imprisoned, of any compensation from the government. Nothing in the language or underlying policy of the CGIA supports this draconian conclusion.

III. CISNEROS SUED SHERIFF ELDER ONLY IN HIS OFFICIAL CAPACITY; THEREFORE, HE HAD NO NEED TO ALLEGE WILLFUL AND WANTON CONDUCT.

A. Standard Of Review And Preservation Of Issues

This issue involves the question of whether C.R.S. § 24-10-118 applies to the complaint's undisputed allegations. It is thus reviewed de novo. *Daniel*, 327 P.3d at 894.

Cisneros agrees that the Sheriff preserved the question of whether section 118 applies. But the Sheriff did not preserve his request for a *Trinity* hearing, Op. Br. 29-30, his argument that Cisneros must show deliberate indifference, Op. Br. 30-31, or his argument that he relied on a facially valid ICE warrant, Op. Br. 32-34. He forfeited those issues. *Harder*, 251 P.3d at 4.

B. Because Cisneros Sued Sheriff Elder In His Official, Not Individual, Capacity, He Had No Need To Allege Willful And Wanton Conduct.

Contrary to the Sheriff's contention, Cisneros had no need to 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, 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; *see* CF, p 2, ¶ 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 immunity, the Sheriff is subject to liability like any private defendant.

C. The Sheriff Ignores The Complaint's Allegations, Which Show He Established Policy Carried Out By His Deputies.

In arguing that he was sued in his individual capacity, the Sheriff cherry-picks discrete allegations from the complaint and insists this shows that Cisneros is suing the Sheriff individually. Op. Br. at 27-28. Not so.

The Sheriff ignores Cisneros's theory of liability and the acts of which he complains. He alleged that Sheriff Elder, acting in his official capacity, established policies and practices for the El Paso County Sheriff's Office, which Cisneros abbreviated as "EPSO"; that the Sheriff established an "ICE Hold" policy and practices; and that his policy and practices were implement by his deputies, not by the Sheriff individually. The complaint explains this as follows:

- "Defendant Bill Elder is the Sheriff of El Paso County. He is responsible for all EPSO policies and practices. He has ultimate supervisory responsibility for employees and deputies who work at EPSO. He is sued in his official capacity."
- "November 28, 2017, Gloria Cisneros, Saul's eldest daughter, went to the jail to post bond for her father. She posted the money and obtained a receipt, but her father was not released."

- "Pursuant to Sheriff Elder's practices, deputies notified [ICE] that the CJC had been asked to release Mr. Cisneros on bond. ICE sent the CJC Forms I-247A (Detainer) and I-200 (Administrative Warrant)."
- "EPSO placed what it calls an 'ICE Hold' on Mr. Cisneros and continued to detain him in the CJC."
- When Gloria called the jail, "She was told that after she posted the bond money, ICE put a 'hold' on her father, so EPSO would not release him. Later that day, another EPSO deputy explained to Gloria that with an 'ICE hold' on her father, he could not get out on bond."
- "Pursuant to EPSO's practices at the time, EPSO did not release Mr. Cisneros on bond, because ICE had sent an I-247A Form and an I-200 Form to the jail."

CF, pp 2-3, ¶¶ 9, 12-15, 17.

The complaint describes in detail "EPSO's policy and practice to refuse to release prisoners who had posted bond, completed their sentence, or resolved their criminal case whenever ICE had faxed or emailed an immigration detainer." CF, p 5, ¶ 37; *see* CF, pp 5-6, ¶¶ 37-50. It then states a false imprisonment claim by alleging, among other things, that, "[a]s a result of Sheriff Elder's unlawful policies, Plaintiff was not released on bond. He remained imprisoned in the El

Paso County Jail." CF, p 7, ¶ 60. Throughout the complaint, "Sheriff Elder" and "the Sheriff" are used interchangeably with "EPSO," which underscores the capacity in which the Sheriff was sued. CF, pp 2-7.

This case is thus unlike *State v. Nieto*, 993 P.2d 493, 508-09 (Colo. 2000), where the plaintiff sued a prison nurse and guard for providing inadequate medical care. Op. Br. 26-28. Unlike the plaintiff in *Nieto*, Cisneros doesn't allege that Sheriff Elder *personally* took any action against him besides establishing the illegal ICE Hold policy and practices. And the establishment of EPSO policy was an act he took—and could only take—in his official capacity.

Finally, even if the Sheriff were right that he was sued in his personal capacity, he would not avoid liability. Under C.R.S. § 24-10-118(2)(a), a public employee is immune from suit for acts that are not willful or wanton, "except that no such immunity may be asserted in an action for injuries resulting from the circumstances specified in section 24-10-106(1)." Thus, a prison employee whose acts occur within the operation of a jail has no immunity, even if his acts were not willful and wanton. *Nieto*, 993 P.2d at 506-07. For the reasons discussed in Argument § I above, all relevant actions involved the operation of a jail, and Sheriff Elder is not immune from suit in any event.

D. The Sheriff Forfeited His Request For A *Trinity* Hearing And His Arguments On Deliberate Indifference And ICE Warrants, And These Assertions Also Have No Merit.

Sheriff Elder attempts to raise three arguments that were not preserved for review. Op. Br. at 29-34. The Sheriff never requested a *Trinity* hearing on the issue of whether his acts were "willful and wanton." He did not argue below that Cisneros must show "deliberate indifference." And he did not claim he relied on a valid an ICE warrant. He thus forfeited these issues. *Harder*, 251 P.3d at 4.

***Trinity* Hearing.** Sheriff Elder made only a conditional request for a hearing, and only on the issue of whether Cisneros was "serving a sentence" as opposed to being a pretrial detainee for purposes of the waiver for operation of a jail. CF, p 50 ("If the Court . . . requires additional evidence in determining whether Plaintiff was serving a sentence, Defendant respectfully requests that the Court conduct a hearing pursuant to *Trinity Broadcasting of Denver, Inc. v. City of Westminster*, 848 P.2d 916 (Colo. 1993)."). The Sheriff never asked for a hearing on whether his conduct was willful and wanton.

The district court determined that the facts were undisputed, CF, p 121, and it did not hold a hearing on the one issue on which the Sheriff requested a hearing. The Sheriff does not contend on appeal that this was error. And a hearing on whether the conduct was willful and wanton would have been superfluous, because

the Sheriff has been sued only in his official capacity. *Gray*, 284 P.3d at 196 ("waivers of immunity for acts or omissions that are willful and wanton only apply to public employees, not to public entities"). The court thus properly declined to hold a *Trinity* hearing.

Deliberate Indifference. Aside from forfeiting the issue, the Sheriff's argument on deliberate indifference is baseless. The three cases he cites all involved claims under 42 U.S.C. § 1983 for alleged constitutional violations. Op. Br. at 30. Here, by contrast, Cisneros has asserted a state-law tort claim. Where "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*, 987 P.2d at 935. There is no need to show deliberate indifference to prevail on a state-law tort claim.

ICE Warrant. The Sheriff finally contends he relied on a facially valid ICE warrant and thus didn't violate the Fourth Amendment. Op. Br. 32-34. This argument is specious.

First, this is a merits argument. It has nothing to do with the question of subject matter jurisdiction under the CGIA, or the interpretation of the statute.

Second, this appeal involves a state-law tort claim, not a Fourth Amendment claim. If it involved a Fourth Amendment claim, the CGIA wouldn't apply. The CGIA only bars claims that lie or could lie in tort. C.R.S. § 24-10-108. Because Constitution claims derive from the constitution and not the common law of torts, the CGIA doesn't apply to such claims. *See Casey*, 310 P.3d at 205; *Jorgenson*, 767 P.2d at 758; *Ruegsegger*, 197 F. Supp. 2d at 1265-66.

Third, even if the merits were at issue, Cisneros established that the Sheriff conducted an unreasonable seizure in violation of Colorado Constitution Art. II, § 7. Appendix at 9-28. And the Sheriff had no authority to execute a "facially valid ICE warrant." Op. Br. 32. ICE administrative warrants are directed to federal officers, not county sheriffs, and federal law specifies that only certain federal officers may execute them. *Lunn v. Commonwealth*, 78 N.E.3d 1143, 1151 n.17 (Mass. 2017); 8 C.F.R. § 287.5(e)(3). ICE warrants and detainers convey no authority on state officials to hold inmates after state-law authority to hold expires. *See* Appendix at 9-28; *People ex rel. Wells v. DeMarco*, 88 N.Y.S.3d 518, 526-32 (N.Y. App. Div. 2018) (collecting numerous cases); *Esparza v. Nobles Cty.*, 2019 WL 4594512, *4-10 (Minn. Ct. App. Feb. 23, 2019) (collecting cases).

In the companion class action, Elder *admitted* that ICE administrative warrants can be served only by ICE agents who have specialized training. *See*

2019CA136, CF, p 1038, ¶¶ 11-13. His contrary argument here is not only wrong but frivolous.

CONCLUSION

For these reasons, the Court should affirm the district court's decision.

Dated December 20, 2019.

Respectfully submitted,

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

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CERTIFICATE OF SERVICE

I certify that on December 20, 2019, I caused to be served a true copy of this **MOTION FOR EXTENSION OF TIME TO FILE ANSWER BRIEF** was filed with the Court of Appeals via Colorado Courts E-Filing System, on the following:

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ADDENDUM

District Court Order Granting Summary Judgment, Case Number 18CV30549, December 6, 2018

DATE FILED: December 06, 2018 7:01 PM

DISTRICT COURT, EL PASO COUNTY, COLORADO 270 S. Tejon Colorado Springs, Colorado 80901	
Plaintiffs: Saul Cisneros, Rut Noemi Chavez Rodriguez, On behalf of themselves and all others similarly situated, v. Bill Elder, in his official capacity as Sheriff of El Paso County, Colorado	▲COURT USE ONLY▲
	Case Number: 18CV30549 Div.: 8 Courtroom: W550

ORDER GRANTING SUMMARY JUDGMENT

Before the Court is Plaintiffs' motion for summary judgment. The Court has reviewed the motion, Sheriff Elder's response, and Plaintiffs' reply, along with the parties' Amended Stipulations filed September 20, 2018 (the Stipulations), the case file, and applicable law.

The parties have elected to forego trial and to submit the motion upon the stipulated documentary record. They agree that the Stipulations address the totality of the factual issues in the case, that the issues before the Court are purely issues of law, and that the case should be resolved as a matter of law.

INTRODUCTION

This is a case of first impression in Colorado. While it is litigated on a largely blank legal canvas in this state, the issues have been hotly litigated in recent years in federal and state courts across the country. The subject is the extent and means by which federal immigration authorities may recruit state and local law enforcement to assist them in enforcement of the nation's immigration laws.

In carrying out their mandate to remove persons who are in our country illegally, federal immigration authorities rely heavily on local law enforcement. A central part of this assistance is provided by local sheriffs, who routinely exchange information with immigration authorities as to the identity of individuals in local jails and who may then be asked by immigration authorities to detain such individuals beyond their release dates so they can be picked up by immigration authorities and held pending proceedings to remove them from the United States.

Such detentions are known as "immigration holds," "immigration detainers," or "ICE holds." They constitute a central part of the national strategy on immigration enforcement, while also raising civil liberties concerns. The legality of that practice in Colorado is the subject of this case. The case addresses, specifically, whether a Colorado sheriff has authority under Colorado and/or federal law to continue to detain inmates at the county jail, at the request of federal immigration authorities but without the participation of a judge, for up to 48 hours after they have posted bond, completed their sentence, or otherwise resolved their criminal cases, so they can be picked up by immigration authorities. The Plaintiffs are two classes of inmates and pretrial detainees at the El Paso County jail who are subject to ICE detainer requests. No published Colorado case addresses the issue.

Most sheriffs' offices around Colorado stopped honoring immigration detainers in recent years after receiving cease-and-desist letters from the ACLU. Sheriff Elder, through counsel, informed the Court in March that El Paso County is one of only two counties that still honor ICE detainer requests. The one other county known to the Court is Teller County. A case similar to this one is pending there, and the Court in that case ruled preliminarily in favor of the sheriff. (*Salinas v. Mikesell*, case no. 2018CV30057 (trial set for June 2019).) Clearly, the issues are ones on which reasonable minds may differ. Resolution of one of these cases by a higher court is needed in order to provide certainty in this area to Colorado's sheriffs and the immigrant population.

PROCEDURAL BACKGROUND

The case was initiated in February 2018 by the two named Plaintiffs, Saul Cisneros and Rut Noemi Chavez Rodriguez. Cisneros and Chavez were pretrial detainees in the custody of the El Paso County Sheriff's Office ("EPSO" or "Sheriff's Office"). Both Plaintiffs attempted to post their court-ordered bond but were informed by the Sheriff's Office that they would not be released because federal immigration authorities had imposed an "ICE hold." Both Plaintiffs were then detained for months per the ICE hold. They were not released until this Court issued a preliminary injunction on March 19, 2018 restraining the practice until trial on the merits (the "PI Order").

On March 15, 2018, shortly before the preliminary injunction hearing, the Sheriff's Office issued Directive Number 18-02, titled "Change in Ice Procedures." As explained more fully below, this directive belatedly changed existing EPSO policy to conform to a 2017 change in policy by U.S. Immigration and Customs Enforcement (ICE). The new policy, which is

effective nationwide, requires an ICE official to appear in person to serve ICE forms on detainees before they can be transferred to federal custody, and limits the "ICE hold" period (which had previously been indefinite) to a maximum of 48 hours after conclusion of state-law authority. As ICE detainees, these individuals may be housed in the El Paso County jail (the "Jail") pursuant to El Paso County's housing agreement with ICE (the Intergovernmental Services Agreement, or "IGSA"), pending completion of federal removal proceedings.

Upon the Court's issuance of the PI Order on March 19, 2018, Sheriff Elder ceased his practice of honoring immigration detainers, pending resolution of this case. He has, however, publicly expressed his intention to resume the ICE hold practice in the event he prevails in court.

Sheriff Elder promptly filed a petition with the Colorado Supreme Court pursuant to C.A.R. 21, seeking emergency review of the preliminary injunction. The Supreme Court denied that petition on April 12, 2018. (2018SA71).

On May 1, 2018, the Court granted Plaintiffs' motion to certify two classes of inmates at the Jail. The classes are composed of all current and future prisoners in the Jail, including pretrial detainees for whom bond has been set, who are or will be subject to immigration detainers and/or administrative warrants sent by ICE. In granting the motion, the Court rejected Sheriff Elder's contention that Plaintiffs' claims had become moot as a result of the PI Order, the Sheriff's temporary abandonment of the challenged practices, or the release of the two named Plaintiffs.

On May 8, 2018, the Court denied Sheriff Elder's motion seeking to compel joinder of ICE as a party. The United States had filed a Statement of Interest (an amicus brief) in opposition to the preliminary injunction, but since that time it has not participated in the case.

STIPULATED FACTS

I adopt the Stipulations, as well as the affidavits and documentary record referenced therein and the factual summary set forth on pages 2-6 of Plaintiffs' motion. In short, the Stipulations establish the following undisputed facts:

A. The Immigration Detainer Forms.

Immigration enforcement officers employed by ICE request the Sheriff's Office to continue to detain prisoners after state law authority to detain has ended. The requesting documents are the three standardized ICE forms described below, none of which is reviewed, approved, or signed by a judicial officer:

1. Immigration Detainer (ICE Form I-247A).

This form identifies a prisoner being held in a local jail and asserts that ICE believes the prisoner may be removable from the United States. It asks the jail to continue to detain that prisoner for an additional 48 hours after he or she would otherwise be released, to allow time for ICE to take the prisoner into federal custody.

2. Administrative Warrant (ICE Form I-200).

This form names a particular prisoner, asserts that ICE has grounds to believe he or she is removable from the United States, and directs federal immigration officers to arrest the person. Although this form is called a "warrant," it is not reviewed, approved, or signed by a judicial officer, as a warrant normally would be.

3. Tracking Form (ICE Form I-203).

This form is used to track detainees housed in local jails; it accompanies ICE detainees when ICE officers place them in, or remove them from, a detention facility. Although this form

bears the title "Order to Detain or Release Alien," it is not reviewed, authorized, approved or signed by a judicial officer, and it confers no authority on a Colorado sheriff to initiate custody of an individual who is not already in federal custody.

B. The Intergovernmental Services Agreement (IGSA).

DHS and El Paso County are parties to the IGSA, a contract that authorizes the Sheriff to house ICE detainees in the Jail, in ICE's custody and at ICE's expense. The contract applies only to persons who are already in the physical custody of ICE officers when they arrive at the Jail. It is stipulated that the named Plaintiffs, Cisneros and Chavez, were not held pursuant to the IGSA; the IGSA is not a so-called "287(g) agreement" (discussed below); and El Paso County does not currently have a 287(g) agreement with ICE, although it previously had one from 2013 to 2015.

C. The Challenged Practices at the Time This Lawsuit Was Filed.

At the time this lawsuit was filed on February 27, 2018, it was EPSO's policy and practice to refuse to release prisoners who had posted bond, completed their sentence, or resolved their criminal case whenever ICE had faxed or emailed an immigration detainer (Form I-247A) and an administrative warrant (Form I-200).

EPSO used the term "ICE hold" to indicate that: (1) for a particular prisoner, ICE had sent Form I-247A and/or I-200; (2) EPSO would contact ICE to notify it of the prisoner's release date and time; and (3) EPSO would continue to hold the prisoner for ICE if the prisoner posted bond, completed his/her sentence, or otherwise resolved his/her criminal charges. Even when a prisoner did not have an "ICE hold," Sheriff Elder's written policies required deputies to delay the processing of bond paperwork when the prisoner was a "foreign born national."

D. Effect of the Challenged Practices on the Plaintiffs.

Sheriff Elder's use of ICE holds caused the named Plaintiffs to be detained for months after they would otherwise have been released on bond.

On November 24, 2017, Saul Cisneros was booked into the Jail and charged with two misdemeanor offenses. The court set his bond at $2,000. On November 28, 2017, his daughter went to the Jail to post bond for her father. She posted the money, but her father was not released because an ICE hold had been imposed. He was held in the Jail on the ICE hold until after the Court issued its preliminary injunction on March 19, 2018.

The other named Plaintiff, Rut Noemi Chavez Rodriguez, was arrested and booked into the Jail on November 18, 2017, and her bond was set at $1,000. ICE sent Forms I-247A and I-200, and the Jail placed an ICE hold on her. Friends from her church went repeatedly to the Jail and tried to bail her out, but were told the Jail would not release her on bond because an immigration hold had been imposed. Like Cisneros, she was held in the Jail on the ICE hold until after the Court issued its preliminary injunction on March 19, 2018.

The Sheriff's treatment of Cisneros and Chavez was representative of the office's ICE hold practices with respect to the Plaintiff classes. The Stipulations provide numerous examples of how ICE holds were applied to other detainees.

E. The Challenged Practices as of March 8, 2018.

On March 15, 2018, four days before the preliminary injunction hearing, EPSO approved Directive Number 18-02, "Change in Ice Procedures." This change was made after a meeting with ICE supervisors on March 8, 2018, where EPSO staff learned for the first time that ICE had

changed its procedure and practice in 2017. (EPSO started following the new procedures on March 8th, even though the written procedures were not in place until the 15th.)

EPSO Directive 18-02 ended EPSO's practice of transferring inmates to what it called "IGSA holds" and housing them under the IGSA when ICE sent the Jail the detainer forms. Under the new policy, an ICE agent is required to appear in person to serve the papers on the detainee within 48 hours of the inmate's release date or posting of bond. Once the ICE appears and serves the papers, the inmate is deemed to have been transferred to federal custody, and he or she may either be housed at the Jail per the IGSA or taken to a federal facility. If the ICE agent fails to show up within that 48-hour period, the inmate is released.

F. The Challenged Practices Since the Preliminary Injunction Was Issued.

Upon the Court's issuance of the PI Order on March 19, 2018, the named Plaintiffs, Cisneros and Chavez, were released, and Sheriff Elder ceased his practice of ICE holds pending resolution of this case. Sheriff's Office personnel still communicate with ICE and let ICE know when undocumented inmates are about to leave the Jail, but the Sheriff does not detain inmates past their release dates at this time.

SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate when the pleadings and supporting documents demonstrate that no genuine issue as to any material fact exists and that the moving party is entitled to judgment as a matter of law. C.R.C.P. 56. The burden is on the moving party to establish that no genuine issue of fact exists. The nonmoving party is entitled to the benefit of all favorable inferences that may be drawn, and all doubts as to the existence of a triable issue of fact must be resolved against the moving party. *Martini v. Smith*, 42 P.3d 629, 632 (Colo. 2002).

PERMANENT INJUNCTION STANDARD

A court of equity has the power to restrain unlawful actions of executive officials. *See County of Denver v. Pitcher*, 129 P. 1015, 1023 (Colo. 1913) (holding that equity courts may enjoin illegal acts in excess of authority).

The requirements for a permanent injunction are similar to those for a preliminary injunction; however, the elements are somewhat simplified, and the applicant is required to show actual success on the merits rather than merely a reasonable probability of success. The moving party must show that: (1) it has achieved actual success on the merits; (2) irreparable harm will result unless the injunction is issued; (3) the threatened injury outweighs the harm that the injunction may cause to the opposing party; and (4) the injunction, if issued, will not adversely affect the public interest. *Dallman v. Ritter*, 225 P.3d 610, 621 & n.11 (Colo. 2010).

ANALYSIS: LAWFULNESS OF THE ICE HOLD PROCEDURE

The issue before the Court is whether Sheriff Elder has authority under Colorado and/or federal law – based on receipt and service of the above-described ICE documents – to hold Plaintiffs at ICE's request for up to 48 hours after they have posted bond, completed their sentence, or otherwise resolved their criminal cases.

Plaintiffs contend the 48-hour ICE holds are unlawful, as they are authorized by neither state nor federal law. Sheriff Elder responds that his office's practice is lawful for at least three separate reasons: (1) the 48-hour hold is not an arrest, but is rather a short-term detention akin to a *Terry* stop; (2) EPSO has authority to hold inmates for 48 hours under Colorado law, including his inherent authority as a Colorado sheriff; and (3) EPSO has authority to cooperate with immigration agents under the federal Immigration and Nationality Act, section 287(g).

For the reasons set forth below, I conclude the Sheriff's ICE hold practice is not authorized by either Colorado or federal law.

A. ICE Immigration Detainers are Requests, not Commands. The Choice, and the Legal Responsibility, are the Sheriff's.

As a threshold matter, it is fundamental – and Sheriff Elder has stipulated (Stip. 11) – that the ICE forms at issue constitute requests from ICE, not commands; and thus Sheriff Elder is under no compulsion to comply with them.

Whereas ICE administrative warrants "command" federal immigration officers to arrest suspected illegal immigrants and take them into custody (*see* Ex. 2), ICE detainers are directed to local law enforcement agencies and simply "request" their assistance in detaining a non-citizen. *See* Ex. 1 ("IT IS THEREFORE REQUESTED THAT YOU: … Maintain custody of the alien for a period NOT TO EXCEED 48 HOURS beyond the time when he/she would otherwise have been released from your custody …"). This is a change from previous versions of the detainer form, which used to "require" such assistance. (Stip. 11.)

The reason ICE administrative warrants only "request," and do not "command," the cooperation of local officials, is that to issue commands to state or local officials would be unconstitutional. *See Galarza v. Szalczyk*, 745 F.3d 634, 643 (3rd Cir. 2014). As the *Galarza* court explained, if detainers were regarded as commands from the federal government to state or local officials, they would violate the Tenth Amendment's anti-commandeering principle. *Id.*; *and see Printz v. United States*, 521 U.S. 898, 922 (1997) ("The power of the Federal Government would be augmented immeasurably if it were able to impress into its service – and at no cost to itself – the police officers of the 50 States").

Thus, federal immigration authorities cannot order, and are not ordering, Sheriff Elder to hold inmates beyond the term of their release. They are merely requesting that he do so. Whether he does so is his choice, and it is he who is legally responsible for the decision. That point was made particularly clear early in this case, when Sheriff Elder invited, and then attempted to force, ICE to defend its practices in this Court, without success.

B. Continued Detention After a Prisoner is Eligible for Release is the Equivalent of a New Arrest.

Sheriff Elder now contends that the 48-hour hold is not a new arrest, but is more akin to the kind of short-term investigative detention known as a *Terry* stop.[1] However, he is unable to cite any legal authority that supports his position, and ample authority compels the opposite conclusion.

1. Continued detention constitutes a new arrest.

A detainer is, of course, different from a typical arrest: the person being detained is already in custody. No reported Colorado opinion addresses whether continued detention under an immigration detainer constitutes an arrest. However, courts in other jurisdictions have (uniformly, to the Court's knowledge) concluded there is no difference for constitutional purposes.

A "seizure" occurs in Colorado when a police officer restrains the liberty of a person. *People v. Marujo*, 192 P.3d 1003, 1005 (Colo. 2008). The seizure can amount to an

[1] This contention differs from Sheriff Elder's initial position in the case, when he conceded, for purposes of the preliminary injunction motion, that the 48-hour hold constituted an arrest. The change in position is notable largely to illustrate the way in which the legal arguments in this case continue to be a moving target. Courts around the country are grappling actively with related issues, and the legal landscape is evolving at a rapid pace.

investigatory stop, requiring only reasonable suspicion, if it is limited, brief, and non-intrusive; or to an arrest, requiring probable cause, if it is more extensive. *People v. Cervantes-Arredondo*, 17 P.3d 141, 146 (Colo. 2001).

Numerous federal courts have held that, when an inmate is entitled to release but is instead held in custody for a new reason, the continued detention constitutes a new seizure under the Fourth Amendment. *See Morales v. Chadbourne*, 793 F.3d 208, 217 (1st Cir. 2015) ("Because Morales was kept in custody for a new purpose after she was entitled to release, she was subjected to a new seizure for Fourth Amendment purposes—one that must be supported by a new probable cause justification"); *Roy v. Cty. of Los Angeles*, No. CV 12-09012-AB (FFMx), 2018 WL 914773, at *23 (C.D. Cal. Feb. 7, 2018) (same); *Ochoa v. Campbell*, 266 F. Supp. 3d 1237, 1249-50 (E.D. Wash. 2017) (same, citing additional federal cases). *Compare Tenorio-Serrano v. Driscoll*, 324 F. Supp. 3d 1053, 1065 (D. Ariz. 2018) (relied on by Elder and cited in the Teller County ruling) ("the Court does not necessarily disagree with Plaintiff's premise – that continued detention is tantamount to an arrest").

Likewise, the few courts that have addressed the issue under the laws of other states have concluded that continued detention under an ICE detainer constitutes a new arrest. *See Lunn v. Commonwealth*, 78 N.E. 3d 1143, 1153-54 (Mass. 2017) (continued detention of inmate on immigration detainer after he was entitled to release was "plainly an arrest" under Massachusetts law); *People ex rel. Wells v. DeMarco*, No. 2017-12806, 2018 WL 5931308, at *4-5 (N.Y. App. Div. Nov. 14, 2018) (when inmate was retained in custody per ICE detainer after his release date, he was subjected to a new arrest and seizure under both New York law and the Fourth Amendment).

I conclude that continued detention of an inmate under an immigration detainer, after the inmate has reached his or her release date, constitutes an arrest under Colorado law and a seizure under the Fourth Amendment. Federal precedent is generally considered highly persuasive authority in the Fourth Amendment arena. *See People v. Schaufele,* 325 P.3d 1060, 1067 (Colo. 2014) ("the Supreme Court has cautioned against permutations by each state supreme court that would apply federal constitutional law in a way that 'would change the uniform 'law of the land' into a crazy quilt'"). There is no doubt that continued detention restrains the liberty of an inmate who is otherwise free to go. Because an inmate is being kept in custody for a new purpose after he was entitled to release, he is subject to a new seizure that is the equivalent of a new arrest.

This should be distinguished from the situation that occurs, for instance, when a prisoner who is already in ICE custody is housed in the local jail. *See Abriq v. Metro. Gov't of Nashville,* 2018 WL 4561246, at *3 (M.D. Tenn. Sep. 17, 2018) (local officials did not arrest or seize the plaintiff when they detained him in local jail, because he was already in ICE custody). "[M]erely transferring custody of that individual from one law enforcement agency to another deprives him of nothing he has not already lost." *U.S. ex rel. Vanorsby v. Acevedo,* No. 11 C 7384, 2012 WL 3686787, at *5 (N.D. Ill. Aug. 24, 2012). For that reason, the Plaintiffs in this case have not challenged Sheriff Elder's housing of ICE detainees at the Jail under the IGSA. What they challenge is the Sheriff's continued detention of prisoners who have posted bond, completed their sentence, or are otherwise entitled to immediate release under Colorado law.

2. Continued detention is not comparable to a *Terry* stop.

Sheriff Elder contends that the 48-hour ICE holds at issue are equivalent to a brief investigatory stop (a "*Terry* stop") rather than an arrest – that they involve a limited intrusion on

the inmate's liberty that is reasonable, limited in time, and appropriate in light of the interests at stake.

A warrantless seizure is unreasonable unless it falls within an "established and clearly articulated exception[] to the warrant requirement." *People v. Rodriguez,* 945 P.2d 1351, 1359 (Colo. 1997). A *Terry* stop, which is recognized as one such exception, "is a brief investigatory stop supported by a reasonable suspicion of criminal activity." *Terry v. Ohio*, 392 U.S. 1 (1968); *Rodriguez*, 945 P.2d at 1359. A *Terry* stop must be "brief in duration, limited in scope, and narrow in purpose." *Id.* at 1359, 1362. Sheriff Elder's 48-hour holds do not satisfy any of these three essential elements.

The duration of reasonable *Terry* stops is typically measured in minutes, not hours or days. *See Rodriguez*, 945 P.2d at 1362-63 (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. 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).

Moreover, the purpose of a *Terry* stop is to investigate – specifically, to conduct a brief investigation with a limited scope, in order to quickly confirm or dispel the reasonable suspicion of criminal activity that justified the intrusion. *Rodriguez*, 945 P.2d at 1362. In contrast, the purpose of a 48-hour ICE hold is not to investigate, but solely to detain. ICE does not ask the Sheriff to investigate, for instance, whether the Plaintiffs are removable, and it has not trained or deputized Sheriff's personnel to do so; it solely requests that the named individuals be jailed for up to 48 additional hours so ICE can serve them with documents and take them into federal

custody. This continued detention beyond an inmate's release date is not a brief investigative stop; as discussed above, the courts have found it to be an arrest. *See* cases cited *supra*; *and see Lunn*, 78 N.E. 3d at 1153 (rejecting the investigative-stop argument); *Morales,* 793 F.3d at 215-16 (same).

C. Colorado Law Does Not Authorize the Sheriff to Continue to Detain a Prisoner after his or her Release Date.

Sheriff Elder contends that EPSO has authority to hold inmates for 48 hours under Colorado law, based on (a) his inherent authority as a sheriff and (b) a statute that authorizes him to house federal prisoners in the Jail. Previously, in response to Plaintiffs' motion for a preliminary injunction, he raised a third argument, namely that he had authority to conduct ICE holds under Colorado's arrest statute. I will address the issue of statutory authority first, and then inherent authority. While Sheriff Elder no longer contends that Colorado's arrest statute authorizes continued detention, it is necessary to start there, as the arrest statute delineates the authority of Colorado peace officers to make arrests.

1. Statutory authority.

a. Colorado's Arrest Statute (C.R.S. § 16-3-102).

Colorado's arrest statute provides, in full, as follows:

> (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.

No part of the statute provides authority for an arrest under the circumstances here.

As to (1)(a), the forms ICE faxes to the jail are not warrants under Colorado law. A "warrant" is "a written order issued by a judge of a court of record directed to any peace officer commanding the arrest of the person named or described in the order." C.R.S. § 16-1-104(18). As Sheriff Elder admits (Stip. 7), none of the ICE forms at issue are reviewed, approved, or signed by a judicial officer, as the statute requires; they are issued, instead, by ICE enforcement officers. Thus, continued detention of a local inmate at the request of federal immigration authorities, beyond when he or she would otherwise be released, constitutes a warrantless arrest.

A warrantless arrest is presumed to be unconstitutional. *People v. Burns*, 615 P.2d 686, 688 (Colo. 1980). When peace officers make an arrest without a warrant, the government bears the burden of rebutting that presumption and demonstrating that the arrest fits within a recognized exception to the warrant requirement. *Id*. Sheriff Elder cannot, and has not attempted to, meet that burden.

Under subsection (1)(c), a peace officer may make a warrantless arrest only when he has "probable cause to believe an offense was committed" and probable cause to believe that the suspect committed it. Sheriff Elder argued previously that the arrest statute provides authority for his policy, but he has now abandoned that argument, as he must. As this Court previously found, an "offense," as used in the warrantless-arrest statute, means a crime, not a civil offense. *See* C.R.S. § 18-1-104(1) ("The terms 'offense' and 'crime' are synonymous"); C.R.S. 16-1-105(2) (definitions in C.R.S. Title 18 (the criminal code) also apply in C.R.S. Title 16 (the code of criminal procedure)).

The parties agree that deportation proceedings are civil, not criminal proceedings. Stip. 10. *And see Arizona v. United States*, 567 U.S. 387, 396, 407 (2012) ("As a general rule, it is not a crime for a removable alien to remain present in the United States"; the federal administrative process for removing someone from the United States "is a civil, not criminal matter"); *Lunn*, 78 N.E. 3d at 1146 ("The removal process is *not* a criminal prosecution. The detainers are not criminal detainers or criminal arrest warrants. They do not charge anyone with a crime, indicate that anyone has been charged with a crime, or ask that anyone be detained in order that he or she can be prosecuted for a crime").

Thus, the ICE forms at issue provide the Sheriff with, at best, probable cause to believe an individual is subject to a civil deportation proceeding, but not with "probable cause to believe an offense was committed." Thus, a federal officer's finding that an individual may be removable from the United States does not authorize the Sheriff, under the warrantless-arrest statute, to deprive that individual of liberty.[2]

b. The federal prisoners statute (C.R.S. § 17-26-123).

Sheriff Elder also relies on a statute that authorizes him to house federal prisoners in the county jail. C.R.S. § 17-26-123 ("Federal Prisoners – Expense") provides, in material part:

> It is the duty of the keeper of each county jail to receive into the jail every person duly committed thereto for any offense against the United States, by any court or

[2] The ICE forms also raise the issue of whether Sheriff Elder may rely on an immigration officer's finding of probable cause, as set forth on the form simply through a checked box without case-specific findings. The Sheriff contended previously that he may rely on that finding pursuant to the "fellow officer rule" or "collective knowledge doctrine," which generally allows a law enforcement officer to rely on information known to another officer. *See People v. Washington*, 865 P.2d 145 (Colo. 1994). Plaintiffs disagreed. This is not an issue the Court needs to resolve, as, even if this Court were to find the "fellow officer rule" applicable, that would not resolve the other issues addressed herein.

> officer of the United States, and to confine every such person in the jail until he is duly discharged, the United States paying all the expenses …

Sheriff Elder contends that this statute, in addition to expressly granting him the power to detain federal prisoners, also implicitly authorizes him to temporarily detain individuals at the request of federal immigration authorities. The contention is unpersuasive. By its plain language, the purpose of this statute is to authorize sheriffs to house federal prisoners in local jails once they have been "duly committed thereto for any offense against the United States, by any court or officer of the United States," and to allocate the expense of confinement to the United States. It does not purport to address the power at issue here, namely the power to detain inmates beyond their release dates when they have not been "duly committed thereto." Further, the statute authorizes confinement only for an "offense against the United States." As noted above, "offense" is defined in Titles 16 and 18 to mean a crime. Sheriff Elder has provided no reason to believe it means anything different in this context.

2. Inherent Authority.

Sheriff Elder contends he has the inherent authority, as the county's chief law enforcement officer, to hold inmates for 48 hours beyond their release date at ICE's request. He contends this authority is inherent in his power to protect the citizens of his county, and particularly those lawfully present, from illegal activity by non-citizens; and he contends that the practice is an appropriate way of reducing the risk to the community that could occur if arrests had to be carried out in public.

Colorado sheriffs are limited to the express powers granted them by the Legislature and the implied powers "reasonably necessary to execute those express powers." *People v. Buckallew*, 848 P.2d 904, 908 (Colo. 1993). Powers will be implied only when the sheriff

cannot "fully perform his functions without the implied power." *Id.; see also Douglass v. Kelton*, 610 P.2d 1067, 1069 (Colo. 1980) (holding that sheriff and other public officials "have only such power and authority as are clearly conferred by law"; refusing to infer authority to issue concealed-carry permits).

For elaboration on this issue, both sides cite Colorado Attorney General Formal Opinion No. 99-7, 1999 WL 33100121 (Sept. 8, 1999), which was issued after several Colorado sheriffs sought guidance on their authority to act in response to potentially catastrophic Y2K computer failures.

As the AG Opinion makes clear, the duties and powers of the sheriff extend far back in the English common law, even predating the Magna Carta. However, in Colorado, the office of sheriff is created by the state constitution (specifically, Article XIV, Section 8), and sheriffs' powers and duties are defined by statute. AG Opinion No. 99-7, at *3-4.

Sheriffs' peace-keeping duties, the Opinion notes, are codified in various statutes, including C.R.S. § 30-10-516 (sheriffs may keep the peace), 16-3-102 (arrest), and § 16-3-110 (peace officer duties). "The sheriff typically enforces the laws by issuing summons or making arrests for violations of criminal statutes," and "[t]he sheriff's use of authority beyond the arrest power must be found in a specific statute." AG Opinion No. 99-7, at *4.

As the Colorado Supreme Court has made clear, "the authority of peace officers to effectuate arrests is now defined by legislation." *People v. Hamilton*, 666 P.2d 152, 154 (Colo. 1983). The scope of the arrest power is defined primarily in Article 3, Part 1, of Title 16, of the Colorado Revised Statutes ("Authority of Peace Officer to Make an Arrest"), 16-3-101 to 16-3-110, with the primary statute being C.R.S. 16-3-102, as discussed above.

The legislature has expressly recognized certain other limited circumstances in which the power to detain is appropriate; but in each case, a statute spells out the scope and limits of that power. No Colorado statute currently authorizes sheriffs to enforce civil immigration law or even to cooperate with its enforcement. Under these circumstances, absent a statutory grant of authority, the Court is reluctant to create an arrest power through inference. *Accord Lunn, supra,* 78 N.E. 3d at 1157 ("we should be chary about reading our law's silence as a basis for affirmatively recognizing a new power to arrest – without the protections afforded to other arrestees under Massachusetts law – under the amorphous rubric of 'implicit' or 'inherent' authority"); *People ex rel. Wells, supra,* 2018 WL 5931308, at *6 ("We decline … to intrude upon a carefully crafted, comprehensive, and balanced legislative determination as to the proper scope of the police power to effectuate arrests …").

Notably, Colorado used to have a statute that authorized, and indeed required, local law enforcement to assist the immigration authorities in detaining suspected illegal immigrants. In 2006, Colorado enacted SB-90, which required local law enforcement to report individuals to ICE when there was probable cause to believe they were present in violation of federal immigration law. *See* C.R.S. § 29-29-101-103 (repealed). In 2013, the Legislature repealed the statute in its entirety, declaring that "[t]he requirement that public safety agencies play a role in enforcing federal immigration laws can undermine public trust." Colo. HB 13-1258 (April 26, 2013). Absent the re-enactment of a comparable statute conferring the power of arrest on sheriffs in the immigration context, Sheriff Elder lacks the authority to detain individuals beyond their legally mandated release dates.

As to Sheriff Elder's contention that failing to recognize his inherent authority will expose the community to risk, he has provided no evidence. Public debate on immigration enforcement rightly focuses on public safety. All counties in Colorado, with two or three exceptions, have ceased their practice of honoring ICE hold requests. Had that change in practice created public safety issues, there would no doubt be evidence to show for it, whether in the form of data or, at the least, affidavits from other sheriffs. However, Sheriff Elder has submitted no evidence whatsoever on the subject, and he cannot raise a genuine issue of material fact by mere argument of counsel.

D. Federal Law Does Not Authorize the Sheriff to Continue to Detain a Prisoner After his or her Release Date.

Sheriff Elder contends that the INA, and specifically section 287(g)(10) of the Act, codified as 8 U.S.C. § 1357(g)(10), provides authority for 48-hour ICE holds.

Section 287 of the INA delineates the powers of federal immigration officers, including the power to arrest and detain suspected non-citizens pending removal proceedings. A subsection, section 287(g), addresses the extent to which the federal government may delegate those powers to state and local officers and employees. Delegation is accomplished through a written agreement known as a "287(g) agreement," entered into between the United States Attorney General and a state or local government. Under such an agreement, state or local officers who have been certified to be trained in enforcement of the federal immigration laws may perform the functions of immigration officers "to the extent consistent with State and local law." 8 U.S.C. § 1357(g)(1). The Sheriff's Office entered into a 287(g) agreement with ICE in 2013, but the agreement was terminated in 2015, and the parties currently do not have such an agreement. (Stip. 22; Exs. D & E.)

Given that the Sheriff's Office is currently not operating under a 287(g) agreement with ICE, Sheriff Elder now relies on a separate part of section 287(g), namely subsection 287(g)(10), which states:

> (10) Nothing in this subsection shall be construed to require an agreement under this subsection [i.e., a 287(g) agreement] in order for any officer or employee of a State or political subdivision of a State—
>
> > (A) to communicate with the Attorney General regarding the immigration status of any individual, including reporting knowledge that a particular alien is not lawfully present in the United States; or
> >
> > (B) otherwise to cooperate with the Attorney General in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States.

8 U.S.C. § 1357(g)(10).

Sheriff Elder contends that this provision provides him with authority not only to communicate and coordinate with ICE, but also to "cooperate" with ICE in the "apprehension [and] detention" of illegal non-citizens by imposing a 48-hour ICE hold on inmates otherwise subject to release from the Jail. This is a plausible contention, at the least, and one on which courts may reasonably differ. I will address first the express language of the statute and then the contention that the ICE holds constitute lawful "cooperation" or "operational support" as envisioned by the statute.

1. Express statutory authorization.

The initial question is whether, as Sheriff Elder suggests, the express language of section 287(g)(10) affirmatively grants him the power to cooperate with ICE in the arrest and detention of suspected non-citizens. It does not.

The language of the statute is not that of authorization: it does not say that local governments "may" cooperate with ICE by arresting and detaining; it simply says that nothing in the statute prevents them from doing so. It does not affirmatively grant the authority to arrest, but rather makes clear that arrests by local officials, when done in cooperation with federal immigration officials, "are a permissible form of State participation in the Federal immigration arena that would not be preempted by Federal law." *Lunn*, 78 N.E.3d at 1159; *accord Ochoa*, 266 F. Supp. 3d 1237, 1249, 1253-55.

The fact that section 287(g)(10) is not an affirmative grant of arrest authority is underscored when one compares it to the remainder of section 287(g), which lays out the specifics of what must be done by way of a written agreement, training, and certification before local officers will be allowed to enforce federal immigration laws. *See* 8 U.S.C. 1357(g)(1)-(9). *And see Lunn,* 78 N.E.3d at 1159-60 ("[i]n those limited instances where the Act affirmatively grants authority to State and local officers to arrest, it does so in more explicit terms than those in section 1357(g)(10)") (citing 8 U.S.C. 1103(a)(10), 1252c, 1324(c), and 1357(g)(1)-(9)).

In short, section 287(g)(10) does not prevent states from making arrests in conjunction with federal immigration officers, but neither does it affirmatively authorize it. As the *Lunn* court explained, section 287(g)(10) "simply makes clear that State and local authorities may continue to cooperate with Federal immigration officers in immigration enforcement *to the extent they are authorized to do so by their State law* and choose to do so." *Lunn*, 78 N.E.3d at 1159 (emphasis added); *and see Ochoa*, 266 F. Supp. 3d at 1254-55; *People ex rel. Wells*, 2018 WL 5931308, at *7. As I have previously found, Colorado law does not provide the necessary authorization.

2. "Cooperation" or "Operational Support"

Notwithstanding the above, there is no question that section 287(g) contemplates communication and cooperation between federal and state officials in immigration enforcement, even in the absence of a written 287(g) agreement. Sheriff Elder contends, and some courts appear to agree, that the statute's reference to cooperation provides implicit authorization for cooperative actions such as honoring ICE detainer requests.

The leading case on federal-state cooperation in immigration enforcement is *Arizona v. United States*, 567 U.S. 387 (2012). The case addressed, and largely overturned on preemption grounds, an Arizona statute that enlisted state and local law enforcement to the front lines of immigration enforcement. One provision (Section 6) authorized state officers to make warrantless arrests of persons if they had probable cause to believe such persons were removable from the country. The Court overturned that provision, finding that such a broad grant of authority improperly invaded the province of federal immigration officials. *Id.* at 407-10.

The Court addressed the scope of "cooperation" contemplated by section 287(g)(10) and found that, while "[t]here may be some ambiguity as to what constitutes cooperation" under that section, no reading of that term would allow state officers to arrest aliens unilaterally, without direction from federal officers. The Court noted several examples of cooperation that would arguably be permissible, including participating in a joint task force with federal officers, providing operational support in executing a warrant, and allowing federal access to detainees held in state facilities. *Id.* at 410. Sheriff Elder contends that the 48-hour holds requested by ICE are permissible because they fall within the scope of "cooperation" or "operational support" approved in *Arizona*.

Whether 48-hour ICE holds are comparable to the kinds of "cooperation" or "operational support" described in *Arizona* is a difficult question, but it is not one this Court is required to answer. The sole issue addressed by the Supreme Court in *Arizona* was preemption. The Court addressed whether Arizona's grant of immigration enforcement authority to state officers infringed on the broad immigration powers granted to federal officials by the Constitution and the INA. Preemption, however, is only step one of the analysis. Even were this Court to conclude that 48-hour ICE holds fall on the permitted side of the preemption line, the Court would still need to address step two: that is, I would still need to find that Colorado law affirmatively grants Sheriff Elder the authority to detain inmates on ICE holds. *See Lunn*, 78 N.E.3d at 1157-60; *Ochoa*, 266 F. Supp. 3d at 1254-55; *People ex rel. Wells*, 2018 WL 5931308, at *8. As set forth above, Colorado law does not provide that authority.

E. Miscellaneous Contentions.

Sheriff Elder raises a number of additional contentions, of which I will address the most significant.

(a) *Lopez-Lopez*. Sheriff Elder relies heavily on a recent case, *Lopez-Lopez v. Cty. of Allegan*, 2018 WL 3407695 (W.D. Mich. July 13, 2018). (The court in the Teller County case mentioned above also relied heavily on *Lopez-Lopez* in its order denying a motion for a preliminary injunction based on similar facts. *Salinas v. Mikesell*, 2018CV30057, Order issued 8/19/18.)

The *Lopez-Lopez* case addressed the legality of an ICE detention in which ICE's recent forms (the same ones at issue in this case) were used. The facts are comparable to the facts of this case. Mr. Lopez-Lopez had been arrested on an outstanding warrant for a probation

violation and booked into the county jail, and his family posted bond. The county sheriff, having received an I-247A detainer and an I-200 warrant from ICE, maintained custody of Mr. Lopez-Lopez until the next morning, when an ICE officer served the ICE forms on him and took him into custody. The court found that the sheriff's cooperation "with the federal government's request (as allowed pursuant to sec. 1357(g)(10)) 'by providing operational support' by holding [Mr. Lopez-Lopez] until ICE could take custody of him the following day … did not run afoul of the Fourth Amendment prohibition against unreasonable seizures." *Id.* at *5-6.

Lopez-Lopez is not on point, in that it does not address the claims that have been raised in this case. The claim in that case was solely that the ICE detention violated the Fourth Amendment. The court appeared to assume that the sheriff's cooperation fell within the "operational support" contemplated by section 287(g)(10) and *Arizona,* but that assumption was dicta on an issue that the plaintiff had not expressly raised and that the court did not explore beyond the sentence quoted above. The court did not address the claim raised in this case, which is that the Sheriff lacks authority under state law to continue to detain the Plaintiffs.

(b) Revised ICE Forms. Sheriff Elder also contends, again citing *Lopez-Lopez,* that ICE's recent revisions to its detainer forms dispel the issues caused by prior version of those forms. (Resp. at 6–8; *Lopez-Lopez*, 2018 WL 3407695, at *3–5.) This contention fails, because this Court's reasoning is based on its review of the current ICE forms, and not on prior versions. As discussed above, none of the current ICE forms amounts to a warrant under Colorado law, because none has been reviewed and approved by a neutral magistrate. *See Lunn*, 78 N.E.3d at 1151 n.17 & 1155 n.21. As the *Lunn* court explained, these forms "do not transform the removal

process into a criminal process, nor do they change the fact that [state] officers have no common-law authority to make civil arrests." *Id.* at 1155 n.21.

(c) *Roy v. County of Los Angeles*. Sheriff Elder also contends (Response, pp. 18-20) that review by a neutral magistrate is not required in the detainer context. As discussed above, that is true for ICE officers, but it is not true for Colorado sheriffs acting pursuant to Colorado law. *See supra*, sections B and C. The Sheriff relies here on *Roy v. Cty. of Los Angeles*, 2017 WL 2559616 (C.D. Cal. June 12, 2017). That case is not on point, for the reasons set forth on page 13 of Plaintiffs' Reply.

(d) *City of El Cenizo v. Texas*. Elder also cites another recent decision, *City of El Cenizo v. Texas*, 890 F.3d 164 (5th Cir. 2018), in which the Fifth Circuit upheld a Texas statute that required local law enforcement agencies to honor ICE detainers. The Fifth Circuit, like the *Lopez-Lopez* court, concluded that the "cooperation" referenced in 1357(g)(10) includes honoring ICE detainers; and accordingly it found the Texas statute did not offend principles of preemption. 890 F.3d at 185-89. The key distinction from the facts of this case was that the very Texas statute that was challenged provided the state-law authority to honor the ICE detainers that is missing from this case.

As noted above, Colorado had a somewhat similar statute from 2006 to 2013, when it was repealed based on the legislature's finding that enlisting local law enforcement to assist in immigration enforcement had undermined public trust. The Colorado legislature could re-enact that statute, or a similar one, if it wished; and, if it did so, it could supply the state law authorization that is currently missing. Likewise, Sheriff Elder could re-enter into the formal 287(g) agreement his office previously enjoyed with ICE; and doing so could arguably supply

the missing authority to honor ICE's detainer requests (an issue that is not before this Court). Until one or the other of those circumstances comes about, I conclude that Sheriff Elder lacks authority under either Colorado or federal law to continue to detain the Plaintiffs after they have posted bond or otherwise resolved their criminal cases.

CONTINUED DETENTION WOULD BE IN VIOLATION OF THE COLORADO CONSTITUTION

By continuing to detain the Plaintiffs without legal authority, Sheriff Elder would violate several provisions of the Colorado Constitution, as set out in Plaintiffs' motion. Sheriff Elder did not contest these conclusions. Accordingly, I find he has conceded the issue, and I adopt the reasoning set forth on pages 16-19 of Plaintiffs' motion.

First, by depriving the Plaintiffs of liberty without legal authority, Sheriff Elder carries out unlawful warrantless arrests that constitute unreasonable seizures, in violation of Article II, Section 7.

Second, by failing to release the Plaintiffs after they have posted or offered to post bond, Sheriff Elder violates their right to bail under Article II, Section 19.

Third, Sheriff Elder has deprived the Plaintiffs of their due process rights, in violation of Article II, Section 25.

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

PLAINTIFFS SATISFY THE REQUIREMENTS FOR A PERMANANT INJUNCTION

Having established actual success on the merits, the Plaintiffs also satisfy the remaining three elements for permanent injunctive relief.

A. Plaintiffs and Class Members Suffered and Will Suffer Irreparable Injury Unless the Injunction Issues.

Plaintiffs and class members have a right to release upon posting of bond, completion of their sentence, or when state-law authority to hold them has otherwise expired. Sheriff Elder's refusal to release them has deprived them of liberty without legal basis. "It is well established that the deprivation of constitutional rights 'unquestionably constitutes irreparable injury.'" *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012); *accord United States v. Bogle*, 855 F.2d 707, 710-11 (11th Cir. 1988) (unnecessary incarceration is a deprivation of liberty that "clearly constitutes irreparable harm."). Few injuries are more real, immediate, or irreparable than being deprived of one's personal liberty.

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

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

By contrast, Sheriff Elder will not be harmed by releasing Plaintiffs and class members on bond or freeing them when state law detention authority ends. He will be complying with Colorado law, which is in his interest. And he may continue to cooperate with ICE, if he chooses, within the bounds of the law. The Sheriff may continue to contact ICE and let it know when a prisoner is about to leave the Jail. (This is the Sheriff's current practice, *see* Stip. 54.)

C. A Permanent Injunction Will Serve the Public Interest.

Protection of constitutional rights advances the public interest. *See, e.g.*, *Awad v. Ziriax*,

670 F.3d 1111,1131 (10th Cir. 2012) ("It is always in the public interest to prevent the violation of a party's constitutional rights").

The injunction is also consistent with the Colorado legislature's declaration in 2013, when it repealed the statute that had required local law enforcement to cooperate with federal immigration authorities: "The requirement that public safety agencies play a role in enforcing federal immigration laws can undermine public trust." H.B. 13-1258 (April 26, 2013).

PLAINTIFFS SATISFY THE REQUIREMENTS FOR MANDAMUS RELIEF AND ARE ENTITLED TO A DECLARATORY JUDGMENT

Because Sheriff Elder has a clear legal duty to release Plaintiffs when his state-law authority to confine them has ended, Plaintiffs are entitled to mandamus relief. And because Plaintiffs prevailed on the merits, they are also entitled to the declaratory relief they seek in their Complaint. Sheriff Elder did not contest these conclusions, and accordingly I find he has conceded the issue, and I adopt the reasoning set forth on pages 22-24 of Plaintiffs' motion.

CONCLUSION

For the reasons set forth above, the Court FINDS that there are no material facts in dispute and summary judgment is appropriate in Plaintiffs' favor as a matter of law.

It is hereby ORDERED:

(A) Summary judgment enters in favor of the named Plaintiffs and the Plaintiff classes and against Sheriff Elder, determining that the challenged practices exceed his authority and are unconstitutional; this conclusion necessarily applies not only to Sheriff Elder's practices as of March 8, 2018, but also to the broader practices that were in place at the time this case was filed;

(B) Plaintiffs' request for a permanent injunction is GRANTED. Sheriff Elder is ENJOINED from engaging in the challenged practices, as described in paragraph (D) below;

(C) Mandamus relief is awarded, as requested; and

(D) A judgment shall enter, declaring that Sheriff Elder:

> (1) exceeds his authority under Colorado law when he relies on ICE detainers or ICE administrative warrants or I-203 Forms, or any combination thereof, as grounds for refusing to release prisoners who post bond, complete their sentence, or otherwise resolve their state criminal case; violates the Colorado constitutional right to be free of unreasonable seizures when he relies on ICE detainers or ICE administrative warrants or I-203 Forms, or any combination thereof, as grounds for refusing to release prisoners who post bond, complete their sentence, or otherwise resolve their state criminal case;
>
> (2) violates the Colorado constitutional right to due process of law when he relies on ICE detainers or ICE administrative warrants or I-203 Forms, or any combination thereof, as grounds for refusing to release prisoners who post bond, complete their sentence, or otherwise resolve their state criminal case; and
>
> (3) violates the Colorado constitutional right to bail when he relies on ICE detainers or ICE administrative warrants as grounds for refusing to release pretrial detainees who post bond.

Within 7 days, counsel shall confer and then jointly submit a proposed order of judgment.

DONE and ORDERED December 6, 2018.

BY THE COURT

Eric Bentley
DISTRICT COURT JUDGE