SUPREME COURT, STATE OF COLORADO 2 East 14th Avenue Denver, CO 80203	
Colorado Court of Appeals Opinion by Judge Terry; Judge Johnson specially concurs; Judge Richman dissents; Case No. 19CA546 El Paso County District Court Judge Eric Bentley Case No. 2018CV32870	
Petitioner: Saul Cisneros v. **Respondent**: Bill Elder, in his official capacity as Sheriff of El Paso County, Colorado.	▲ COURT USE ONLY ▲
Attorneys for Petitioner Saul Cisneros Stephen G. Masciocchi, #19863 Peter A. Kurtz, # 54305 Holland & Hart LLP 555 17th Street, Suite 3200 Denver, CO 80202-3921 Telephone: 303-295-8451 Fax: 303-975-5388 smasciocchi@hollandhart.com pakurtz@hollandhart.com Mark Silverstein, # 26979 Arielle Herzberg, #54234 American Civil Liberties Union Foundation of Colorado 303 E. Seventeenth Ave. Suite 350 Denver, Colorado 80203 Telephone: 303-777-5482 Fax: 303-777-1773 msilverstein@aclu-co.org aherzberg@aclu-co.org	Case No. 2021SC6
OPENING 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).

> ☒ It contains 6,628 words (principal brief does not exceed 9,500 words; reply brief does not exceed 5,700 words).

The brief complies with the standard of review requirements set forth in C.A.R. 28(a)(7)(A) and/or C.A.R. 28(b).

> ☒ For each issue raised by the petitioner, the brief contains under a separate heading before the discussion of the issue, a concise statement: (1) of the applicable standard of appellate review with citation to authority; and (2) whether the issue was preserved, and, if preserved, the precise location in the record where the issue was raised and where the court ruled, not to an entire document.
>
> ☐ In response to each issue raised, the respondent must provide under a separate heading before the discussion of the issue, a statement indicating whether respondent agrees with petitioner's statements concerning the standard of review and preservation for appeal and, if not, why not.

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

INTRODUCTION

At the behest of federal immigration authorities, El Paso County Sheriff Bill Elder refused to release prisoners who posted bonds, completed their sentences, or otherwise resolved their criminal cases. 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 detain persons suspected of civil violations of federal immigration law. As the district court held in a companion case, that authority does not exist.

Cisneros sued the Sheriff for false imprisonment. The Sheriff asserted sovereign immunity under the Colorado Governmental Immunity Act (CGIA), even though the CGIA waives immunity for the "operation of any . . . jail" so long as a pretrial detainee "can show injury due to negligence." The district court rejected the Sheriff's CGIA defense, but the court of appeals reversed in a split decision comprising three separate opinions.

The majority opinion is deeply flawed. It gives the CGIA waiver an unduly narrow interpretation under which jailers can be liable in tort only for negligent acts but not for knowing or intentional ones. As Cisneros explains below, the Legislature intended for negligence to be a floor, not a ceiling. His interpretation reads the term "negligence" in context, is consistent with other CGIA waivers, and

avoids an illogical and absurd result. Cisneros therefore asks this Court to reverse the majority's decision and reinstate his false imprisonment claim.

ISSUE PRESENTED

Whether the court of appeals was correct to conclude that section 24-10-106(1.5)(b), C.R.S. (2020), of the Colorado Governmental Immunity Act does not waive sovereign immunity for intentional torts that result from the operation of a jail for claimants who are incarcerated but not convicted.

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, ask the El Paso County Sheriff's Office (EPSO) to continue to detain prisoners after state-law authority to detain has ended. EPSO complied with such a request pertaining to Saul Cisneros.

A court had granted Cisneros bail and his daughter had posted the bond, but EPSO deputies nonetheless detained him for nearly four months after Colorado law required his release. Cisneros claimed that EPSO's authority to detain him had expired. He thus sued El Paso County Sheriff Bill Elder in his official capacity for false imprisonment.

The merits of Cisneros's claim are not at issue. Instead, the Sheriff appealed from the district court's ruling that Cisneros's claim fell within the CGIA's waiver of sovereign immunity for torts resulting from the operation of a jail, if the tort was committed when the claimant was incarcerated but not yet convicted, and if the claimant "can show injury due to negligence." The court of appeals reversed and ruled that the waiver applies only to negligence claims, not to intentional torts. Cisneros now asks this Court to reinstate the district court's decision.

B. Statement of Facts

ICE officers ask EPSO to keep prisoners in custody after state-law authority to detain them expires, so that ICE has time to take them into federal custody for possible removal proceedings. CF, p 5, ¶¶ 37-39. ICE makes those requests by sending sheriffs documents, including (1) an immigration detainer, ICE Form I-247A and (2) an administrative warrant, ICE Form I-200, neither 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. The warrant names a prisoner and asserts that ICE has grounds to believe the prisoner is removable. 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. 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 a particular prisoner, ICE had sent ESPO Form I-247A and/or I-200; (2) EPSO would notify ICE of the prisoner's release date and time; and (3) EPSO would continue to hold the prisoner for ICE even if the prisoner 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.

4. 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 El Paso County Criminal Justice Center (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, Saul's eldest daughter, Gloria Cisneros, posted the bond money, but ESPO didn't release her father. CF, p 3, ¶ 12. When Gloria called the Jail the next day, she was told that after she posted the bond, ICE 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 due to the "ICE hold," her father 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, ¶¶ 13-14. The Jail later returned Gloria's money. CF, p 3, ¶ 16. The Jail held Cisneros for nearly four

months after Gloria posted bond, until March 20, 2018, when the court enjoined Sheriff Elder's practices and Cisneros was released. CF, p 3, ¶ 18.[1]

C. Course of Proceedings and Disposition Below

1. Cisneros and another Plaintiff sue Sheriff Elder for mandamus, declaratory, and injunctive relief in a separate class action.

Cisneros and another plaintiff filed a class action complaint for mandamus, declaratory, and injunctive relief in El Paso County District Court, 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 claims under the Colorado Constitution for deprivation of procedural and substantive due process, for violation of the right to bail, and for unreasonable seizure. *See* Colo. Const. art. II, §§ 7, 19, 25.

The district court certified two classes and entered summary judgment in plaintiffs' favor. *Cisneros v. Elder*, No. 18CV30549, 2018 Colo. Dist. LEXIS

[1] On March 15, 2018, EPSO revised its procedures in relevant part to (i) limit the amount of time it held prisoners for ICE past their release dates to 48 hours, and (ii) require ICE agents to appear in person to serve the papers on detainees and take them into ICE custody. CF, p 6, ¶¶ 48-49.

3388, *5, 41-42 (El Paso Cnty. Dist. Ct., Dec. 6, 2018), *vacated as moot*, 19CA0136, at ¶ 3 (Colo. App. Sept. 3, 2020). The court ruled that immigration detainers and administrative warrants are mere requests, not commands, *id.* at *13-15, and that when prisoners post bail, complete their sentences, or resolve their criminal cases, the Sheriff must release them, *id*. at *19-34. It concluded that by holding plaintiffs after state-law authority to hold them had expired, the Sheriff violated their state constitutional rights to due process, to bail, and to be free from unreasonable seizures, and it enjoined the challenged practices. *Id*. at *38-43.[2]

The Sheriff appealed. While the appeal was pending, the Colorado General Assembly codified the *Cisneros* ruling, and Governor Polis signed it into law. *See* C.R.S. §§ 24-76.6-101 to -103. The new statute mooted the Sheriff's appeal. *Cisneros*, No. 19CA0136, at ¶ 3.

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

[2] Appellate courts have issued similar decisions under the comparable laws of other states. *See Lunn v. Commonwealth*, 78 N.E. 3d 1143 (Mass. 2017); *People ex rel. Wells v. DeMarco*, 88 N.Y.S. 3d 518 (N.Y. App. Div. 2018); *Esparza v. Nobles Cnty.*, 2009 WL 4594512 (Minn. Ct. App. Sept. 23, 2019); *Ramon v. Short*, 460 P.3d 867 (Mont. 2020).

class claims for prospective relief from Cisneros's individual claim for damages so that the claims for prospective relief could be resolved expeditiously. CF, p 18. Consequently, plaintiffs amended their class action complaint, Cisneros dropped his damages claim, and with defendants' stipulation not to raise issue preclusion or claim preclusion, Cisneros filed the instant official-capacity action alleging damages for false imprisonment. *See* CF, pp 1-8, 18.

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

Sheriff Elder moved to dismiss the complaint under C.R.C.P. 12(b)(1) based on sovereign immunity. CF, pp 17-24. Among other things, the Sheriff contended that the CGIA's waiver of immunity for the operation of a jail didn't apply. CF, pp 20-22; *see* C.R.S. § 24-10-106(1)(b), (1.5)(b).

CGIA section 106(1)(b), which waives immunity for the operation of a jail, applies if a pretrial detainee like Cisneros "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.

In his supplemental brief, Cisneros supplemented his statutory interpretation arguments with the legislative history of House Bill (H.B.) 94-1284, which became section 106(1.5)(b). CF, pp 62-110. He showed that the Legislature added section

1.5(b) to address the perceived problem that courts had imposed strict liability on jailers; section 106(1.5)(b) would thus require claimants to establish *at least* negligence. CF, pp 92 (Tr. 3:16-24), 95 (Tr. 6:16-21).

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

The district court denied the motion. CF, pp 121-28. The court first noted that Sheriff Elder 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. CF, p 124. It described the Sheriff's contrary argument—that his refusal to release Cisneros was "ancillary" to the Jail's operation—as "Orwellian." CF, p 124.

Though the court found the legislative history on the requirement to show negligence inconclusive, it ruled that the waiver provision applied. CF, pp 127-28. It relied on the principles that courts must construe CGIA immunity provisions narrowly and CGIA waiver provisions broadly. CF, pp 127-28. It opined that a contrary result would be unjust and absurd. CF, p 128. The Sheriff appealed.[3]

5. The court of appeals reverses in a split decision.

The court of appeals reversed in a split-three-ways decision. Judge Terry, noting that the issue was "one of first impression," 2020 COA 163M, at ¶ 14, ruled

[3] While the appeal was pending, Cisneros amended his complaint to add a claim under 42 U.S.C. § 1983. That claim is not at issue. *See* 2020 COA 163M, ¶ 5.

that section 24-10-106(1.5) does not waive immunity for injuries caused by intentional torts, *id.* at ¶ 11. Reasoning that "'negligence' means negligence," Judge Terry interpreted the statute to apply only to ordinary negligence claims and not to intentional torts. *Id.* at ¶¶ 4, 18-23. She rejected Cisneros's argument that the statute established a minimum culpable mental state and that Cisneros met this standard because intent subsumes negligence. *Id.* at ¶¶ 24-26.

Judge Terry then examined, "for the sake of completeness," the statute's legislative history. *Id.* at ¶ 28. She acknowledged that a prior draft of the bill waived immunity for pretrial detainees "*only* if the person [could] show injury due to negligence," but in the final version, the term "only" had been removed. *Id.* at ¶ 29 (emphasis and alteration in original). Yet she concluded, citing additional legislative history, that the Legislature didn't want the waiver to apply to intentional torts. *Id.* at ¶¶ 31-37.

Judge Johnson specially concurred. In her view, because the waiver was unambiguously limited to negligence claims, legislative history was irrelevant. *Id.* at ¶¶ 43, 46-47. She found that the legislative history cited by Judge Terry invited confusion and did not confirm Judge Terry's opinion, while the legislative history cited by Judge Richman was likewise unhelpful. *Id.* at ¶¶ 46, 48-51.

Judge Richman dissented. Quoting all the relevant portions of the statute, reading the statute as a whole, and considering the CGIA's purpose, he concluded that Cisneros's claim fell within the statutory waiver. *Id.* at ¶¶ 54-57.

Judge Richman first addressed the CGIA's plain language. He observed that the CGIA in general, and the waiver at issue in particular, allows parties to seek redress for injuries caused by public entities, and interpreting the waiver to apply only to negligence but not to intentional torts turns this purpose on its head. *Id.* at ¶¶ 58-62. He interpreted the requirement to show negligence in harmony with other CGIA provisions to mean that negligence was a minimum, not a maximum, showing needed to establish the waiver. *Id.* at ¶¶ 63-64. He noted that Colorado courts have consistently rejected strict interpretations of CGIA waivers. *Id.* at ¶ 65. Finally, he opined that his reading would avoid an absurd, illogical result under which more serious torts would go unpunished, and he noted that even the Sheriff conceded that the waiver would apply to physical torts, like assault or battery, that require intent. *Id.* at ¶¶ 66-67.

Assuming there was an ambiguity, Judge Richman—invoking legislative history that Judge Terry overlooked—concluded that the Legislature intended to waive immunity not just for negligence but also for more serious torts, including gross negligence and intentional torts. *Id.* at ¶¶ 68-69. In addition, he attached

significance to the Legislature's deliberate revision that removed the term "only" from a prior draft. *Id.* at ¶ 70. In discussing this revision, the Senate sponsor of H.B. 94-1284 had observed that the purpose of this waiver language was to require "a very minimal standard," and the sponsor agreed that more culpable conduct, including gross negligence, would be actionable. *Id.* at ¶¶ 71-72.

Judge Richman also agreed with Cisneros that the whole point of the amendment was to avoid strict liability for jail operations and establish a minimum standard. *Id.* at ¶¶ 73-74. He concluded by noting that the possible availability of a civil rights claim did not bar Cisneros's tort claim. *Id.* at ¶ 77.

SUMMARY OF ARGUMENT

1. Cisneros established that the waiver of sovereign immunity in C.R.S. § 24-10-106(1.5)(b) applies to his false imprisonment claim. Section 105(1.5)(b) requires a claimant to "show injury due to negligence," *i.e.*, to prove a minimum culpable mental state, not to bring one particular type of tort claim. By pleading that Sheriff Elder acted knowingly and intentionally, Cisneros satisfied the statute.

Cisneros's interpretation comports with the CGIA's purpose and its general approach to waivers, under which public entities are subject to liability for more culpable conduct but not for conduct that is less culpable. Furthermore, under this Court's precedent, waivers must be broadly construed, and construing section

106(1.5)(b) to apply only to negligence claims would violate that rule. And a more narrow interpretation yields an illogical and absurd result.

The court of appeals majority erred by giving the waiver a cribbed reading. Instead of interpreting the term "negligence" in context, the majority relied on a tautology—"'negligence' means negligence." The majority thus failed to honor the Legislature's intent to set a minimum standard of culpability. The majority also failed to read section 106(1.5)(b) in harmony with other CGIA provisions. This produced an illogical and absurd result that exposes jailers to liability for mere negligence but immunizes them for intentional conduct.

2. The legislative history of CGIA section 106(1.5)(b) confirms that the Legislature sought to abolish absolute liability for jailers and require claimants to show *at least* negligence. Thus, even if the statute were deemed to be ambiguous, the Court should adopt Cisneros's interpretation.

3. Finally, Cisneros's interpretation is supported by multiple policy rationales. A contrary interpretation would immunize jailers from their misconduct for intentional harm to pretrial detainees and punish them only for negligent harm. And the availability of a civil rights claim with unique defenses and technicalities should not preclude a state-law tort claim. The Court should therefore reverse the court of appeals' decision and reinstate Cisneros's false imprisonment claim.

ARGUMENT

I. Cisneros's Claim Falls Within The CGIA's Waiver Of Immunity For Injuries Resulting From The Operation Of A Jail, Because By Pleading Intent And Knowledge, He Necessarily Satisfied The Requirement To Show Injury Due To Negligence.

A. Standard of Review and Preservation of Issues

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, . . . appellate review is de novo." *Daniel v. City of Colo. Springs*, 2014 CO 34, ¶ 10.

The CGIA "implicates issues of subject matter jurisdiction," *id.*, which cannot be waived, *Herr v. People*, 198 P.3d 108, 111 (Colo. 2008). In any event, Cisneros preserved his arguments in his response to Elder's motion to dismiss, CF, pp 35-45, and in his supplemental briefing, CF, pp 62-113.

B. The Unambiguous Language of C.R.S. 24-10-106(1.5)(b), Which Waives CGIA Immunity if a Claimant "Can Show Injury Due to Negligence," Sets a Floor, Not a Ceiling, for the Requisite Culpable Mental State.

Resolution of the question presented turns on the interpretation of CGIA section 24-10-106(1.5)(b). In interpreting this statute, the Court's "primary task is to ascertain and give effect to the legislature's intent[.]" *Daniel*, ¶ 11. Where, as here, a statute is unambiguous, this Court enforces its plain and ordinary meaning.

Id. ¶ 12. To determine ordinary meaning, the Court "read[s] the words and phrases in a statute 'in context,' and 'according to the rules of grammar and common usage.'" *Carrera v. People*, 2019 CO 83, ¶ 17 (quoting *McCoy v. People*, 2019 CO 44, ¶ 37). And it "must take care to construe the legislative scheme 'as a whole' by 'giving consistent, harmonious, and sensible effect to all of its parts.'" *Id.* (quoting *McCoy*, ¶ 37).

Conversely, the Court "must avoid constructions that would render any words or phrases superfluous or lead to illogical or absurd results." *McCoy*, ¶ 38. This requirement to avoid illogical or absurd results applies at the outset of the statutory interpretation process, when the Court is discerning a statute's plain language. *See Carrera*, ¶ 17; *McCoy*, ¶ 38. Finally, because "the CGIA is in derogation of Colorado's common law," the Court will "narrowly construe the CGIA's immunity provisions, and as a logical corollary, . . . broadly construe the CGIA's waiver provisions." *Daniel*, ¶ 13.

The waiver in section 106(1)(b) for injuries resulting from "[t]he operation of any . . . jail" applies if the claimant (i) was "incarcerated but not yet convicted" of the crime for which he was in jail, and (ii) "can show injury due to negligence." C.R.S. § 24-10-106(1.5)(b). The first part of this test was undeniably met, because

at all relevant times, from November 24, 2017 to March 20, 2018, Cisneros was incarcerated but not convicted. CF, p 3, ¶¶ 11-18; p 7, ¶ 58.

The second part—at issue here—was likewise satisfied. Section 106(1.5)(b) sets negligence as a floor, not, as the court of appeals majority ruled, a ceiling. This conclusion is compelled by the statute's plain language; by the CGIA taken as a whole; by the rules of CGIA interpretation, under which waivers must be broadly construed; and by the requirement to interpret statutes in a manner that avoids absurd or illogical results.

1. The statute's plain language requires a claimant to prove *at least* negligence, not *at most* negligence.

Section 106(1.5)(b) waives sovereign immunity if a claimant "can show injury due to 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 waive immunity, for multiple reasons.

First, the words chosen by the Legislature plainly refer to a *culpable mental state*, not to a *type of tort claim*. For the waiver to apply, a claimant must "show injury due to" negligence, not "state a claim for" negligence or "bring an action for" negligence. C.R.S. § 24-10-106(1.5)(b). If the Legislature had intended to limit the waiver to ordinary negligence *claims*, it would have said so.

The Legislature's negligence requirement thus 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). A showing of intent meets—indeed, exceeds—the requirement to "show . . . negligence."

Cisneros's interpretation of section 24-10-106(1.5)(b) dovetails with the settled principle that more culpable mental states subsume less culpable ones. For instance, under Colorado's Criminal Code, "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) (2020); *see People v. Rigsby*, 2020 CO 74, ¶ 21 (acknowledging a hierarchy of culpable mental states for criminal liability and concluding that "acting with intent necessarily includes . . . acting with criminal negligence").

So too with respect to tort liability. "The law of torts recognizes that a defendant who intentionally causes harm has greater culpability than one who negligently does so." *Mayer v. Town of Hampton*, 497 A.2d 1206, 1209 (N.H. 1985). Thus, for purposes of tort liability, more culpable mental states subsume

less culpable ones. *See Sheehan v. Oblates of St. Francis de Sales*, 15 A.3d 1247, 1256-57 (Del. 2011) (interpreting statute that revives tort claims for child abuse upon a finding of "gross negligence," and ruling that a finding of intent satisfies the statute, because "by definition a finding of an intentional breach of a duty subsumes a grossly negligent breach of that duty"); *see also Huffman v. Caterpillar Tractor Co.*, 908 F.2d 1470, 1477 (10th Cir. 1990) (interpreting Colorado's Comparative Fault Statute and ruling that "[t]he term 'fault,' as employed in C.R.S. 13-21-406, is more plausibly construed as a general term encompassing a broad range of culpable behavior including, but not limited to, negligence").

Second, as Judge Richman reasoned, Cisneros's interpretation is consistent with the purpose of CGIA waivers and with the CGIA's general approach to culpable conduct. *See* 2020 COA 163M, ¶¶ 62-64 (Richman, J., dissenting). CGIA waivers permit parties to seek redress for injuries caused by public entities. *Id.* ¶ 62. This is "one of the basic but often overlooked purposes of the CGIA." *Daniel*, ¶ 13 (citation and quotation marks omitted). Moreover, the CGIA generally waives immunity for public entities and employees for more culpable conduct but not for less culpable conduct. 2020 COA 163M, ¶ 64 (Richman, J. dissenting and citing C.R.S. §§ 24-10-105(1), 106(4), 106.3(4), 106.3(8), and 118(1)). These principles bolster the conclusion that by requiring negligence in

section 106(1.5)(b), the Legislature established a minimum—not maximum—standard of culpability.

Third, Cisneros's interpretation comports with this Court's mandate that CGIA waiver provisions be interpreted broadly. *Daniel*, 2014 CO 34, ¶ 13. A narrow interpretation of this waiver restricts its reach to torts sounding only in negligence. A broad—and correct—interpretation recognizes negligence as a minimum requirement, one that can be met if a claimant establishes intentional or knowing conduct, as Cisneros alleges here. CF, p 7, ¶ 61.

Fourth, this Court presumes the Legislature intended "a just and reasonable result" and thus rejects "a statutory interpretation that defeats the legislative intent or leads to an absurd result[.]" *AviComm, Inc. v. Colo. PUC*, 955 P.2d 1023, 1031 (Colo. 1998). Again, this duty to avoid illogical or absurd results applies when the Court is discerning a statute's plain language. *See Carrera*, ¶ 17; *McCoy*, ¶ 38. Here, interpreting section 106(1.5)(b) to waive immunity only for injuries resulting from a jailer's negligence, and not from a jailer's knowing or intentional conduct, would be both illogical and absurd. It would turn the purpose of immunity waivers "on its head." 2020 COA 163M, ¶ 62 (Richman, J., dissenting).

Finally, as Judge Richman observed, the Sheriff conceded for purposes of this appeal that section 106(1.5)(b) applies to intentional torts involving bodily

injuries, such as assault or battery. *Id.* at ¶ 67. The Sheriff suggested that the waiver applies only to claims for such injuries and not to the type of injury Cisneros suffered. *Id.*; *see* 2019CA0546, Amended Op. Br. at 39. But nothing in the text of section 106(1.5)(b) supports this supposed distinction.

The Sheriff's concession that section 106(1.5)(b) can apply to intentional torts should have made this an easy decision. Yet, the court of appeals majority disregarded this admission, misapprehended this Court's approach to interpreting CGIA waivers, narrowly interpreted section 106(1.5)(b), and threw out Cisneros's false imprisonment claim. As shown next, the majority thus erred.

2. The court of appeals majority strayed far from this Court's approach to CGIA waivers.

The majority improperly gave section 106(1)(b) a cribbed reading. Stating that "'negligence' means negligence," 2020 COA 163M, ¶ 4, the majority ruled that no greater culpable mental state could satisfy this standard, *id.* at ¶¶ 18-23. But "negligence means negligence" is not plain language interpretation; it is a tautology. The majority failed to address the term "negligence" in the context of the sentence in which it appears, much less in the overall context of the statute.

Again, the statute doesn't refer to a negligence *claim* or a negligence *action*; it requires a claimant to "show injury due to negligence," and thus, sets forth the *minimum mens rea* needed to waive immunity. Nor does the statute read "can

show injury due *only* to negligence." And courts will not read terms into a statute to restrict its application where the Legislature didn't do so. *DuBois*, 214 P.3d at 588.

The majority compounded this mistake by misapplying this Court's core rule of interpreting CGIA waivers. "[T]he CGIA is in derogation of the common law," and therefore, this Court will "narrowly construe the CGIA's immunity provisions, and as a logical corollary, . . . broadly construe the CGIA's waiver provisions." *Id.* at ¶ 13. Here, at the beginning of her discussion of legislative history, Judge Terry—joined by no other judge—minimized this interpretive rule, stating, "[i]t can be argued that" waivers should be broadly construed, and then asserting that the rule doesn't apply unless the waiver contains an ambiguity. 2020 COA 163M, ¶¶ 27-28. This is doubly wrong. Under this Court's clear precedent, CGIA waiver provisions must be interpreted broadly, period. *See Daniel*, ¶ 13.

The majority also misapplied the maxim *expressio unius est exclusio alterius* (the inclusion of certain items implies the exclusion of others) to the phrase "show injury due to negligence." 2020 COA 163M, ¶¶ 19-20. This maxim applies only when the Legislature supplies a *list* of items, and only where the list is *exhaustive*. *See Johnson v. Sch. Dist. No. 1*, 2018 CO 17, ¶ 17. And the maxim, which is a tool for discerning legislative intent, "should not be applied where doing so would

undermine that intent." *Id.* Here, the statute contains no list, much less an exhaustive one, and applying the maxim would undermine the Legislature's intent to require a minimum, not a maximum, culpable mental state.

Finally, the majority effectively conceded that its interpretation would yield an illogical or absurd result. But it did not factor this consideration into the process of statutory interpretation. Instead, under a concluding section entitled "Takeaways," Judge Terry opined:

> It may strike reasonable people the same way as it did the district court, that if liability is waived for negligent conduct, it should also be waived for intentional conduct. But we are bound to apply the law as written, and the pertinent provision of the CGIA simply does not permit imposition of governmental liability for intentional conduct.

2020 COA 163M, ¶ 39. This was error. In interpreting the statute, the court was duty-bound to presume the Legislature intended a reasonable result and to avoid an illogical or absurd one. *AviComm*, 955 P.2d at 1031.

Cisneros was kept in jail without any legal authority for nearly four months due to the Sheriff's illegal policies and practices. As the district court observed in the companion class action, Cisneros suffered grave, irreparable injuries. *See Cisneros*, 2018 Colo. Dist. LEXIS 3388, at *39 ("Few injuries are more real, immediate, or irreparable than being deprived of one's personal liberty."). In the

majority's view, had Cisneros been held without legal authorization due to mere *negligence*, the waiver would have applied; but because his detention was *intentional*, it did not. Nothing in section 106(1.5)(b) compelled this draconian result.

C. Even if the Statute Were Ambiguous, the Legislative History Shows that the Legislature Wished to Establish a "Very Minimal" Standard—a Floor, Not a Ceiling.

A statute is ambiguous if it is reasonably susceptible to more than one interpretation. *Colo. Oil & Gas Conservation Comm'n v. Martinez*, 2019 CO 3, ¶ 19. If this Court determines that the CGIA's language does not resolve whether negligence is a floor or a ceiling, then it "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*. These factors underscore the Legislature's intent to set negligence as a floor to establish the waiver at issue, not a ceiling.

1. The Relevant Legislative History Confirms Cisneros's Interpretation.

The relevant legislature history, which Cisneros supplied below, confirms his interpretation of the section 106(1.5)(b). Paragraph 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 74-76. 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 jailers 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). Even then, 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) (emphasis added). This 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 jailer, 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). He then clarified his

intent: He wanted to impose "a very minimal standard" and "gross negligence would have been a higher standard than I . . . particularly wanted[.]" CF, p 107 (Tr. 7:7-23). The following colloquy then took place:

> SENATOR RIZZUTO: [W]ould it be your intent as a sponsor and basically our intent . . . that . . . if you show a mere minimum of negligence, that's enough, but if somebody claims that it was more than that, then that doesn't become a defense for the sovereign immunity to apply? . . .
>
> SENATOR MUTZEBAUGH: Let me see if I understand your question. If, for instance, the claimant could show gross negligence, then he would have the right to pursue his action under this bill, the way I read it.
>
> SENATOR RIZZUTO: That's your intent?
>
> SENATOR MUTZEBAUGH: Yes.

CF, pp 107-08 (Tr. 7:25–8:14).

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.

This history clarifies the legislative intent. House Bill 94-1284 addressed the perceived problem of strict liability for correctional facilities by requiring a claimants to show *some degree of fault—at least negligence*—as stated repeatedly by Senator Mutzebaugh. CF, pp 92 (Tr. 3:16-24), 95 (Tr. 6:16-21). And in response to questioning from Senator Rizzuto on whether the waiver would apply if a claimant alleged more than mere negligence, Senator Mutzebaugh confirmed that negligence was a minimum, not a maximum. CF, p 108 (Tr. 7:25–8:14). The bill was later amended to remove the term "only," confirming that conduct more culpable than negligence falls within the waiver. *Compare* CF, pp 77-78 *with* 79-80. The legislative history thus confirms Cisneros's interpretation.

2. Judge Terry Overlooked Key Portions of the Legislative History.

Judge Terry misapprehended or overlooked key portions of the legislative history. She suggested that H.B. 94-1284 was introduced to address concerns "about inmates bringing frivolous *negligence* claims" against jails. 2020 COA 163M, ¶ 31. In fact, it was introduced 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 jailers were at fault. CF, pp 93-95 (Tr. 4:23–6:14); *see* 2020 COA 163M, ¶ 73 (Richman, J., agreeing with this point).

Moreover, as noted above, in proposing a floor amendment, Senator Mutzebaugh clarified that a claimant had to allege "at least" negligence in order for the waiver to apply. CF, p 92 (Tr. 3:16–24). Judge Terry disregarded this crucial piece of legislative history, even though Judge Richman pointed to it in his dissent. *See* 2020 COA 163M, ¶ 73.

Finally, in a colloquy with Senator Rizzuto during the Senate Third Reading, Senator Mutzebaugh clarified that he wanted to impose "a very minimal standard" and noted, for instance, that "gross negligence would have been a higher standard than I . . . particularly wanted[.]" CF, p 107 (Tr. 7:7-23). Judge Terry overlooked this critical explanation that negligence was meant to be a "minimal" standard; Judge Richman did not. *See* 2020 COA 163M, ¶ 71. If legislative history should have been considered, then this key clarification by the Senate sponsor should have been considered. It underscores the Legislature's intent that negligence was to serve as a floor, not as a ceiling.

In sum, whether the Court limits its review to the CGIA's plain language or considers the legislative history, the Legislature's intent was clear: The waiver in section 106(1.5)(b) establishes a minimum standard, not a maximum one. The Court should so hold.

D. Policy Rationales Support Cisneros's Interpretation.

Multiple policy rationales support the result Cisneros urges. *First*, it makes no sense to assume the Legislature intended to waive immunity for negligent acts but to immunize jailers for more serious conduct. Intentional wrongdoing would go unpunished while only negligent wrongs would be actionable.

Second, the issue presented impacts all pretrial detainees in Colorado—a vast and continually changing population of persons who are incarcerated but have not been convicted of crimes. Torts visited on pretrial detainees in a wide variety of circumstances will go unredressed if the majority's decision stands. And allowing persons to be deliberately detained without authorization *after* they post bond, are acquitted, complete their sentences, or otherwise resolve their criminal cases undermines the rule of law. A commonsense interpretation of the waiver at issue will help ensure the law is obeyed.

Third, other possible remedies should not preclude Cisneros's tort claim. Judge Terry repeatedly referred to Cisneros's pending civil rights claim. 2020 COA 163M, ¶¶ 5, 34-36. But the availability of a separate federal claim with separate requirements, defenses, and technicalities shouldn't foreclose Cisneros or other claimants from exercising their rights under state tort law. Indeed, in detainer cases in other jurisdictions, courts have allowed false imprisonment claims

to proceed alongside constitutional claims. *See*, *e.g.*, *C.F.C. v. Miami-Dade Cnty.*, 349 F. Supp. 3d 1236, 1254-68 (S.D. Fla. 2018); *Parada v. Anoka Cnty.*, 332 F. Supp. 3d 1229, 1239-46 (D. Minn. 2018).

In short, interpreting the waiver narrowly to apply only to negligence claims eviscerates significant rights, nullifies the remedial purpose of CGIA waivers, and undermines the rule of law. The Court should restore the waiver's proper reach and effectuate its remedial purpose.

CONCLUSION

For the foregoing reasons, Cisneros asks the Court to reverse the court of appeals' decision and reinstate his false imprisonment claim.

DATED this 20th day of July, 2021.

Respectfully submitted,

s/ Stephen G. Maschiocchi

Stephen G. Masciocchi, # 19873
Peter A. Kurtz, # 54305
HOLLAND & HART, LLP
In cooperation with the American Civil Liberties Union Foundation of Colorado

Mark Silverstein, #26979
Arielle Herzberg, #54234
ACLU FOUNDATION OF COLORADO

CERTIFICATE OF SERVICE

I certify that on July 20, 2021, I served a copy of the foregoing document to the following by

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

Peter A. Lichtman, Sr. Asst. County Attorney
Mary Ritchie, Assistant County Attorney
200 S. Cascade Ave.
Colorado Springs, CO 80903
Phone (719) 520-6485
Fax (719) 520-6487

s/Brenda S. Proskey

16969420_v2