DISTRICT COURT, TELLER COUNTY, COLORADO 101 W. Bennett Avenue Cripple Creek, Colorado 80813	
Plaintiff: LEONARDO CANSECO SALINAS, On behalf of himself and all others similarly situated, v. **Defendant:** JASON MIKESELL, in his official capacity as Sheriff of Teller County, Colorado	▲COURT USE ONLY▲
Attorneys For Plaintiff: Byeongsook Seo, #30914 Stephanie A. Kanan, #42437 SNELL & WILMER, LLP 1200 17th Street Suite 1900 Denver, CO 80202-5854 Telephone: 303-295-8000 Fax: 303-634-2020 bseo@swlaw.com skanan@swlaw.com *In cooperation with the American Civil Liberties Union Foundation of Colorado* Mark Silverstein, #26979 Arash Jahanian, #45754 AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF COLORADO 303 E. Seventeenth Ave. Suite 350 Denver, Colorado 80203 Telephone: (303) 777-5482 Fax: (303) 777-1773 msilverstein@aclu-co.org ajahanian@aclu-co.org	Case No. 18CV30057 Div.: 11
PLAINTIFF'S REPLY IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION	

Sheriff Mikesell exceeds his authority under state law by refusing to release Mr. Canseco when he posts bond. By "cooperating" with ICE in this manner, the Sheriff carries out a warrantless arrest, which is presumptively unreasonable, and which the government bears the burden of justifying. *People v. Burns*, 615 P.2d 686, 688 (Colo. 1980).

The Sheriff has failed to carry that burden. No statute authorizes the re-arrest of Mr. Canseco, and the Sheriff has failed to demonstrate that he has inherent, implicit, or common law authority to make arrests not authorized by statute. Section II. The federal immigration statute does not supply the arrest authority that the Sheriff lacks under state law. Section III. The Massachusetts and Colorado cases analyzing sheriffs' state law authority—not Defendant's cases—demonstrate the correct analysis this Court must follow. Section IV.

I. Mr. Canseco Has Standing to Seek Prospective Relief

Mr. Canseco seeks prospective relief to prevent a threatened injury-in-fact to his legally protected interest in securing pretrial release on bond. In similar cases, courts have not required plaintiffs to actually post the bond money before challenging a sheriff's practice of refusing to release on bond. *See, e.g.*, *Ochoa v. Campbell*, 266 F. Supp. 3d 1237, 1260 (E.D. Wash. 2017) (granting TRO ordering defendant to release pretrial detainee plaintiff when he posts bond); *Tenorio-Serrano v. Driscoll*, 2018 U.S. Dist. LEXIS 112404, at *7-11 (D. Ariz. July 6, 2018).

II. Sheriff Mikesell Cannot Rely on "Inherent" or "Common Law" Authority as Grounds for Re-arresting Mr. Canseco on the Basis of ICE Documents

Although the Sheriff likes to call it "cooperation," he does not deny that he carries out the equivalent of a new arrest when he relies on ICE documents as grounds for refusing to release Mr. Canseco when he posts bond. Nor could he. *See* Mot. 8-9; *Roy v. Cty. of L.A.*, 2018 U.S. Dist. LEXIS 122410, at *8 (C.D. Cal. July 11, 2018) ("holding the inmates beyond their release

dates on the basis of civil immigration detainers constituted a new arrest"); *Orellana v. Nobles Cty.*, 230 F. Supp. 3d 934, 944 (D. Minn. 2017).

As Mr. Canseco explained, the Colorado statute authorizing arrest on a warrant, C.R.S. § 16-3-102(1)(a), does not authorize Sheriff Mikesell to refuse to release Mr. Canseco on bond. Mot. 9. Neither does C.R.S. § 16-3-102(1)(c), the statute authorizing warrantless arrests. Mot. 10. Sheriff Mikesell does not disagree. Instead, he alludes to purported authority under common law and argues that he has "inherent authority" or "implicit authority" to honor ICE's request to re-arrest Mr. Canseco. Resp. 10-12. The Sheriff is wrong.

The Colorado Supreme Court has explained that it is legislation—not common law and not inherent authority—that provides the authority for arrests. *People v. Hamilton*, 666 P.2d 152, 154 (Colo. 1983) ("In Colorado, as elsewhere, the authority of peace officers to effectuate arrests is now defined by legislation."). Thus, the authority of sheriffs and other Colorado peace officers to make arrests is limited by C.R.S. § 16-3-102 as well as additional statutes not relevant here, such as C.R.S. § 16-3-106. *See id*. at 154-55. When a Colorado peace officer makes an arrest that is not authorized by statute, as Sheriff Mikesell plans to do when Mr. Canseco posts bond, he exceeds his authority.

Colorado sheriffs are limited to the express powers granted by the Legislature and the implied powers "reasonably necessary to execute those express powers." Mot. 7 (quoting *People v. Buckallew*, 848 P.2d 904, 909 (Colo. 1993)). Powers will be implied only when the sheriff cannot "fully perform his functions without the implied power." *Id*. The court's reasoning in *Douglass v. Kelton*, 610 P.2d 1067 (Colo. 1980), demonstrates how narrowly the court construes the range of implied powers. Mot. 7. Although the Sheriff cites the same test from *Buckallew*,

Resp. 11, he fails to demonstrate that he would be unable to fully perform his functions if he were required to follow Colorado law that mandates release of prisoners when they post bond, complete their sentence, or otherwise resolve their state criminal case.

A. Attorney General Formal Opinion 99-7 Supports Mr. Canseco's Position

The Sheriff quotes an Attorney General opinion that refers to the common law powers of sheriffs to preserve order and protect the community. Resp. 10 (quoting Formal Opinion No. 99-7, Colo. Att'y Gen., 1999 WL 33100121 (Sept. 8, 1999), attached as Ex. 14 (hereafter "AG op.")). That opinion also discusses sheriffs' statutory duty to keep the peace, C.R.S. § 30-10-516, on which the Sheriff relies. Resp. 11 (quoting AG op. at *4). The Formal Opinion, however, refutes instead of supports Sheriff Mikesell's contention that he has powers of arrest beyond the powers specified in Colorado statutes.

The Formal Opinion responded to Colorado sheriffs who feared "Y2K" scenarios including power outages, disruptions of telecommunications, and shortages of water, fuel, and medicine. *See* AG op. at *1. One question posed was whether sheriffs had authority, beyond the power of arrest, to direct the actions of citizens or commandeer and utilize private property. The answer was no: "The sheriff's use of authority beyond the arrest power must be found in a specific statute." *Id.* at *4.

The Attorney General said that sheriffs carry out their duty to keep and preserve the peace, specified in C.R.S. § 30-10-516, "by issuing summons or making arrests for violations of the criminal statutes." *Id*. (citing C.R.S. § 16-3-102). Relying on *Buckallew* and *Douglass*, the Attorney General concluded that the sheriff had no authority to "commandeer the use of an electricity generator and employ it to provide electricity to other citizens." *Id*. at *5. The

Attorney General further concluded that sheriffs may respond to a Y2K emergency to "keep the peace," but they must rely only on their power of arrest.

B. The Sheriff Fulfills His Duty to Keep the Peace by Exercising His Statutory Powers According to Law, Not by Relying on Arrest Powers He Does Not Have

The Sheriff contends that "illegal aliens" contribute to "increased crime" in Teller County. He contends that "removing" such persons from the County's "streets and neighborhoods" is related to his statutory duty to keep and preserve the peace. Resp. 11.[1] The same argument, of course, could apply to citizens accused of crime whom the sheriff removes from streets. As the Attorney General helped explain, however, the Sheriff carries out his statutory peacekeeping duties by exercising the powers of arrest codified in Colorado statutes. Pursuant to Colorado law, the Sheriff's power to "remove" persons accused of crime from the streets is limited by the criminal court's power to grant pretrial release on bail. The Sheriff's statutory duty to keep and preserve the peace does not provide authority to refuse to release Mr. Canseco when he posts the bond set by the Teller County Court.

Sheriff Mikesell suggests that a ruling for Mr. Canseco will somehow impair the Sheriff's ability to cooperate with other law enforcement agencies. Resp. 11. Not so. The request from ICE to "cooperate" is a request to re-arrest Mr. Canseco, in violation of Colorado law. Unless Sheriff Mikesell's cooperation with the other government agencies involves making arrests that are not authorized by statute, then that cooperation is not threatened by a ruling for Mr. Canseco.

C. The Repeal of SB-90 in 2013 Supports Mr. Canseco's Position

[1] Mr. Canseco is charged with two misdemeanors. The more serious charge alleges that he played $8.25 in credits left unattended at a slot machine. Ex. 15, Arrest Affidavit.

The Sheriff erroneously claims that SB-90 and its repeal somehow confirms his "inherent authority." Resp. 12-13. It did no such thing. When the Colorado legislature repealed SB-90 in 2013, it adopted a legislative declaration that articulates a clear public policy position. It declared that when public safety agencies play a role in enforcing federal immigration laws, as Sheriff Mikesell seeks to do, it undermines public trust in law enforcement.[2] *See* Def. Ex. I.

D. C.R.S. § 17-26-123 Grants No Power to Refuse to Release Mr. Canseco on Bond

It is "the duty" of county jailers "to receive into the jail every person duly committed thereto for any offense against the United States, by any court or officer of the United States." C.R.S. § 17-26-123. Sheriff Mikesell contends, erroneously, that this statute requires him to house any prisoner ICE brings to the jail for "any civil immigration offense." Resp. 14.

Plaintiff explained that a statutory reference to "offense" means crime. Mot. 10 (citing C.R.S. § 18-1-104(1); C.R.S. § 16-1-105(2)). Sheriff Mikesell has not disagreed. Thus, the statute applies to persons accused of federal crimes, not persons held for a civil proceeding to determine removability. The Sheriff does not contend that federal officers "duly committed" Mr. Canseco to the jail. He is not a federal prisoner. He is in custody for a criminal proceeding in county court, not a federal civil proceeding to determine removability. The *Cisneros* court correctly concluded that this statute provides no authority for refusing to release a pretrial detainee on bond. *Cisneros*, slip op. at 7.

III. Section 1357(g)(10) Grants No Authority to Refuse to Release Mr. Canseco on Bond

[2] At three points, Sheriff Mikesell relies on the failure of a bill to get out of committee during the 2015 legislature. Resp. 8, 13, 15. "Nothing of significance can be gleaned from the failure of the legislature to pass particular legislation." *DOT v. Stapleton*, 97 P.3d 938, 944 n.5 (Colo. 2004).

Sheriff Mikesell claims that his refusal to release Mr. Canseco on bond is authorized by 8 U.S.C. § 1357(g)(10). Resp. 1. His reliance is erroneous and also misses the point at issue here: He has no authority under *state* law to deprive Mr. Canseco of liberty on the basis of ICE documents, and subsection (g)(10) cannot and does not supply that missing state law authority.

Section 1357(g), titled "Performance of immigration officer functions by State officers and employees," provides for what is commonly known as a "287(g) agreement." *See Lunn v. Commonwealth*, 78 N.E.3d 1143, 1158 (Mass. 2017). It provides that local law enforcement agencies can enter into written agreements with federal authorities to perform functions ordinarily reserved to federal immigration officers. But the participation of local law enforcement must be "consistent with State and local law." *Id.*; *see* 8 U.S.C. § 1357(g)(1). The non-federal officers must "receive[] adequate training regarding the enforcement of relevant Federal immigration laws." § 1357(g)(2). Subsections (g)(3) through (g)(9) provide additional statutory caveats regarding the written agreements known as 287(g) agreements.

Sheriff Mikesell is not operating under a 287(g) agreement. Subsection (g)(10), upon which he relies, merely states that nothing in §1357(g) requires a written agreement for local officials to "communicate" with federal officials regarding individuals' immigration status or "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).

Even if "cooperation" somehow included re-arresting detainees on the basis of ICE detainers (and it does not),[3] subsection (g)(10) simply confirms that certain forms of cooperation

[3] In *Arizona v. United States*, 567 U.S. 387 (2012), the Court provided examples of the local "cooperation" contemplated by (g)(10). Despite the urging of the United States, the Court did not include making "arrests at the request of immigration officials," *see* 2012 U.S. S. Ct.

in the absence of a 287(g) agreement are not *preempted* by federal law. In other words, the (g)(10) savings clause confirms that Section 1357 does not abolish, on preemption grounds, whatever state-law authority already exists for local law enforcement to communicate with ICE or "otherwise cooperate." But that does not address the question here: whether *state* law provides authority to for the arrest. Whether or not the arrest is preempted is irrelevant, because Colorado law does not authorize the Sheriff to re-arrest Mr. Canseco.

Critically, courts have held, and the federal government has agreed, that Section 1357(g)(10) does not *supply* arrest authority. *See Lunn*, 78 N.E.3d at 1158 ("[T]he United States does *not* contend that § 1357(g)(10) affirmatively confers authority on State and local officers to make arrests pursuant to civil immigration detainers, where none otherwise exists."). The

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Briefs LEXIS 1130, at *96, as an example of cooperation. Instead, the Court cited the only statute that mentions an ICE detainer, § 1357(d), and said local officials may "respond[] to requests for information" about an individual's release date. *Arizona*, 567 U.S. at 410. The Court provided additional examples of (g)(10) cooperation: allowing ICE agents into local jails to speak with detainees, participation in a joint task force with federal officials, and providing "operational support in executing a warrant." *Id.*

In claiming "authority" to arrest Mr. Canseco, Sheriff Mikesell impermissibly tweaks the Supreme Court's text. When local officials provide operational support to ICE "in executing a warrant," they play a supporting role to ICE agents, who are the only officials authorized to execute ICE warrants. Sheriff Mikesell claims he is "cooperating" consistent with (g)(10) "*by* providing operational support *by* holding Plaintiff until ICE may take custody." Resp. 6-7 (emphasis added). Thus, Sheriff Mikesell converts his role into the active player making the immigration arrest in the first instance, with no ICE agents even present. The local "cooperation" contemplated by subsection (g)(10) does not include depriving persons of liberty on the basis of ICE documents, as federal law reserves that authority to federal officials trained in immigration law. *Arizona*, 567 U.S. at 408 (citing 8 C.F.R. §§ 241.2(b), 287.5(e)(3)).

The *Arizona* Court noted that its examples of (g)(10) cooperation derive from a DHS Guidance document, at 13-14. *Arizona*, 567 U.S. at 410. The Guidance remains current on the DHS web site, https://bit.ly/2KKxaiy and is attached as Ex. 16. In explaining the potential role of local law enforcement in providing "operational support in executing a warrant," the Guidance offers the example of "providing tactical officers to join the federal officials during higher risk operations, or providing perimeter security for the operation . . . ." *Id.* at 13. Sheriff Mikesell's planned arrest of Mr. Canseco is not the kind of "operational support" contemplated by subsection (g)(10), the *Arizona* Court, or the DHS Guidance.

Massachusetts Supreme Court in *Lunn* flatly rejected any suggestion that §1357(g)(10) authorizes a state or local official like Sheriff Mikesell to arrest a detainee who would otherwise be released. *Id*. at 1159. Other courts agree that § 1357(g)(10) does not grant authority to non-federal officers beyond whatever authority they already have under state law. *See Ochoa*, 266 F. Supp. 3d at 1254-55; *Lopez-Aguilar v. Marion Cty. Sheriff's Dep't.*, 296 F. Supp. 3d 959, 973-74 (S.D. Ind. 2017); *Cisneros*, slip op. at 9-10. Thus, Sheriff Mikesell cannot rely on §1357(g)(10) to furnish authority that he does not have under Colorado law.

IV. The Sheriff's Criticism of *Cisneros* Is Misplaced

The Sheriff mistakenly claims that *Cisneros* is contrary to what the Sheriff perceives as a trend.[4] Resp. 7. The issue here, and the issue in *Cisneros*, is the sheriff's authority under Colorado law. There are zero cases contradicting *Cisneros* about Colorado sheriffs' authority. The federal case on which the Sheriff relies extensively, *Lopez-Lopez v. County of Allegan*, did not discuss state law at all. Local law differs from one state to another. A Texas statute mandates that sheriffs honor ICE detainer requests. *City of El Cenizo v. Texas*, 890 F.3d 164, 188 (5th Cir. 2018). In Massachusetts, as in Colorado, state law does not authorize sheriffs to honor detainers. *Lunn*, 78 N.E.3d at 1159. The results on this point in *Cisneros* and *Lunn* are not "contrary" to the ruling in *El Cenizo*.

Sheriff Mikesell makes the baseless claim that *Cisneros* incorrectly analyzed detainers as "a criminal arrest" and overlooked the validity of administrative warrants in immigration. Resp.

[4] The Sheriff's "trend" requires overlooking contrary decisions. For example, in *Roy v. County of L.A.*, to which the Sheriff devotes a block quotation, Resp. 10, the court later held that L.A. sheriffs "have no authority to arrest individuals for civil immigration offenses" or to "detain[] individuals beyond their date for release." 2018 U.S. Dist. LEXIS 27268, at *70 (C.D. Cal. Feb. 7, 2018). *See also Ochoa*, 266 F.Supp.2d at 1260; *Lopez-Aguilar, v.* 296 F. Supp. 3d at 973-74.

7-8. On the contrary, the *Cisneros* court searched for any statute that might authorize a sheriff to arrest for the admittedly civil matter of suspected removability. It found none. As for administrative warrants, federal law stipulates that only trained ICE agents—not Colorado sheriffs—may rely on them to deprive persons of liberty. *See* 8 C.F.R. § 241.2(b).

According to the Sheriff, Plaintiff relies on cases decided "on significantly different facts" because they predate ICE's 2017 policy to send administrative warrants with I-247 detainers. Resp. 5. On the contrary, *Lunn* carefully analyzed the 2017 change and concluded that the administrative warrant did not provide authority to local officers to hold persons who would otherwise be released. *Lunn*, 78 N.E.2d at 1155 n.21; *id*. at 1151 n.17. Second, contrary to the flawed reasoning of *Lopez-Lopez*, on which the Sheriff relies, the decision to supplement detainers with administrative warrants did not provide any additional information about ICE's suspicion of removability. ICE's detainer forms have asserted probable cause since 2012.[5] As ICE itself acknowledged in the announcement attached to Defendant's brief, it began sending administrative warrants with detainers to comply with a ruling that ICE's prior practice exceeded the agency's statutory authority for warrantless arrests. *See* Resp. Ex. D. 2 n.2.

V. Mr. Canseco Satisfies the *Rathke* Requirements

First, contrary to the Sheriff's suggestion, courts must sometimes grapple with issues of first impression in deciding on interim relief. The "reasonable probability of success on the merits" factor "requires the court to substantively evaluate the issues as it would during trial."

[5] In 2012, ICE changed its I-247 form to state that the agency had "reason to believe" (equivalent to probable cause) that the subject was removable. https://bit.ly/2MzqDJp, Ex. 17. In 2014, ICE detainer form began expressly asserting "probable cause." https://bit.ly/29oZZk5, Ex. 18.

Dallman v. Ritter, 225 P.3d 610, 621 (Colo. 2010). Sheriff Mikesell fails to demonstrate that Colorado law provides him with authority to deny release when Mr. Canseco posts bond.

Second, Plaintiff is suffering irreparable loss of liberty with every day that passes. Sheriff Mikesell argues that "removable aliens" merit diminished protection. Mr. Canseco has not been found to be removable; there have been no immigration proceedings. The Constitution "applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent." *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001).

Third, contrary to the Sheriff's misconception, the "crux" of this action is to secure the Sheriff's compliance with Colorado law, which requires release when a pretrial detainee posts bond. There is no adequate remedy at law because damages cannot compensate for Sheriff Mikesell's violations of Mr. Canseco's "right to liberty and freedom from unauthorized and unjustified imprisonment." *Cisneros*, slip op. at 12.

Fourth, an order to follow Colorado law undoubtedly *serves* the public interest, which is disserved by allowing the Sheriff to exceed his statutory authority. In 2013, the Colorado legislature declared that disentangling local law enforcement from immigration enforcement serves the public interest.

Fifth, the Sheriff has conceded that the balance of equities favors a grant of interim relief.

And *sixth*, the status quo is the status *between the parties* before the controversy arose, when Mr. Canseco's bond was set but ICE had not sent a detainer. Mot. 15. Sheriff Mikesell contends the status quo is his supposedly inherent authority to honor ICE detainers. That does not reflect the status between the parties, and as Plaintiff has shown, no such authority exists.

Respectfully submitted this 10th day of August, 2018.

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CERTIFICATE OF SERVICE

I certify that on August 10, 2018, I served a copy of the foregoing document to the following by

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