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| **DISTRICT COURT, EL PASO COUNTY, COLORADO**<br>270 S. Tejon Street<br>Colorado Springs, Colorado 80901 | |
| **Plaintiffs:**<br><br>Saul Cisneros,<br>Rut Noemi Chavez Rodriguez,<br><br>On behalf of themselves and all others similarly situated,<br><br>v.<br><br>**Defendant:**<br><br>Bill Elder, in his official capacity<br>as Sheriff of El Paso County, Colorado | ▲ COURT USE ONLY ▲ |
| Chad A. Readler, Acting Assistant Attorney General<br>William C. Peachey, Director<br>Erez Reuveni, Assistant Director<br>Lauren C. Bingham, Trial Attorney<br>Steven A. Platt, Trial Attorney<br>U.S. Department of Justice, Civil Division<br>Office of Immigration Litigation, District Court Section<br>P.O. Box 868, Ben Franklin Station<br>Washington, DC 20044<br>(202) 532-4074, Fax (202) 305-7000<br>steven.a.platt@usdoj.gov | Case Number: 2018CV030549<br><br>Division: 8<br><br>Courtroom: W550 |
| **STATEMENT OF INTEREST OF THE UNITED STATES OF AMERICA** | |

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## INTRODUCTION

The United States respectfully submits this statement of interest in accordance with federal statutes that authorize the United States Department of Justice "to attend to the interests of the United States" by "argu[ing] any case in a court of the United States in which the United States is interested." 28 U.S.C. §§ 517, 518.[1]

This memorandum of law explains why and in what contexts the El Paso County Sheriff's Office's (the County) cooperation with federal immigration detainers and federal immigration arrest warrants issued by U.S. Immigration and Customs Enforcement (ICE) is lawful. A detainer asks local law enforcement to aid federal immigration-enforcement efforts by notifying ICE prior to the release of an individual for whom there is probable cause to believe that he or she is a removable alien, and maintaining custody of that alien briefly (up to 48 hours beyond when the alien would otherwise be released) so that ICE can take custody of the alien in an orderly way. Without such cooperation, removable aliens, including individuals who have committed crimes, would be released into local communities, where it is harder and more dangerous for ICE to take custody of them and where they may commit more crimes. Then, under a so-called intergovernmental services agreement (IGSA) between the County and ICE,

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[1] Under 28 U.S.C. § 517, "[t]he Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States." Under 28 U.S.C. § 518, "[w]hen the Attorney General considers it in the interests of the United States, he may personally conduct and argue any case in a court of the United States in which the United States is interested, or he may direct the Solicitor General or any officer of the Department of Justice to do so." These statutes provide a mechanism for the United States to submit its views in cases in which the United States is not a party. *See, e.g.*, *SEC v. Nacchio*, No. 05-cv-480-MSK-CBS, 2008 WL 2756941, *2 (D. Colo. July 14, 2008); *Ren-Guey v. Lake Placid 1980 Olympic Games, Inc.*, 49 N.Y.2d 771, 773 (1980) (per curiam).

the County assists ICE, at federal request and cost, by physically housing detainees, though the detainees remain in federal custody.

ICE's use of — and local cooperation with — detainers and administrative arrest warrants is consistent with federal and Colorado law. Federal statutes authorize ICE to use detainers and warrants, and allow States and localities to cooperate with them. Colorado law affirmatively permits such cooperation with the detainers' and the IGSA's policy. And such cooperation is consistent with both the Fourth Amendment to the U.S. Constitution and Article II, Sections 7 and 25 of the Colorado Constitution.

With this background in mind, the United States respectfully submits that should the Court issue a temporary restraining order, such an order should be narrowly tailored to avoid impinging on this federally authorized and critical cooperative law enforcement scheme.

## BACKGROUND

Legal Background. The federal government has "broad, undoubted power over the subject of immigration and the status of aliens." *Arizona v. United States*, 567 U.S. 387, 394 (2012). This includes authority to interview, arrest, and detain removable aliens. *See, e.g.*, 8 U.S.C. § 1226(a) (Secretary of Homeland Security may issue administrative arrest warrants and may arrest and detain aliens pending removal decision); *id.* § 1226(c)(1) (Secretary "shall take into custody" aliens who have committed certain crimes when "released"); *id.* § 1231(a)(1)(A), (2) (Secretary may detain and remove aliens ordered removed); *id.* § 1357(a)(1), (2) (authorizing certain warrantless interrogations and arrests).[2]

In enforcing the immigration laws against removable aliens, the federal government

[2] Following the Homeland Security Act of 2002, many references in the Immigration and Nationality Act to the "Attorney General" are now read to mean the Secretary. *Clark v. Suarez Martinez*, 543 U.S. 371, 374 n.1 (2005).

works closely with state and local governments. The Immigration and Nationality Act (INA), 8 U.S.C. § 1101, *et seq.*, contemplates these cooperative efforts, which are critical to enabling the federal government to identify and remove the hundreds of thousands of aliens who violate immigration laws each year. Three such forms of cooperation are relevant in this case.

First, the INA specifically authorizes the Department of Homeland Security (DHS) to enter into cooperative agreements with States and localities, *see* 8 U.S.C. § 1357(g), also known as 287(g) agreements, under which state and local officers may, "subject to the direction and supervision of the [Secretary]," *id.* § 1357(g)(3), perform the "functions of an immigration officer in relation to the investigation, apprehension, or detention aliens." *Id.* § 1357(g)(1).

Second, Congress has authorized DHS to enter into agreements, referred to as IGSAs, with localities for the "housing, care, and security of persons detained by [DHS] pursuant to Federal law." *Id.* § 1103(a)(11)(A). In such circumstances, a detainee has been arrested by ICE, the alien is in ICE's custody, but ICE utilizes the IGSA facility to house the alien temporarily in a state or local facility, pursuant to federal custody. *See, e.g.*, *Roman v. Ashcroft*, 340 F.3d 314, 320–21 (6th Cir. 2003). Until an immigration officer — or a state or local officer who has been delegated immigration officer authority pursuant to a 287(g) agreement[3] — arrests the detainee, the IGSA is not triggered, and the detainee remains in state custody.

Third, even without a formal 287(g) agreement or IGSA detention contract, States and localities may "communicate with the [Secretary] regarding the immigration status of any individual" or "cooperate with the [Secretary] in the identification, apprehension, detention, or

[3] An IGSA does not deputize state law enforcement to unilaterally perform the functions of a federal immigration officer. Rather, it governs the housing, at federal request and cost, of federal detainees in state facilities. Therefore, an IGSA is distinct from a 287(g) agreement. *Compare* 8 U.S.C. § 1103(a)(11)(A) (authority for IGSAs), *with id.* § 1357(g)(1)–(9) (authority for 287(g) agreements).

removal of aliens not lawfully present in the United States," 8 U.S.C. § 1357(g)(10), when that cooperation is pursuant to a "request, approval, or other instruction from the Federal Government," *Arizona*, 567 U.S. at 410. Such cooperation may include: "participat[ion] in a joint task force with federal officers"; "provid[ing] operational support in executing a warrant"; "allow[ing] federal immigration officials to gain access to detainees held in state facilities"; "arrest[ing] an alien for being removable" when the federal government requests such cooperation; and "responding to requests for information about when an alien will be released from their custody." *Id.* The INA permits such cooperation whether it is directed by state statute or is implemented *ad hoc* by a local sheriff. *See id.* at 413. To comply with the Supremacy Clause, which invalidates uninvited intrusions on the federal government's expansive immigration authority, a state or local government may not cooperate beyond the terms of the federal government's "request, approval, or other instruction." *Arizona*, 567 U.S. at 403. Thus, compliance with ICE policy, as expressed in the detainer request, is essential to the lawfulness of the local action.

States and localities frequently cooperate with federal immigration enforcement by responding to federal requests for assistance, often contained in federal immigration detainers, including those issued by ICE, a component of DHS responsible for immigration enforcement in the interior of the country.[4] An immigration detainer notifies a State or locality that ICE intends to take custody of a removable alien who is detained in state or local criminal custody, and asks the State or locality to cooperate with ICE in that effort. A detainer asks a State or locality to cooperate in two main respects: (1) by providing ICE with advance notification of the alien's

[4] U.S. Customs and Border Protection, another DHS component, also issues detainers in certain situations. 6 U.S.C. § 211. This brief addresses only ICE detainers. ICE always requires probable cause to issue a detainer.

release date; and (2) when probable cause of removability exists, by maintaining custody of the alien for up to 48 hours, based on ICE's determination that it has probable cause to believe that the individual is a removable alien, until DHS can take custody. *See* 8 C.F.R. § 287.7(a) (describing notification of release), (d) (describing request for continued detention).[5]

In those instances in which probable cause is required, DHS's detainer form, Form I-247A, sets forth the basis for DHS's determination that it has probable cause to believe that the subject is a removable alien. The form states that DHS's probable cause is based on: (1) a final order of removal against the alien; (2) the pendency of removal proceedings against the alien; (3) biometric confirmation of the alien's identity and a records match in federal databases that indicate, by themselves or with other reliable information, that the alien either lacks lawful immigration status or, despite such status, is removable; or (4) the alien's voluntary statements to an immigration officer, or other reliable evidence that the alien either lacks lawful immigration status or, despite such status, is removable. Form I-247A at 1, https://www.ice.gov/sites/default/files/documents/Document/2017/I-247A.pdf.

Specifically, the current detainer form requests that the State or locality "[m]aintain 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." *Id.* The form clarifies that, "[t]his detainer arises from DHS authorities and should not impact decisions about the alien's bail, rehabilitation, parole, release, diversion, custody classification, work, quarter assignments, or other matters." *Id.* The I-247A detainer form also says that the "alien must be served with a copy of this form for the detainer to take effect," and that the detainer "should not impact," among

[5] Statutes authorizing such action include 8 U.S.C. §§ 1103(a)(3), 1226(a) and (c), 1231(a), and 1357(d).

other things, "decisions about the alien's bail" or "release." *Id.* The form encourages local law enforcement and the alien to contact ICE with "any questions or concerns" about a detainer. *Id.*

As of April 2, 2017, ICE policy requires that detainers be accompanied by a signed administrative warrant issued under 8 U.S.C. §§ 1226 or 1231(a). *See* ICE Policy No. 10074.2 ¶¶ 2.4, 2.5, https://www.ice.gov/detainer-policy. That warrant — either a Form I-200, Warrant for Arrest of Alien (issued for aliens not yet subject to a removal order) or a Form I-205, Warrant of Removal/Deportation (issued for aliens subject to a final removal order) — is issued by an executive immigration officer and sets forth the basis for that officer's probable-cause determination. *See* 8 C.F.R. §§ 236.1, 241.2, 287.5 (describing officers who may issue such warrants and when). It is this detainer and warrant — not a housing-focused IGSA — which authorize a county to detain inmates who are otherwise scheduled for release.

In sum, a state or local law enforcement agency may generally physically detain an alien suspected of being removable in three scenarios: (1) the jurisdiction has a 287(g) contract with ICE, under which "state and local officials become de facto immigration officers, competent to act on their own initiative," *City of El Cenizo, Texas v. Texas*, — F.3d. —, 2018 WL 1282035, *6 (5th Cir. Mar. 13, 2018); (2) the jurisdiction has an IGSA with ICE, which authorizes local law enforcement to house aliens at the request of ICE, after ICE initially takes custody of those aliens and then decides to book those aliens into the local facility as ICE detainees, *see Roman*, 340 F.3d at 320–21; or (3) ICE requests cooperation from the law enforcement agency through a detainer, accompanied by an administrative warrant, thereby authorizing the locality to maintain custody of the alien for up to 48 hours, "under color of federal authority." *See* 8 U.S.C. § 1357(g)(8), (10)(B). Outside of such scenarios or absent a "predicate federal request" to detain, *see El Cenizo*, 2018 WL 1282035, *15, a local government's seizure based on suspected

removability is unilateral, and thus in many cases unlawful as state action preempted by federal law. *Arizona*, 567 U.S. at 410.

Factual Background. El Paso County has long had a practice of cooperating with ICE's immigration enforcement efforts. Under the County's current practice, the County cooperates with ICE's efforts generally and with ICE's immigration detainers and warrants specifically. The County thus routinely cooperates with ICE requests to temporarily maintain custody of an alien upon release from state charges to facilitate the orderly transfer of the alien to ICE custody.

The County has an IGSA with ICE that allows ICE to house immigration detainees in the El Paso County Jail. Am. Compl. ¶ 24. Pursuant to ICE policy, if ICE wishes to be notified of the impending release of an alien whom ICE has probable cause to believe is removable from the United States, it will lodge a detainer and administrative warrant with the alien's state or local custodian. *See* ICE Policy No. 10074.2 ¶¶ 2.3–2.7. Once grounds for state custody lapse—that is, once the state charge does not authorize further detention—if ICE wants to take physical custody of the alien, ICE will do so within 48 hours. *Id.* ¶ 2.7.

Alternatively, if ICE wants to avail itself of bed space at the El Paso County Jail pursuant to the IGSA, ICE may arrest the alien upon his release from local custody, after which ICE will book the alien back into the jail, subject to the IGSA, as an ICE detainee. Ex. A, El Paso County IGSA.

Although the County had a 287(g) agreement until 2015, the County does not now have a 287(g) agreement with ICE. *Sheriff's Office Ends 287(g) Immigration Enforcement Program*, El Paso Cty. Sheriff's Office, https://www.epcsheriffsoffice.com/news-releases/

sheriff%E2%80%99s-office-ends-287g-immigration-enforcement-program (May 1, 2015).[6]

According to the operative complaint, Plaintiff Saul Cisneros was booked into the El Paso County Jail for committing a state crime. Am. Compl. ¶ 53. Cisneros is a foreign national whom the County anticipated would be subject to a detainer and warrant. *Id.* ¶¶ 21–22, 53. The complaint alleges that Cisneros's daughter posted bond, but the jail would not release him. *Id.* ¶ 53. He alleges that he is still detained. *Id.* ¶¶ 53–56.

Plaintiff Rut Noemi Chavez Rodriguez, the operative complaint alleges, was booked into the El Paso County Jail on November 18, 2017. *Id.* ¶ 57. Bond was set at $1,000 plus a $10 fee. *Id.* ¶ 60. Although Chavez Rodriguez implies that her detention is affected by a forthcoming detainer and warrant, she admits that she has not posted bond, *id.*, and therefore remains in state custody based on her state charges.

On February 27, 2018, Plaintiffs filed this putative class action claiming that the County lacks authority to detain aliens beyond the point they are entitled to release under state law. Their amended complaint centers on Colorado state law. They contend that the County, by holding and housing aliens at the request of ICE, is acting ultra vires of Colorado law and violating the Colorado Constitution's unreasonable seizure, due process, and right-to-bail provisions. Plaintiffs moved for a temporary restraining order, which the court will hear at 9 a.m. on March 19, 2018.

## ARGUMENT

This Court should hold that a locality's cooperation with ICE, either through an IGSA or cooperation with ICE detainers and arrest warrants, is lawful under federal and Colorado law

[6] For background, a copy of the now-expired 287(g) agreement between the County and ICE is archived at https://www.ice.gov/doclib/287gMOA/elpasocountysheriffsoffice.pdf (last visited Mar. 16, 2018).

insofar as it complies with ICE policy. The United States therefore asks the Court to deny Plaintiffs' request for preliminary relief to that extent.

To start, although the County does not have a 287(g) agreement, it does have an IGSA contract with ICE to house alien detainees in ICE custody. That agreement authorizes the County to temporarily house aliens in ICE custody, and detention pursuant to such an agreement occurs under color of federal authority and is not subject to review in state court. Moreover, to the extent the County cooperates with ICE detainers, such cooperation is fully consistent with the federal and Colorado law, the Fourth Amendment, and its Colorado analogue. Either form of cooperation is lawful and this Court, in analyzing the County's actions in this case, should conclude that if the County cooperated with ICE pursuant to an IGSA or a detainer request, that cooperation was lawful.

## I. Cooperation with an IGSA Is Consistent with Federal Law

To the extent that either Plaintiff is ultimately released upon posting bond and is booked back into ICE custody pursuant to the IGSA, that cooperation is lawful. If Plaintiffs elect to post bond and are released, and ICE wishes to assume custody, ICE would do so by effectuating an administrative arrest warrant following their release from their state charges. Thereafter, one of two things might happen. ICE could transport Plaintiffs elsewhere. In that scenario, there would be no justiciable complaint in this Court to speak of, as Plaintiffs would not be housed in the County. If, however, ICE were to invoke its authority pursuant to the IGSA to house Plaintiffs in County facilities, Plaintiffs then would be detained as ICE detainees subject to ICE's custody. The fact that under the IGSA, Plaintiffs would only return to county facilities *after* ICE effects an arrest, means two things: (1) any detention of Plaintiffs after their release from state charges would be premised on *federal* authority and, consequently, (2) state courts lack authority to

enjoin officers acting under color of federal authority.

*First*, if Plaintiffs are arrested by ICE pursuant to a federal warrant, they will become *federal* ICE detainees, subject to *federal* authority. *See* 8 U.S.C. § 1226(a). The County's contract with ICE to house ICE detainees is entered into pursuant to federal law, which permits ICE to pay localities for the housing of aliens detained by ICE "pursuant to Federal law under an agreement" with any locality for "detention services" including "guaranteed bed space for person detained by the" federal government. *Id.* § 1103(a)(11)(A). Thus, regardless of whether Plaintiffs might conceivably be housed in County facilities as an ICE detainee, they would be held there subject to *federal* authority and under ICE supervision. *See, e.g.*, *Roman*, 340 F.3d at 320–21 (addressing § 1103(a)(11)(A) and holding that ICE is the proper defendant in habeas cases involving persons detained at the request of ICE in state and local contract detention facilities); *Henderson v. INS*, 157 F.3d 106, 122 (2d Cir. 1998) (holding that although the warden of each detention facility technically has day-to-day control over alien detainees, the INS District Director for the district where a detention facility is located "has power over" such alien habeas corpus petitioners); *accord Braden v. 30th Judicial Cir. Ct. of Ky.*, 410 U.S. 484, 488–89 (1973) ("Since the Alabama warden acts here as the agent of the Commonwealth of Kentucky in holding the petitioner . . . we have no difficulty concluding that petitioner is 'in [Kentucky's] custody'"). Thus, if ICE arrests Plaintiffs pursuant to its federal administrative warrants and invokes its authority pursuant to the IGSA to house them in County facilities, Plaintiffs would be detained there as ICE detainees subject to ICE's custody. *See* 8 U.S.C. § 1103(a)(11)(A).

*Second*, when a local government executes an IGSA with ICE, the locality is the housing aliens at the request of the federal government pursuant to a federal statute where the aliens remain subject to the physical control of ICE occurs under color of federal authority. In that

circumstance, state courts lack jurisdiction over challenges to such cooperation. It is well-settled that "[n]o state judge or court, after they are judicially informed that the party is imprisoned under the authority of the United States, has any right to interfere with him, or to require him to be brought before them." *Ableman v. Booth*, 62 U.S. (21 How.) 506, 524 (1858). Thus, state courts "cannot, under any authority conferred by the States, discharge from custody persons held by authority of the courts of the United States, or of commissioners of such courts, or by officers of the General Government acting under its laws" because of "the supremacy of the Constitution and laws of the United States." *Ex parte Royall*, 117 U.S. 241, 249–50 (1886). Therefore, if Plaintiffs' possible future ICE detention was based on cooperation with the United States through a statutorily authorized IGSA, the United States would have exclusive authority over Plaintiffs, and no state court injunction or declaratory order could issue in the first place. *See In re Tarble* ("*Tarble's Case*"), 80 U.S. (13 Wall.) 397, 407 (1872).

State courts have applied the reasoning of these cases to immigration matters, including cooperation with immigration detention when at the direction and supervision of the federal government. *See, e.g.*, *State v. Theoharopoulos*, 240 N.W. 2d 635, 647 (Wis. 1976) ("jurisdiction over the defendant was obtained by a federal detainer warrant," and "[t]he fact that the defendant at the time of the filing of the petition was physically within the confines of the Waukesha County Jail should not confuse the question."); *State v. Chavez-Juarez*, 923 N.E.2d 670, 672 (Ohio Ct. App. 2009) ("[T]he trial court could not adjudicate the validity of the federal detainer, because the area of immigration and naturalization is within the exclusive jurisdiction of the federal government."); *see also Galarza v. State*, 2014 WL 4230194, *3 (Iowa Ct. App. Aug. 27, 2014) ("[The alien detainee] cannot use the Iowa habeas law to command action by federal immigration officials."), *aff'd*, 864 N.W. 2d 122 (Iowa 2015).

The reasoning underlying these cases applies here to bar state and local courts from impinging on national prerogatives regarding immigration enforcement. The Constitution requires "an uniform Rule of Naturalization," U.S. Const. art. I, § 8, cl. 4; Congress has instructed that "the immigration laws of the United States should be enforced vigorously and uniformly," Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 115(1), 100 Stat. 3359, 3384; and the Supreme Court has described immigration policy as "a comprehensive and unified system." *Arizona*, 567 U.S. at 402. For these reasons, "the removal process is entrusted to the discretion of the Federal Government," *id.* at 409, "not the 50 separate States," *id.* at 395, and state governments may not "intrude within the jurisdiction, or authorize any interference therein by its judicial officers with the action of," the United States in immigration matters. *Tarble's Case*, 80 U.S. at 407.

Therefore, given that any possible future detention at the County as of Plaintiffs as ICE detainees, if it occurs at all, would be detention pursuant to an IGSA under color of federal authority, this Court would lack jurisdiction over any claims arising from such detention, which would have to be litigated in federal court. *See* 8 U.S.C. § 2241; *Theoharopoulos*, 240 N.W. 2d at 647.

## II. Cooperation with ICE Detainers Is Consistent with Federal Statutory Law.

Separate from the County's use of its IGSA, Plaintiffs also challenge the County's cooperation with ICE detainers. The INA provides that state and local officers may "cooperate with the [Secretary] in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States." 8 U.S.C. § 1357(g)(10)(B). Such cooperation is consistent with the INA so long as it is undertaken pursuant to a "request, approval, or other instruction from the Federal Government" and follows the specifications of such. *Arizona*, 567 U.S. at 410.

Cooperation with a detainer satisfies that test. *First*, detainers are "request[s] . . . from the Federal Government" to a State or locality to assist its efforts to detain a particular alien, so complying with those requests is necessarily permissible cooperation at the federal government's "request, approval, or other instruction." *Id.*; *accord City of El Cenizo, Texas v. Texas*, — F.3d —, 2018 WL 1282035, *14 (5th Cir. Mar. 13, 2018) (assistance with detainers occurs "only when there is already federal direction — namely, an ICE-detainer *request*") (emphasis added).

*Second*, the INA authorizes DHS to request cooperation "either to hold the prisoner for the agency or to notify the agency when release [] is imminent." *McLean v. Crabtree*, 173 F.3d 1176, 1185 n.12 (9th Cir. 1998) (defining detainer as a request "to hold the prisoner for the agency or to notify the agency when release of the prisoner is imminent" and holding that DHS "has authority to lodge a detainer against a prisoner"); *accord El Cenizo*, 2018 WL 1282035, *2 (similar). This detainer "authority," formalized by 8 U.S.C. §§ 1103(a)(3), 1226(a) and (c), 1231(a), and 1357(d), "predates the INA and has long been viewed as implied by federal immigration enforcers' authority to arrest those suspected of being removable." *Santoyo v. United States*, No. 16-855, 2017 WL 6033861, *3 (W.D. Tex. Oct. 18, 2017); *see United States v. Carlos Gomez-Robles*, No. 17-730, 2017 WL 6558595, *3 (D. Ariz. Nov. 28, 2017) (similar); *Mendez v. United States*, No. 02 CR 745 (RPP), 2009 WL 4857490, *1 n.2 (S.D.N.Y. Dec. 11, 2009) (similar); *Comm. for Immigrant Rights of Sonoma Cty. v. Cty. of Sonoma*, 644 F. Supp. 2d 1177, 1199 (N.D. Cal. 2009) (similar); *see also Akande v. U.S. Marshals Serv.*, 659 F. App'x 681, 684 (2d Cir. 2016) ("[T]he immigration detainer would appear . . . to justify an additional 48 hours of detention beyond the expiration of the prisoner's term."); *Rosario v. New York City*, No. 12 Civ. 4795 (PAE), 2013 WL 20992547, *3 (S.D.N.Y. May 15, 2013) (noting the INA's "authority to detain [alien] under [] detainer").

*Third*, such cooperation is permitted even if the County lacks a formal 287(g) agreement or does not satisfy the training and certification requirements that accompany such agreements. As the United States Court of Appeals for the Fifth Circuit recently explained, the INA, through section 1357(g)(10)(B), "indicates that Congress intended local cooperation without a formal agreement," and without "a written agreement, training, and direct supervision by DHS . . . in a range of key enforcement functions." *El Cenizo*, 2018 WL 1282035, *6. That is, cooperation with immigration detainers is permitted and envisioned by the INA without any of the formal training and certification requirements necessary for "state and local officials [to] become de facto immigration officers, competent to act on their own initiative" under a formal 287(g) agreement. *Id.* And as a prior panel (at the stay stage) of the Fifth Circuit held with respect to Texas law requiring cooperation with immigration detainers, "nothing in *Arizona v. United States*, 567 U.S. 387 (2012), prohibits such assistance" and "8 U.S.C. § 1357(g), provides for such assistance." *El Cenizo*, 2017 WL 4250186, *1–2.

Indeed, the U.S. Supreme Court in *Arizona* did not purport to define the outer limits of cooperation permitted by section 1357(g)(10). Instead, it listed a number of examples of permissible cooperation states and localities may partake in without the training and certification requirements of a formal agreement under 8 U.S.C. § 1357(g)(1), including "arrest[ing] an alien for being removable" if that arrest is made in response to a "request" from the federal government. 567 U.S. at 410. *Arizona* distinguished between such a scenario—which is permissible under section 1357(g)(10)(B)—and the scenario authorized by the law at issue in *Arizona*: "unilateral state action to detain . . . aliens in custody for possible unlawful presence without federal direction and supervision" and without any federal "request" to do so. *Id.* at 410, 413; *accord El Cenizo*, 2018 WL 1282035, *6 (state law requiring cooperation with federal

detainers "permit[s] no unilateral enforcement activity" because cooperation only occurs following "a predicate federal request for assistance").

Moreover, there is no requirement under the INA that a State or locality may only cooperate if it has a formal cooperation agreement under 8 U.S.C. § 1357(g)(1) and its officers are trained and certified under that provision. *See* 8 U.S.C. § 1357(g)(10)(B). Indeed, the Fifth Circuit recently rejected that assertion, *El Cenizo*, 2018 WL 1282035, *6, and rightly so: Section 1357(g)(10) says that *no* formal "agreement under" section 1357(g) is required for local officers to "cooperate with" federal immigration officers. Formal agreements are quite different from informal cooperation. Under formal agreements, local officers undergo the training necessary to "perform [the] function of an immigration officer," 8 U.S.C. § 1357(g)(1)—allowing them to enforce immigration law without any triggering request from the federal government to do so. *See Arizona*, 567 U.S. at 409–10 (explaining when DHS "grant[s] that authority to specific officers" through formal agreement). Under section 1357(g)(10), officers not subject to such agreements may still cooperate absent any formal training, so long as such cooperation is not "unilateral," but at the "request, approval, or other instruction from the Federal Government." *Id.* at 410; *see United States v. Ovando-Garzo*, 752 F.3d 1161, 1164 (8th Cir. 2014) (argument to the contrary is "meritless"). The County's cooperation with federal immigration detainers thus presumes that such cooperation will occur *consistent with* federal law, because a detainer "always requires a predicate federal *request* before local officers may detain aliens for the additional 48 hours." *El Cenizo*, 2018 WL 1282035, *15 (emphasis added).

Cooperation is thus permitted irrespective of whether it is directed by a state statute or by a local sheriff: in neither case does it exceed the bounds of the cooperation permitted by Congress. *See Arizona*, 567 U.S. at 410, 413 (affirming state legislative mandate "requiring state

officials to contact ICE as a routine matter"). The only limitation is that such state-mandated cooperation may not "authorize state and local officers to engage in [] enforcement activities as a general matter" without "any input from the Federal Government." *Id.* at 408, 410. While "unilateral decision[s] of state officers to arrest an alien for being removable" are preempted, cooperation under a "request, approval, or other instruction from the Federal Government" is not. *Id.* at 410. Courts have thus recognized that federal law permits States and localities to cooperate, without formal training or certification, with federal requests to detain a removable alien. *See, e.g.*, *El Cenizo*, 2018 WL 1282035, *6 (finding "[s]tate action under" provision state-law provision requiring local cooperation with federal immigration enforcement does "not conflict with federal priorities or limit federal discretion [] because it requires a predicate federal request," and therefore "does not permit local officials to act without federal direction and supervision"); *Santos v. Frederick Cty. Bd. of Comm'rs*, 725 F.3d 451, 467 (4th Cir. 2013) (detention by state officer lawful when "at ICE's express direction"); *Ovando-Garzo*, 752 F.3d at 1164 (cooperation without "written agreement" is lawful if "not unilateral").

Federal statutory law thus permits the County's cooperation with detainers here because that cooperation is not unilateral and occurs pursuant to a request or direction from the federal government.

## III. Cooperation with ICE Detainers and Warrants and Housing Aliens pursuant to an IGSA Is Consistent with Colorado Statutory Law.

Plaintiffs argue that the County's detention power is constrained by Colorado law. They are wrong: Colorado law authorizes such cooperation.

Like any other State, Colorado wields broad "police powers," which are "an exercise of the sovereign right of the Government to protect the lives, health, morals, comfort and general welfare of the people." *Manigault v. Springs*, 199 U.S. 473, 480 (1905). States did not give up

their common law police powers by joining the Union. *See Arizona*, 567 U.S. at 400. The States' status as separate sovereigns means that they possess all residual powers not abridged or superseded by the United States Constitution. *Mayor of New York v. Miln,* 36 U.S. (11 Pet.) 102, 139 (1838). This residual authority exists regardless any statutory invocation or clarification of that authority by a State's legislature. *See Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122, 193 (1819) (Marshall, C.J.). Thus, absent evidence that it "was the clear and manifest purpose of Congress to abridge [a State's police] powers," *Arizona*, 567 U.S. at 400, States and their subdivisions retain whatever common-law police powers they had when joining the Union. *Id.* Far from abridging state power, Congress has authorized cooperation with detainers and federal immigration warrants through the INA. *See* 8 U.S.C. § 1357(g)(10)(B).

As to Colorado's or its localities' exercise of its police powers, there is no requirement that, "before a state law enforcement officer may arrest a suspect for violating federal immigration law, state law must *affirmatively* authorize the officer to do so." *United States v. Santana-Garcia*, 264 F.3d 1188, 1193–94 (10th Cir. 2001) (collecting cases). Rather, "state and local law enforcement officers are empowered to arrest for violations of federal law, as long as such arrest is authorized by state law." *United States v. Vasquez-Alvarez*, 176 F.3d 1294, 1296 (10th Cir. 1999) (emphasis added).[7]

Colorado law does not withdraw localities' retained authority to cooperate with federal

[7] The overwhelming consensus is that at common law, a State's police powers are not diminished simply because the state legislature has not explicitly provided authority for a *specific* action. *See, e.g.*, *Santana-Garcia*, 264 F.3d at 1193–94; *United States v. Janik*, 723 F.2d 537, 548 (7th Cir. 1983); *United States v. Bowdach*, 561 F.2d 1160, 1167–68 (5th Cir. 1977); *Marsh v. United States*, 29 F.2d 172, 174 (2d Cir. 1928) (L. Hand, J.); *Commonwealth v. Leet*, 641 A.2d 299, 303 (Pa. 1994); *Christopher v. Sussex Cty.*, 77 A.3d 951, 959 (Del. 2013); *Dep't of Pub. Safety & Corr. Servs. v. Berg*, 342 Md. 126, 137–39 (1996); *S. Ry. Co. v. Mecklenburg Cty.*, 231 N.C. 148, 150–51 (1949).

immigration enforcement. Far from it: two Colorado statutes affirmatively authorize local jails to temporarily cooperate with immigration detainers and to house individuals at the request of ICE pursuant to an IGSA.

*First*, Colorado law permits a peace officer to arrest a person when the officer "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." Colo. Rev. Stat. § 16-3-102(1)(c). That provision appears in the statute that separately authorizes a peace officer to effect arrests where any "crime has been or is being committed by such person in his presence." *Id.* § 16-3-102(1)(a)–(b). By distinguishing between the term "offense" and the term "crime," Colorado law authorizes peace officers to effect arrests not just for crimes, but for the far broader category of "offenses," so long as the peace officer has probable cause to believe the person being arrested in fact committed the offense.

That provides the needed authority in this context. A detainer and warrant demonstrate that there is probable cause to believe that an alien is subject to removal, a federal civil *offense*. 8 C.F.R. § 287.7. An alien is subject to removal if he or she has violated federal immigration law in any number of specified ways. *See generally* 8 U.S.C. §§ 1182, 1227. Therefore, an ICE officer issuing a detainer and warrant has probable cause to believe that the alien has committed the "offense" of being unlawfully present or being otherwise removable from the United States.

Indeed, Colo. Rev. Stat. § 16-3-102(1)(c) reflects the general principle of the well-established collective knowledge doctrine, *People v. Anaya*, 545 P.2d 1053, 1056 (Colo. App. 1975). Under the collective knowledge doctrine as applied in Colorado, "probable cause can be measured by the knowledge of the fellow officers who ordered the arrest." *Id.* (interpreting Colo. Rev. Stat. § 16-3-102(1)(c) and applying the collective knowledge doctrine). Thus "an arresting

officer who does not personally possess sufficient information to constitute probable cause may still make a warrantless arrest if (1) he acts upon the direction or as a result of a communication from a fellow officer, and (2) the police, as a whole, possess sufficient information to constitute probable cause." *People v. Baca*, 600 P.2d 770, 401 (Colo. 1979). The arresting officer need not check the other officer's work; the arresting officer is "entitled to presume that an outstanding warrant is based upon probable cause, and [is] not required to conclusively establish the validity of the warrant at the time of the arrest." *People v. Thompson*, 793 P.2d 1173, 1176 (Colo. 1990); *see also El Cenizo*, 2018 WL 1282035, *13 ("Compliance with an ICE detainer [] constitutes a paradigmatic instance of the collective-knowledge doctrine, where the detainer request itself provides the required communication between the arresting officer and an officer who has knowledge of all the necessary facts.").

Thus, so long as a Colorado peace officer has actual or constructive knowledge of the fact of an immigration detainer and warrant, Colorado law authorizes the peace officer to cooperate with a detainer. Indeed, under the current ICE policy, where detainers are accompanied by administrative warrants, "an ICE-detainer request evidences probable cause of removability in every instance." *El Cenizo*, 2018 WL 1282035, *1. Colo. Rev. Stat. § 16-3-102(1)(c) therefore affirmatively authorizes local cooperation with detainers and warrants.

Plaintiffs resist this conclusion, claiming that "offense," as used in § 16-3-102(1)(c), means "crime." Pls' Reply in Supp. of Mot. for TRO at 7. They point to no definition of "offense" in Title 16 of the Colorado Revised Statutes to support that meaning. Although Title 16 — the title containing the warrantless arrest statute, § 16-3-102(1)(c) —contains a definitions provision, it does not define "offense." *Id.* § 16-1-104. Instead, Plaintiffs rely on § 18-1-104(1) for the proposition that "the terms 'offense' and 'crime' are synonymous." *Id.* That section is

housed in Title 18 of the Colorado Revised Statutes, entitled "Criminal Code." Neither § 18-1-104(1) nor its surrounding provisions give any indication that the statute's definition of offense applies anywhere outside Title 18. When the Colorado General Assembly intends for a definition used in one title to apply in Title 16, it often explicitly says so. *E.g.*, Colo. Rev. Stat. § 16-11.8-102(3) (in Title 16, specifically adopting Title 18's definition of "domestic violence offense," which is explicitly defined there as a "crime"); *id.* § 16-13-303(1) (in Title 16, adopting several particular definitions from Title 18, such as "controlled substance," "prostitution," and "human trafficking"); *see also id.* § 17-2-103.5(1)(a)(II)(B) (in Title 17, adopting a Title 16's definition of "crime of violence"). Therefore, the Title 18-specific definition equating "offense" to "crime" does not apply in Title 16, which has its own definitions section and does not so limit "offense."

The § 18-1-104(1) definition of "offense" does apply outside Title 18 in a limited circumstance: when "construction of . . . any offense defined in any statute of this state" is at issue. Colo. Rev. Stat. § 18-1-103(1). But there is no particular "offense" that needs defining here; the Colorado Revised Statutes do not "define[]" the federal immigration offenses that may give rise to a warrantless arrest under § 16-3-102(1)(c); thus there is no cause to use § 18-3-104(1)'s definition of "offense." Because the § 18-1-104(1) definition does not apply to § 16-3-102(1)(c), the former statute does not displace the latter's plain meaning of "offense": a violation of the law, whether criminal or civil.

*Second*, sheriffs may exercise the express powers granted to 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). Colorado law expressly empowers a sheriff to detain "every person duly committed" to a county jail by a federal official "for any offense against the United States." Colo. Rev. Stat. § 17-26-123.

This language affirmatively authorizes the County's IGSA agreement with ICE to house federal detainees on a federal basis at federal expense in the County's facilities. *See* 8 U.S.C. § 1103(a)(11)(A). This statute also authorizes local jails to temporarily hold individuals subject to federal civil process, such as a charge by a federal official for a federal immigration violation. For individuals who will be subject to federal detention for federal immigration violations and who are currently in state custody, the easiest and safest way (albeit not the only way) to transition those individuals from state custody to federal custody is to keep them in the same place: state jail. A detainer, requesting that the jail maintain custody not to exceed 48 hours, is a mechanism to accomplish that transition. Therefore, for a sheriff to execute his or her express power to detain federal immigration violators in the county jail, in the case of aliens already in the jail on state-law grounds, it is reasonable for the sheriff to temporarily hold those aliens for the length of time contemplated by the detainer.

Thus, cooperation with ICE detainers supported by federal warrants, and with housing requests from ICE issued pursuant to an IGSA, are not forbidden, and, in fact, are affirmatively authorized by Colorado statutory law. *See* Colo. Rev. Stat. §§ 16-3-102(1)(c), 17-26-123. In adjudicating Plaintiffs' motion for a temporary restraining order, any order should reflect the fact that such cooperation is lawful to the extent it complies with ICE policy and the terms of the detainer and IGSA.

## IV. Cooperation with ICE Detainers Is Consistent with the U.S. Constitution and the Colorado Constitution.

Plaintiffs further allege that the County's practice of complying with detainers and the IGSA violates the Colorado Constitution's unreasonable seizure and due process provisions.

### *A. By cooperating with ICE detainers, the County does not commit an unreasonable seizure*

Plaintiffs allege that cooperation with ICE detainers violates Article II, Section 7 of the

Constitution of the State of Colorado, which prohibits unreasonable seizures, because the arrests are without legal authority. Am. Compl. ¶¶ 100–03. This claim is meritless.

At the outset, as the Colorado Supreme Court has explained, Article II, Section 7 of the Colorado Constitution is frequently interpreted co-extensively with the Fourth Amendment to the U.S. Constitution. *E.g.*, *People v. Brunsting*, 307 P.3d 1073, 1078 (Colo. 2013). "However, in every case in which our supreme court has recognized a greater protection under the state constitution than that afforded by the federal constitution, it has identified a privacy interest deserving of greater protection than that available under the Fourth Amendment." *People v. Rossman*, 140 P.3d 172, 176 (Colo. Ct. App. 2006) (holding that probationers do not hold a greater expectation of privacy than that afforded by the Fourth Amendment). Plaintiffs do not identify any special privacy interest that they hold, and predictably so. Aliens whom ICE has probable cause to conclude are removable do not have special privacy interests that warrant heightened protection under the Colorado Constitution. To the contrary, "aliens, even those lawfully within the country, do not have most of the constitutional rights afforded to citizens," including that "[t]hey may be arrested [by] administrative warrant issued without an order of a magistrate . . . and held without bail." *Lopez v. INS*, 758 F.2d 1390, 1393 (10th Cir. 1985). Accordingly, the Court should construe the Colorado Constitution to provide no greater protection than does the Fourth Amendment in this context.

Three points establish that local cooperation with detainers accords with both the Fourth Amendment and its Colorado equivalent: (1) federal officials can (as Plaintiffs do not dispute) constitutionally arrest aliens under a federal administrative warrant (which accompanies each ICE detainer); (2) the lawfulness of that practice does not change when local officials help effectuate such an arrest at ICE's request; and (3) local officials may constitutionally rely upon

federal officials' probable-cause determinations.

*First*, there is no dispute that the Fourth Amendment permits *federal* officers to make civil arrests of aliens based on probable cause of removability contained in a detainer or administrative warrant. To start, the "Fourth Amendment does not require warrants to be based on probable cause of a crime, as opposed to a civil offense." *United States v. Phillips*, 834 F.3d 1176, 1181 (11th Cir. 2016) (collecting examples, including bench warrants for civil contempt and writs of replevin). Arrests may be premised on probable cause of any legal violation, whether civil or criminal. *See, e.g.*, *El Cenizo*, 2018 WL 1282035, *13 (collecting other constitutionally valid examples, including seizures of the mentally ill, those who pose a danger to themselves, and juvenile runaways); *United States ex rel. Randazzo v. Follette*, 418 F.2d at 1322 (2d Cir. 1969) (holding that a parole violator warrant designated as "administrative" under New York law was not subject to ordinary Fourth Amendment safeguards and thus did "not depend upon a showing of probable cause"), *cited in People v. Tafoya*, 985 P.2d 26, 29 (Colo. Ct. App. 1999) (declining to hold that the Colorado Constitution requires, for a warrantless search of a parolee, a showing that the parolee has committed a parole violation or crime). Indeed, given that "[i]n determining whether a search or seizure is unreasonable, [courts] begin with history," including "statutes and common law of the founding era," *Virginia v. Moore*, 553 U.S. 164, 168 (2008), that understanding is especially settled in the immigration context. There is "overwhelming historical legislative recognition of the propriety of administrative arrest[s] for deportable aliens." *Abel v. United States*, 362 U.S. 217, 233 (1960) (noting "impressive historical evidence" of validity of "administrative deportation arrest from almost the beginning of the Nation"). Therefore, aliens "may be arrested by administrative warrant issued without order of a magistrate." *Lopez*, 758 F.2d at 1393.

Nor do warrants accompanying detainers violate the Fourth Amendment or the Colorado Constitution just because they are issued by an ICE official rather than through a warrant signed by a judge. Given the civil context of federal immigration detainers, an executive immigration officer can constitutionally make the necessary probable-cause determination. "[L]egislation giving authority to the Attorney General or his delegate to arrest aliens pending deportation proceedings under an administrative warrant, not a judicial warrant within the scope of the Fourth Amendment," has existed "from almost the beginning of the Nation." *Abel*, 362 U.S. at 234. "It is undisputed that federal immigration officers may seize aliens based on an administrative warrant attesting to probable cause of removability." *El Cenizo*, 2018 WL 1282035, *13. So "it is not unconstitutional under the Fourth Amendment for the Legislature to delegate a probable cause determination to an executive officer, such as an ICE agent, rather than to an immigration, magistrate, or federal district court judge." *Roy v. ICE*, No. 13-4416, 2017 WL 2559616, *10 (C.D. Cal. June 12, 2017); *Sherman v. U.S. Parole Comm'n*, 502 F.3d 869, 876–80 (9th Cir. 2007) (in immigration context, warrants may be issued "outside the scope of the Fourth Amendment's Warrant Clause"); *United States v. Lucas*, 499 F.3d 769, 776 (8th Cir 2007) (en banc) (plurality) (similar).

*Second*, because the Fourth Amendment allows federal immigration officers to arrest and detain based on an administrative warrant attesting to probable cause of removability, state and local officials can do the same when they act at the request or direction of the federal government. The Fourth Amendment does not apply differently when a local official rather than a federal official is arresting or detaining. "The Fourth Amendment's meaning [does] not change with local law enforcement practices." *Virginia*, 553 U.S. at 172. To hold otherwise would cause Fourth Amendment "protections [to] vary if federal officers were not subject to the same

statutory constraints as state officers." *Id.* at 176.

Thus, if a seizure is legal under the Fourth Amendment when a federal officer effectuates it, then so too when a state or local officer does, even where state law does not authorize the arrest. A police officer's "violation of [state] law [in arresting an alien based on a violation of federal immigration law] does not constitute a violation of the Fourth Amendment." *Martinez-Medina v. Holder*, 673 F.3d 1029, 1037 (9th Cir. 2011). And the legality of an arrest made by a state officer is especially apparent where a local officer is not just arresting for a federal offense, but doing so at and after the express request of the federal government supported by a federal administrative warrant, and consistent with state law authorizing the arrest and requiring compliance with federal detainers requesting such arrests. Under detainer requests, County sheriff's deputies do not act unilaterally — they act at ICE's request, within the parameters of ICE's request. *See El Cenizo*, 2018 WL 1282035, *15 ("[T]he ICE-detainer mandate, [] always requires a predicate federal request before local officers may detain"); *Santos*, 725 F.3d at 467 (cooperation lawful when "at ICE's express direction"); *Ovando-Garzo*, 752 F.3d at 1164 (cooperation without "written agreement" lawful if "not unilateral"); *cf. Melendres v. Arpaio*, 695 F.3d 990, 1001 (9th Cir. 2012) (detention of removable aliens is unilateral absent a formal agreement or request for cooperation).

*Third*, similar to the statutory collective-knowledge doctrine discussed above, *see* Colo. Rev. Stat. § 16-3-102(1)(c), arrests or detentions based on probable cause may constitutionally be made where the probable-cause determination is made by one official (here, a federal ICE officer) and relied on by another official who serves under a different sovereign (here, a local official). Put differently, state and local officers may rely on ICE's findings of probable cause, as articulated in a detainer and administrative warrant, to detain the subject of a detainer when the

federal government so requests. Where one officer obtains an arrest warrant based on probable cause, other officers can make the arrest even if they are "unaware of the specific facts that established probable cause." *United States v. Hensley*, 469 U.S. 221, 231 (1985). An officer may thus arrest someone, even when the officer does not know the facts establishing probable cause, so long as "one officer knows facts constituting reasonable suspicion or probable cause . . . and he communicates an appropriate order or request." *United States v. Chavez*, 534 F.3d 1338, 1347 (10th Cir. 2008).

This rule of collective law-enforcement knowledge applies when "the communication [is] between federal and state or local authorities," 3 Wayne R. LaFave, *Search and Seizure* § 3.5(b) (2016) (collecting cases), including when a state or local officer arrests someone based upon probable cause from information received from an immigration officer. *See, e.g.*, *El Cenizo*, 2018 WL 1282035, *13 ("Compliance with an ICE detainer [] constitutes a paradigmatic instance of the collective-knowledge doctrine, where the detainer request itself provides the required communication between the arresting officer and an officer who has knowledge of all the necessary facts."); *Mendoza v. U.S. ICE*, 849 F.3d 408, 419 (8th Cir. 2017) ("County employees . . . reasonably relied on [ICE agent's] probable cause determination for the detainer"). And "an ICE-detainer request evidences probable cause of removability in every instance." *El Cenizo*, 2018 WL 1282035, *13.

### *B. Cooperation with ICE Detainers is consistent with the Due Process Clause of Article II, Section 25 of the Colorado Constitution*

Plaintiffs suggest that when the County maintains custody of an alien pursuant to a detainer, the alien does not receive "meaningful notice and opportunity to be heard to contest the unreasonable detentions." Am. Compl. ¶ 105. Ignoring the process afforded by the removal proceedings that generally follows the initial detainer-based detention, *see generally* 8 U.S.C.

§ 1229a, Plaintiffs claim that detainers violate the procedural due process provision in Article II, Section 25 of the Colorado Constitution.

For the purposes of this case, whether the County is violating the Due Process Clause of the Colorado Constitution may be determined by analyzing case law under its federal counterpart, the Fifth and Fourteenth Amendments. *See Nat'l Prohibition Party v. State*, 752 P.2d 80, 83 n.4 (Colo. 1988) ("[Because] Article II, section 25, of the Colorado Constitution provides a guarantee similar to that under the fourteenth amendment of the United States Constitution . . . , we apply the requirements of federal law."). Because cooperation is perfectly consistent with the demands of the federal Constitution, it is equally consistent with the Colorado Constitution. As explained below, the claim is not viable.

*First*, where a party raises both Fourth and Fifth Amendment challenges to the same nexus of events, as here, the "independent" Fifth or Fourteenth Amendment due process claim collapses into the Fourth Amendment claim and cannot serve as a separate, freestanding claim. *See, e.g.*, *Bryant v. City of New York*, 404 F.3d 128, 135–36 (2d Cir. 2005); *Becker v. Kroll*, 494 F.3d 904, 920 (10th Cir. 2007) ("[T]he Fourth Amendment adequately protected [the detainee's] constitutional liberty interests, and she therefore has no procedural due process claim based on pre-trial deprivations of physical liberty."). Indeed, as the Supreme Court recently explained, "[i]f the complaint is that a form of legal process resulted in pretrial detention unsupported by probable cause, then the right allegedly infringed lies in the Fourth Amendment," and not the "due process clause." *Manuel v. City of Joliet*, 137 S. Ct. 911, 919 (2017).

*Second*, a prerequisite to any due process claim, whether procedural or substantive, is an assertion of a cognizable liberty interest. *E.g.*, *Watso v. Colo. Dep't of Soc. Servs.*, 841 P.2d 299, 304 (Colo. 1992). But the lodging of any detainer generally has no "immediate effect upon

protected liberty interests," because the subject of a detainer is "not entitled to a hearing prior to the execution of the warrant or to compelled execution of the warrant" on which the detainer relies. *Heath v. U.S. Parole Comm'n.*, 788 F.2d 85, 91 (2d Cir. 1986); *see Nasious v. Two Unknown B.I.C.E. Agents*, 657 F. Supp. 2d 1218, 1223, 1225 (D. Colo. 2009), *aff'd*, 366 F. App'x 894 (10th Cir. 2010) ("Plaintiff's detention was imposed by the state of Colorado based on Plaintiff's pending criminal charges; it was not imposed by or in any way impacted by the ICE detainer," and "could not, as a matter of law, constitute a restraint on or deprivation of a liberty"); *Keil v. Spinella*, No. 09-3417-CV-S-RED, 2011 WL 43491, *8–9 (W.D. Mo. Jan. 6, 2011) ("[A] detainer alone does not cause imprisonment or a seizure by ICE. Rather, a seizure only occurs when the agency to which the detainer was issued turns custody over to ICE."); *Escobar v. Holder*, Civ No. 09-3717 (PAM/JJK), 2010 WL 1389608, *4 (D. Minn. Mar. 9, 2010) (finding "no support for the proposition that" an alien "is entitled to a hearing before immigration officials send [] a detainer").

This is especially true in the immigration context. Removable aliens generally lack any due process right to be free from detention pending resolution of their removal proceedings until such detention becomes *prolonged*. *See Soberanes v. Comfort*, 388 F.3d 1305, 1311 (10th Cir. 2004). Until it does, detention remains "a constitutionally valid aspect of the deportation process," and impinges on no cognizable liberty interest. *Demore v. Kim*, 538 U.S. 510, 523 (2003). That is true whether the custodian of that detention is the federal government or a state or locality. *See, e.g.*, *Themeus v. U.S. Dep't of Justice*, 643 F. App'x 830, 832–33 (11th Cir. 2016). To be sure, aliens who are not subject to mandatory detention may challenge their ongoing detention in their removal proceedings and seek release on bond. *See, e.g.*, 8 C.F.R. §§ 236.1(c)(8), 236.1(d)(1), 287.3(d). They may also, as Plaintiffs are fully capable of doing in

their forthcoming removal proceedings, seek to terminate their removal proceedings based on a pre-removal proceeding "deprivation of fundamental rights," including Fourth and Fifth Amendment rights. *Rajah v. Mukasey*, 544 F.3d 427, 446–47 (2d Cir. 2008). But the remedies available in removal proceedings do not create a freestanding due process right to avoid immigration detention. *See Demore*, 538 U.S. at 523. And absent such a cognizable liberty interest, there can be no procedural due process violation in the first place. *See Watso*, 841 P.2d at 304.

*Finally*, even assuming both a freestanding due process claim and that Plaintiffs' detention affects a cognizable liberty interest, they have been accorded procedural due process as a matter of law. Procedural due process requires only "notice and some opportunity to be heard" before deprivation of a protected interest. *Whiteside v. Smith*, 67 P.3d 1240, 1258–59 (Colo. 2003); *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). Detainers constitute such notice. Those forms provide that the "alien must be served with a copy of this form for the detainer to take effect," encourage local law enforcement and the alien to contact ICE's Law Enforcement Support Center with "any questions or concerns" about a detainer request, and clearly provide a means for contacting ICE to correct any errors. Form I-247A at 1. No more is required. Therefore, the United States asks the Court to hold that when a detainer is served, the recipient alien receives all the notice and opportunity to be heard that he or she is due.

For these reasons, the U.S. and Colorado Constitutions allow local officials to detain aliens in response to, and in accordance with, ICE detainers.[8]

[8] Plaintiffs also claim that the detainer scheme violates the "right to bail" provision of the Colorado Constitution, Article II, Section 19. Am. Compl. ¶¶ 111–14. This provision does not implicate the detainer scheme or the IGSA, because the charges for which Plaintiffs allege they were denied bail were their *state criminal* charges. Plaintiffs do not allege that they were denied

## CONCLUSION

So long as the County cooperates with federal immigration enforcement by detaining an alien in response to an ICE detainer, rather than detaining an alien unilaterally when they are otherwise entitled to release, or houses an alien at the request of ICE pursuant to an IGSA, after ICE arrests that alien or otherwise takes custody, that cooperation is permitted by federal law. When a locality acts unilaterally, however, that cooperation is preempted by federal law. To the extent the County does not act unilaterally when it cooperates with ICE detainers and ICE housing requests, that cooperation is facially lawful under Federal and State law.

To the extent that the Court is inclined to issue a temporary restraining order or any other order granting some relief, the United States respectfully requests that the Court limit such an order to enjoining unilateral action, rather than permissible cooperation with federal immigration enforcement as outlined in this brief.

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bail from their detention on a detainer and immigration warrant, or from detention under ICE custody pursuant to the IGSA.

Dated: March 16, 2018

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I hereby certify that on March 16, 2018, a true copy of this Statement of Interest was e-filed and served sent by overnight Federal Express on all active parties and counsel of record:

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