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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF COCONINO

Jose Montelongo-Morales, as an individual, and on behalf of all others similarly situated,

Plaintiff,

v.

James Driscoll, et al.

Defendants.

Case No. S0300CV2019-00012

PLAINTIFF'S MOTION FOR:

TEMPORARY RESTRAINING ORDER OR, IN THE ALTERNATIVE, PRELIMINARY INJUNCTION, AND

APPLICATION TO ACCEPT SPECIAL ACTION JURISDICTION AND FOR ORDER TO SHOW CAUSE

Plaintiff, Jose Montelongo-Morales ("Plaintiff" or "Montelongo"), pursuant to A.R.S. §§ 12-1801 and 12-1831, Rules 4 and 6, Ariz. R. P. Spec. Act., and Ariz. R. Civ. P. 65, moves this Court to order injunctive, declaratory, and special action relief.

INTRODUCTION

This motion seeks to ensure the timely release of Jose Montelongo-Morales, a longtime Flagstaff resident who is currently in the custody of the Coconino County Sheriff's Office ("CCSO") and facing an almost certain unlawful prolongation of his detention absent intervention by this Court. CCSO maintains a policy of re-arresting

certain individuals after the relevant superior court, justice court, or city court releases them based solely on a "detainer" request from the federal Immigration and Customs Enforcement ("ICE") alleging that the individual is a non-citizen subject to deportation. In Arizona, such re-arrests are unlawful because Arizona law does not grant authority to Arizona law enforcement officers to conduct civil immigration arrests. CCSO's policy thus causes the systematic jailing of individuals after the state-law basis for their detention has expired.

Plaintiff's case illustrates CCSO's typical practice when it receives an ICE detainer request. On December 28, 2018, Flagstaff police arrested Montelongo for a local violation. Within hours of his booking, ICE became aware that he was in CCSO custody and sent CCSO two documents: an ICE detainer request (Form I-247A) and an "administrative warrant" (Form I-205). These two documents informed CCSO that ICE suspected that Montelongo is an "alien subject to removal" from the United States. Pursuant to its written policy, CCSO initiated steps to ensure that Montelongo's eventual release would be delayed for up to 48 additional hours to allow ICE to take custody of him. CCSO's policy requires this delayed release even without probable cause that a crime has been committed and even though no federal or state law requires local law enforcement agencies to accommodate detainer requests.

This is not the first case to challenge CCSO's policy. In 2018, another jail detainee sued Defendants based on a similarly unlawful prolonged detention. U.S. District Court Judge David Campbell preliminarily declined to grant the injunctive relief sought in that case, indicating that a ruling one way or the other required "a more thorough exploration" of certain state law matters. *Tenorio-Serrano v. Driscoll*, 324 F. Supp. 3d 1053, 1062 (D. Ariz. 2018). Calling the plaintiff's arguments "credible" and noting that he "raise[d] serious questions that require further litigation," *id.* at 1064, Judge Campbell denied the

preliminary injunction, in part, because "the parties have not briefed the history of the [Arizona] constitutional provisions at issue, the intent of the drafters [of the Arizona Constitution], or the common law roots" of the authority of Arizona sheriffs. *Id.* at 1062. The more "thorough exploration" of these issues never occurred because CCSO released the plaintiff into ICE custody shortly after that ruling, thereby mooting the case. This motion addresses those issues, among others.

In short, Arizona sheriffs lack state law authority to prolong jail detention in circumstances like Plaintiff's. Holding jail detainees after the state-law reason for detention has ended violates Arizona law and causes irreparable harm to Plaintiff and putative class members. The Court's intervention is needed to prevent such harm.

LEGAL STANDARDS

Temporary Restraining Order and Preliminary Injunction

A court may issue a temporary restraining order and/or preliminary injunction if the moving party establishes: 1) a strong likelihood of success on the merits; 2) the possibility of irreparable injury if the relief is not granted; 3) a balance of hardships in the moving party's favor; and 4) public policy favors the relief. *Smith v. Ariz. Citizens Clean Elections Comm'n*, 212 Ariz. 407, 410 ¶ 10 (2006) (citation omitted). Arizona courts apply this standard using a sliding scale: "the moving party may establish either 1) probable success on the merits and the possibility of irreparable injury; or 2) the presence of serious questions and that the balance of hardships tips sharply in favor of the moving party." *Id.* at 411 ¶ 10 (internal marks and citations omitted). In other words, "[t]he greater and less reparable the harm, the less the showing of a strong likelihood of success on the merits need be." *Id.*

In this case, Plaintiff has a strong likelihood of success because, under Arizona law, Defendants lack any basis for holding Plaintiff and putative class members in jail after their conditions of release, set by state or local courts, have been satisfied.

Special Action

Special action relief is appropriate where, as here, there is no "equally plain, speedy, and adequate remedy by appeal"; where a defendant, acting in an official capacity, has "failed to perform a duty required by law as to which he has no discretion"; or where a defendant "has proceeded or is threatening to proceed without or in excess of jurisdiction or legal authority." Ariz. R. P. Spec. Act. 1(a), 3(a), 3(b). Defendants' threatened unlawful detention of Plaintiffs justifies special action relief .

Ripeness

"[T]he ripeness doctrine prevents a court from rendering a premature judgment or opinion on a situation that may never occur." *Winkle v. City of Tucson*, 190 Ariz. 413, 415 (1997). The doctrine prevents actions that are so "premature" that "no basis exist[s] to conclude" the anticipated future event will ever occur. *Santa Fe Ridge Homeowners' Ass'n v. Bartschi*, 219 Ariz. 391, 397 (Ct. App. 2008). Plaintiff seeks immediate relief to prevent a harm almost certain to befall him absent this Court's intervention.

ARGUMENT

Plaintiff is entitled to preliminary injunctive relief because he is likely to succeed on the merits, he will suffer irreparable harm, and there is no harm to Defendants.

Plaintiff can demonstrate both a likelihood of success on the merits and a probability of irreparable harm if the Court does not enjoin Defendants' unlawful policy and practice. Furthermore, there will be great harm to Plaintiff absent injunctive relief.

1. Plaintiff is likely to succeed on the merits.

State law governs whether a law enforcement agency has the authority to detain a person and on what grounds. *Lunn v. Commonwealth*, 477 Mass. 517, 527 (2017); *Martinez-Medina v. Holder*, 673 F.3d 1029, 1037 (9th Cir. 2011). Plaintiff is likely to succeed on the merits of his claims because Defendants can point to no provision of Arizona law that provides the authority to prolong a person's detention based on an immigration detainer.

a. *Defendants' written policy requires jail staff to prolong Plaintiff's detention, which is an independent arrest for purposes of state law.*

Just as continuing to detain an individual in a traffic stop scenario requires theofficer to have "additional suspicion of criminality", *Melendres v. Arpaio*, 695 F.3d 990, 1001 (9th Cir. 2012), continuing to hold a jail detainee based on an immigration detainer after the state-law justification for detention has expired constitutes a new arrest. *See Lunn*, 477 Mass. at 527; *accord Roy v. Cty. of Los Angeles*, 2018 WL 914773, at *23 (C.D. Cal. Feb 7, 2018). Sheriffs in other states have acknowledged this principle. *E.g.*, *Cisneros v. Elder*, No. 2018-cv-30549 (Colo. D. Ct. Mar. 19, 2018) (attached as Exhibit A) ("Sheriff Elder also conceded [that to] keep prisoners in custody, who would otherwise be released, constitutes a new arrest."). Thus, the question is whether Arizona officers may effectuate a new arrest based exclusively on a suspected *civil* immigration violation. As explained below, they cannot.

b. *Arizona law does not authorize arrests for civil violations of federal immigration law.*

"Because mere unauthorized presence is not a criminal matter, suspicion of unauthorized presence alone does not give rise to an inference that criminal activity is 'afoot.'" *Melendres*, 695 F.3d at 1001; *see Arizona v. United States*, 567 U.S. 387, 407 (2012) ("[I]t is not a crime for a removable alien to remain present in the United States."). Indeed, the two ICE documents at issue in this case do not mention the words "felony" or "misdemeanor" [Complaint, ¶ 42], or make any allegations of criminal wrongdoing [Complaint, ¶ 41].

Arizona law enforcement officers may arrest when there exists probable cause of a federal *crime*, *Whitlock v. Boyer*, 77 Ariz. 334, 338 (1954), but not where there is a suspicion of only a federal civil immigration violation. *Gonzales v. City of Peoria*, 722 F.2d 468, 476 (9th Cir. 1983), *overruled on other grounds by Hodgers-Durgin v. de la Vina*, 199 F.3d 1037 (9th Cir. 1999); *see also Melendres*, 695 F.3d at 1001 ("if the [sheriff's department is] to enforce immigration-related laws, they must enforce only immigration-related laws that are criminal in nature.") Indeed, the U.S. Supreme Court permanently enjoined as preempted the only Arizona provision purporting to authorize arrests for civil immigration offenses, *Arizona*, 567 U.S. at 410 (enjoining A.R.S. § 13-3883(A)(5)), and Defendants previously acknowledged that that provision "would not authorize the detentions at issue" even if the statute had not been struck down. *Tenorio*, 324 F. Supp. 3d at 1053.

A growing number of state courts have found that local officials must possess state law arrest authority to prolong jail detention at the request of ICE. *Lunn*, 477 Mass. at 518; *People ex rel. Wells v. DeMarco*, 88 N.Y.S.3d 518, 530 (N.Y. App. Div. 2018); *Cisneros v. Elder*, No. 18-cv-30549 (Colo. D. Ct. Mar. 19, 2018). These courts have found their respective state statutes lacking such authority. *Id.* The only published

decision to hold otherwise involves a Texas statute with no Arizona counterpart. *City of El Cenizo v. Texas*, 890 F.3d 164, 185 (5th Cir. 2018) (finding state statutory authority where state law dictates that local officials "shall . . . comply" with ICE detainer requests); *see Tenorio*, 324 F. Supp. 3d at 1064 n.2 (noting the inapplicability of *City of El Cenizo* in Arizona). Indeed, Arizona's closest cousin to the Texas law, A.R.S. § 11-1051 (known as S.B. 1070), "does not appear to be an affirmative grant of authority" nor "to supply the express [arrest] authorization." *Tenorio*, 324 F. Supp. 3d at 1064.

c. *Defendants' arrest authority is narrowly limited to those situations prescribed by Arizona statute*

The Arizona Constitution provides that the authority of the sheriff and his deputies is defined by statute. *See* Ariz. Const. art. XII, § 4 (providing that the "powers" of sheriffs "shall be as prescribed by law"). This provision of the Arizona Constitution, which remains unchanged since the original 1910 Constitutional Convention, shares its origins with parallel provisions that similarly confer powers on other public officials "as prescribed by law." Ariz. Const. art. V, § 9 (powers of state elected officers); Ariz. Const. art. VI, § 3 (powers of state board of education). In interpreting these constitutional provisions, Arizona courts have repeatedly explained that that phrase – "as prescribed by law" – means "statutory law of the State," not judicially created common law. *Ariz. State Land Dep't v. McFate*, 87 Ariz. 139, 142 (1960); *see State ex rel. Frohmiller v. Hendrix*, 59 Ariz. 184, 188 (1942) (commenting that the Arizona Constitution requires courts to "refer to the statutes in order to ascertain what powers and duties the legislature has conferred"); *Cecil v. Gila Cty.*, 71 Ariz. 320, 322 (1951) ("[The Constitution] does not detail the duties of county officers . . . . It left such task to the legislature.")

Although no relevant notes survive from the 1910 Constitutional Convention,[1] other evidence strongly indicates that the delegates to the convention intended "as prescribed by law" to mean only that law created "by legislative act." *Shute v. Frohmiller*, 53 Ariz. 483, 495 (1939). The delegates to the 1910 Convention are presumed to have intended the then-commonly understood meaning of specific terms, *Kriz v. Buckeye Petroleum Co.*, 145 Ariz. 374, 377 (1985), a rule of construction already in place at the time of the convention, *Stokes v. Territory*, 14 Ariz. 242, 249 (1912). In the territorial period, there already existed a common understanding of the term "prescribed by law." *Simms v. Simms*, 5 Ariz. 212, 219 (1897) (observing a person's failure to follow the proper procedures "as prescribed by law," that is, pursuant to territorial statute); *see also Territory v. Delinquent Tax List of Apache Cty. for 1887*, 3 Ariz. 69, 77 (1889) ("We must conclude that the term 'fixed by law' must be the regular term of court as fixed by statute.").

In addition to this common understanding, the convention delegates similarly understood that the powers of public officials and public bodies "are defined solely by the legislature" and that "resort can alone be had to our own legislative enactments" to determine the scope of a public official's authority. *History Co. v. Dougherty*, 3 Ariz. 387, 392 (1892); *see also Haupt v. Maricopa Cty.*, 8 Ariz. 102, 105 (1902) (noting that the "powers" of the county boards of supervisors are "as specified in this act"); *Nat'l Metal Co. v. Greene Consol. Copper Co.*, 9 Ariz. 192, 195 (1905) (finding that a territorial court "has no power" to hear cases absent a "provision of the statute"). Moreover, Arizona in 1910 had already had in place for at least twenty-seven years a

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[1] John D. Leshy, *The Arizona State Constitution: A Reference Guide* (1993), at 8 ("The delegates compiled no official complete record of the convention proceedings. Almost nothing is available about the deliberations of the committees, where much of the actual drafting was done").

statutory framework narrowly circumscribing local law enforcement officers' arrest authority. *Whitlock v. Boyer*, 77 Ariz. 334, 337 (1954) (noting that the session laws of 1883 prescribed the duties of a police chief and limited his "power to arrest" to some degree).

Following adoption of the Arizona Constitution, state judges similarly understood that the powers of county elected officers "depends upon the terms of the statute." *Kenney v. Bank of Miami*, 19 Ariz. 338, 342 (1918); *see also State Bd. of Control v. Buckstegge*, 18 Ariz. 277, 282 (1916) (concluding that elected county officers "can exercise no powers except those specifically granted by the statute and in no other way than that fixed by the statute"). Just as during the territorial era, the term "prescribed by law" continued during early statehood to mean only that law "prescribed" by the legislature. *Ariz. Corp. Comm'n v. Heralds of Liberty*, 17 Ariz. 462, 469 (1916) (finding that the constitutional provision granting an entity the power to "issue licenses . . . as may be prescribed by law" grants the entity such authority as to license applicants "that the Legislature may prescribe"). Thus, county sheriffs, who are governed by the same constitutional provision as all other elected county officers, derive their powers from the same source – the statutes. *Bd. of Sup'rs of Maricopa Cty. v. Woodall*, 120 Ariz. 391, 394 (App. 1978), *rev'd on other grounds*, 120 Ariz. 379 (1978) (noting that, where the board of supervisors possesses only those powers "delegated to it by the legislature," it "would logically follow" that the same rule apply to the county attorney); *accord State v. Jamali*, 2013 WL 2325613, at *2 n.5 (Ariz. Ct. App. May 28, 2013) (observing that Ariz. Const. art. 12, § 4 uses the same phrase to define the powers of sheriffs and county attorneys).

Likewise, a sheriff's arrest authority is defined in the same manner as the arrest authority of all other state peace officers: by statute. *Miles v. Wright*, 22 Ariz. 73, 81 (1920) ("[u]nder the statute [a sheriff's deputy] has authority to make an arrest without a

warrant"); *see also Bonebrake v. Hunt*, 11 Ariz. 98, 99 (1907) (noting that the arrest authority of a territorial-era deputy is limited to the same extent as all other "peace officers"). Arizona courts do not infer arrest authority where such authority is not explicit in statute. *Erickson v. City Ct. of Phoenix*, 105 Ariz. 19, 20 (1969) (explaining that arrest was unlawful "in the absence of a statute" authorizing it); *State v. Garcia-Navarro*, 224 Ariz. 38, 41 (Ct. App. 2010) (finding an unlawful arrest where "[t]he legislature did not display any intent" to grant such authority).

Merrill v. Phelps – the only known Arizona case suggesting that sheriffs possess extra-statutory powers – addresses neither a sheriff's arrest authority nor a sheriff's management over jails. In *dicta*, the *Merrill* court stated that "the power exercised by the sheriff under the common law still pertains to our sheriff, except in so far as it has been modified by constitutional and statutory provisions." *Merrill v. Phelps*, 52 Ariz. 526, 530 (1938). The dispute in *Merrill* – whether a sheriff or a judge has the authority to appoint court officers – was decided on statutory grounds. *Id*. at 531 ("these provisions have appeared in our statutes since early territorial days"). To the extent that *Merrill* explored common law principles, it was to resolve a statutory conflict underlying the dispute in that case. *Clark v. Campbell*, 219 Ariz. 66, 72, ¶ 22-23 (App. 2008) (noting that *Merrill* "examined the interplay between the [statutory] authority of a superior court judge and a county sheriff"). Even if territorial-era sheriffs possessed common law authority – which they did not – such powers were modified by the Arizona Constitution. *Gorenc v. Futch*, 876 F.2d 896 (9th Cir. 1989) (citing *Merrill* for the proposition that "[t]he duties and powers of sheriff officers are defined by statute").

In sum, if Defendants have the authority to prolong the detention of Plaintiff and others similarly situated, it must be found in an Arizona statute.[2]

d. *There exists no Arizona statute authorizing Plaintiff's arrest for an alleged civil violation of federal immigration law*

For the most part, Arizona statutes authorize warrantless arrests only for criminal violations. A.R.S. § 13-3883(1), (2), (4) (providing that peace officers may arrest without warrant for felonies and misdemeanors).[3] As noted above, however, ICE detainers and their accompanying administrative warrants request that local officers make arrests for *civil* immigration violations. In the rare circumstances in which Arizona officers are permitted to effectuate warrantless *civil* arrests, the authority is explicitly granted by narrow statutes. *See, e.g.*, A.R.S § 36-525(B) (psychiatric commitment); A.R.S. § 8-303(C) (juvenile delinquents and runaways); A.R.S. § 36-2026(A) (emergency intoxication commitment). As *Lunn* observed with regard to Massachusetts law, "none of

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[2] Nor do Arizona sheriffs possess any "inherent authority to enforce the civil provisions of federal immigration law." *United States v. Arizona*, 641 F.3d 339, 362 (9th Cir. 2011), *aff'd in relevant part*, 567 U.S. 387 (2012).

[3] An administrative arrest warrant as does not qualify as a "warrant" for purposes of Arizona law. *See, e.g.*, A.R.S. § 13-3897 ("When the arrest by virtue of a warrant occurs . . . the officer making the arrest shall without unnecessary delay take the person arrested before the magistrate who issued the warrant[.]") (emphasis added); A.R.S. § 13-3886 ("Any magistrate may, by an endorsement under his hand upon a warrant of arrest, authorize the service of the warrant by telegraph or telephone[.]") (emphasis added); *see also State v. Hyde*, 186 Ariz. 252, 268 (1996) (explaining that the purpose of the warrant requirement is "to place a neutral magistrate between" officers and individual rights); *State v. Hadd*, 127 Ariz. 270, 275 (Ct. App. 1980) ("The key element [of a warrant] is consideration of the affidavit by a neutral and detached magistrate."). While a non-judicial warrant may authorize arrest by federal law enforcement officers, for state-law purposes, a local officer in Arizona with only a non-judicial warrant would be effecting a warrantless arrest.

these statutes either directly or indirectly authorizes the detention of individuals based solely on a Federal civil immigration detainer." *Lunn*, 477 Mass. at 532.

Similarly, the state statutes governing a sheriff's responsibilities over jail administration do not supply the needed authorization here. Various Arizona statutes give to sheriffs the primary responsibility over jails: A.R.S. § 31-101 ("[t]he common jails . . . shall be kept by the sheriffs"); A.R.S. § 31-121 ("The sheriff shall receive all persons who are committed to jail"); A.R.S. § 11-441(A)(5) (sheriff shall "[t]ake charge of and keep . . . the prisoners in the county jail"). While a sheriff, as the county jailkeeper, retains the power to determine the "means" of managing the jail, *Trombi v. Donahoe*, 223 Ariz. 261, 267 (Ct. App. 2009), a sheriff cannot unilaterally refuse to release an inmate at the time ordered by the state or local court. *State ex rel. Murphy v. Super. Ct. of Maricopa Cty.*, 30 Ariz. 332, 334 (1926) ("The [prison] superintendent's duty was to observe and enforce the court's mandate, and, when he violated its terms by releasing the prisoner before the minimum sentence was served, his act was contemptuous.").

Moreover, the sheriff's statutory authority to "receive" those "committed to the jail" requires an independent statute setting out when and how a person is "committed." A.R.S. § 31-101 ("[t]he jails shall be used for detention of persons committed to them *in accordance with the provisions set forth in this chapter*.") (emphasis added). State law provisions that merely confirm a jailer's power to hold arrestees do not constitute "an independent source of authority [to] lawfully arrest [individuals] solely on the basis of a detainer." *C.F.C. v. Miami-Dade Cty.*, 2018 WL 6616030, at *15 (S.D. Fla. Dec. 14, 2018)

One such provision – A.R.S. § 31-122 – allows sheriffs to "keep in the county jail any prisoner committed thereto by process or order issued under the authority of the United States." This "archaic" statute "adds nothing to the County's arrest authority." *C.F.C.*, 2018 WL 6616030, at *15 (interpreting an almost identical provision of Florida law); *Printz v. United States*, 521 U.S. 898, 909 (1997) (noting that there exist similarly-

worded statutes in many states, dating to the 1800s). Furthermore, A.R.S. § 31-122 requires, as a prerequisite, that "[p]rovisions . . . be made by the United States for the support of such a prisoner" – in other words, a contractual arrangement with the federal government. *Id*. Defendants have received no such provisions and have no such contract. 8 CFR § 287.7(e) ("[n]o detainer . . . shall incur any fiscal obligation on the part of the Department [of Homeland Security], until actual assumption of custody by the Department."); *City & Cty. of San Francisco v. Trump*, 897 F.3d 1225, 1241 n.7 (9th Cir. 2018) ("ICE does not reimburse local jurisdictions for the costs of continued detention."). The one contract that Defendants have related to jail detention is not applicable here. *See Tenorio*, 324 F. Supp. 3d at 1063.

Arizona law provides clear guidance on how a sheriff must proceed when a detainee who posts bail in one criminal case is subject to a judicial warrant from another Arizona county or another state. A.R.S. § 13-3964; A.R.S. §13-3841 *et seq.*; Ariz. R. Crim. P. 4.1(c)(2). No similar statute or authority permits detention pursuant to non-judicial documents such as the Forms I-247 and I-205 issued by ICE. Beyond these specific authorizations, A.R.S. §13-3972 provides "[a] person charged with a crime or public offense shall not, before conviction, be subject to more restraint than is necessary for his detention to answer the charge."

Neither does A.R.S. § 11-1051 (also known as S.B. 1070) authorize sheriffs to prolong an individual's jail detention. The plain language makes this clear: neither the word "jail" nor the word "sheriff" appears in the statute. Despite the "legislature's policy determination in S.B. 1070 that Arizona should cooperate with federal immigration enforcement," *Tenorio*, 324 F. Supp. 3d at 1067, Defendants derive no arrest authority from its provisions. Indeed, the word "cooperation" appears exactly once in A.R.S. § 11-1051 – in the title heading, which may be relied upon only if there is an ambiguity. A.R.S. § 1-212 ("[H]eadings to sections . . . do not constitute part of the law.") There is

no ambiguity in A.R.S. § 11-1051, which, unlike the Texas statute described above, *see El Cenizo*, 890 F.3d at 185, the Arizona statute does not address ICE detainer requests. A desire for increased cooperation between local and federal officials does not, by itself, indicate that the legislature intended for sheriffs to prolong jail detention. *Lopez-Aguilar v. Marion Cty. Sheriff's Dep't*, 296 F. Supp. 3d 959, 973 (S.D. Ind. 2017) (describing an Indiana state law similar to S.B. 1070)

If the legislature had intended to authorize a sheriff to prolong an individual's detention in response to an ICE request – as a method of cooperation – "it signally failed and omitted to say so." *Murphy*, 30 Ariz. at 334 (discussing the governor's lack of statutory authority to override a superior court's sentencing decision); *see also State v. Nicholls*, 2016 WL 3903405, at *2 (Ariz. Ct. App. July 14, 2016) (observing that the legislature "would have clearly stated so since it knows how to . . . write statutes"). In fact, the legislature *did* authorize one form of cooperation relating to jail detainees. A.R.S. § 11-1051(C) (requiring Arizona jailers to "immediately" notify immigration officials when certain inmates are "discharge[d] from imprisonment"). It did not require or authorize jailers to prolong an individual's jail detention.

An ICE detainer request typically asks for local sheriffs to do two things: "hold the prisoner for the [federal immigration] agency" and "notify the agency when release of the prisoner is imminent." *McLean v. Crabtree*, 173 F.3d 1176, 1185 n.12 (9th Cir. 1998). This two-pronged aspect of ICE detainer requests had existed for many years before the legislature enacted S.B. 1070. *Cabezas v. Scott*, 717 F. Supp. 696, 697 (D. Ariz. 1989). Thus, the legislature could have authorized both actions by sheriffs, but it did not. The omission is presumed to have been intentional. *Pima Cty. v. Heinfeld*, 134 Ariz. 133, 134 (1982) ("[T]he expression of one or more items of a class indicates an intent to exclude

all items of the same class which are not expressed.").[4] In sum, neither S.B. 1070 nor any other Arizona statute provides Defendants the needed state law authorization to prolong Plaintiff's detention.

Plaintiff will suffer irreparable harm if injunctive relief is not granted.

Where, as here, a plaintiff seeking preliminary injunctive relief has demonstrated probable success on the merits, he need show only the "possibility" of irreparable harm in the absence of relief from the court. *Smith,* 212 Ariz. at 410 ¶ 10. The prolonged detention that Plaintiff and putative class members will experience is unquestionably irreparable harm. *Tenorio,* 324 F. Supp. 3d at 1067 ("[f]orty-eight hours of unauthorized detention would impose a significant hardship" on a jail detainee). And because the harm cannot effectively be remedied after the fact, prolonged detention calls for equitable relief. *Rodriguez v. Robbins,* 715 F.3d 1127, 1145 (9th Cir. 2013); *R.I.L-R v. Johnson,* 80 F. Supp. 3d 164, 191 (D.D.C. 2015).

The balance of hardships tips sharply in Plaintiff's favor and public policy favors injunctive relief.

Just as an unlawfully prolonged detention almost always results in irreparable harm to the moving party, so too a government actor "cannot reasonably assert that it is harmed in any legally cognizable sense by being enjoined from" unlawful action. *Zepeda v. U.S. I.N.S.*, 753 F.2d 719, 727 (9th Cir. 1983). Indeed, ICE detainer requests are just

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[4] A 2016 Arizona Attorney General opinion emphasizes that S.B. 1070 requires jailers to *communicate* with federal immigration officials but does not authorize jailers to prolong jail detention. Ariz. Att'y Gen. Op. No. I16-010 (noting that "[o]fficers shall not arrest an individual simply because the individual lacks proper documentation"); *see Ruiz v. Hull*, 191 Ariz. 441, 449 (1998) (noting that the "reasoned opinion [of attorney general opinions] should be accorded respectful consideration.")

that: requests. *Lunn*, 477 Mass. at 526 ("The United States . . . concedes that compliance by State authorities with immigration detainers is voluntary, not mandatory."); *Orellana v. Nobles Cty.*, 230 F. Supp. 3d 934 (D. Minn. 2017) (quoting local police officials as saying that "ICE lawyers . . . now have acknowledged to us that these requests are just that, requests and are voluntary"); *Galarza v. Szalczyk*, 745 F.3d 634, 645 (3d Cir. 2014) (same). Thus, Defendants cannot be meaningfully harmed by a preliminary injunction here.

There is no compelling public policy weighing in favor of Defendants' policy and practice of delaying detainees' release. *Lopez-Aguilar*, 296 F. Supp. 3d at 977 ("The state has no interest in ensuring the 'suspect's' appearance at 'trial,' because the state may not adjudicate deportability [and] no interest in preventing the noncitizen from continuing his offense, because the state may not deport him"). Thus, the balance of hardships is strongly in Plaintiff's favor.

Special action relief is appropriate because Plaintiff seeks to compel Defendants to perform a ministerial duty over which they have no discretion and to compel Defendants to refrain from unauthorized acts.

Special action relief is appropriate where, as here, there is no "equally plain, speedy, and adequate remedy by appeal"; where a defendant has "failed to perform a duty required by law as to which he has no discretion"; or where a defendant "is threatening to proceed without . . . legal authority." Ariz. R. P. Spec. Act. 1(a), 3(a), 3(b).

Because Plaintiff's harm is imminent unlawful detention, his harm cannot be remedied by post-trial appeal, and special action relief is appropriate. Ariz. R. P. Spec. Act. 1(a). By holding Plaintiff for up to 48 additional hours, Defendants will fail to

perform a duty required by law – to release Plaintiff pursuant to the order of the Flagstaff Municipal Court. A.R.S. § 13-3967(A); *Maricopa Cty. v. State*, 126 Ariz. 362, 364 (1980) (concluding that taking custody of inmates is "a ministerial duty concerning which [the jailer] has no discretion"). As explained above, Defendants are neither required nor permitted to delay Plaintiff's release from county jail absent clear and express authority under Arizona statutes. No statute grants such power, absent an independent finding of probable cause that Plaintiff committed or is about to commit a crime or violation of Arizona statutes. *State v. Sweeney*, 224 Ariz. 107, 112 (Ct. App. 2010). Plaintiff is not so accused. Therefore, Defendants' threatened unlawful action is appropriate for special action relief.

CONCLUSION

Plaintiff's original (and lawful) detention will end once he satisfies all conditions of release set by the Flagstaff Municipal Court on January 2, 2019. Plaintiff's threatened detention beyond that time is unlawful. As such, this Court should order Plaintiff released from the Coconino County Detention Facility, upon his completing all local conditions.

RESPECTFULLY SUBMITTED this 28 January 2019.

s/William B. Peard
William B. Peard
Attorney for Plaintiff