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MONTANA NINETEENTH JUDICIAL DISTRICT COURT
COUNTY OF LINCOLN

AGUSTIN RAMON, On behalf of himself and all others similarly situated, Plaintiffs, vs. ROBY BOWE, in his individual capacity and his official capacity as Sheriff of Lincoln County and administrator of Lincoln County Detention Center, Defendant.	)	Cause No. _____ Hon. **PLAINTIFFS BRIEF IN SUPPORT OF APPLICATION FOR TEMPORARY RESTRAINING ORDER, PRELIMINARY INJUNCTION, AND ORDER TO SHOW CAUSE**

EXHIBIT 4

This suit challenges the Lincoln County Sheriff's policy and practice of unlawfully exceeding his authority under Montana law by depriving people of their liberty on the ground that they are suspected of civil violations of federal immigration law. The Sheriff does so at the request of federal immigration authorities (an "immigration detainer"). But Montana law provides him with no authority to continue to hold prisoners in custody, after they would otherwise be released, solely for alleged civil violations of federal immigration law.

Plaintiff thus asks the Court to join a growing number of other jurisdictions which have recognized that where there is no state law authority for continuing to detain people on civil immigration detainers, such detention is unlawful and must be enjoined. In the past month, a court in Minnesota joined the Supreme Judicial Council of Massachusetts and a court in Colorado in so holding.

Plaintiff Agustin Ramon hereby applies, pursuant to Mont. Code Ann. §§ 27-19-301 and 27-19-314, for a temporary restraining order and preliminary injunction prohibiting Defendant from refusing to release Plaintiff from custody based on an immigration detainer when he posts bond, completes his sentence, or otherwise resolves his criminal case. Undersigned counsel provided notice of this application to the District's Counsel on October 30 and duly served this application and the accompanying complaint. Plaintiff has been detained since August 3, 2018, even though his family is able to post his bond and has attempted to do so. Without the Court's intervention, Plaintiff will continue to be unlawfully detained. Plaintiff has an upcoming criminal hearing on November 19, at which his criminal case may well be resolved—triggering the detainer as the sole restraint on his liberty. Accordingly, **Plaintiff seeks an expedited hearing on this motion within 7 days of its filing.**

BACKGROUND

A. Immigration Detainers and the Sheriff's Policy

Central to this case is a federal form requesting the detention of state and local inmates beyond

the time at which they would otherwise be released from state custody. These requests come from immigration enforcement officers employed by U.S. Immigration and Customs Enforcement (ICE) and the U.S. Customs and Border Protection, agencies within the Department of Homeland Security (DHS). The requests are made using DHS Form I-247A, also known as an "immigration detainer." *See* Affidavit of Jessica Polan ("Polan Aff."), Ex. A. An immigration detainer identifies a prisoner being held in a local jail or other state facility. It asserts that DHS believes the prisoner may be removable from the United States. It asks the jail to detain that prisoner for an additional 48 hours after he or she would otherwise be released, to provide time for ICE to take the prisoner into federal custody. Detainers are issued by ICE officers and Border Patrol Agents. They are never reviewed, approved, or signed by a judicial officer.

Detainers may be accompanied by other forms that convey similar information, such as an administrative warrant, DHS Form I-200, or an inmate tracking form, DHS Form I-203.[1] These forms are issued by ICE officers and/or Border Patrol agents. None are reviewed, approved, or signed by a judicial officer.

Detainers and the related forms are part of the federal government's enforcement of *civil* immigration law. Being present in the United States without authorization is a civil matter, not a crime. *Arizona v. United States*, 567 U.S. 387, 396 (2012). And detainers are requests, not commands. As multiple courts have held, local law enforcement agencies are free to decline any detainer request. *See, e.g., Galarza v. Szalczyk*, 745 F.3d 634 (3d Cir. 2014).

Montana law requires the release of prisoners who have posted bond, completed their sentences, or otherwise resolved their criminal cases. Mont. Const. art. II, §§ 10, 11, 17, 21. Sheriff Bowe nevertheless, as a matter of policy, refuses to release prisoners if federal immigration authorities have

[1] *See, e.g.*, Form I-200, *available at* https://www.ice.gov/sites/default/files/documents/Document/2017/I-200_SAMPLE.PDF

requested the prisoner's continued detention. *See* Affidavit of Krystel Pickens ("Pickens Aff.") ¶¶7-8; Polan Aff. ¶¶12-13. .

B. Mr. Ramon's Detention Despite Attempting to Post Bail

Plaintiff Agustin Ramon was booked into the Lincoln County Jail on August 3, 2018 on a state criminal charge. Affidavit of Lily McNair ("McNair Aff.") ¶4; Polan Aff. ¶3. The court set bond for his release at $25,000. Polan Aff. ¶10. The jail received an ICE detainer for Mr. Ramon, dated August 3, 2018. *See* Polan Aff. ¶¶6-9, Ex. A. Mr. Ramon's wife, Lily McNair, then retained a bail bond company and paid the company the agreed-upon fee for the company to post Mr. Ramon's bond. McNair Aff. ¶¶ 6-7. When the company attempted to post the bond at the jail, officials there told them doing so would be futile: the sheriff would continue to hold Mr. Ramon on the basis of the ICE detainer even if the bond were paid and he would otherwise be entitled to release. McNair Aff. ¶¶ 8-10; Polan Aff. ¶¶11-13. The bond company thus did not post the bond and returned to Ms. McNair her fee. McNair Aff. ¶12. Ms. McNair remains able and willing to have the bond company post the bond. McNair Aff. ¶11. The Lincoln County jail roster confirms that Mr. Ramon "can bond, but do not release," meaning that Mr. Ramon would not be released to anyone but federal authorities, even if he posts bond. Pickens Decl. ¶¶5-7.

ARGUMENT

Interim injunctive relief is necessary to remedy Sheriff Bowe's ultra vires deprivation of Plaintiff's liberty; to compel him to release Plaintiff when he posts bond, completes any sentence, or otherwise resolves his criminal case; and to protect Plaintiff's fundamental state constitutional rights to be free from unreasonable seizures and to post bail. This Court should issue a restraining order and preliminary injunction prohibiting Defendant from refusing — based on the immigration detainer—to release Plaintiff from custody when he is otherwise required to be released.

Montana law allows a court to issue a temporary restraining order or a preliminary injunction in any of the following situations:

> (1) when it appears that the applicant is entitled to the relief demanded . . .;
>
> (2) when it appears that the commission or continuance of some act during the litigation would produce a great or irreparable injury to the applicant; [or]
>
> (3) when it appears during the litigation that the adverse party is doing or threatens or is about to do or is procuring or suffering to be done some act in violation of the applicant's rights, respecting the subject of the action, and tending to render the judgment ineffectual[.]

Mont. Code Ann. § 27-19-201. "These requirements are in the disjunctive, meaning that findings that satisfy one subsection are sufficient." *Mont. Cannabis Indus. Ass'n v. State*, 2012 MT 201, ¶ 14, 366 Mont. 224, 286 P.3d 1161. The Montana Supreme Court has instructed courts to consider:

> (1) [T]he likelihood that the movant will succeed on the merits of the action;
>
> (2) the likelihood that the movant will suffer irreparable injury [without] a preliminary injunction;
>
> (3) [whether] the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party (a balancing of the equities); and
>
> (4) [whether] the injunction, if issued, would not be adverse to the public interest.

Van Loan v. Van Loan (1995), 271 Mont. 176, 182, 895 P.2d 614, 617.

Here, Plaintiff is entitled to relief based on the merits of his claim, he will suffer irreparable injury that outweighs any damage to the Defendant, and the balancing of the equities favors him. Where an applicant can "either establish a prima facie case, or show that it is at least doubtful whether or not he will suffer irreparable injury before his rights can be fully litigated[,] . . . courts are inclined to issue the preliminary injunction." *State v. BNSF Ry. Co.*, 2011 MT 108, ¶ 17, 360 Mont. 361, 254 P.3d 561.

I. Plaintiff is Entitled to Relief on the Merits.

A. Plaintiff's Arrest Without State Arrest Authority is Unlawful.

A growing number of state courts have recognized that state law must authorize local officers to conduct arrests pursuant to immigration detainers— and that very often it does not. In *Lunn v.*

Commonwealth, 477 Mass. 517 (2017), the Massachusetts Supreme Judicial Court held that continuing to detain someone on a civil immigration detainer constituted a new arrest, and that no state law provided for such an arrest for a federal civil immigration matter. Likewise, in *Cisneros v. Elder*, No. 18-cv-30549 (Colo. D. Ct. Mar. 19, 2018), the court found a lack of arrest authority to hold pursuant to an immigration detainer under Colorado law. [Attached Ex. A]. And earlier this month, in *Esparza v. County of Nobles*, No. 53-cv-18-751 (Minn. D. Ct. Oct. 19, 2018), the court reached the same conclusion under Minnesota law. [Attached Ex. B]. For the reasons set forth below, Montana law likewise provides no authority justifying Plaintiff's ongoing detention.

1. Continued detention pursuant to an immigration detainer is a new arrest.

As an initial matter, it is clear that continuing to hold an individual after the resolution of his state-law charges for a new purpose, namely civil immigration enforcement, constitutes a new arrest. By statute, an arrest occurs when there is "an actual restraint of the person to be arrested or by the person's submission to the custody of the person making the arrest." Mont. Code Ann. § 46-6-104. Montana courts have further elaborated on elements of arrest: "(1) authority to arrest; (2) assertion of that authority with intention to [e]ffect arrest; and (3) restraint of the person arrested." *State v. Thornton* (1985), 218 Mont. 317, 322-23, 708 P.2d 273, 277.

Here, the Sheriff claims an authority to arrest based on the immigration detainer by making clear he intends to continue to confine Plaintiff even if the bond is paid and the state-law reason to detain him has ended.

Such continued detention for a new purpose constitutes a new arrest. Indeed, numerous courts have now so held in the specific context of immigration detainers. *See Lunn*, 477 Mass. at 527; *Esparza*, No. 53-cv-18-751, slip op. at 14; *Cisneros*, No. 18-cv-30549, slip op. at 4; *Morales v. Chadbourne*, 793 F.3d 208, 217 (1st Cir. 2015); *Roy v. Cty. of Los Angeles*, 2018 WL 914773 at *23 (C.D. Cal. Feb. 7, 2018); *cf. Ochoa v. Campbell*, 266 F. Supp. 3d 1237, 1249-50 (E.D. Wash. 2017).

To be sure, a typical arrest occurs when someone at liberty is detained by officers and taken into custody. But nothing in Montana law limits arrests to such circumstances. On the contrary, this State's courts "accord 'arrest' a broad definition determined by whether a reasonable person, innocent of any crime, would have felt free to walk away under the circumstances." *State v. Ellington*, 2006 MT 219, ¶ 14, 333 Mont. 411, 143 P.3d 119. Under that broad definition, an individual who is in custody but should be free to leave because he has posted bond (or otherwise resolved the criminal charges) is re-arrested when he is restrained for a separate legal reason.

Montana's statutory extradition scheme underscores that one can be arrested while already in custody, because it specifically contemplates the arrest of an individual who is already being held in a jail. An individual arrested on suspicion of an out-of-state felony charge, but without a governor's extradition warrant, is brought before a judge and may be "commit[ted]" to the county jail for up to thirty days. Mont. Code Ann. § 46-30-302. This commitment period, the statute provides, "will enable the *arrest* of the accused to be made under a warrant of the governor." *Id.* (emphasis added); *see also id.* § 46-30-304 (similar). The statutes thus leave no doubt that one who is already in custody can be arrested. *See State v. Holliman* (1991), 247 Mont. 365, 369, 805 P.2d 52, 54 (holding that a governor's warrant remained valid even after a prolonged delay in arresting defendant on that warrant; concluding that the defendant "remained in custody under [a criminal] conviction . . . and was *arrested* under the governor's warrant") (emphasis added).[2]

2. Montana law does not authorize the Sheriff to make immigration arrests.

[2] *State v. Dieziger* (1982), 200 Mont. 267, 650 P.2d 800, is not to the contrary. In *Dieziger*, the court held that a defendant was not entitled to dismissal of his conviction for an incident in prison, where authorities had waited six weeks before they filed charges and then promptly brought him before a judge. *Id.* at 269-70. The court's observation that "an arrest was unnecessary" was simply an observation that authorities could wait to file new charges without "any prejudice from the delay" to the defendant, because he remained incarcerated throughout the six weeks on an unrelated sentence. *Id.* at 270. The case thus has no bearing on whether detention for a new purpose after the justification for the original custody lapses constitutes a new arrest.

Because continued detention pursuant to an immigration detainer constitutes a new arrest, the Sheriff must have state law authority to conduct such an arrest. But arrest authority in Montana is set forth in a series of statutes which narrowly define officers' authority, particularly in the context of limited civil arrest authority. And no state statute authorizes arrests pursuant to immigration detainers. Nor is there any common law authority that could fill that gap. Finally, federal law does not supply the missing state arrest authority. In sum, arrests pursuant to immigration detainers are unlawful under Montana law.

a. Montana's statutes provide no authority to arrest pursuant to detainers.

Montana statutes make clear that an arrest is only valid if "authorized by law." Mont. Code Ann. § 46-1-202. The statutory scheme sets out detailed rules establishing the authority to make an arrest and the manner in which that arrest must be made. Nowhere is there authorization for state officers to make an arrest for a suspected federal civil immigration violation.

First, the authorization to execute arrests pursuant to a warrant, Mont. Code Ann. §§ 46-6-210 (criminal warrants) & 27-18-102 (civil warrants), is inapplicable. Although detainers are now generally accompanied by an administrative warrant, an administrative arrest warrant is not an "arrest warrant" under Montana law. "'Arrest warrant' means a written order *from a court* . . . ." Mont. Code Ann. § 46-1-202(4) (criminal warrants) (emphasis added); *accord id.* § 27-16-201 ("[a]n order for the arrest of the defendant [in a civil action] must be obtained from the judge of the court in which the action is brought"); *see also id.* § 46-1-202(4) ("The term [arrest warrant] includes the original warrant of arrest and a copy certified by the issuing court."); *Id.* § 46-6-201 (requirements for issuance of a criminal arrest warrant "by the court."). Neither administrative warrants nor detainers are issued by any court, so they do not constitute "warrants" for the purposes of arrest authority under Montana law. *See Cisneros*, No. 18-cv-30549, slip op. at 4-5 (reaching the same conclusion under Colorado law); *see also Lunn*, 477 Mass. at 524n.17.

Even if Montana law considered Form I-200 to be a warrant, it still would not allow state officers to execute such a warrant for the federal government. Montana's statutory scheme allows state officers to execute warrants from outside of Montana only for felony criminal charges. Mont. Code Ann. § 46-6-210. A civil immigration detainer is not a criminal warrant, much less a felony criminal warrant. Moreover, even if some out-of-state administrative warrants could provide the basis for a Montana arrest pursuant to a warrant, Form I-200 clearly does not. It is "directed to" only "Federal immigration officials," *Lunn*, 477 Mass. at 524 n.17, and so cannot be executed by the Sheriff, *see Ochoa*, 266 F. Supp. 3d at 1255; *see also* 8 CFR 287.5(e)(3), 287.8(c)(1) (providing that only certain trained federal officers can execute administrative warrants).

Nor is there any authority in Montana statute for a *warrantless* arrest pursuant to an immigration detainer. Indeed, Montana statutes for the most part authorize warrantless arrests only for *criminal* violations:

> (1) A peace officer may arrest a person when a warrant has not been issued if the officer has probable cause to believe that the person is committing an offense or that the person has committed an offense and existing circumstances require immediate arrest.

Mont. Code Ann. § 46-6-311. "Offense" is defined as "a violation of any *penal* statute of this state or any ordinance of its political subdivisions." Mont. Code Ann. § 46-1-202 (emphasis added); *see also State v. Boulton*, 2006 MT 170, ¶ 16, 332 Mont. 538, ¶ 16, 140 P.3d 482,¶ 16 (probation violations are not "offenses," per § 46-1-202 because they do not violate any penal statute). Immigration detainers, however, ask local officers to make arrests for *civil* immigration violations. *See Arizona*, 567 U.S. 387, 396. Section 311 thus confers no authority to make civil immigration arrests.

Where Montana law does provide narrow authority to effectuate *civil* warrantless arrests, it does so explicitly, and with specific procedural protections for arrestees. *See, e.g.*, Mont. Code Ann. §§ 53-21-129 (emergency psychiatric commitment); 41-5-321 et seq. (youth commitments); 53-24-107 (emergency commitment for intoxication); 3-1-501 et seq. (contempt). For example, peace officers may

take someone into custody for psychiatric care—without a petition for commitment—in only two types of emergencies, Mont. Code Ann. § 53-21-102, and only subject to procedural protections, *see id.* §§ 122, 129(1), 146. As the *Lunn* Court observed with regard to Massachusetts law, so too for the laws of Montana: "none of these statutes either directly or indirectly authorizes the detention of individuals based solely on a Federal civil immigration detainer." *Lunn*, 477 Mass. at 532.

Nor does any statute vest the Sheriff with the arrest authority denied to all other Montana law enforcement agents. His *duties* do include conducting arrests. Mont. Code Ann. § 7-32-2121(2). But that duty grants no power to effectuate any arrests—that authority is granted, if at all, in other statutes. *See State v. Dist. Court of Fifteenth Judicial Dist. In & For Musselshell Cty.* (1925), 75 Mont. 116, 241 P. 1075, 1076 (observing that this *duty* was imposed by predecessor to § 7-32-2121, while arrest *authority* was granted by another statute). Moreover, Section 7-32-2121(2) extends only to arrests for "offense[s]"—but, again, that means crimes.

The statutes addressing the maintenance of jails provide no additional arrest authority – indeed, they do not address arrest authority at all. Mont. Code Ann. § 7-32-2242, for example, does nothing more than what its title—"Use of detention center—payment of costs"—clearly indicates: it sets out who must pay the costs of detention, and allows for federal officials, for example, to make an agreement to pay for detention of a defendant in a federal criminal case, *see* § 7-32-2242(2)-(3). It does not authorize any arrest, but rather provides for the "confinement" of *already* "arrested persons." *Id.* § 7-32-2242(1).

Similarly, Mont. Code Ann. § 7-32-2203 authorizes no arrests. It rather defines who may be held in jails—those who are "charged" with crimes, "sentenced" for crimes, or "committed" to the jail by some *other* lawful authority. *Id.* It thus simply lists categories of people whom, once they are arrested, the detention center may *receive* and hold. Thus the description in Section 2203 of persons "committed . . . upon civil process or by other authority of law" does nothing to establish an arrest

power for a sheriff in a jail; it simply describes categories of detainees that the operator of the detention center, who may not even be a sheriff, *see id.* §§ 7-32-2201(2)(b) & 2232, may receive. The authority to make civil arrests comes from other statutes, described above, which explicitly authorize specific kinds of civil arrests. Moreover, even if Section 2203 granted some arrest authority, it would not authorize arrests pursuant to detainers. "'Process means a writ or summons issued in the course of *judicial* proceedings." Mont. Code Ann. § 1-1-202 (emphasis added); *see also id.* § 7-32-2131(4)(b). The phrase "by other authority of law" simply refers to arrest powers provided elsewhere under Montana law, which nowhere authorizes civil immigration warrantless arrests. *Id.* § 2203(3). Thus, no statute provides the Sheriff with the power to re-arrest Plaintiff.

b. There is no common-law authority to arrest pursuant to an immigration detainer.

The Sheriff may argue that he has common-law authority to make civil immigration arrests. But any such assertion of common-law power is belied by the reticulated statutory arrest scheme. *See* Mont. Code Ann. § 1-1-108 ("In this state there is no common law in any case where the law is declared by statute"); *see also id.* § 1-2-103 ("The statutes establish the law of this state respecting the subjects to which they relate"). If officers had some broad, undefined authority to conduct arrests as they saw fit, there would be no need for the detailed arrest statutes. Indeed, the narrow authority the legislature has granted would be superfluous, and its limits would be effectively nullified. *Cf., e.g., Woods v. State ex rel. Montana State Hosp.*, 2015 MT 8, ¶ 19, 378 Mont. 38, 340 P.3d 1254 (2015) (holding that a broader common law tort rule could not apply because "the law is declared by statute") (quoting Mont. Code Ann. § 1-1-108).Accordingly, Montana courts have long rejected such assertions of non-statutory arrest authority. In *State v. Bradshaw* (1916), for example, the Montana Supreme Court held that a deputy sheriff's right to arrest without a warrant "is vested in him by law, only under the circumstances defined in [the arrest statute at that time], and if the circumstances do not exist, thus bringing into activity the authority of the law, he has no power to make the arrest." 53 Mont. 96, 161 P. at 711. In

other words, because the legislature has granted only certain arrest authority, officers must locate their power in those statutory grants—or not at all. *See* Mont. Code Ann. §§ 1-1-108 & 1-2-103; *see also, e.g., State v. Lemmon* (1984), 214 Mont. 121, 128-29, 692 P.2d 455, 459 (rejecting a common-law claim of power to arrest as a member of a sheriff's posse, holding that statutes set out the arrest power); *State v. Ellis*, 2007 MT 210, ¶ 23, 339 Mont. 14, 167 P.3d 896 (observing that § 27-16-102 "sets forth the limited circumstances in which a defendant in a civil action may be arrested"). Against such a backdrop of statutes setting out arrest powers in Montana, the court cannot and should not "create, and attempt to define, some new authority for court officers to arrest that heretofore has been unrecognized and undefined." *Lunn*, 477 Mass. at 534.

c. Federal law does not supply the missing state law authority

Nor, finally, does Federal law supply the missing arrest power in the absence of state-law authorization to make civil immigration arrests. Indeed, as a general matter, the authority of state and local officers to conduct arrests for federal offenses is a matter of *state* law. *See Arizona,* 567 U.S. at 414-15. So whether federal law *permits* local officers to effectuate arrests for a particular purpose by not preempting such arrests is irrelevant; the question here is whether Montana law grants Montana officers to conduct such arrests. As explained above, it does not.

The Sheriff may seek to rely on 8 U.S.C. § 1357(g)(10)(B), but it does not provide the missing state-law authority. That section is a preemption savings clause— providing that a formal immigration-enforcement agreement between the federal government and localities is not required for certain forms of cooperation—within the statute that permits such formal agreements. What constitutes cooperation under this savings clause is a highly contested issue, but it is irrelevant here. As the federal government conceded in *Lunn*, § 1357(g)(10)(B) does not supply authority to arrest that is missing as a matter of state law:

> Significantly, the United States does not contend that § 1357(g)(10) affirmatively confers authority on State and local officers to make arrests pursuant to civil immigration

> detainers, where none otherwise exists. In other words, it does not claim that § 1357(g)(10) is an independent source of authority for State or local officers to make such an arrest.
>
> . . .
>
> Further, it is not reasonable to interpret § 1357(g)(10) as affirmatively granting authority to all State and local officers to make arrests that are not otherwise authorized by State law. Section 1357(g)(10), read in the context of § 1357(g) as a whole, simply makes clear that State and local authorities, even without a [formal] agreement that would allow their officers to perform the functions of immigration officers, may continue to cooperate with Federal immigration officers in immigration enforcement to the extent they are authorized to do so by their State law and choose to do so.

Lunn, 477 Mass. at 535-36. Thus, this savings clause cannot provide authority for a state officer to make an arrest for civil immigration detainers where such authority is lacking as a matter of state law. *Id.*; *Esparza*, No. 53-cv-18-751, slip op. at 12-13 (concluding "the same principles apply" as in *Lunn*); *Cisneros*, No. 18-cv-30549, slip op. at 8 ("this provision does not, on its face, grant any authority to local officials; it is simply a reserve clause, making clear that the statute does not prevent local officials from communicating or cooperating with federal immigration authorities").

B. By Depriving Plaintiff of Liberty Without Legal Authority, Sheriff Bowe Carries Out an Unreasonable Seizure in Violation of Article II, Sections 10 & 11.

The Montana Constitution protects against unreasonable searches and seizures and further provides that an individual's right to privacy "shall not be infringed without the showing of a compelling state interest." Mont. Const. art. II, § 10. Montana Courts interpret Article II, Sections 10 and 11 to provide "greater protection to individual rights than does the Fourth Amendment of the United States Constitution." *State v. Urziceanu*, 2015 MT 58, ¶ 11, 378 Mont. 313, 344 P.3d 399; *see also State v. Goetz*, 2008 MT 296, ¶ 20, 345 Mont. 421, 191 P.3d 489 (requiring "an independent analysis").

Where, as here, a sheriff carries out an arrest without authority under state law, "[h]is effort to do so is a trespass upon the right of the citizen to the enjoyment of his personal liberty free from aggression by any one," *Bradshaw*, 53 Mont. 96, 161 P. at 711, and it violates Montana's right to

privacy and its protections against unreasonable seizures. *See State v. Van Dort*, 2003 MT 104 ¶¶ 17-21, 315 Mont. 303, 68 P.3d 728.

C. Holding Plaintiff on an ICE Detainer Violates State Due Process

Article II, Section 17 of the Montana Constitution provides: "No person shall be deprived of life, liberty, or property without due process of law." Article II, Section 21 further provides that "[a]ll persons shall be bailable by sufficient sureties, except for capital offenses, when the proof is evident or the presumption great." Sheriff Bowe is detaining Mr. Ramon pursuant to an ICE detainer which provides no opportunity for notice or a hearing to contest that detention. . No procedural safeguards accompany detention based on an ICE detainer, which involve no judicial approval of any kind, let alone one based on a finding of harm. *See* 8 C.F.R. § 287.7 (2017).

Moreover, that ongoing detention pursuant to detainers violates his right to post bail. Here, the criminal court clearly authorized Mr. Ramon's release on reasonable conditions that ensure his future appearance and which protect the safety of the community. *See* Mont. Code Ann. § 46-9-106. However, Mr. Ramon was informed by jail administrators that he cannot post bond because of the ICE detainer, in violation of his unequivocal right to post bail and be released now.

II. An Injunction is Necessary to Prevent Irreparable Injury to Plaintiff and Preserve a Meaningful Judicial Remedy.

Although Plaintiff's entitlement to relief on the merits of his claims is sufficient on its own to warrant injunctive relief, this Court should enjoin the Defendant from detaining Plaintiff on the basis of the immigration detainer for the additional reason that it would irreparably injure Plaintiff's personal liberty and interests. Mont. Code Ann. § 27-19-201. Specifically, Plaintiff will suffer the harm of arrest and detention by the Sheriff without authority—a harm to his liberty that cannot be remedied by money damages—and will suffer ongoing violation of his constitutional rights, which is *per se* irreparable. *See Mont. Cannabis Indus. Ass'n*, ¶ 15.

In contrast to the harms that Plaintiff will suffer if Defendant Bowe is allowed to arrest them pursuant to civil immigration detainers, Defendant will not be harmed by an injunction. *See Esparza*, No. 53-cv-18-751, slip op. at 10; *Cisneros*, No. 18-cv-30549, slip op. at 12; *see also All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1137 (9th Cir. 2011). The Sheriff has no legitimate interest in conducting arrests that are beyond his authority. Accordingly, the balance of equities tips in Plaintiff's favor. Issuing a preliminary injunction also serves the public interest because "it is always in the public interest to prevent the violation of a party's constitutional rights." *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir 2012) (citations omitted) (reviewing cases).

III. Plaintiff Should not be Required to Post a Bond in this Case

This Court should exercise its discretion pursuant to Mont. Code Ann. § 27-19-306(1) not to require a written undertaking in conjunction with issuance of a preliminary injunction. Although such a bond may be required to reimburse parties "wrongfully enjoined or restrained," the undertaking may be waived in the interests of justice. *Id.* Here, the Defendant will suffer no harm or damages due to the requested injunction.

CONCLUSION

For the foregoing reasons, this Court should grant Plaintiff's application for a TRO and enter an order to show cause, if any, why a preliminary injunction should not be granted prohibiting the Defendant from relying upon immigration detainers.

Respectfully submitted on this 30th day of October, 2018.

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