IN THE SUPREME COURT OF THE STATE OF MONTANA
No. DA 18-0661

AGUSTIN RAMON,

Plaintiff and Appellant,

V.

ROBY BOWE, IN HIS INDIVIDUAL CAPACITY AND HIS OFFICIAL CAPACITY AS SHERIFF OF LINCOLN COUNTY AND ADMINISTRATOR OF LINCOLN COUNTY DETENTION CENTER,[1]

Defendant and Appellee.

APPELLANT'S BRIEF IN OPPOSITION TO MOTION TO DISMISS

Alex Rate
Elizabeth K Ehret
ACLU OF MONTANA
P.O. Box 9138
Missoula, MT 59807
406-203-3375
406-204-0284
ratea@aclumontana.org
ehrete@aclumontana.org

Shahid Haque
BORDER CROSSING LAW FIRM
618 Highland St.
Helena, MT 59601
406-594-2004
shahid@bordercrossinglaw.com

Cody Wofsy*
Spencer Amdur*
American Civil Liberties Union Foundation, Immigrants' Rights Project
39 Drumm Street
San Francisco, CA 94111
(415) 343-0774
cwofsy@aclu.org
samdur@aclu.org

Omar C. Jadwat*
Daniel Galindo*
American Civil Liberties Union Foundation, Immigrants' Rights Project
125 Broad Street, 18th Floor
New York, NY 10004
(212) 549-2600
ojadwat@aclu.org
dgalindo@aclu.org
**Pro Hac Vice Admitted*

[1] Pursuant to M.R.App. P. 25(3) current Lincoln County Sheriff Darren Short should be substituted on all official capacity claims against the Lincoln County Sheriff and Administrator of Lincoln County Detention Center.

[2]This is the second time in less than two years that a similar set of facts are being presented to this Court. *See, Valerio-Gonzales v. Jarrett*, 2017 Mont. LEXIS 764, 390 Mont. 427. These challenges will recur until the Court decides the legality of local and state officers holding people on the purported authority of a federal immigration detainer request.

I. The County's Motion should be denied because this appeal fits the capable of repetition and public interest mootness exceptions

This court has recognized two exceptions to the mootness doctrine: 1) Capable of repetition, yet evading review; and 2) Public Interest. *Gateway Opencut Mining Action Group v. Bd of County Comm'rs*, 2011 MT 198, 361 Mont. 398, (citing *Morawicz v. Hynes*, 501 Ill. App. 3d 142, 929 N.E. 2d 544). *See also*, *Walker v. State*, 2003 MT 134, 316 Mont. 103.

Capable of Repetition: "The exception to mootness for those actions that are capable of repetition, yet evading review, usually is applied to situations involving governmental action where it is feared that the challenged action will be repeated." *Common Cause v. Statutory Comm. to Nominate Candidates for Comm'r of Political Practices* (1994), 263 Mont. 324, (quoting *Butte-Silver Bow Local Gov't v. Olsen* (1987), 228 Mont. 77, 743 P.2d 564). In *Walker*, the Court

[2] The body of this brief is limited, pursuant to Rule 16, M.R.App.P, to five pages (1,250 words). Because the Plaintiff believes that this Court would benefit from a more lengthy discussion of the important legal principles at play, Plaintiff concurrently files a motion for over-length brief, brief in support, and a more thorough brief in opposition to Defendant's motion to dismiss. *See, e.g. Valerio Gonzales*, 2017 Mont. LEXIS 764 (Brief in Opposition to Motion to Dismiss (13 pages), Amicus Curiae briefs (26 and 29 pages, respectively)).

reviewed a prisoner's challenge to various policies and practices at Montana State Prison. Walker appealed the District Court's denial of his Motion for post-conviction Relief. During the pendency of his appeal, Walker was discharged from MSP. Nevertheless, the Court found that "the problems involved could otherwise evade review because BMPs are intended to last only a few days, barely enough time to file a complaint let alone for the issue to come before this Court." *Walker,* 2003 MT 134, ¶ 44.

The Court has applied this exception in a line of cases with the same basic features as the present matter: allegations of unconstitutional or illegal detention that will recur and would otherwise evade review. *See, In re N.B.,* 190 Mont. 319, 322-323; *In re K.G.F.*, 2001 MT 140, 306 Mont. 1, (overruled on other grounds by *In re J.S.*, 2017 MT 214, 388 Mont. 397); *In re D.L.B.*, 2017 MT 106, 387 Mont. 323; *In re J.S.W.*, 2013 MT 34, 369 Mont. 12.

The situation presented here is not meaningfully different from the above cases. Lincoln County continues to unlawfully hold people who, but for the federal immigration detainer request, would otherwise be released pending trial on their criminal charges. Individuals who are subject to immigration detainers are, by definition, subject to release at any time pursuant to plea agreements, voluntary dismissals by prosecutors, trials on the merits or, as in Valerio-Gonzales' case, sua sponte orders of release by lower courts. The inherently transitory nature of the

lower court criminal proceedings effectively prevents Supreme Court review of detainer challenges (even where, as here, a party requests expedited briefing). *See also, Lunn v. Commonwealth*, 477 Mass. 517 (2017).

Public Interest: The public interest exception is similar to the capable of repetition exception, except insofar as it is most often invoked to "guide public officers in the performance of their duties." Numerous other states have ratified the public interest exception. *See, Nat'l Elect. Contractors Ass'n v. Seattle Sch. Dist.*, 66 Wn.2d 14, 400 P.2d 778 (1965); *Pallas v. Johnson*, 100 Colo. 449, 68 P.2d 559 (1937); *Couey v. Atkins*, 357 Ore. 460, 355 P.3d 866 (2015); *People ex rel. Wallace v. Labrenz*, 411 Ill. 618, 104 N.E. 2d 769. Application of the public interest exception requires: (1) the existence of a question of public importance; (2) the desirability of an authoritative determination for the purpose of guiding pubic officers in the performance of their duties; and (3) the likelihood that the question will recur.[3] *People v. J.T. (In re J.T.)*, 221 Ill. 2d 338, 851 N.E. 2d 1 (citing *In re Andrea F.*, 208 Ill. 2d 148, 156, 802 N.E.2d 782, 280 Ill. Dec. 531 (2003)).

An issue of substantial public interest is generally suited for review under the public interest exception. *People ex rel. Wallace v. Labrenz*, 411 Ill. 618, 104 N.E. 2d 769. The State of Montana, like many other states, is grappling with the harsh new immigration policies of President Trump. At the same time, numerous

[3] Likelihood of recurrence is discussed above, *supra*, p. 1-3.

states across the country have ruled that detainers violate state arrest authority and/or important constitutional provisions. *Lunn v. Commonwealth*, 477 Mass. 517 (2017); *People ex rel. Wells v. DeMarco*, 168 A.D.3d 31, 88 N.Y.S.3d 518 (N.Y. App. Div. 2018); *Cisneros v. Elder*, No. 2018CV30549, 2018 WL 7142016 (Colo. D. Ct. Dec. 6, 2018); *Esparza v. County of Nobles*, No. 53-cv-18-751, 2018 WL 6263254 (Minn. D. Ct. Oct. 19, 2018); *see also Creedle v. Miami-Dade Cty.*, 2018 WL 6427713 (S.D. Fla. Nov. 9, 2018) (finding no Florida state-law authority for detainer arrests); *C.F.C. v. Miami-Dade Cty.*, No. 18-CV-22956-KMW, 2018 WL 6616030, at *11 (S.D. Fla. Dec. 14, 2018) (same).

Here in Montana, the legality of county compliance with federal immigration detainers has been challenged in three cases: *Valerio-Gonzales*, the instant action, and *Soto-Lopez v. Jarrett,* Cause No. DV-19-212B (Gallatin County, 2019). Each of these cases has garnered intense and widespread public interest. Over twenty articles have appeared in major media outlets across the state covering these cases. Where, as here, "the issue presented is of substantial public interest, a well-recognized exception exists to the general rule that a case which has become moot will be dismissed upon appeal." *Labrenz*, 411 Ill. 618

Further, an authoritative determination on the legality of detainers will guide public officers in the performance of their duties. County sheriffs and jail administrators face significant uncertainty regarding their roles and responsibilities

when taking and maintaining custody of an individual subject to an immigration detainer. And for good reason. This is a confusing area of the law that heretofore has not been explored in Montana. For example, public officers may not be aware that continued detention on an immigration detainer is a new arrest. Ramon's appeal raises the important argument that such detention has no basis in state law, violates Montana's constitution, and is not authorized by any other source of law.

Indeed, local officers and agencies face a significant risk of litigation and financial liability when they honor ICE detainers. See *Roy v. Cty. of Los Angeles*, 2018 WL 914773 (C.D. Cal. Feb. 7, 2018). As a result, even if this court determines that Ramon's claims are moot, rendering an ultimate opinion on the legality of federal immigration detainers would provide needed guidance for public officials in the performance of their duties. *See*, *Johnson v. Edgar*, 176 Ill.2d 499, 680 N.E.2d 1372 (1997).

Ramon respectfully requests that the Court recognize an accepted exception to the mootness doctrine, and deny the County's Motion to Dismiss.

Dated this 21st day of May, 2019.

Respectfully submitted,

/s/ Alex Rate
Alex Rate
Counsel for Appellant

CERTIFICATE OF COMPLIANCE

The undersigned, Alex Rate, certifies that the foregoing complies with the requirements of Montana Rules of Appellate Procedure 11 and 12. The lines in this document are double spaced, except for footnotes and quoted and indented material, and the document is proportionately spaced with typeface consisting of fourteen characters per inch. The total word count is 1,250 words or fewer, excluding caption, table of contents, table of authorities, signature block and certificate of compliance. The undersigned relies on the word count of the word processing system used to prepare this document.

/s/ Alex Rate
Alex Rate
Counsel for Appellant

CERTIFICATE OF SERVICE

I hereby certify that I have filed a true and accurate copy of the foregoing BRIEF IN OPPOSITION TO MOTION TO DISMISS with the Clerk of the Montana Supreme Court, each attorney of record, and each party not represented by an attorney in the above-referenced District Court action, as follows:

Maureen Lennon
MACo Defense Services
2717 Skyway Drive, Suite F
Helena, MT 59602
MLennon@mtcounties.org
Counsel for Appellees

KURT G.ALME
United States Attorney
CHAD SPRAKER
Assistant United States Attorney
U.S. Attorney's Office
901 Front Street, Suite 1100
Helena, MT 59626
(406) 457-5270
chad.spraker@usdoj.gov
Service Method: Conventional

JOSEPH H. HUNT
Assistant Attorney General
WILLIAM C. PEACHEY
Director
EREZ REUVENI
Assistant Director
U.S. Department of Justice
Civil Division
Office of Immigration Litigation
District Court Section
P.O. Box 868, Ben Franklin Station
Washington, DC 20044
(202) 307-4293
Erez.R.Reuveni@usdoj.gov
Service Method: Conventional

Dated this 21st day of May, 2019.

/s/ Alex Rate
Alex Rate

CERTIFICATE OF SERVICE

I, Alexander H. Rate, hereby certify that I have served true and accurate copies of the foregoing Response/Objection - Response to Motion to Dismiss to the following on 05-21-2019:

Maureen H. Lennon (Attorney)
2717 Skyway Dr., Ste. F
Helena MT 59602
Representing: Robby Bowe
Service Method: eService

Cody Wofsy (Attorney)
39 Drumm Street
San Francisco CA 94111
Representing: Agustin Ramon
Service Method: E-mail Delivery

Spencer Amdur (Attorney)
39 Drumm Street
San Francisco CA 94111
Representing: Agustin Ramon
Service Method: E-mail Delivery

Elizabeth K. Ehret (Attorney)
P.O. Box 9138
Missoula MT 59808
Representing: Agustin Ramon
Service Method: E-mail Delivery

Omar C. Jadwat (Attorney)
125 Broad Street, 18th Floor
New York NY 10004
Representing: Agustin Ramon
Service Method: E-mail Delivery

Daniel Antonio Galindo (Attorney)
125 Broad Street, 18th Floor
New York NY 10004
Representing: Agustin Ramon
Service Method: E-mail Delivery

Shahid Haque (Attorney)
618 Highland St.
Helena MT 59601
Representing: Agustin Ramon
Service Method: E-mail Delivery

Kurt G. Alme (Attorney)
U.S. Dept of Justice
2601 Second Ave N, Box 3200
Billings MT 59101
Representing: United States of America
Service Method: Conventional

Chad Clarken Spraker (Attorney)
Paul G. Hatfield Courthouse
901 Front St., Suite 1100
Helena MT 59626
Representing: United States of America
Service Method: Conventional

Electronically Signed By: Alexander H. Rate
Dated: 05-21-2019