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

AGUSTIN RAMON,

Plaintiff and Appellant,

v.

DARREN SHORT, IN HIS OFFICIAL CAPACITY AS SHERIFF OF LINCOLN COUNTY AND ADMINISTRATOR OF LINCOLN COUNTY DETENTION CENTER,

Defendant and Appellee.

APPELLANT'S OPENING BRIEF

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INTRODUCTION

This case is about whether Montana law authorizes local law enforcement officers—here the Lincoln County Sheriff—to arrest people for allegedly violating the civil provisions of federal immigration law. It does not. Montana statutes set out local officers' arrest authority in great detail, but they neither authorize civil immigration arrests specifically, nor provide any broad authority that would encompass such arrests.

The legal issue in this case is a vital one for this Court to resolve, even though the Plaintiff is no longer in the Sheriff's custody. The federal Department of Homeland Security ("DHS") sends dozens of detainer requests to Montana law enforcement every year, asking local officers to arrest individuals based solely on alleged civil immigration violations. And sheriffs across the state, like the Defendant in this case, have carried out those arrests. Without this Court's intervention, the State's law enforcement officers will continue to curtail people's liberty without any legal authority. And those illegal arrests will continue to evade review, because immigration detainers ask for 48 hours of detention, which is insufficient to litigate a challenge to judgment, especially on appeal.

The Court should therefore apply the exceptions to mootness for issues of public importance and issues that are capable of repetition, yet likely to evade review. And it should join a growing consensus of courts holding that state arrest

laws like Montana's do not authorize local officers to hold people based on federal immigration detainers. *See Lunn v. Commonwealth*, 477 Mass. 517 (2017); *People ex rel. Wells v. DeMarco*, 88 N.Y.S.3d 518 (N.Y. App. Div. 2018); *Cisneros v. Elder*, No. 2018-CV-30549, 2018 WL 7142016 (Colo. Dist. Ct. Dec. 6, 2018); *Esparza v. Nobles Cty.*, No. 53-cv-18-751, 2018 WL 6263254 (Minn. Dist. Ct. Oct. 19, 2018); *Creedle v. Miami-Dade Cty.*, 349 F. Supp. 3d 1276, 1306-08 (S.D. Fla. 2018).

STATEMENT OF THE ISSUES

1. Does an exception to mootness doctrine apply to this challenge to the lawfulness of a sheriff arresting someone for a violation of civil immigration law, where the issues are of public importance and are likely to both recur and evade review?
2. Did the district court err in holding that the Sheriff has state-law authority to conduct a civil immigration arrest in response to a federal detainer request?

STATEMENT OF THE CASE AND FACTS

The material facts in this case are undisputed. At the time the complaint was filed, Plaintiff Agustin Ramon lived in Eureka with his wife, Lily McNair. Doc. 5 ¶¶ 1-5. He was arrested on a charge of burglary on August 3, 2018 and booked into the Lincoln County Jail. Doc. 19 Ex. A ¶ 8. His bond was set at $25,000. *Id.*

The day Mr. Ramon was booked, the jail received a detainer request for him from U.S. Customs and Border Protection ("CBP"), a component of DHS. Doc. 4 Aff. ¶¶ 6-9, Ex. 1. The detainer request indicated that a CBP officer believed Mr. Ramon had violated civil immigration law and requested that the jail detain him for up to 48 hours after he was entitled to release on his state charges—after, for example, he posted bail or was acquitted. Doc. 4, Ex. 1. It is undisputed that the detainer request did not require or order the jail to hold Mr. Ramon for the suspected civil immigration violation. *See Galarza v. Szalczyk*, 745 F.3d 634, 645 (3d Cir. 2014) (holding that immigration detainers are mere requests, not mandatory orders).

Ms. McNair retained a bail bond company and paid the company the agreed-upon fee to post Mr. Ramon's bond. Doc. 5 ¶¶ 6-7. When the company attempted to post the bond at the jail, however, officials there told them doing so would be futile: because of CBP's detainer request, the Sheriff would continue to detain Mr. Ramon even if the bond were paid and he would otherwise be entitled to release. Doc. 5 ¶¶ 8-10; Doc. 4 ¶¶ 11-13; *see also* Doc. 19 Ex. A ¶¶ 5, 7; Doc. 6 ¶¶ 5-7 (jail roster noting "can bond but do not release").

Mr. Ramon's detention represents just one instance in the widespread and increasing use of immigration detainers. Indeed, in fiscal years 2017 and 2018, DHS issued 135 detainers in Montana, more than double the number from the previous

two fiscal years.[1] The vast majority of immigration detainers target people with little to no criminal record.[2]

On October 30, 2018, Mr. Ramon filed a complaint alleging that his continued detention violated Montana law. Doc. 1.[3] Mr. Ramon filed an Application for Temporary Restraining Order ("TRO"), Preliminary Injunction, and Order to Show Cause concurrently with his complaint.[4] Doc. 2. The district court held a hearing on November 9, 2018. The Sheriff conceded the material facts, submitting evidence confirming that his office holds people in response to immigration detainers, and that he would not release Mr. Ramon even if his family were to post bail. Doc. 4 Ex. A; Doc. 19 Ex. A ¶¶ 5-6, 7, 10.

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[1] *See* Trans. Records Access Clearinghouse, Syr. Univ., *Latest Data: ICE Detainers* (Dec. 2018), https://trac.syr.edu/phptools/immigration/detain/. This is consistent with DHS's efforts to increase the numbers of detainers issued nationwide. *See* John Kelly, Sec'y, Dep't of Homeland Sec., *Enforcement of the Immigration Laws to Serve the National Interest*, at 2, 4 (Feb. 20, 2017) (removing discretionary guidance about when to issue detainers), https://bit.ly/2miirQd.

[2] *See, e.g.*, Syracuse Univ., *New ICE Detainer Guidelines Have Little Impact*, Oct. 1, 2013, https://trac.syr.edu/immigration/reports/333/.

[3] Along with the statutory ultra vires claim at issue in this appeal, Mr. Ramon also asserted state constitutional claims.

[4] Pursuant to M. R. App. P. 25(3), the current Sheriff of Lincoln County has been substituted for Roby Bowe, who was Sheriff at the time the complaint was filed. References to the "Sheriff" throughout this brief refer to the Office of the Sheriff. Sheriff Bowe was also sued in his individual capacity for damages; that claim is not currently before this Court.

The district court denied the TRO motion. In its ruling, it first noted that there was undisputed "common ground" as to the key facts of the case, including that Mr. Ramon's family had attempted to post bail for him through a bail bond company, and that the bail bond employee was told the jail would continue to detain Mr. Ramon even if bail were paid. Doc. 27 at 2-3. The district court also rejected the Sheriff's standing and ripeness arguments. *Id.* at 3. In doing so, the court noted the importance of effective judicial review and, given the factual circumstances of this type of case, the difficulty in obtaining review, explaining that "[u]nder the Defendant's argument, the matter will never be ripe or by the time a court can review the issue it will be moot." *Id.*

The district court ruled against Mr. Ramon on the merits. It noted his argument that refusing to release an individual when he would otherwise be free to go constitutes an arrest, and must be justified by arrest authority under state law. *See id.* at 5. But it concluded that Mr. Ramon's arrest pursuant to the detainer was authorized by Montana Code § 7-32-2203(3), which addresses "[w]ho may be confined" in Montana jails, and provides that jails can be used to confine "persons committed for contempt or upon civil process or by other authority of law." *Id.* at 6. The opinion reached this conclusion in a single sentence and did not address any of Mr. Ramon's arguments that § 2203(3) is inapplicable. Mr. Ramon timely appealed.

The Sheriff moved to dismiss the appeal as moot on the basis that Mr. Ramon was released from jail and into the custody of DHS on February 11, 2019, after sentencing in his case. Plaintiff opposed the motion, and this Court denied it, directing the parties to brief the merits and whether "an exception to the mootness doctrine" applies. Order (May 28, 2019).

STANDARD OF REVIEW

When the denial of a temporary injunction "is based solely upon conclusions of law," the Court reviews "the district court's conclusions of law to determine whether the interpretation of the law is correct." *City of Whitefish v. Bd. of Cty. Comm'rs of Flathead Cty. ex rel. Brenneman*, 2008 MT 436, ¶ 7, 347 Mont. 490, 199 P.3d 201. The standard of review is de novo because "no discretion is involved" when reviewing legal conclusions. *Id.*

SUMMARY OF ARGUMENT

I. This Court should apply an exception to mootness and reach the merits of this appeal. Two exceptions apply here. The public interest exception applies because the extent of Montana officers' arrest authority presents a question of exceptional public importance, the resolution of which will guide the actions of police and sheriffs throughout the State. Relatedly, a second mootness exception applies because this issue is "capable of repetition yet evading review." Montana jails receive dozens of immigration detainer requests each year, but because the

detainers request 48 hours of additional detention, plaintiffs do not have enough time to litigate their challenges to judgment, especially on appeal. If this Court does not apply an exception to mootness, this critical issue threatens to escape review.

II. Holding a person on an immigration detainer constitutes a new arrest, because it initiates a new detention for a new purpose after the person would otherwise be free to leave. To make this arrest, a law enforcement officer must have arrest authority under state law. But none of Montana's arrest statutes provides authority for local officers to arrest people for civil immigration violations. Montana's arrest framework specifies in great detail when sheriffs and other law enforcement officers can make arrests—with and without a warrant, for civil and criminal matters, for particular types of violations, when helping other law enforcement agencies—but nothing in that scheme authorizes immigration arrests in general or detainer arrests in particular.

The district court did not engage with the structure of arrest authority in Montana law. It instead found authority to arrest Mr. Ramon in a single statute, which spells out the general categories of persons "[w]ho may be confined in a detention center," Mont. Code Ann. § 7-32-2203, including those "committed . . . upon civil process or by other authority of law." But that statute does not provide any arrest authority at all. Rather, as its title states, the statute simply describes who

can be detained in Montana jails after they have already been arrested. In contrast, the statutes that *do* provide arrest authority do so explicitly.

No other source of law supplies the missing arrest authority. The common law does not provide any such authority, as modern arrest authority in Montana comes only from statutes. And even at common law, arrest authority was narrowly circumscribed and did not include civil immigration arrests. Nor does federal law supply the arrest authority that Montana law withholds, as courts across the country have all concluded and as the federal government has itself acknowledged.

This Court should therefore hold that Montana law does not provide authority for a sheriff to carry out civil immigration arrests.

ARGUMENT

I. The Court Should Apply an Exception to Mootness.

Plaintiff brought this case to challenge his arrest and 48-hour detention as requested by an immigration detainer, but those 48 hours passed before this Court could resolve the merits of his claim. Although Plaintiff is no longer in the Sheriff's custody, the Court should decide the merits of this case because two related exceptions to mootness doctrine apply here: (1) a "public interest exception" for cases that "present[] a question of public importance that will likely recur and whose answer will guide public officers in the performance of their duties," and (2) "an exception for cases involving events of short duration that are capable of repetition,

yet evading review." *Gateway Opencut Mining Action Group v. Bd of County Comm'rs*, 2011 MT 198, ¶ 14, 361 Mont. 398, 260 P.3d 133.

The public interest exception applies because the authority of Montana officers to make civil immigration arrests is an important and recurring issue, and this Court's ruling is necessary to "guide public officers in the performance of their duties." *Id*. And the exception for issues that are capable of repetition yet evading review applies because the 48-hour detention requested by an immigration detainer leaves individuals like Mr. Ramon unable to obtain a final judgment before they are turned over to DHS.

A. The Public Interest Exception Applies Because Counties Need Guidance on Whether They Can Make Civil Immigration Arrests.

For the public interest exception to mootness, the Court must find: (1) the existence of a question of public importance (2) whose answer will guide public officers in the performance of their duties, and (3) a likelihood that the question will recur. *See id.* at ¶¶ 14, 24 (recognizing exception).

These three requirements are clearly met. First, the extent of a sheriff's power to deprive Montana residents of their liberty is a question of utmost public importance. Moreover, whether state officers have authority to make civil immigration arrests in particular has been contested in three recent Montana cases: *Valerio-Gonzales v. Jarrett*, Cause No. DV 17-688B (18th Judicial Dist. Gallatin County 2017), 2017 Mont. LEXIS 764, 390 Mont. 427, 410 P.3d 177, the instant

action, and the ongoing case of *Soto-Lopez v. Jarrett*, Cause No. DV-19-212X (18th Judicial Dist. Ct., Gallatin County 2019). Each of these cases has garnered widespread public interest, including more than twenty articles in major media outlets across the state,[5] and the United States filed a statement of interest in *Valerio-Gonzales* and in this case. *See, e.g.*, Doc. 20.

Second, a ruling on the merits would provide crucial guidance to sheriffs across Montana. The court below provided only a cursory, one-sentence analysis, reaching a conclusion that is erroneous as a matter of Montana law—and contrary to the decisions of state courts across the country. *See infra* Part II. Without this Court's guidance, Lincoln County and others will continue to detain people without lawful authority, with a cost not only to individual liberty but also, potentially, to the public fisc. *See, e.g.*, *Roy v. Cty. of Los Angeles*, 2018 WL 914773 (C.D. Cal. Feb. 7, 2018) (granting partial summary judgment against county in large class action for damages relating to detainer practices); *cf. Walker v. State*, 2003 MT 103, ¶ 41, 316 Mont. 103, 68 P.3d 872 (applying exception to mootness in part "to avoid future litigation on a point of law") (quotation marks omitted).

[5] *See, e.g.*, Phoebe Tollefson, *Montana Supreme Court Dismisses Petition by Mexican Man Held by Immigration Officials*, BILLINGS GAZETTE (Jan. 2, 2018), https://bit.ly/2G8V0VD; Rima Austin, *Ramon Sentenced to Six Years Suspended: Man Who Was Subject of ACLU Against Sheriff Takes Plea Agreement*, THE WESTERN NEWS (Feb. 15, 2019), https://bit.ly/2XKJkOJ.

Third, questions about whether Montana law authorizes local immigration arrests are certain to recur until this Court rules on the issue. According to federal government records, DHS sent 135 detainers to Montana counties from 2017 through 2018. *Supra* n.1. And as mentioned, three separate cases in the last two years have raised the issue. Yet, because of immigration detainers' inherently transitory nature, these same issues threaten to go unresolved absent the application of an exception to mootness. *See Fairbanks Fire Fighters Ass'n, Local 1324 v. City of Fairbanks*, 48 P.3d 1165, 1168 (Alaska 2002) (applying public-interest exception where mootness "may cause review of the issues to be repeatedly circumvented"); *see also infra* Part I.B.

The public interest exception to mootness thus applies here. The Court should provide much-needed guidance to Montana law enforcement on this important and recurring issue.

B. State Officers' Civil Immigration Arrests Will Recur and Continue to Evade Review.

A second, related doctrine also applies to this case: "The exception to mootness for those actions that are capable of repetition, yet evading review." *Common Cause of Mont. v. Statutory Comm. to Nominate Candidates for Comm'r of Political Practices* (1994), 263 Mont. 324, 328, 868 P.2d 604 (quoting *Butte-Silver Bow Local Gov't v. Olsen* (1987), 228 Mont. 77, 82, 743 P.2d 564). This

exception requires that "the challenged action must be too short in duration to be fully litigated prior to cessation." *Gateway Opencut*, 2011 MT 198, ¶ 22.

Detainer arrests clearly fit that description, because the requested 48-hour period of detention does not provide enough time to litigate its legality to judgment, especially on appeal. The facts of this case and *Valerio-Gonzales* amply illustrate that concern. In both cases, plaintiffs filed complaints and sought emergency relief while they were in local custody, but they were turned over to DHS before this Court could address the merits of their claims. Absent a ruling from this Court on the merits, that situation is certain to recur, and people held on immigration detainers will be unable to meaningfully challenge the legality of their arrests. That is why courts in other states have applied mootness exceptions to reach the merits of similar detainer cases. *See Lunn*, 477 Mass. at 520-521; *Wells*, 88 N.Y.S. 3d at 525.

While this mootness exception frequently involves "a reasonable expectation that the same complaining party would be subject to the same action again," *Gateway Opencut*, 2011 MT 198, ¶ 22, that is not an absolute requirement. When unlawful detention and other fundamental issues are at stake, this Court applies the exception where it is clear that the challenged practice is likely to recur and evade review as to *someone*, even if not as to the plaintiff.

For instance, in *Walker*, the Court reached the merits of a former detainee's challenge to certain jail practices, even though he had already been released, and

there was no reason to think he would face the same practices "in the foreseeable future." 2003 MT 103, ¶ 44. The Court nonetheless applied the mootness exception because there was "no doubt" that "*other* . . . inmates[] could be subjected to the same" practices, and as to *those* inmates the issue would continue to evade review. *Id.* ¶¶ 44, 39 (emphasis added, quotation marks omitted). Likewise, in *Wier v. Lincoln Cty. Sheriff's Dep't* (1996), 278 Mont. 473, 475-476, 925 P.2d 1172, this Court applied the mootness exception in an inmate's challenge to his bail denial, even though he had already been released and faced no prospect of again being denied bail. And in *Matter of N.B.* (1980), 190 Mont. 319, 322-323, 620 P.2d 1228, the Court applied the exception without considering whether the same plaintiff was likely to face the challenged policy again, because "approximately 100 Montanans each year" *other* than the plaintiff were subject to the same policy. *Id.* at 322-323; *see also, e.g.*, *In re Mental Health of K.G.F.*, 2001 MT 140, ¶¶ 18-20, 306 Mont. 1, 29 P.3d 485 (same), *overruled on other grounds by In re J.S.*, 2017 MT 214, 388 Mont. 397, 401 P.3d 197; *Matter of D.L.B.*, 2017 MT 106, ¶ 12, 387 Mont. 323, 394 P.3d 169 (similar).

The same imperative applies here: Montana officers will continue to make civil immigration arrests as requested by detainers absent guidance from this Court. Those arrests implicate basic liberty interests, and yet they will continue to evade review as inmates are turned over to DHS before this Court has a chance to resolve

their claims. The fact that these cases "will likely be moot before reaching an appellate court . . . necessarily impl[ies] the desirability of an authoritative adjudication on the subject." *Iowa Supreme Court Bd. of Prof'l Ethics & Conduct v. Ramey*, 639 N.W.2d 226, 234 (Iowa 2002). The Court should thus decide the merits of this important issue.

II. Montana Law Does Not Authorize Civil Immigration Arrests.

The Sheriff's arrest and detention of Mr. Ramon for a suspected civil immigration violation was unlawful. By keeping Mr. Ramon in the jail for a new purpose, after he was otherwise entitled to release, the Sheriff effected a new arrest and therefore needed arrest authority vested in him by Montana law. But there is no such authority. To the contrary, Montana statues exhaustively regulate which violations officers can arrest for, and in what circumstances, but nowhere do they provide authority for civil immigration arrests. Unable to point to any arrest authority, the district court relied entirely on Montana Code § 7-32-2203. But by its own terms, that statute provides no authority to arrest anyone for anything; rather, it sets forth the categories of individuals who may be *housed* in a jail after they have been arrested or sentenced. Nor can the Sheriff locate any arrest authority in common law or federal law. The district court therefore erred and must be reversed.

A. Continued Detention Based on an Immigration Detainer Is a New Arrest.

Keeping a person in jail after he would otherwise be free to leave constitutes a new arrest, and therefore requires applicable arrest authority. Montana courts "accord 'arrest' a broad definition determined by whether a reasonable person . . . would have felt free to walk away under the circumstances." *State v. Ellington*, 2006 MT 219, ¶ 14, 333 Mont. 411, 143 P.3d 119; *see also State v. Van Dort*, 2003 MT 104, ¶ 12, 315 Mont. 303, 68 P.3d 728 (same test). Thus, an arrest occurs anytime there is "an actual restraint of the person to be arrested." Mont. Code Ann. § 46-6-104. The arrest criteria are met when a sheriff keeps someone in jail for a new purpose who would otherwise be released.

Restraining an individual in this manner—effectuating an arrest—is exactly what an immigration detainer asks for. The detainer asks the Sheriff to start a new period of detention for a new purpose when the person would otherwise be free to leave. In response, the Sheriff—if he chooses to comply with the request—restrains the person by keeping the jail door locked, making clear that the person is not "free to walk away." *Ellington*, 2006 MT 219, ¶ 14.[6] That new restraint for a new purpose

[6] Indeed, in Mr. Ramon's case, jail officials informed the bail-bondsman that they would not release Mr. Ramon even if bond was posted. *See* Doc. 5 ¶¶ 8-10; Doc. 4 ¶¶ 11-13.

is an arrest, as a broad and strong consensus of courts around the country reflects. *See, e.g.*, *Lunn*, 477 Mass. at 518 (holding on an immigration detainer "constitutes an arrest under [state] law"); *Wells*, 88 N.Y.S.3d at 526-27 (same); *Esparza*, 2018 WL 6263254, at *6 (same); *Cisneros*, 2018 WL 7142016, at *6 (same); *Creedle*, 349 F. Supp. 3d at 1307-08 (same); *see also, e.g.*, *Morales v. Chadbourne*, 793 F.3d 208, 217 (1st Cir. 2015) (finding it "beyond debate" that an ICE detainer subjects a person "to a new seizure"); *Moreno v. Napolitano*, 213 F. Supp. 3d 999, 1005 (N.D. Ill. 2016) (detainer hold constitutes an "arrest" under federal statutory law); *cf. Rodriguez v. United States*, 135 S. Ct. 1609, 1613, 1616 (2015) (even "seven or eight minutes" of detention for a new purpose after individual would otherwise be released constituted a new seizure). Montana law is no different from any of these other jurisdictions regarding what constitutes an arrest.

To be sure, a typical arrest takes the form of someone at liberty being detained, but nothing in Montana law limits arrests to that context. Indeed, the Defendant acknowledged below that a person "may be arrested while in custody," Doc. 19 at 4, and this Court has previously recognized that when a person in custody is held for a new purpose, that new detention constitutes an arrest. For example, in *State v. Norvell*, an inmate was detained for violating probation, and when that detention ended, he was kept in jail to face "new felony charges." 2019 MT 105, ¶ 7, 395 Mont. 404, 440 P.3d 634 (quotation marks omitted). This Court held that this new

period of detention for a new purpose was "an arrest" for statutory purposes. *Id.* (discussing "arrest" definition in Mont. Code Ann. § 46-7-101(1)). Likewise, Montana's extradition statutes explicitly describe the "arrest" of an individual who is already being held in a jail. Under that scheme, an individual may be "commit[ted]" to the county jail before an extradition warrant is issued, in order to subsequently "enable the *arrest* of the accused to be made under warrant of the governor." Mont. Code Ann. § 46-30-302 (emphasis added); *see id.* § 46-30-304 (similar). Such a person is already in jail when they are "arrest[ed]" for extradition. *See State v. Holliman* (1991), 247 Mont. 365, 369, 805 P.2d 52, 54 (describing a person who "remained in custody under [a criminal] conviction . . . and was [then] arrested under the governor's warrant"). Thus, the Sheriff effected a new arrest when he refused to release Mr. Ramon. That arrest was for a civil immigration violation, as requested by the detainer. *See Arizona v. United States*, 567 U.S. 387, 396 (2012) ("Removal is a civil, not criminal, matter."). And the arrest was unlawful unless the Sheriff was authorized to make it—which, as explained below, he was not.

B. Civil Immigration Arrests Are Unlawful Unless Authorized by State Law.

The Sheriff cannot make civil immigration arrests, as requested by detainers, unless Montana law provides authority for him to do so. When local officers make an "arrest for violation of federal law," the arrest's legality "is to be determined by

reference to state law." *Miller v. United States*, 357 U.S. 301, 305 (1958); *see also United States v. Di Re*, 332 U.S. 581, 589 (1948) ("[T]he law of the state where an arrest without warrant takes place determines its validity."); *Arizona*, 567 U.S. at 414–15 (same); *Gonzales v. City of Peoria*, 722 F.2d 468, 476 (9th Cir. 1983) (same), *overruled on other grounds by Hodgers-Durgin v. de la Vina*, 199 F.3d 1037 (9th Cir. 1999). The Sheriff has never disputed this bedrock principle, which is key to "state sovereignty." *Koog v. United States*, 79 F.3d 452, 460 (5th Cir. 1996) (state sovereignty "surely encompasses the right to set the duties of office for state-created officials").

Exercising their sovereign prerogative to decide their own officers' arrest authority, states across the country have made different choices about immigration arrests. Some states authorize their officers to carry out such arrests. For instance, Texas law requires peace officers to "fulfill any request made in [a DHS] detainer." Tex. Code Crim. Proc. art. 2.251(a)(1). In Florida, after a federal district court held that officers lacked state-law authority to make civil immigration arrests, *Creedle*, 349 F. Supp. 3d at 1307-08, the legislature in that state recently enacted a similar requirement, *see* Fla. Stat. § 908.105(1)(c). Virginia law, too, gives peace officers the "authority to enforce immigration laws" by making certain "arrest[s]." Va. Code Ann. § 19.2-81.6. These examples illustrate the kind of statutes that can authorize

immigration arrests under state law.[7]

By contrast, in states where no such laws exist, there is no arrest authority. For instance, "nothing in the statutes or common law of Massachusetts authorizes [law enforcement] to make . . . civil arrest[s]" for immigration violations. *Lunn*, 477 Mass. at 519. In New York, the legislature has not "convey[ed] to state and local law enforcement the authority to make arrests for federal immigration law violations." *Wells*, 88 N.Y.S.3d at 532. The same is true in Minnesota and Colorado. *See Esparza*, 2018 WL 6263254, at *9-10; *Cisneros*, 2018 WL 7142016. As explained below, Montana plainly falls into this latter camp.

The undoubted need for state-law arrest authority makes this case different from the vast majority of federal cases about immigration detainers, which consider challenges based on *federal* law, not state law. For instance, federal courts have addressed whether detainer arrests violate the federal Fourth Amendment or federal statutory law. *See, e.g., C.F.C. v. Miami-Dade County*, 349 F. Supp. 3d 1236, 1259-1262 (S.D. Fla. 2018) (holding that they violate both). For purposes of the present case, the answers to those federal questions do not matter. Even if detainer arrests complied with federal law, the Sheriff still cannot carry them out without authority under *Montana* law.

[7] Of course, even if arrest authority is conferred by state statute, it may be limited by other principles, such as federal preemption. *See, e.g., Arizona*, 567 U.S. at 410.

C. There Is No Basis in Montana Law to Make Civil Immigration Arrests.

There is no authority under Montana law for the Sheriff to make civil immigration arrests. Montana statutes provide a comprehensive scheme of arrest authority. They specify in great detail all of the circumstances—criminal and civil, with and without a warrant, generally and in specific situations, in collaboration with other law enforcement agencies—in which Montana officers can make arrests. And yet none of them authorizes local officers to make civil immigration arrests as requested by detainers. Neither does the common law, both because modern arrest authority is codified in statute only, and because even at common law there was no rule permitting civil immigration arrests or anything similar. Nor does federal law supply the missing authority. Detainer arrests thus exceed the Sheriff's arrest authority under Montana law.

1. No Statute Provides the Relevant Arrest Authority.

It is undisputed that Mr. Ramon was held for DHS without a warrant.[8] His arrest can therefore only be legal if it falls within one of Montana's statutes that authorize warrantless arrests.

[8] DHS sometimes issues an administrative form called an I-200 "warrant" alongside a detainer request. It did not do so in this case. But even if it had, the I-200 form is irrelevant to state-law arrest authority. *See Wells*, 88 N.Y.S. 3d at 529 (no state-law arrest authority even with an I-200); *Lunn*, 477 Mass. at 531 n.21 (explaining that an I-200 would not change the state-law analysis).

a. None of Montana's warrantless arrest statutes authorizes civil immigration arrests. The general warrantless arrest statute authorizes arrests only for "offense[s]," Mont. Code Ann. § 46-6-311, which are defined as "violation[s] of any *penal* statute"—i.e. crimes, *id.* § 46-1-202(15) (emphasis added); *see State v. Boulton*, 2006 MT 170, ¶ 16, 332 Mont. 538, 140 P.3d 482 (explaining that "'[o]ffense' is defined in Title 46" to exclude violations that are "'civil' in nature"). This statute therefore cannot authorize arrests based on civil immigration detainers. *See Arizona*, 567 U.S. at 407 (unauthorized presence is "not a crime").

A number of other statutes authorize warrantless arrests in particular circumstances, and none of them include civil immigration arrests either. *See, e.g.*, Mont. Code Ann. § 46-9-505(3) (authorizing arrest "without a warrant" of a pre-trial defendant who has "violated the conditions of the defendant's release" on bond); *id.* § 46-23-1012(2) (probation violations); *id.* § 46-23-1023(2) (parole violations); *id.* § 61-8-703 (certain speeding violations).

Consistent with this detailed arrest framework, Montana authorizes arrests for *civil* violations only in tightly limited circumstances. Warrantless civil arrests are particularly rare. *See, e.g.*, Mont. Code Ann. § 53-21-129 (emergency mental health arrests); *id.* § 53-24-107 (public intoxication); *id.* § 10-1-611 (military arrests).[9]

[9] Other civil arrests require judicial authorization. *See* Mont. Code Ann. §§ 3-1-511 to -515 (civil contempt of court); *id.* § 25-14-102 (arrest to enforce civil judgments); *id.* §§ 27-16-201 to -206 (arrests during the pendency of civil actions).

Critically, none of these civil arrest authorities encompasses civil immigration arrests.[10]

Nor do any of the Montana statutes that authorize collaboration between local officers and other law enforcement agencies encompass civil immigration arrest authority. The Legislature has, for instance, instructed agencies to *report* certain immigration violations to DHS, *see* Mont. Code Ann. § 1-1-411(3), *invalidated by Mont. Immigration Justice All. v. Bullock*, 2016 MT 104, ¶ 45, 383 Mont. 318, 371 P.3d 430, and to incorporate DHS's threat assessments into certain licensing decisions, *see* Mont. Code Ann. § 61-5-147(1). It has also authorized local officers to make arrests on behalf of other jurisdictions in certain circumstances. *See* Mont. Code Ann. § 46-6-210(2) (arrests based on "a felony warrant . . . issued in another jurisdiction"); *id.* § 46-30-213, -215 (arrests to effectuate criminal extradition); *id.* § 46-30-301 (warrantless extradition arrests); *id.* § 46-31-101 (authority to execute *criminal* detainers). It has even authorized DHS officers to conduct arrests for state crimes. *See id.* § 46-6-412. The Legislature plainly knows how to authorize

[10] Montana statutes further provide arrest authority—both criminal and civil—in various specific contexts, none of which includes civil immigration violations. *See, e.g.*, Mont. Code Ann. § 16-11-141 (arrests for tobacco violations); *id.* § 30-12-210 (arrests for weights and measures violations); *id.* § 44-1-1003 (arrests for highway offenses); *id.* § 13-13-122 (arrest for obstructing a polling place); *id.* § 26-2-106 (arrest of a disobedient witness); *id.* § 37-47-345 (arrests for violating outfitter and guide laws); *id.* § 81-1-202 (arrests for livestock violations); *id.* § 85-5-108 (arrest for water distribution violations).

collaboration between law enforcement agencies, including arrests by Montana officers on behalf of other jurisdictions. And yet it has excluded the type of collaboration at issue here.

The Montana Legislature has thus made clear exactly when state officers can make arrests. But it has pointedly omitted any authority to hold people on immigration detainers. That authority therefore does not exist. *See In re M.P.M.*, 1999 MT 78, ¶ 23, 294 Mont. 87, 976 P.2d 988 ("[I]n determining legislative intent, an express mention of a certain power or authority implies the exclusion of nondescribed powers.") (internal quotation marks omitted).

b. The district court did not examine any of Montana's extensive arrest statutes. Instead, it concluded that the Legislature had authorized detainer arrests in a single statute: Montana Code § 7-32-2203. Section 2203 provides that "[d]etention centers are used" for five purposes:

> (1) for the detention of persons committed in order to secure their attendance as witnesses in criminal cases;
> (2) for the detention of persons charged with crime and committed for trial;
> (3) for the confinement of persons committed for contempt or upon civil process or other authority of law;
> (4) for the confinement of persons sentenced to imprisonment therein upon conviction of a crime;
> (5) for the confinement of persons sentenced to the state prison, as agreed upon by the state and the administrator in charge of the detention center.

This statute does not authorize civil immigration arrests.

Most fundamentally, § 2203 is not an arrest statute—it does not provide any

arrest authority in the first place. It does not even mention arrests, unlike the dozens of statutes that confer arrest powers explicitly. *See supra*. Instead, as its title makes clear, § 2203 simply describes "[w]ho may be confined in a detention center"—in other words, who can be housed in the jail *after* they have been validly arrested or sentenced.[11] Each of its five subsections describes a category of inmate who can be detained in a jail once they have *already* been "committed" or "sentenced" by a court or arresting officer. And the neighboring provisions echo that jails exist to "confin[e] *arrested* persons or persons *sentenced* to the detention center." Mont. Code Ann. § 7-32-2241(1) (emphasis added); *see id.* § 7-32-2242(1) (similar). The jail's power to detain an already-arrested or sentenced person plainly does not give the jail authority to arrest or sentence that person anew.

The surrounding context removes any doubt that § 2203 addresses who jails may house, not who sheriffs may arrest. Section 2203 appears in a series of administrative provisions governing the construction, maintenance, and operation of local jails. *See* Mont. Code Ann. §§ 7-32-2201, -2204, -2205 (discussing jail "maintenance" and the need to provide "food, clothing, and bedding" to inmates). These provisions simply explain what jails are for and how they should operate on a basic level. None of them purports to expand the arrest powers of sheriffs.

[11] The Code uses "detention centers" to mean local jails run by sheriffs. *See City of Hardin v. State*, 2008 Mont. Dist. LEXIS 171, *3 (such facilities are known to history and the general public as 'county jails.'").

Indeed, prior to the issue in this case arising, in the more than 120 years § 2203 has been a part of Montana law, no court or commentator had ever cited it as a source of arrest authority. *See* Penal Code of 1895, § 3022 (original version). Rather, when the legality of an arrest is disputed, this Court looks to statutes that actually purport to confer arrest authority, and it never examines § 2203. *See, e.g.*, *City of Missoula v. Iosefo*, 2014 MT 209, ¶ 12, 376 Mont. 161, 330 P.3d 1180; *Brannin v. Sweet Grass Cty.* (1930), 88 Mont. 412, 417, 293 P.3d 970, 972; *State v. Bradshaw* (1916), 53 Mont. 96, 98, 161 P. 710.

While there is little case law about § 2203 itself, most states have similar statutes, and none of them has ever been understood as a grant of new arrest authority. In particular, courts have rejected attempts to validate immigration detainer arrests using statutes like § 2203. *See Creedle*, 349 F. Supp. 3d at 1307 (statute directed jail to "receive into [its] custody any prisoner who may be committed . . . under the authority of the United States"); *Cisneros*, 2018 WL 7142016, at *9 (statute authorized sheriff to "receive into the jail every person duly committed thereto"). As these courts have explained, these jail statutes simply "authorize[] jailers to hold prisoners who have already been validly arrested." *Creedle*, 349 F. Supp. 3d at 1307 (quotation marks omitted). They are "not an independent source of authority under which [a] County could lawfully arrest [a person] solely on the basis of a detainer." *Id.*

Section 2203(3) is further inapposite because Mr. Ramon was never "committed" to the jail by CBP. A person can be "commit[ted]" to confinement by a court or an "arresting agency." Mont. Code Ann. § 7-32-2245(6) (an "arresting agency" is the one that "commits a person to the detention center"); *see* Mont. Code Ann. § 25-13-308 (directing sheriff to "arrest the debtor" and *then* "commit the debtor to jail"). CBP did not arrest Mr. Ramon prior to the detainer, so it could not have "committed" him to jail. As this Court has explained in another context, "the plain meaning of the word 'commitment' reveals that the period of commitment begins when [an individual] is *handed over* to [jail] personnel for confinement." *State v. Smith* (1988), 232 Mont. 156, 161–62, 755 P.2d 569, 572 (emphasis added); *see also id*. at 161 ("Commitment may be defined as '[t]he act of *taking or sending* to the prison . . . .'") (emphasis added) (quoting Black's Law Dictionary 248 (5th ed. 1979)); *Commit*, Black's Law Dictionary (11th ed. 2019) (similar). But CBP did not hand over, send, or take Mr. Ramon to the jail. Rather, its detainer asked *local* officials to arrest him so that federal officers could later come and take custody. *See Morales*, 793 F.3d at 217 (explaining that DHS's act of issuing a detainer is "distinct from an arrest," as it requests and "results in" a new arrest by local officials).

In any event, even if § 2203 provided authority to arrest based on "civil process," it still would not authorize detainer arrests, because detainers do not

constitute "process" under Montana law. In the Montana Code, "'[p]rocess' means a writ or summons issued in the course of *judicial* proceedings." Mont. Code Ann. § 1-1-202(5) (emphasis added); *see also id.* § 7-32-2131(4)(b) ("process" is issued by "judicial officers"); *id.* § 25-3-101(2) (same). But a detainer is issued by a DHS enforcement agent, not a judge. *See* 8 C.F.R. § 287.7(b). So even if § 2203(3) provided authority to arrest based on "civil process," it still would not permit detainer arrests.

The same is true of the final clause in § 2203(3), which mentions commitment pursuant to "other authority of law." That phrase is residual clause at the end of a section enumerating types of *judicial* orders—"contempt" and "process." *See* Mont. Code Ann. § 3-1-511 to -513, -515 (contempt requires judicial order). It therefore does not encompass a nonjudicial commitment of any kind. *See Mattson v. Montana Power Co.*, 2009 MT 286, ¶ 32 & n.7, 352 Mont. 212, 215 P.3d 675 (explaining "*ejusdem generis*" canon, which provides that "when a general word or phrase follows a list of specifics, the general word or phrase will be interpreted to include only items of the same class as those listed" (quoting Black's Law Dictionary, 594 (9th ed. 2009)).

2. There Is No Applicable Common-Law Authority.

The common law does not provide the arrest power that the Legislature has withheld. In Montana, "there is no common law in any case where the law is

declared by statute." Mont. Code Ann. § 1-1-108; *see also id.* § 1-2-103 ("The statutes establish the law of this state respecting the subjects to which they relate."). Because the Legislature has codified arrest authority in great detail, statutory law is what determines the legality of an arrest. If officers had some broad, undefined common-law power to conduct arrests as they saw fit, there would have been no need for the Legislature to spell out their specific powers in the Code. In these circumstances, the Court should not "intrude upon a carefully crafted, comprehensive, and balanced legislative" arrest-authority scheme through the "judicial establishment" of a new arrest power. *Wells*, 88 N.Y.3d at 531; *see also Draggin' Y Cattle Co., Inc. v. Junkermier, Clark, Campanella, Stevens, P.C.*, 2019 MT 97, ¶ 38, 395 Mont. 316, 439 P.3d 935 (refusing to impose a common-law duty where the Legislature had already regulated the area in question).

Accordingly, this Court has long rejected assertions of non-statutory arrest authority. In *State v. Bradshaw*, for example, the 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 [statute], 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. at 98. In other words, because the Legislature has granted only certain arrest authorities, officers must locate their power in those statutory grants—or not at all. *See also, e.g.*, *State v. Lemmon* (1984), 214 Mont. 121, 128-29, 692 P.2d 455,

459 (holding that authority must come from statute); *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").

In any event, even before the Legislature codified arrest authority in statute, there was no common-law rule that would have encompassed civil immigration arrests. To the contrary, at common law, the power to arrest was narrowly circumscribed. "The regard for the liberty of the person was so great that the common law did not confer" arrest authority "except in those cases where the interests of the public absolutely demanded it"—which only included "felon[ies]" and "breaches of the peace." *City of Newark v. Murphy*, 40 N.J.L. 145, 149 (N.J. 1878); *see also State v. Leindecker*, 97 N.W. 972, 973 (Minn. 1904) ("[T]he common law rule" prohibited warrantless arrests except "in felony and in breaches of the peace committed in the presence of the officer."); *State v. Mobley*, 240 N.C. 476, 486 (1954) (same); *Lunn*, 477 Mass. at 529-30 & n.20 (same). This narrow arrest rule was a "foundation principle of the common law, designed and intended to protect the people against the abuses of arbitrary arrests." *Mobley*, 240 N.C. at 479. Thus, even if there were some common-law arrest power, that power would not extend to civil immigration arrests. *See Lunn*, 477 Mass. at 534 (refusing to "create, and attempt to define, some new authority for court officers to arrest that heretofore has been unrecognized and undefined").

3. Federal Law Does Not Supply the Missing Authority.

Nor, finally, does federal law supply the missing arrest power. There is no federal statute that purports to give state officers civil immigration arrest authority.[12] And as the United States has conceded in other cases, and every other court to consider this issue has agreed, federal law does not validate an arrest as requested by a detainer that is not authorized by state law. *See Lunn*, 477 Mass. at 535 (noting concession); *Wells*, 88 N.Y.S.3d at 535; *Cisneros*, 2018 WL 7142016, at *23; *Esparza*, 2018 WL 6263254, at *7.

The only federal statute the Sheriff invoked below was 8 U.S.C. § 1357(g)(10)(B), which provides that state and local officers are not preempted from "cooperat[ing] with" DHS as DHS enforces immigration law. But a preemption savings clause like § 1357(g)(10)(B) is not "an affirmative grant of authority." *New England Power Co. v. New Hampshire*, 455 U.S. 331, 344 (1982). It "simply makes clear that State and local authorities . . . 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*, 78 N.E.3d at 1159

[12] Federal law permits local immigration arrests only in very limited circumstances, none of which exists here. *See* 8 U.S.C. §§ 1103(a)(10) (declared emergency), 1252c (felons who re-enter), 1357(g)(1) (pursuant to written agreement and training). Even in these situations, state-law authorization is still required, as Congress has recognized. *See id.* § 1252c(a) (arrest must be "permitted by relevant State and local law"); *id.* § 1357(g)(1) (arrests must be "consistent with State and local law").

(emphasis added). Thus, even if detainer arrests constituted "cooperation" for purposes of § 1357(g)(10), that would mean only that they were not preempted by federal law.[13] But neither that statute, nor anything else in federal law, provides the arrest authority that is lacking under Montana law.

CONCLUSION

The judgment of the district court should be reversed.

Dated this 12th day of July, 2019. Respectfully submitted,

/s/ Alex Rate
Alex Rate
Counsel for Appellant

[13] Whether detainer arrests are permissible under § 1357(g)(10) is a contested issue in other litigation. *See, e.g.*, *C.F.C.*, 349 F. Supp. 3d at 1255-58. This Court need not address that question because, as explained above, even if such arrests are permissible as a matter of federal law, they are not authorized by Montana law. *See supra* Part II.B.

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 10,000 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.

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CERTIFICATE OF SERVICE

I hereby certify that I have filed a true and accurate copy of the foregoing APPELLANT'S OPENING BRIEF 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:

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APPENDIX

TAB	DOCUMENTS	DISTRICT COURT DOCKET NO.
1	District Court's Order Denying Application for Temporary Restraining Order and Preliminary Injunction	27

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