STUART F. DELERY
Assistant Attorney General
Civil Division
COLIN A. KISOR
Acting Director
J. MAX WEINTRAUB
Acting Deputy Director
TIMOTHY M. BELSAN
Trial Attorney
United States Department of Justice
Civil Division
Office of Immigration Litigation
District Court Section
Washington, D.C. 20044
Tel.: (202) 532-4596
Fax: (202) 305-7000
Email: Timothy.M.Belsan@usdoj.gov

Counsel for Defendants

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

GERARDO GONZALEZ, *et al.*, Plaintiffs, v. IMMIGRATION AND CUSTOMS ENFORCEMENT, *et al.*, Defendants.	No. 2:13-cv-4416-BRO (FFMx) **DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION TO DISMISS** DATE: Monday, July 28, 2014 TIME: 1:30 p.m. JUDGE: Beverly Reid O'Connell

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CODE OF FEDERAL REGULATIONS

OTHER

INTRODUCTION

In their Opposition to Defendants' motion to dismiss, Plaintiffs maintain that they have standing to bring claims against Defendants based on the immigration detainers that were briefly lodged against them while local authorities detained them on drug-related charges. *See* Plaintiffs' Opposition to Motion to Dismiss ("Pls' Opp."), ECF No. 34. They press such claims despite having suffered no injury fairly attributable to Defendants because of the detainers and despite the fact that U.S. Immigration and Customs Enforcement ("ICE") canceled the detainers months ago. Those claims must fail. Plaintiffs lack standing to bring their claims because they have not shown an injury fairly traceable to Defendants' allegedly improper conduct, and even if they had standing, their claims became moot when ICE canceled the detainers. Moreover, Plaintiffs base their habeas claim and their claim that ICE's detainer practices are *ultra vires* on a misstatement of the effect of an immigration detainer and thus must also be dismissed.

ARGUMENT

I. Plaintiffs lacked standing at the commencement of the suit because they had not suffered an injury fairly traceable to Defendants.

This Court must dismiss each of Plaintiffs' claims for lack of standing. In their motion to dismiss, to clarify, Defendants have asserted two separate and independent reasons why Plaintiffs lack standing. First, Plaintiffs lack Article III standing because they did not suffer an injury-in-fact based on the immigration detainers, and any injury they have suffered is not fairly traceable to Defendants. Second, Plaintiffs have failed to establish standing to seek prospective equitable relief. These are separate and independent standing requirements, and Plaintiffs' claims must be dismissed if they fail to satisfy either test. *See Hodgers-Durgin v. De La Vina*, 199 F.3d 1037, 1042 & n.3 (9th Cir. 1999).

A. Plaintiffs lack Article III standing.

This Court must dismiss Plaintiffs' Fourth and Fifth Amendment claims because Plaintiffs lack Article III standing to pursue such claims. Plaintiffs are correct that "standing is assessed at the commencement of the suit." *See* Pls' Opp. at 1. Beginning at the commencement of the suit, however, Plaintiffs, have *never* had standing. Plaintiffs emphasize that they were subject to immigration detainers at the time they filed this action, as if this alone amounts to an injury that would in and of itself grant standing. The mere fact that they had immigration detainers lodged against them, however, does not support standing unless such detainers (1) caused an injury in fact that was (2) fairly traceable to Defendants. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 2136, 119 L. Ed. 2d 351 (1992) (irreducible constitutional minimum for standing requires, *inter alia*, "injury in fact" and that the injury be "fairly . . . traceable to the challenged action of the defendant" (internal alterations and citations omitted)). The detainers here did not.

First, Plaintiffs have not shown – and, indeed, cannot show – that the lodging of detainers caused Plaintiff Gonzalez an injury in fact. In order "[t]o satisfy the 'injury in fact' requirement," a plaintiff must "allege an *imminent* threat of *concrete* injury." *Harris v. Bd. of Supervisors, Los Angeles Cnty.*, 366 F.3d 754, 761 (9th Cir. 2004) (emphasis added). Although "[a] plaintiff may allege a future injury in order to comply with this requirement," he must show that he "is *immediately* in danger of sustaining some direct injury as the result of the challenged official conduct and the injury or threat of injury is *both real and immediate*, not conjectural or hypothetical." *See Scott v. Pasadena Unified Sch. Dist.*, 306 F.3d 646, 656 (9th Cir. 2002) (internal quotations omitted, emphasis

added). Moreover, that direct injury must be "concrete." *See Harris*, 366 F.3d at 761.

Plaintiff Gonzalez has failed on both accounts to meet that standard. His alleged injury is that "*if [he had] posted bail*, he would have been subject to unlawful detention of up to 5 days on the sole authority of the immigration hold and subject to further unlawful detention for up to 2 days by ICE." Second Amended Complaint ("SAC"), ECF No. 34, ¶ 45 (emphasis added). He also alleges in the complaint that *had he been convicted* while subject to an immigration detainer, *it might have affected* aspects of the state's decisions regarding imprisonment and access to remedial programs. *Id*. In the Opposition, Plaintiff Gonzalez alleges that "he faced up to five days of detention *as soon as he became eligible for release from criminal custody*." Pls' Opp. at 9. He concedes, however, that he "did not know exactly when his criminal custody would end." *Id*. Read fairly, Plaintiff Gonzalez alleges only that it was *possible* his detention *might be extended* at an *unknown* future date based on the detainer if it remained lodged against him at the time he became eligible for release from criminal custody. By Plaintiff Gonzalez's own concessions, therefore, his "injury" was neither imminent, nor concrete, but rather was nothing more than speculative. Such speculative allegations regarding what might or might not happen in the future are insufficient to establish an immediate danger of direct injury and are insufficient to establish standing. *See City of Los Angeles v. Lyons*, 461 U.S. 95, 102-03, 103 S. Ct. 1660, 75 L. Ed. 2d 675 (1983) ("[I]njury or threat of injury must be both 'real and immediate,' not 'conjectural' or 'hypothetical'"). Because none of the possible conditions precedent was likely to occur (nor, in fact, occurred), Plaintiff Gonzalez's injury is merely speculative, and, accordingly, he lacks standing to proffer these claims. *See Bova v. City of Medford*, 564 F.3d 1093, 1096 (9th Cir.

2009) (stating, albeit in the ripeness context, that "if the contingent events do not occur, the plaintiff likely will not have suffered an injury that is concrete and particularized enough to establish the first element of standing").

Second, although Plaintiff Chinivizyan alleges that he suffered a direct injury when he was denied transfer to a rehabilitation facility,[1] he has failed to show how such action is fairly traceable to Defendants. The "fairly traceable" requirement is a causation requirement, under which the Court must inquire whether the alleged injury was caused by Defendants or by "the independent action of some third party not before the court." *Lujan*, 504 U.S. at 560. Here, Plaintiff Chinivizyan alleges that the immigration detainer caused the Los Angeles Sheriff's Department ("LASD") to deny him release into a rehabilitation program in accordance with a court order. SAC ¶¶ 53-55. The detainer lodged against him, however, expressly provided otherwise: it specified that it "d[id] not limit [LASD's] discretion to make decisions related to [Plaintiff Chinivizyan's] custody classification, work, quarter assignments, or other matters." *See* Ex. 3. Even

[1] In their Second Amended Complaint, Plaintiffs allege that "a superior court judge ordered Plaintiff Chinivizyan to spend six months in a residential treatment facility" but "did not sentence him to any jail time." SAC ¶¶ 52-53. In the Opposition, Plaintiffs appear to contend that this terminated the state's criminal custody. Pls' Opp. at 9-10. As Defendants noted in their motion, however, alternative sentencing to a rehabilitation program does not terminate a state's criminal custody of an individual. *Cf. Khadr v. Bush*, 587 F. Supp. 2d 225, 237 (D.D.C. 2008) (holding, in the habeas context, that a request for "a transfer from adult detention into a rehabilitation and reintegration program for juveniles . . . is not tantamount to a request for outright release and is more accurately characterized as a request seeking a different program or location or environment" (quotations omitted)). Indeed, Plaintiff Chinivizyan acknowledges he was not actually free to leave but rather had to "be released to a representative of the Assessment Intervention Resources so that he could be transferred to the residential treatment facility." SAC ¶ 52.

accepting as true, as the Court must in a motion to dismiss context, Plaintiff Chinivizyan's allegation that LASD refused to transfer him to a rehabilitation facility, that decision was nevertheless based entirely on LASD's own policies and procedures; such a refusal was not directed or requested by ICE. *See* 8 C.F.R. §287.7(d) (ICE's request to detain only applies when the alien is "not otherwise detained by a criminal justice agency"). Indeed, LASD retained its discretion and the ability to handle Plaintiff Chinivizyan's detention in whatever manner it saw fit. *See Galarza v. Szalczyk*, 745 F.3d 634, 636 (3d Cir. 2014) ("We agree with Galarza that immigration detainers do not and cannot compel a state or local law enforcement agency to detain suspected aliens subject to removal.").

B. Plaintiffs lack standing to seek prospective equitable relief.

The Court must also dismiss Plaintiffs' complaint because Plaintiffs lack standing to assert their claims for prospective equitable relief – the only type of relief they seek in this action. It is well-settled law that a plaintiff "must demonstrate standing separately for each form of relief sought." *Friends of the Earth, Inc. v. Laidlaw Envt'l Servs., Inc.*, 528 U.S. 167, 185, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000). In order to establish entitlement to seek prospective equitable relief, a plaintiff must not only establish a likelihood of future injury, but also show an imminent threat of irreparable harm. *See Lyons*, 461 U.S. at 111; *see also Stevens v. Harper*, 213 F.R.D. 358, 366-67 (E.D. Cal. 2002).

Plaintiffs do not take issue with Defendants' analysis of their standing to seek prospective equitable relief based on their risk of being subjected to new detainers in the future. *See* Opp. at 8 n.6. Indeed, they expressly disavow reliance on the risk of future detainers as the basis for their assertion of standing. *Id*. Instead, Plaintiffs contend that their standing to seek prospective equitable relief is "based on the imminent and ongoing injuries they faced when they filed their

complaint." *Id*. But "a plaintiff who has standing to seek damages for a past injury, or injunctive relief for an ongoing injury, does not necessarily have standing to seek *prospective* relief such as a declaratory judgment." *Mayfield v. United States*, 599 F.3d 964, 969 (9th Cir. 2010) (citing *Friends of the Earth*, 538 U.S. at 185-86; *Lyons*, 461 U.S. at 111) (emphasis added).

As discussed above, the Court must reject Plaintiffs' argument that they were suffering an ongoing injury fairly traceable to Defendants at the time they filed this action. Moreover, even if they could establish an ongoing injury, Plaintiffs nonetheless lack standing to seek relief that does not address their alleged ongoing injury, but, rather, seeks to overhaul the entire detainer process. *See, e.g.*, SAC at 31 (seeking an injunction restricting the circumstances in which Defendants can *issue* immigration detainers in the future). Accordingly, this Court should dismiss Plaintiffs' claims for lack of standing to seek prospective equitable relief.

II. Even if Plaintiffs had standing, their claims are now moot because ICE canceled the immigration detainers lodged against them.

As shown above, Plaintiffs have never had standing to pursue the claims in their Second Amended Complaint. But even if this were not the case, the Court lacks jurisdiction over those claims because they are now moot.

Plaintiffs concede that ICE's cancellation of the immigration detainers lodged against the two named Plaintiffs rendered moot their individual claims. *See* Pls' Opp. at 13 (arguing "Plaintiffs' claims fit within either of . . . two exceptions to mootness"). Regardless, however, Plaintiffs assert that the case may proceed because it has been filed as a class action and qualifies for two different exceptions to the mootness doctrine. *Id*. First, Plaintiffs maintain that their claims are "inherently transitory." *Id*. Second, Plaintiffs contend that even if their claims are

not inherently transitory, they are "made so by virtue of [Defendants'] litigation strategy." *Id*. Neither exception applies to Plaintiffs' claims.

Plaintiffs' claims do not qualify as "inherently transitory." A claim is inherently transitory when (1) it is uncertain whether the claim will remain live for any individual that can be named as representative and (2) there is a constant class of persons suffering the deprivation. *See* 13C Fed. Prac. & Proc. Juris. § 3533.9.1 (3d ed.); *see also Sze v. I.N.S.*, 153 F.3d 1005, 1010 (9th Cir. 1998). Plaintiffs cannot meet the first prong. Indeed, Plaintiffs cite several cases in their Second Amended Complaint in which similar claims were not rendered moot before federal court litigation was completed, *see* SAC ¶ 25, and, presumably, the plaintiffs in those cases could have sought to represent a class had they desired to do so. Moreover, although Plaintiffs Gonzalez and Chinivizyan both had immigration detainers lodged against them pre-trial, immigration detainers are also sometimes lodged post-conviction for individuals serving multi-year criminal sentences. *See, e.g.*, California TRUST Act, Cal. Gov't Code § 7282.5(a)(1)-(6) (enumerating circumstances in which state and local law enforcement may comply with an immigration detainer, including when the individual has been convicted of a serious or violent felony, a felony punishable by imprisonment in state prison, or an aggravated felony). In such situations, the individual's claim would likely remain live long enough for the court to rule on the motion for class certification. *Contrast Gerstein v. Pugh*, 420 U.S. 103, 111, 95 S. Ct. 854, 861, 43 L. Ed. 2d 54 (1975) (discussing applicability of inherently transitory exception where "[i]t is by no means certain that any given individual, named as plaintiff, would be in pretrial custody long enough for a district judge to certify the class").

Nor are Plaintiffs' claims "rendered inherently transitory" by Defendants' litigation strategy. Plaintiffs' alleged concern is that ICE may be "picking off"

putative class representatives, thereby "preventing any challenge to its detainer practices and perpetually evading review." Pls' Opp. at 16. Ironically, to the extent Plaintiffs' concerns about "picking off" potential class representatives has any appeal, it is precisely because Plaintiffs did not suffer any injury fairly traceable to Defendants prior to ICE canceling the detainers. Had Plaintiffs suffered an injury providing them with standing, they would retain the ability to pursue at least retrospective relief or damages. *See Lyons*, 461 U.S. at 112-13 ("[W]ithholding injunctive relief does not mean that the federal law will exercise no deterrent effect in these circumstances. If Lyons has suffered an injury barred by the Federal Constitution, he has a remedy for damages under § 1983.") (internal quotations omitted). Indeed, Plaintiffs themselves cite several such cases in their Second Amended Complaint. *See* SAC ¶ 25. Moreover, it is entirely proper for ICE to cancel a detainer for an individual once its investigation determines that the person is a U.S. citizen. Plaintiffs should not now be permitted to use their lack of injury during the short period that the immigration detainers were in place to bootstrap standing to pursue class relief. *See B.C. v. Plumas Unified Sch. Dist.*, 192 F.3d 1260, 1264 (9th Cir. 1999) ("A class of plaintiffs does not have standing to sue if the named plaintiff does not have standing."). Accordingly, Plaintiffs' claims are neither inherently transitory nor rendered so by Defendants' litigation strategy, and Plaintiffs' claims must be dismissed as moot.

III. Plaintiffs have never been "in custody" for purposes of habeas jurisdiction.

It is well-settled law in the Ninth Circuit, that "[a] bare detainer letter alone does not sufficiently place an alien in [immigration] custody to make habeas corpus available." *See Campos v. INS*, 62 F.3d 311, 313 (9th Cir. 1995). In an attempt to side-step this clear precedent, and citing no authority to support their

position, Plaintiffs contend *Campos* is no longer good law because it was based on an earlier version of the immigration detainer form used in the 1980s and 1990s. *See* Pls' Opp. at 16-17. The holding in *Campos* is not, however, outdated law that courts no longer apply; rather, it is a settled principle of law that is regularly and consistently applied in this district and other districts throughout the Ninth Circuit. *See, e.g.*, *Lieng v. United States*, No. 14-cv-02722, 2014 WL 1652496, *1 (C.D. Cal. Apr. 23, 2014); *Alen v. United States*, No. 13-cv-08632, 2013 WL 6622882, *1 (C.D. Cal. Dec. 16, 2013); *Giau Van Dang v. United States*, No. 13-cv-07322, 2013 WL 5780413, *1 (C.D. Cal. Oct. 25, 2013); *Kasiram v. Holder*, No. 13-cv-01284, 2013 WL 4500582, *2 (E.D. Cal. Aug. 22, 2013). Because Plaintiffs' habeas claim challenges "bare detainer letter[s] alone," the Court lacks jurisdiction and must dismiss their habeas claim.

IV. The statutory limits on ICE's warrantless arrest authority do not apply because Plaintiffs were not "arrested" by Defendants.

Finally, Plaintiffs maintain that ICE's issuance of detainers must comply with the statutory limitations on ICE's warrantless arrest powers under 8 U.S.C. § 1357(a) and not merely the requirements for issuing a detainer laid out in § 1357(d). Pls' Opp. at 18-19. Plaintiffs' entire analysis hinges on their conclusion that the issuance of an immigration detainer constitutes an arrest, thereby triggering subsection (a)'s provisions. *See id*. at 19 ("Section 1357(d) does not confer a freestanding arrest authority, and it does not give ICE a pass from the statute's more general limitations on warrantless arrests."). Indeed, Plaintiffs attempt to obfuscate the issue by claiming that "[n]umerous courts have recognized that ICE detainers cause a new seizure that requires its own probable cause justification," *id.* at 5, and citing cases that purport to support that statement. The cases, however, hold otherwise. Courts have not held that *issuing* an ICE detainer

causes "a new seizure," but, rather, that continued detention beyond the criminal custody release date could trigger a new arrest. *See*, *e.g.*, *Miranda-Olivares v. Clackamas Cnty.*, --- F. Supp. 2d ---, No. 12-cv-02317, 2014 WL 1414305, at *9, *10 (D. Or. Apr. 11, 2014) (the "*continuation* of [plaintiff's] detention based on the ICE detainer" constituted a "new arrest, and must be analyzed under the Fourth Amendment") (emphasis added); *Morales v. Chadbourne*, --- F. Supp. 2d ---, No. 12-cv-301, 2014 WL 554478, at *5 (D.R.I. Feb. 12, 2014) (refusing to dismiss Fourth Amendment claim against ICE officials when plaintiff was "held by the state and subsequently ICE for a little more than 24 hours even after she posted bail set for the state charge"), appeal docketed, No. 14-1425 (1st Cir. 2014); *Uroza v. Salt Lake Cnty.*, No. 11-cv-0713, 2013 WL 653968, *5-6 (D. Ut. Feb. 21, 2013) (permitting Fourth Amendment claim to proceed against ICE agent who issued detainer when county detained plaintiff for 36 days after the posting of bail); *Galarza v. Szalczyk*, No. 10-cv-06815, 2012 WL 1080020, at *10-15 (E.D. Pa. Mar. 30, 2012) (permitting Fourth Amendment claim to proceed against ICE agent who issued detainer when plaintiff's detention lasted three days after he posted bail), rev'd on other grounds, *Galarza v. Szalczyk*, 745 F.3d 634 (3d Cir. 2014).[2]

The bare immigration detainer letters lodged against Plaintiffs do not constitute an arrest. The detainers did not detain Plaintiffs or restrain Plaintiffs' freedom of movement – Plaintiffs were already detained by LASD and their freedom of movement was restrained based on the drug charges against them and

[2] In its opinion reversing the district court, the Third Circuit expressly held that "immigration detainers are requests and not mandatory orders to local law enforcement officials," basing this conclusion on statutory analysis, on policy statements, and, perhaps most importantly, on constitutional concerns arising under the Tenth Amendment. *Galarza*, 745 F.3d at 639-645. The Third Circuit's decision supports Defendants' argument that any unlawful detention of Plaintiffs (or, indeed, of putative plaintiffs) is not "fairly traceable" to Defendants.

LASD's policies. *Cf. Moody v. Daggett*, 429 U.S. 78, 86-87, 97 S. Ct. 274, 278, 50 L. Ed. 2d 236 (1976) ("Petitioner's present confinement and consequent liberty loss derive not in any sense from the outstanding parole violator warrant, but from his two 1971 homicide convictions . . . With only a prospect of future incarceration which is far from certain, we cannot say that the parole violator warrant has any present or inevitable effect upon [his] liberty interests"). Indeed, as was discussed above, an immigration detainer does not place an individual in immigration custody sufficient for habeas corpus purposes, *see Campos*, 62 F.3d at 313, which is at least as broad of an inquiry as whether there has been a seizure sufficient to constitute an arrest, *see Dow v. Circuit Court of First Circuit Through Huddy*, 995 F.2d 922, 923 (9th Cir. 1993) (noting that a petitioner can satisfy the habeas "in custody" requirement by showing "that he is subject to a significant restraint upon his liberty not shared by the public generally") (internal quotations omitted). Simply put, Plaintiff Gonzalez's and Plaintiff Chinivizyan's liberty was restricted not by the immigration detainers, but because they were subject to criminal custody on drug charges. ICE complied with the requirements of § 1357(d), the only section of § 1357 applicable to the issuance of the detainers in this case. Plaintiffs' claims that ICE's detainer practices are *ultra vires* must be dismissed.

CONCLUSION

Because Plaintiffs did not suffer injuries fairly attributable to Defendants, and because they have not established an entitlement to seek prospective equitable relief, the Court should find that Plaintiffs lack standing. Additionally, because ICE has canceled the detainers that were lodged against Plaintiffs, the Court should find their claims as moot. This Court should also dismiss Plaintiffs' habeas and *ultra vires* claims because Plaintiffs were neither in ICE's custody nor subjected to warrantless arrests. Accordingly, this Court should dismiss this case.

DATED: June 16, 2014

Respectfully Submitted,

STUART F. DELERY
Assistant Attorney General
Civil Division

COLIN A. KISOR
Acting Director

/s/ J. Max Weintraub
J. MAX WEINTRAUB
Acting Deputy Director

/s/ Timothy M. Belsan
TIMOTHY M. BELSAN, KS 24112
Trial Attorney
United States Department of Justice
Civil Division
Office of Immigration Litigation
District Court Section
P.O. Box 868, Ben Franklin Station
Washington, D.C. 20044
Tel.: (202) 532-4596
Fax: (202) 305-7000
Email: Timothy.M.Belsan@usdoj.gov

Counsel for Defendants