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(continued on next page)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

GERARDO GONZALEZ, et. al.,

Plaintiffs,

vs.

IMMIGRATION AND CUSTOMS ENFORCEMENT, et. al.,

Defendants.

CASE NO. 13-CV-4416 BRO (FFMx)

PLAINTIFFS' OPPOSITION TO MOTION TO DISMISS

DATE: Monday, June 16, 2014
TIME: 1:30 p.m.
JUDGE: Beverly Reid O'Connell

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I. INTRODUCTION

This proposed class action lawsuit challenges ICE's practice of causing thousands of people each year within the jurisdiction of its Los Angeles Field Office to be detained in violation of the Fourth Amendment, Due Process Clause, and ICE's governing statute, through its use of immigration detainers. ICE's motion to dismiss fails to engage with Plaintiffs' allegations, and instead attempts to dodge the serious constitutional and statutory issues in this case by raising misdirected jurisdictional objections. The Court should deny ICE's motion.

The bulk of ICE's motion is premised on basic misunderstandings of black-letter law on standing and mootness. ICE argues, first, that Plaintiffs lack standing because *at this moment* neither Plaintiff is subject to an ICE detainer, and it is not certain that ICE will issue new detainers against either one in the future. ICE further argues that because Plaintiffs were never in ICE's *physical* custody, there is no injury-in-fact that could be addressed in this lawsuit. Both these arguments are fundamentally wrong. Standing is assessed *at the commencement of suit*. At the time each Plaintiff filed his claims against ICE, he was either being detained in a local law enforcement facility because of an ICE detainer, or he was subject to an ICE detainer that would imminently cause him to be so detained. Those injuries are directly attributable to ICE and are plainly sufficient to confer standing. In addition, this Court also has habeas jurisdiction because Plaintiffs' detainers expressly requested their future detention, thus placing them "in custody" for purposes of 28 U.S.C. § 2241.

ICE's subsequent cancellation of Plaintiffs' detainers—in response to the filing of this lawsuit—does not render their claims moot. As putative class representatives, Plaintiffs' claims fall squarely within two distinct exceptions to mootness for "transitory" claims. Indeed, in a nearly identical class action challenging ICE's detainer practices in Chicago, another district court rejected the very standing and mootness arguments ICE advances here. *Jimenez Moreno v.*

Napolitano, No. 11-05452, 2012 WL 5995820, at *3-7 (N.D. Ill., Nov. 30, 2012).

ICE's sole merits argument is directed at Plaintiffs' *ultra vires* claim, and it too misses the mark. Plaintiffs allege that ICE issues detainers in excess of the statutory limitations on ICE's warrantless arrest authority at 8 U.S.C. § 1357(a)(2). ICE protests that Plaintiffs' detainers were issued pursuant to section 1357(d). But nothing in subsection (d)—which simply sets forth additional procedures for detainers in drug cases—overrides the general requirements of § 1357(a) or excuses ICE from complying with that section when using detainers to effect warrantless seizures. Plaintiffs' *ultra vires* claim should proceed.

II. STATEMENT OF FACTS

An ICE detainer is a fill-in-the-blank form that ICE sends to a law enforcement agency, requesting that the agency detain a person in its custody for an extra 48 hours plus weekends and holidays—up to five days over a long weekend—after he would otherwise be released, to give ICE extra time to investigate and decide whether to pursue removal proceedings. *See* Second Amended Complaint ("SAC") ¶14 (Dkt. #24); 8 C.F.R. § 287.7(a), (d). No judge, magistrate, or immigration judge reviews ICE detainers; they are unsworn documents that may be issued "at any time" by ICE enforcement agents themselves. *See* 8 C.F.R. § 287.7(a), (b) (listing issuing officials).[1] As set forth in the complaint, ICE's standard practice is to issue detainers without probable cause

[1] ICE detainers are therefore entirely different from warrants, which must be "supported by oath or affirmation," U.S. Const. amend. IV, and issued by a "neutral and detached" magistrate who is "capable of determining whether probable cause exists." *Shadwick v. City of Tampa*, 407 U.S. 345, 350 (1972).

Despite their name, ICE "detainers" also differ from criminal detainers. Criminal detainers may be issued only if criminal charges are *pending* in the requesting jurisdiction, and their issuance triggers various statutory safeguards designed to protect the individual. *See United States v. Mauro*, 436 U.S. 340, 343-44 (1978). ICE detainers lack any such protections, and they may be issued even where—as in Plaintiffs' cases—no immigration proceedings are pending at all.

to believe the subjects are removable non-citizens, without any judicial oversight, and without making a determination that the subjects are likely to escape before a warrant could be obtained. SAC ¶¶21-22, 28.

Plaintiffs Gerardo Gonzalez and Simon Chinivizyan are two of the thousands of people against whom ICE's Los Angeles Field Office issues detainers every year. SAC ¶64. Both Plaintiffs are U.S. citizens. SAC ¶¶36, 47. Consistent with its general practice, ICE issued detainers against both men without probable cause to believe they are removable non-citizens or likely to escape. SAC ¶¶42, 51.

ICE issued a detainer against Mr. Gonzalez on or about December 31, 2012, while he was in pre-trial custody facing drug possession charges. SAC ¶¶39, 42; Dkt. #31-1 Exhibit 1. Mr. Gonzalez filed this lawsuit on June 19, 2013. At that time, he was still in pre-trial custody but was eligible for bail, and his ICE detainer was active. SAC ¶¶40, 44-45. Because of the detainer, he faced up to five days of extra detention for ICE's benefit upon release from criminal custody. *Id.*

ICE issued a detainer for Mr. Chinivizyan on or about June 19, 2013, while he was in local custody awaiting sentencing for drug and property offenses. SAC ¶¶49, 51; Dkt. #31-1 Exhibit 3. Mr. Chinivizyan joined this lawsuit through the First Amended Complaint on July 10, 2013. Dkt. #10. On that date, his jail time was complete; a state judge had "ordered him released on his own recognizance" on the condition that he participate in a residential rehabilitation program. SAC ¶52. But Mr. Chinivizyan was not released as ordered; instead, he was subjected to a new period of imprisonment solely based on the ICE detainer. SAC ¶¶54-55.

Shortly after each Plaintiff entered this suit, ICE cancelled their detainers. SAC ¶¶46, 60. Thousands of putative class members are still being detained or imminently facing detention on the sole basis of ICE detainers. SAC ¶¶61-67.

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III. ARGUMENT

A. Being Held on an ICE Detainer Is a Seizure Under the Fourth Amendment and a Deprivation of Liberty Under the Due Process Clause, and the Threat of Being So Detained Confers Standing.

ICE's motion endeavors to portray ICE detainers as harmless pieces of paper. ICE describes detainers as "primarily . . . a communication tool," Defendants' Memorandum of Points and Authorities in Support of Defendants' Motion to Dismiss ("MTD") 2 (Dkt. #31), and even contends that "none of the functions of an immigration detainer constitute an arrest or are the basis of any deprivation of liberty." MTD 22. But ICE's description is belied by its own detainer form, which *on its face* asks the receiving agency to "[m]aintain custody" of a person who "would have otherwise been released" for an additional 48 hours, plus weekends and holidays, "to allow DHS to take custody[.]" Dkt. #31-1, Exhibits 1, 3; *see also* 8 C.F.R. § 287.7(d).[2]

Because ICE detainers request and purport to authorize imprisonment in a jail cell for up to five days, they cause full-scale "seizures" that trigger the Fourth Amendment's protections. *Dunaway v. New York*, 442 U.S. 200, 212-13 (1979); *see also U.S. v. Brignoni-Ponce*, 422 U.S. 873, 881-82 (1975) (immigration agents may make "brief[]" vehicle stops on reasonable suspicion, "but any further detention . . . must be based on . . . probable cause."). And, when a person is initially detained on a lawful basis but is kept in custody for a new purpose after he is entitled to release, he is subjected to a *new* seizure for Fourth Amendment purposes—one that must be supported by a new probable cause justification. *See*

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[2] ICE's description may have been true decades ago, when ICE's predecessor, the Immigration and Naturalization Service ("INS"), used a detainer form that requested only *notification* of the subject's release date, and said nothing about detention. *See* Exhibit A; *see also* Amicus Br. of Law Professors, *Galarza v. Szalczyk*, 745 F.3d 634 (3d Cir. 2014), 2013 WL 1451464, at *14-15 (describing detainer form used in the 1980s and 1990s). In contrast, the detainer form ICE uses today requests *detention*, not only information-sharing.

Lee v. City of Los Angeles, 250 F.3d 668, 677-78, 685 (9th Cir. 2001) (plaintiff stated a Fourth Amendment claim against officers who, after initially arresting him on unrelated charges, subjected him to a new seizure on an out-of-state warrant).

In addition, because this new period of detention is a deprivation of liberty, it infringes on the substantive right to be free from imprisonment protected by the Due Process Clause. *See* SAC ¶¶98-100 (Third Cause of Action). Deliberately causing a person to be held in jail without probable cause or judicial authorization is an arbitrary deprivation of liberty sufficient to state a substantive due process claim. *See Lee*, 250 F.3d at 683-85 (plaintiff stated claims under both Due Process Clause and Fourth Amendment). Because courts have generally viewed the Fourth Amendment as the more directly applicable constitutional provision, *see infra*, Plaintiffs' discussion here focuses on the Fourth Amendment.

Numerous courts have recognized that ICE detainers cause a new seizure that requires its own probable cause justification. *See Miranda-Olivares v. Clackamas County*, -- F.Supp.2d --, No. 12-02317, 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"); *Morales v. Chadbourne*, -- F.Supp.2d --, No. 12-301, 2014 WL 554478, at *5 (D.R.I. Feb. 12, 2014) (plaintiff stated Fourth Amendment claim against ICE officials), *appeal docketed*, No. 14-1425 (1st Cir. 2014); *Uroza v. Salt Lake County*, No. 11-0713, 2013 WL 653968, *5-6 (D. Ut. Feb. 21, 2013) (permitting Fourth Amendment claim to proceed against issuing ICE agent); *Galarza v. Szalczyk*, 2012 WL 1080020, at *10-15 (E.D. Pa. Mar. 30, 2012) (same), *rev'd on other grounds*, 745 F.3d 634 (3d Cir. 2014) (county may also be liable); *see also Vohra v. United States*, No. 04-00972, 2010 U.S. Dist. LEXIS 34363, at *25 (C.D. Cal. Feb. 4, 2010) (magistrate report denying summary judgment to ICE agent on Fourth Amendment claim), *adopted*, 2010 U.S. Dist. LEXIS 34088 (C.D. Cal. Mar. 29, 2010).

Plaintiffs, who were subject to ICE detainers when they entered this lawsuit, faced precisely this Fourth Amendment injury. In their cases and thousands of others, they allege that ICE issues detainers without probable cause to believe the subjects are removable non-citizens. SAC ¶¶2, 4, 19, 22. In fact, ICE's motion *supports* Plaintiffs' allegation: Remarkably, ICE refuses to concede that the Fourth Amendment's probable cause standard applies to ICE detainers at all, and instead suggests—relying only on out-of-circuit law from the irrelevant home-entry context—that some "lesser standard" might be sufficient. MTD 23 n.9 (quotation marks omitted). On the merits, ICE's argument is foreclosed by controlling Ninth Circuit authority,[3] but its argument does support Plaintiffs' factual allegation that ICE routinely issues detainers without probable cause.

Further, even if Plaintiffs' ICE detainers *had* been based on probable cause, they would still suffer from a separate Fourth Amendment defect: They are not supported by "a *judicial* determination of probable cause." *Gerstein v. Pugh*, 420 U.S. 103, 114 (1975) (emphasis added). As *Gerstein* made clear, the Fourth Amendment requires that detention be judicially approved—either before arrest in the form of a judicial warrant,[4] or "promptly after arrest" in the form of a probable cause hearing. *Id.* at 125. The Supreme Court later clarified that probable cause hearings held "within 48 hours of arrest will, as a general matter, comply with the promptness requirement of *Gerstein*," whereas delays over 48 hours are presumptively unreasonable. *Riverside v. McLaughlin*, 500 U.S. 44, 56 (1991).

ICE violates this Fourth Amendment rule every time it issues a detainer.

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[3] *See Tejeda-Mata v. INS*, 626 F.2d 721, 725 (9th Cir. 1980) (in immigration arrest context, "reason to believe" means "probable cause"); *Cuevas v. De Roco*, 531 F.3d 726, 736 (9th Cir. 2008) (same in home-entry context).

[4] As explained above, ICE detainers are not warrants. *See supra* n.1; *see also Buquer v. City of Indianapolis*, 2013 WL 1332158, at *3, *8 (S.D. Ind. Mar. 28, 2013) (describing arrests based on detainers as warrantless arrests). Thus, they must comply with *Gerstein*'s rule for warrantless arrests.

Most obviously, the detainer regulation and form purport to authorize warrantless detention for 48 hours *plus weekends and holidays*—the very time-period *Riverside* held to be presumptively *un*reasonable. *See* 500 U.S. at 47, 56-57. Moreover, *Riverside* cautioned that even delays shorter than 48 hours violate *Gerstein* if they are "unreasonabl[e]," including "delays for the purpose of gathering additional evidence to justify the arrest, . . . or delay for delay's sake." *Id*. at 56. ICE routinely uses the detainer period for precisely these impermissible purposes. *See* SAC ¶19 (ICE uses detainers as "'a stop gap measure . . . to give ICE time to investigate'"). Most fundamentally, this is not merely a question of unreasonable delay, but of outright denial. ICE fails to provide a judicial probable cause determination *at any time*. ICE detainers are issued by enforcement officials themselves, 8 C.F.R. § 287.7(b), and no judicial official reviews them. SAC ¶28.[5]

Tellingly, ICE does not question the plausibility of any of these allegations. *See* MTD 21 (seeking 12(b)(6) dismissal only of *ultra vires* claim). Instead, ICE argues mainly that it should not have to answer for these constitutional deficiencies because Plaintiffs faced no injury, or at least no injury traceable to ICE, and thus

[5] To the extent ICE suggests *Gerstein* is inapplicable because ICE detainers do not cause "arrests," MTD 16-17, that argument is without merit. *Gerstein* is a Fourth Amendment ruling, and it is settled that civil immigration arrests, like criminal arrests, must comply with the Fourth Amendment. *See Brignoni-Ponce*, 422 U.S. at 881-82; *cf. Bacon v. United States*, 449 F.2d 933, 942 (9th Cir. 1971) (civil material witness arrest must comply with Fourth Amendment). And certainly, being held in a local jail on an ICE detainer is practically indistinguishable from the "restraint of liberty" caused by pretrial criminal detention. *Gerstein*, 420 U.S. at 125. In fact, the INS itself recognized that it was "clearly bound by . . . [judicial] interpretations [regarding arrest and post-arrest procedures], including those set forth in *Gerstein v. Pugh*[.]" 59 Fed. Reg. 42406-01, 42411 (1994).

In addition, the procedural protections mandated by the Due Process Clause are at least as robust as those mandated by the Fourth Amendment. *See Goldberg v. Kelly*, 397 U.S. 254, 268 (1970) (failure to provide in-person hearing prior to termination of welfare benefits was "fatal to the constitutional adequacy of the procedures"); *cf. Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (due process requires an "opportunity to be heard"). *See* SAC ¶¶104-06 (Fifth Cause of Action).

lack standing. This argument is plainly wrong. As shown below, when ICE issues a detainer, it purports to authorize and foreseeably causes detention. ICE cannot ask other agencies to detain people for its exclusive benefit, and then disclaim responsibility for those detentions when the agencies comply.

B. Plaintiffs Have Standing to Seek Injunctive Relief.

ICE argues that Plaintiffs lack standing to seek injunctive relief because, by the time the Second Amended Complaint was filed, ICE had cancelled their detainers. *See* MTD 5-18. ICE's argument misapprehends basic standing law: The Court does not assess standing based on the facts as they stand *now*, but rather based on the facts *as they stood when Plaintiffs commenced their lawsuit*.[6] Focusing on the correct time period, Plaintiffs clearly have standing.

It is black letter law that "standing is to be determined as of the commencement of suit." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 570 n.5 (1992) (plurality op.). This principle applies "even if the complaint is later amended." *Schreiber Foods v. Beatrice Cheese*, 402 F.3d 1198, 1203 n.3 (Fed. Cir. 2005). And, when a complaint is amended to add a new plaintiff, his standing is assessed based on the facts at the time of the amendment that brought him into the suit. *See Riverside*, 500 U.S. at 51 (looking to second amended complaint to determine standing of plaintiffs added in that complaint); *Lynch v. Leis*, 382 F.3d 642, 647 (6th Cir. 2004) (plaintiff's standing is assessed as of the date of the complaint "adding [the plaintiff] to the action"). Thus, Plaintiffs must show that, *at*

[6] ICE's error leads it into an extended, irrelevant discussion of *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983), and its progeny, arguing that a past injury does not establish standing for injunctive relief absent a showing that the injury may occur again. MTD 6-11. But Plaintiffs do not assert standing based on a risk of being subjected to new detainers in the future. Rather, as shown in this section, their standing is based on the imminent and ongoing injuries they faced when they filed their claims. *See Riverside*, 500 U.S. at 51 (distinguishing *Lyons* where, at the time the complaint was filed, "plaintiffs' injury was . . . capable of being redressed through injunctive relief").

the time each entered the lawsuit, he faced (1) an ongoing or imminent injury-in-fact that is (2) fairly traceable to ICE's actions and (3) likely to be redressed by a favorable decision. Both Plaintiffs easily satisfy all three elements.

1. Plaintiffs have alleged injuries-in-fact.

When Mr. Gonzalez commenced this suit, he was subject to an active ICE detainer. Because of this detainer, he faced up to five days of detention as soon as he became eligible for release from criminal custody. SAC ¶¶45, 87. This concrete threat of additional detention is an imminent injury sufficient to establish standing. *See Harris v. Bd. of Supervisors*, 366 F.3d 754, 760 (9th Cir. 2004) ("'a concrete *risk* of harm . . . is sufficient for injury in fact.'"); *Melendres v. Arpaio*, 695 F.3d 990, 997-99 (9th Cir. 2012) (finding standing based on risk of future detention). This risk was not, as ICE maintains, "'conjectural'" or "'hypothetical.'" MTD 14. It is immaterial that Mr. Gonzales did not know exactly when his criminal custody would end. *See Harris*, 366 F.3d at 763 (uncertainty about when injuries would occur did not affect standing). Mr. Gonzalez's detainer specifically requested that the jail "[m]aintain custody of [him]," and it stated ICE's intention "to take custody of [him]" thereafter. Dkt. #31-1, Exhibit 1. *See also* 8 U.S.C. § 1357(d) (in drug cases, "[i]f . . . a detainer is issued," ICE "shall effectively and expeditiously take custody"). And, as ICE was aware, jails within the L.A. Field Office's jurisdiction had a practice of complying with ICE detainers. SAC ¶¶21, 35. Mr. Gonzalez has clearly alleged an injury in fact.

As for Mr. Chinivizyan, when he entered this suit, he had been ordered released on his own recognizance from criminal custody; he was being detained solely on the basis of the ICE detainer. SAC ¶¶47-55. ICE ignores Mr. Chinivizyan's release order and instead offers its own version of the facts, asserting that he was given an "alternative sentence[] to a rehabilitation program"

which the L.A. Sheriff's Department converted to a jail sentence. MTD 14-16.[7] ICE's rendition of the facts is incorrect, and at any rate, ICE cannot premise a motion to dismiss on facts that are inconsistent with those alleged in the complaint. *Maya v. Centex Corp.*, 658 F.3d 1060, 1067-68 (9th Cir. 2011). As the complaint alleges, Mr. Chinivizyan's release was subject to the conditions (1) that a representative from a drug treatment program pick him up from the jail and (2) that he spend time in the drug treatment facility. SAC ¶52. These conditions were met on July 3, when a program representative arrived to pick him up. SAC ¶¶54-55. At that point, like a person who is ordered released on bail and posts the required amount, Mr. Chinivizyan was entitled to release. *Cf. Morales*, 2014 WL 554478, at *2, 5 (release on recognizance); *Miranda-Olivares*, 2014 WL 1414305, at *11 (release on bail). His detention beyond that point was based solely on the ICE detainer, and this detention is a concrete injury sufficient to support standing.

In any event, even assuming Mr. Chinivizyan was still detained on state criminal grounds when he entered this lawsuit, he would have standing because he, like Mr. Gonzalez, faced imminent future detention on the ICE detainer, which would occur as soon as his criminal custody ended.

2. Plaintiffs' injuries are directly traceable to ICE.

ICE contends that the additional detention Plaintiffs faced cannot be traced to ICE because ICE was only *asking*, not *forcing*, local officials to inflict that injury. MTD 22-23. That argument is without merit. Certainly, Plaintiffs agree that ICE detainers "are requests and not mandatory orders." *Galarza*, 745 F.3d at 643.

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[7] ICE also claims that Plaintiffs "concede that ICE was unaware that Plaintiff Chinivizyan was being held pursuant to a detainer." MTD 15. Plaintiffs make no such concession. Rather, Plaintiffs allege that Mr. Chinivizyan's defense attorney contacted ICE to contest his detention, and the ICE official with whom she spoke said he was unable to locate Mr. Chinivizyan "in the system" and "there was nothing he could do." SAC ¶59. That interaction certainly does not mean ICE as a whole was unaware of the detainer it had issued or its effects on Mr. Chinivizyan.

Yet ICE's inability to *compel* compliance does not change the fact that ICE expressly asks for, purports to authorize, and thus directly causes imprisonment. The injury Plaintiffs faced is directly traceable to ICE.

ICE's argument ignores a basic principle of causation: Where one agency or official requests or authorizes another agency or official to engage in unlawful conduct, *both* may be liable because each actor is "responsible for the natural consequences of his actions." *Malley v. Briggs*, 475 U.S. 335, 344 n.7 (1986) (citation omitted) (police officer who procures a warrant without probable cause is liable even if he did not execute the arrest). Thus, the Ninth Circuit has held the federal government liable for policies that cause states to violate individuals' rights, and has upheld injunctive relief against the federal government on that basis. *See Yesler Terrace Cmty. Council v. Cisneros*, 37 F.3d 442, 446-47 (9th Cir. 1994) (plaintiffs had standing to challenge HUD regulation despite HUD's argument that "it did no more than provide an opportunity for [state authorities] to act"); *see also Renee v. Duncan*, 623 F.3d 787, 797 (9th Cir. 2010) (because "the federal regulation . . . had the effect of permitting California" to violate students' rights, "there is a causal connection between the challenged regulation and the injury of which Appellants complain."). Similarly, in the arrest context, the Ninth Circuit has held that a prosecutor may be liable for "'authoriz[ing] and advis[ing]'" sheriff's deputies to make an unlawful arrest, explaining that "an official with no official authority over another actor can also be liable for that actor's conduct if he induces that actor to violate a third party's constitutional rights." *Lacey v. Maricopa County*, 693 F.3d 896, 916, 918 (9th Cir. 2012).

ICE is plainly liable for Plaintiffs' injuries under this controlling authority. ICE detainers unequivocally ask for—and directly cause—people's imprisonment for days after they would otherwise be released. 8 C.F.R. § 287.7(d). As the complaint alleges, "ICE agents know—and intend—that these detainers will cause the subjects to be imprisoned" after their state custody expires. SAC ¶21; *see also*

Letter from Acting ICE Director to Members of Congress (Feb. 25, 2014), Request for Judicial Notice ("RJN"), Exhibit B (filed concurrently herewith) (although "detainers . . . are not mandatory as a matter of law . . . , ICE relies on the cooperation of its law enforcement partners"); Memorandum of United States, Dkt. #29, No. 12-301, *Morales v. Chadbourne* (D.R.I. Nov. 5, 2012), RJN, Exhibit C (DHS "expects state entities to cooperate and detain aliens upon receipt of a detainer."). Indeed, ICE represents that its requests provide legal authority for those detentions. *See* RJN, Exhibit C (asserting that "[t]he state is *entitled to rely* on the detainer . . . regardless of whether the detainer is mandatory.") (emphasis added). Having requested and purported to authorize detention, ICE shares the responsibility for it. ICE cannot induce local agencies to act and then disclaim responsibility for the results.[8]

ICE also suggests that California's TRUST Act, Cal. Gov. Code §§ 7282, 7282.5, shields ICE from liability for the foreseeable results of its actions. MTD 23 n.9. But even before California passed the TRUST Act, law enforcement agencies were free to decline ICE detainers; the TRUST Act changes nothing in that respect. Its only relevant effect is to shrink the pool of putative class-members, insofar as it prohibits California jails from complying with ICE detainers for certain categories of people with less serious offenses and insofar as the jailors comply with the law. Neither Plaintiff falls into those categories. For Plaintiffs and all others who fall

[8] ICE suggests that Mr. Chinivizyan's detention on the ICE detainer is not traceable to ICE because it lasted beyond five days. MTD 15-16. But the harms Mr. Chinivizyan alleges—being detained in violation of the Fourth Amendment and statutory authority—continued throughout his detention, and resulted directly from ICE's issuance of a detainer. Thus, even assuming LASD could have released him sooner, he has still alleged injuries that are directly traceable to ICE. *See also* SAC ¶¶21, 30-35 (agencies to whom ICE's L.A. Field Office routinely issued detainers had a standard practice of extending people's detention based on ICE detainers alone); *Maya*, 658 F.3d at 1068 ("The threshold question of whether plaintiff has standing . . . is distinct from the merits of his claim").

outside the TRUST Act's protection, ICE detainers continue to cause detention.

3. An injunction would redress the injuries alleged.

Plaintiffs also satisfy the standing inquiry's third prong. The injunction they seek would have cured their injuries by prohibiting ICE from causing their detention via detainers. ICE does not argue otherwise.

C. Plaintiffs' Claims Are Not Moot.

ICE repackages its flawed standing arguments in the mootness context, asserting that it rendered Plaintiffs' claims moot when it cancelled their detainers, shortly after they filed suit. MTD 19. ICE ignores one crucial fact: Plaintiffs filed this case as a class action. In the class action context, the "[Supreme] Court has applied the [mootness] doctrine flexibly, particularly where the issues remain alive, even if the plaintiff's personal stake in the outcome has become moot." *Pitts v. Terrible Herbst, Inc.*, 653 F.3d 1081, 1087 (9th Cir. 2011) (internal quotations omitted). When a named plaintiff's individual claims become moot prior to class certification, the case may still proceed if the claims fall within either of two distinct exceptions to mootness: (1) claims that are "'inherently transitory,'" *Riverside*, 500 U.S. at 52, and (2) claims that, "[al]though not *inherently* transitory," are made so "by virtue of the defendant's litigation strategy," *Pitts*, 653 F.3d at 1091. *See also* Newberg on Class Actions § 2:13-15 (5th ed. Supp. 2013) (discussing these two class action exceptions to mootness). In either situation, a class certification decision will "relate back" to the filing of the complaint. *Riverside*, 500 U.S. at 52; *Pitts*, 653 F.3d at 1092. The Ninth Circuit has made clear that the relation-back doctrine applies even if a class certification motion has not yet been filed, so long as "the named plaintiff can still file a timely motion for class certification." *Pitts*, 653 F.3d at 1092.[9]

Plaintiffs' claims fit within either of these two exceptions to mootness.

[9] Plaintiffs' class certification motion will be due "60 days after the Court has ruled on any motion to dismiss filed by Defendants." *See* Dkt. #28.

1. Plaintiffs' claims are "inherently transitory."

A claim is "inherently transitory" if (1) it is unlikely the court will have enough time to rule on class certification before the proposed representative's individual interest expires, and (2) the claim will certainly repeat "either because the individual could nonetheless suffer repeated harm or because it is certain that other persons similarly situated will have the same complaint." *Pitts*, 653 F.3d at 1090 (internal punctuation omitted). Plaintiffs' claims meet both elements.

First, it was extremely unlikely at the time of filing that either Plaintiff would be subject to an ICE detainer long enough for the court to rule on a class certification motion. In *Gerstein*, where plaintiffs sought to challenge the lack of a probable cause hearing in pretrial custody, the Supreme Court held that the plaintiffs' claims were inherently transitory because "[t]he length of pretrial custody cannot be ascertained at the outset, and it may be ended at any time . . . ." 420 U.S. at 110 n.11. Similarly, here, the length of Plaintiffs' detention was uncertain and liable to end without warning.

When this lawsuit began, Mr. Gonzalez was in pretrial custody, which could have "ended at any time by release on recognizance, dismissal of the charges, or a guilty plea, as well as by acquittal or conviction after trial." *Id.* These unpredictable factors also affected the timing of the ICE detainer, which, once triggered, would last only a matter of days. The length of Mr. Chinivizyan's detention was similarly uncertain. When he joined the lawsuit, he was already being detained solely on the ICE detainer; ICE could have transported him to an ICE detention center and/or released him at any time, ending his detainer period without warning. For these same reasons, the court in *Jimenez Moreno* found the plaintiffs' claims "inherently transitory" because "the duration of any claim is at the discretion of ICE, and the detainer against any plaintiff may be lifted for reasons that he or she cannot anticipate." 2012 WL 5995820, at *7.

Second, it is "certain that other persons similarly situated will be detained

under the [same] allegedly unconstitutional procedures" that Plaintiffs seek to challenge. *Gerstein*, 420 U.S. at 110 n.11. ICE's Los Angeles Field Office issues tens of thousands of detainers each year, and its practice is to do so without a probable cause determination and in excess of ICE's statutory authority. SAC ¶64. Plaintiffs' claims are certain to repeat as to the class they seek to represent.

2. ICE's litigation strategy renders Plaintiffs' claims transitory.

Plaintiffs' claims also fit within a separate exception to mootness: the exception for claims that, "[al]though not inherently transitory," are made so "by virtue of the defendant's litigation strategy." *Pitts*, 653 F.3d at 1091 (emphasis omitted). This exception applies where defendants could "'pick[] off'" individual claims—for example, through voluntary action or a Rule 68 offer of judgment—to avoid the class action and evade review. *Id.* As *Pitts* explained, "allowing a class action to become moot simply because the defendant has sought to buy off the individual private claims of the named plaintiffs before the named plaintiffs have a chance to file a motion for class certification would . . . contravene Rule 23's core concern: the aggregation of similar, small, but otherwise doomed claims." *Id.* (internal quotations omitted).[10]

This exception plainly applies here. ICE lifted Mr. Gonzalez's detainer mere hours after he filed this lawsuit, SAC ¶46, and Mr. Chinivizyan's detainer two days after he joined the lawsuit, SAC ¶60. This timing was no coincidence; in fact, an ICE agent had told Mr. Chinivizyan's lawyer there was "nothing he could do" to lift his detainer just nine days earlier. SAC ¶59. ICE used this same litigation strategy—unsuccessfully—in *Jimenez Moreno*, canceling the two named plaintiffs'

[10] The Supreme Court's opinion in *Genesis Healthcare v. Symczyk*, 133 S.Ct. 1523 (2013)—which considered whether an unaccepted offer of judgment mooted a plaintiff's claims in a collective action under the Fair Labor Standards Act—does not affect the Rule 23 mootness holding in *Pitts*. *See Ramirez v. Trans Union*, 2013 WL 3752591, at *3 (N.D. Cal. July 17, 2013); *Canada v. Meracord*, 2013 WL 2450631, at *1-2 (W.D. Wash. June 6, 2013).

detainers shortly after the lawsuit was filed, and then canceling the detainers of two more people when they sought to join the suit. 2012 WL 5995820, at *7 n.4. If ICE could moot Plaintiffs' class action so easily, it could effectively prevent *any* challenge to its detainer practices and perpetually evade review. For these reasons, in addition to the "inherently transitory" exception, Plaintiffs' claims fit squarely within the separate *Pitts* exception to mootness.

D. The Court Has Jurisdiction over Plaintiffs' Habeas Claim.

Plaintiffs plead the habeas statute as a separate jurisdictional basis on which the Court can grant relief. ICE objects, asserting that Plaintiffs have never been "in ICE's custody" for habeas purposes. MTD 20. ICE misapprehends the law.

Under well-settled precedent, ICE's request for Plaintiffs' future detention put them "in custody" for purposes of 28 U.S.C. § 2241. In *Braden v. 30th Judicial Circuit Court of Ky.*, 410 U.S. 484 (1973), the Supreme Court held that a prisoner incarcerated in Alabama could challenge the legality of a criminal detainer issued by the state of Kentucky, even though he was incarcerated in an Alabama prison at the time he filed his habeas petition. *Id.* at 488-89. *See also Preiser v. Rodriguez*, 411 U.S. 475, 487 (1973) ("[H]abeas corpus relief is not limited to immediate release from illegal custody, but . . . is available [also] to attack future confinement and obtain future releases."); *Harrison v. Ollison*, 519 F.3d 952, 955 n.2 (9th Cir. 2008) (citing *Braden* for proposition that petitioner may challenge future period of confinement while detained by a different custodian). The same analysis applies here. Because ICE requested that L.A. County maintain custody of Plaintiffs after they were entitled to release, the Court has jurisdiction to review their habeas claims challenging this additional period of confinement due to the detainers.[11]

[11] ICE incorrectly assumes that Plaintiffs can invoke habeas jurisdiction only under 28 U.S.C. § 2241(c)(1) based on future federal custody, MTD 20, but the habeas statute also provides jurisdiction to remedy "custody in violation of the Constitution or laws . . . of the United States," even for individuals in state custody. *Id.* § 2241(c)(3). Plaintiffs' claims are cognizable under both subsections.

ICE misreads Ninth Circuit law in arguing that a "'bare detainer letter alone does not sufficiently place an alien in INS custody to make habeas corpus available.'" MTD 20 (quoting *Campos v. INS*, 62 F.3d 311, 314 (9th Cir. 1995) and *Garcia v. Taylor*, 40 F.3d 299, 303 (9th Cir. 1994)). Critically, ICE omits that the *Garcia* court held habeas to be unavailable specifically *because* the version of the detainer form the INS used in that case "merely advise[d] that an investigation has been commenced" and "request[ed] notice of the [petitioner's] release time at least thirty days prior to release." 40 F.3d at 303. It did not ask the receiving agency to "*hold* the prisoner for the INS," and thus did not "constitute[] future confinement." *Id.* at 304.[12] *Campos*, in turn, simply recited *Garcia*'s holding with no further analysis, *see* 62 F.3d at 314, and also appeared to have involved a notification-only detainer. In contrast to the old detainer forms used in *Garcia* and *Campos*, ICE detainers today no longer serve as mere notifications. *See supra* n.2. As the complaint alleges, they specifically ask for—and purport to authorize—the subject's *detention* after he would otherwise be released. SAC ¶14. Thus, the Court has habeas jurisdiction under § 2241.[13]

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[12] The detainer form described in *Garcia* appears to correspond with the version used by the INS in the 1980s and 1990s, described *supra* at n.2; *see* RJN, Exhibit A.

[13] ICE also cursorily argues that it has defeated habeas jurisdiction by canceling Plaintiffs' detainers. This is incorrect. Like standing in other contexts, habeas jurisdiction is tested at the time a petitioner files his initial claim. *See Carafas v. LaVallee*, 391 U.S. 234, 238 (1968) ("[O]nce the federal jurisdiction has attached . . . , it is not defeated by the release of the petitioner prior to completion of proceedings . . ."). Nor has ICE's action rendered Plaintiffs' habeas claim moot because, again, they raise it on behalf of a class. *See supra* Part III(C); *Cox v. McCarthy*, 829 F.2d 800, 804 (9th Cir. 1987) (observing that in habeas class actions "the fact that the named plaintiffs' particular claims have become moot does not moot the entire case"). Even if Rule 23 does not authorize a class action in this case, Plaintiffs are entitled to proceed on an analogous basis under the habeas statute. *Nguyen Da Yen v. Kissinger*, 528 F. 2d 1194, 1202 (9th Cir. 1975).

E. ICE's Detainer Practices Are Ultra Vires.

ICE makes only one argument under Federal Rule 12(b)(6): It argues that Plaintiffs fail to state an *ultra vires* claim. MTD 21. That argument is incorrect.

The Immigration and Nationality Act permits warrantless immigration arrests only in certain "limited" circumstances. *Arizona v. United States*, 132 S. Ct. 2492, 2506 (2012). In particular, it requires a showing that the person is "likely to escape before a warrant can be obtained." 8 U.S.C. § 1357(a)(2).[14] Yet ICE makes no such determination before issuing detainers. SAC ¶22. In fact, ICE issues detainers *only* against people who are "presently in the custody" of a law enforcement agency, 8 C.F.R. § 287.7(a), making them by definition unlikely to escape. Nor does ICE make any individualized determination of their flight risk upon release from criminal custody. *See* SAC ¶¶22, 87-88; *see also Mountain High Knitting, Inc. v. Reno*, 51 F.3d 216, 218 (9th Cir. 1995) (statute requires an individualized determination of flight risk). By issuing detainers without making a flight risk determination—and thereby asking local law enforcement officials to make warrantless immigration arrests where ICE agents themselves could not legally do so—ICE exceeds its statutory authority. Simply put, ICE agents cannot delegate arrest powers that Congress never gave them in the first place.

ICE makes no attempt to argue that its current detainer practices, as alleged, satisfy § 1357(a)(2)'s flight risk requirement. Rather, it attempts to avoid the statute's requirements altogether, arguing that because Plaintiffs' state criminal charges were drug-related, ICE was bound only by the procedural requirements of

[14] In addition, in order to make a warrantless immigration arrest, the statute requires ICE to have probable cause to believe the arrestee is an "alien . . . in the United States in violation of" federal immigration law. *Id.* Section 1357(a)(2) uses the phrase "reason to believe"—the same phrase that appears in ICE's detainer form, *see* SAC ¶18—and the Ninth Circuit has long held that this phrase means "probable cause," consistent with the Fourth Amendment. *See Tejeda-Mata*, 626 F.2d at 725. Because probable cause is discussed above at Part III(A), this section focuses only on the statute's flight risk requirement.

8 U.S.C. § 1357(d), not the more general requirements of § 1357(a). MTD 21. This argument is incorrect. 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. Section 1357(d) simply imposes *additional* procedural constraints and timeliness requirements on ICE's detainer issuance in controlled substances cases, which Congress wished to prioritize. *See* 8 U.S.C. § 1357(d), enacted as part of the Anti-Drug Abuse Act, Pub. L. 99–570, 100 Stat 3207 (Oct. 27, 1986) (providing that in drug cases, "the Service shall *promptly* determine whether or not to issue such a detainer" and "shall *effectively and expeditiously* take custody of the alien.") (emphases added); *see also Comm. for Immigrant Rights of Sonoma Cnty. v. Cnty. of Sonoma*, 644 F. Supp. 2d 1177, 1199 (N.D. Cal. 2009) (concluding that § 1357(d) did not create or limit detention authority, but "simply plac[ed] special requirements on officials issuing detainers for a violation . . . relating to controlled substances.").

The language of the detainer regulation, 8 C.F.R. § 287.7, confirms the error in ICE's reasoning. The regulation purports to authorize ICE to issue detainers "at any time" and for any "alien presently in the custody of [a law enforcement] agency," 8 C.F.R. § 287.7(a)—not only for those with drug-related arrests. And, in practice, ICE regularly issues detainers regardless of the underlying criminal charges. *See* Dkt. #30-1, 3 (listing various "priority" categories, not limited to drug charges). If that practice is legal at all, it is only because ICE's statutory authority to issue detainers comes from § 1357(a)(2), not from § 1357(d).

In drug-related cases as in all others, ICE remains bound by § 1357(a)(2)'s limitations on its arrest authority. It cannot bypass these limitations by asking local officials to make civil immigration arrests where ICE agents themselves could not. ICE's 12(b)(6) motion should be denied.

IV. CONCLUSION

For the foregoing reasons, ICE's motion should be denied in its entirety.

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Respectfully submitted,

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